



all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must “present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented.” *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party’s favor.

A motion for reconsideration must be properly supported by a recitation of the factual findings or legal conclusions with which the moving party takes issue. On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986).

ECIC first asserts that the Commission misconstrued the medical evidence in this case, particularly the testimony of Dr. Roman Schwartsman and Dr. Mark Williams. Claimant responds that the evidence supports the Commission’s findings. The Fund concurs and further argues that ECIC is asking the Commission to reweigh evidence and arguments that have already been considered. We agree. The Commission carefully reviewed the evidence in the record prior to adopting the Referee’s recommendation, and the substantial, competent evidence in the record supports the decision as it stands.

ECIC next argues that the Commission committed an error of law by “improperly characteriz[ing] Defendants’ burden of going forward” on the issue of apportionment. ECIC takes issue with the following finding:

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased

or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.” *Idaho Code* § 72-406. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). Claimant bears the burden of persuasion on the issue of whether he has suffered disability referable to the subject accident. However, once Claimant makes a prima facie showing in this regard, the burden of going forward with the evidence that some portion of Claimant’s disability is, in fact, referable to a preexisting condition shifts to Defendants. *See, Barton v. Seventh Heaven Recreation, Inc.*, 2010 IIC 0379 (2010). Here, Claimant has clearly made a prima facie showing that he has suffered disability referable to the 2009 accident. Therefore, the burden of going forward with the evidence that some part of Claimant’s disability is referable to the 2005 accident, shifts to Defendants.

*Harmon v. Idaho Custom Wood Products*, 2011 IIC 0059.5 (August 15, 2011). ECIC argues that the crux of this finding is that ECIC did not meet its burden because it “failed to show that some part of [Claimant’s] preexisting condition was attributable to the 2005 accident.” *See* Brief in Support of Defendants’ Motion to Reconsider, pp. 4-5. This is incorrect. The Commission did not find that ECIC must prove that Claimant’s preexisting condition was caused by a specific prior accident. Rather, the Commission stated that, once Claimant has made a prima facie showing on the issue of disability referable to the subject accident, the burden of going forward with evidence that some portion of the disability is attributable to a preexisting condition shifts to Defendants. ECIC acknowledges that it bears the burden to “show that Claimant suffered a preexisting physical impairment.” *See* Brief in Support of Defendants’ Motion to Reconsider, p. 5. However, ECIC failed to show this. The decision’s reference to the 2005 accident is not significant. It was made in the context of arguments presented by ECIC, and was not an effort to create, as ECIC alleges, a new burden of proof.<sup>1</sup>

Additionally, ECIC argues that the Commission erred by not considering retraining as an alternative to an award of permanent disability. However, as specifically noted in the decision, as

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<sup>1</sup> As part of its argument about the burden of proof, ECIC implies that the decision should be reconsidered simply because Commissioner Baskin, the attorney representative on the Commission, did not sign it. We note that only two commissioners need to sign a decision, and it is immaterial whether the attorney commissioner is one of these.

well as by Claimant and the Fund, retraining was not an issue noticed for hearing, and proof on the issue was not adequately proffered or developed.

Finally, ECIC alleges that the Referee's findings on Claimant's credibility are not supported by the record. We disagree. The substantial, competent evidence in the record is consistent with Claimant's testimony. This was explained in the decision and need not be repeated here.

Having reviewed the record, the decision, and the pleadings of the parties, we find that there has been no error, factual or legal, sufficient to justify reconsideration. Accordingly, ECIC's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this   1st   day of  November , 2011.

INDUSTRIAL COMMISSION

  /s/    
Thomas E. Limbaugh, Chairman

  /s/    
Thomas P. Baskin, Commissioner

  /s/    
R.D. Maynard, Commissioner

ATTEST:

  /s/    
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the   1st   day of   November  , 2011, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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  /s/  \_\_\_\_\_