

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL PICCIRILLI,

Claimant,

v.

AES AN EMPLOYMENT SOURCE, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2010-017971

ORDER DENYING RECONSIDERATION

Filed August 20, 2012

On June 25, 2012, Claimant filed a Motion for Reconsideration and on June 27, 2012, he filed Motion for Clarification of the Industrial Commission's decision filed June 4, 2012, in the above referenced case. On July 5, 2012, Defendants filed a response to the motion for reconsideration and a response to the motion for clarification. Claimant filed a reply on July 10, 2012.

In the underlying decision Claimant contended that he was entitled to continuing medical care for an ulnar nerve injury and that he is entitled to temporary total disability (TTD) benefits while ordered off work by his treating physician and that two light-duty job offers by Employer were not reasonable.

Defendants argued that Claimant's treating physician and the IME physician agree that Claimant is stable and does not need further medical treatment. Defendants also contended that

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Employer's offer of light-duty employment was legitimate and reasonable.

On July 21, 2010, Claimant tripped over a traffic cone and landed on his right side, injuring his right elbow. Claimant had right elbow anterior submuscular ulnar nerve transposition surgery on December 6, 2010. The Commission found Dr. Greendyke's opinion that Claimant was stable with no restrictions and that he needed no more treatment, and Dr. Boyea's letter agreeing, to be the only significant medical evidence presented. The Commission concluded that Claimant failed to prove by credible medical evidence that he is entitled to continued medical care as a result of his industrial accident. Further, the Commission concluded that Employer offered Claimant legitimate work which Claimant refused unreasonably. Therefore, Claimant was only entitled to TTD benefits from March 8, 2011 to August 9, 2011.

In his motion for reconsideration, Claimant argues that the decision contains false findings of fact. Claimant contends that Dr. Boyea had no legal right to give a recommendation because at the time he gave the recommendation he was not Claimant's treating physician. Thus, Claimant avers he is entitled to TTD benefits from March 3, 2011 to the present date. Claimant also requests clarification of what was meant when the Commission ordered that "Defendants are to receive a credit for any total temporary disability benefits paid with this period." Order, filed June 4, 2012.

Defendants contend that Claimant's motion for reconsideration is untimely and that Claimant simply wants the Commission to reweigh the evidence because it was not resolved in Claimant's favor. Defendants argue that Dr. Boyea was Claimant's longest treating physician and was in the best position to evaluate Dr. Greendyke's opinion. Finally, Defendants aver that since they paid TTD benefits when Claimant's was not entitled to benefits (September 24, 2010 through November 14, 2010), Defendants are entitled to a credit for these benefits paid against

what they owe from March 8, 2011 through August 9, 2011.

Under Idaho Code § 72-718, a decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision . . . and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion."

On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. *Davison v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code § 72-718. *See, Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (*citing Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

The Commission will briefly address the timeliness of Claimant's motion for reconsideration. The time in which a motion is filed is computed by excluding the first day, and including the last unless the last is a holiday; Sunday is included within this meaning of holiday.

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Idaho Code §§ 73-108 and 73-109. Claimant had twenty days within which to file his motion for reconsideration. Idaho Code § 72-718. The twentieth day, June 24, 2010, was a Sunday. Thus, Claimant's motion for reconsideration filed on Monday, June 25, 2010 is timely.

First, Claimant contends that it is false statement to say that Claimant proffered no medical evidence to support his position in light of the MRI which was positive for lid medial epicondylitis and slight inflammation of the ulnar nerve. Claimant is correct that the MRI standing alone may have supported his claim but, as stated in the decision, Dr. Greendyke did not feel these findings were significant enough to warrant further operative intervention and that Claimant's pathology should resolve with time. The Commission thoroughly discussed the medical evidence and Dr. Greendyke's opinion, as quoted in large part by Claimant in his motion. The fact remains that the medical record as a whole overwhelmingly supports the findings that Claimant is not entitled to additional medical care.

Next, Claimant alleges that Dr. Boyea had no legal right to give a medical recommendation because he was no longer treating Claimant. There is no requirement for a doctor to be treating a claimant in order to give an opinion. Further, as noted by Defendants, Dr. Boyea, as Claimant's longest treating doctor, was in the best position to give an informed opinion on Claimant's condition.

Finally, Claimant requests clarification as to what time period or TTD benefit payments Defendants' will receive credit for payments previously made. Defendants state that they paid TTD benefits from September 24, 2010 until November 14, 2010, which was a time period Claimant was found to not be entitled to TTD benefits. Claimant argues that those 2010 payments cannot be used as a credit for the March 2011 through August 2011 TTD payment time period. Defendants are correct. Defendants are entitled to a credit for TTD benefits paid during

the time period Claimant was found to not be entitled to payments. That credit may be applied to the March 2011 through August 2011 time period.

The Commission has reviewed the record with a focus on the details presented by Claimant in the motion for reconsideration and we still find that the facts support the decision. The Commission's analysis took into account all the documentary evidence and testimony. Although Claimant disagrees with the Commission's findings and conclusions, the Commission finds the decision is supported by substantial evidence in the record and Claimant has presented no persuasive argument to disturb the decision.

Based upon the foregoing reasons, Claimant's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED this ___20th___ day of ___August_____, 2012.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman

/s/ Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 20th day of August , 2012, 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/ _____