

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

BRYAN OLIVEROS,

Claimant,

v.

RULE STEEL TANKS, INC.,

Employer,

and

ADVANTAGE WORKERS  
COMPENSATION INSURANCE CO.,

Surety,

Defendants.

**IC 2008-024772**

**ORDER ON ALTERNATIVE MOTIONS  
TO RECONSIDER OR TO REHEAR  
CASE *EN BANC***

Filed 12/14/2012

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On or about November 21, 2012, Claimant filed his timely motion for reconsideration of the Commissions' Findings of Fact, Conclusions of Law, and Order filed November 2, 2012. As noted in that decision, the Commission chose not to adopt the Referee's recommendation and to issue its own findings of fact, conclusions of law, and order. In his motion, Claimant argues that in adopting Dr. Gross' opinion, the Commission altogether ignored Claimant's successful impeachment of Dr. Gross. In this regard, Claimant notes that Dr. Gross made the original referral of Claimant to Mr. Lang's clinic for consideration of prostheses, and it is therefore more than a little odd that Dr. Gross is now so vehement in his criticism of the recommendations made by Mr. Lang. More important to Claimant, however, is the fact that Dr. Gross attempted to coerce Claimant into settling his claim against his will by advising Claimant that if he would settle his case, Dr. Gross would relent and write a prescription for the prostheses recommended by Mr. Lang. Per Claimant, Dr. Gross's current insistence that the recommended prostheses are

altogether unnecessary is illustrative of Dr. Gross's desire to induce Claimant to settle the case without Surety being held responsible for the lifetime cost of the prostheses in question. Claimant argues that Dr. Gross's actions are internally inconsistent; he cannot, on the one hand support Claimant's claim for the prostheses in the context of a negotiated settlement, and on the other hand, protest the reasonableness of that treatment when the case goes to hearing. This internal inconsistency is fatal to the credibility of the opinion on which the Commission chose to rely, such as to require the Commission to revisit its decision on reconsideration. We will examine each of these arguments.

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. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion." Generally, greater leniency is afforded to *pro se* claimants. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920 (2005). 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.

As Claimant has noted, there is testimony of record which supports a finding that it was Dr. Gross who referred Claimant to Mr. Lang for the purpose of evaluating Claimant for prosthetic fingers. In this regard, Mr. Lang testified:

A. (by Lang): I'm responsible for not only the day-to-day operations of our office, but I'm also the prosthetist, the primary prosthetist, for the office. So, I'm involved in every aspect of our patients' care from initial evaluation to the impressions to the final fitting of a device and followup.

Q. (by Bowen): Now, with respect to Mr. Oliveros, how did you make contact with him?

A. Mr. Oliveros was referred to us by his doctor, Dr. Gross.

Q. Okay. And when you met with Bryan back there in March of 2011, did you have his medical records?

A. I did not have his full medical record. I had a brief, again, referral from Dr. Gross. And then, I took a full and, like I said, comprehensive, you know, questionnaire and medical history while he was in the office.

Lang Dep. 32/5-21.

Although this testimony is not directly challenged in the record, there are other facts of record which make it seem unlikely that Dr. Gross perfected the referral of Claimant to Mr. Lang's clinic.

Dr. Gross appears to have released Claimant from care on or about April 6, 2009, when he pronounced Claimant medically stable, gave him an impairment rating, and authored certain

permanent limitations/restrictions. A little over a year later, Dr. Gross authored his letter of June 17, 2010 in which he responded to inquiries he had received from Mr. Bowen concerning the suitability of finger prostheses for Claimant. In that letter, Dr. Gross stated that he knew of no prosthesis that would improve Claimant's function, and did not recommend the same for Claimant. Thereafter, on August 30, 2011, and again on November 1, 2011, Claimant's counsel asked Dr. Gross for clarification of the statements made by Dr. Gross in his letter of June 17, 2010. In his November 1, 2011 reply, Dr. Gross reiterated his position that Claimant was unsuited to the use of prosthetic fingertips. He then stated:

Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case. But I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and, Bryan understands that while it may help him "give some support", it was clear that he knew it would not significantly improve the use of the hand other than for looks.

D. Ex. 4, p. 79.

In follow-up, Claimant's counsel wrote Dr. Gross on December 10, 2011, proposing to Dr. Gross that if he felt that it was appropriate to prescribe finger prostheses for Claimant in the context of an anticipated settlement, he should be prepared to make the same recommendation in the context of an ongoing litigated workers' compensation case. On or about December 19, 2011, Dr. Gross authored the following response to the apparent inconsistency noted by Claimant's counsel in Dr. Gross's treatment of the issue of Claimant's suitability for finger prostheses:

This letter is in reference to your correspondence dated December 10, 2011. I have reviewed your request, and find I am uncomfortable prescribing the prosthesis prior to the settlement being reached. As I stated earlier, I am happy to write for it should Bryan wish to use his settlement to purchase a set, but I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and *do not want my*

*prescription for the prostheses construed as an agreement to the fact that it is medically necessary.* (Emphasis added).

Gross Dep., Ex. 12.

As noted above, Dr. Gross last saw Claimant for the purposes of treatment/evaluation on or about April 6, 2009. Dr. Gross testified that at no time during his treatment of Claimant did Claimant ever express an interest in finger prostheses. (Gross Dep. 23/15-17). There is nothing in Dr. Gross's notes or reports to belie this assertion. Moreover, Claimant himself has testified that he knew nothing of Advanced Arm Dynamics until he received a call from that facility sometime in the spring 2011 about setting up an evaluation in Portland, Oregon. (C. Dep. 23/14-24/16). Claimant was evidently seen at Advanced Arm Dynamics on March 18, 2011, and it was a result of that visit that Mr. Lang made his recommendations of April 1, 2011. However, prior to the March 18, 2011 exam, Claimant's counsel authored a March 15, 2011 letter to Advanced Arm Dynamics tending to suggest that Claimant was seen at Advanced Arm Dynamics not on the referral of Dr. Gross, but at the request of Claimant's counsel:

Dear Ms. Taylor:

It was a pleasure to speak with you today. As I mentioned, this office represents Bryan, who suffered a workers' compensation injury in 2008 that resulted in the amputation of his right hand fingers (index, long, ring, small).

We seek an independent expert evaluation to determine if Bryan might be a candidate for prosthetic rehabilitation. It is my understanding that you have made arrangements for Bryan to be evaluated at your clinic on 3/18/11, and that the clinic provides the evaluation and travel at its own expense. Following the evaluation, I would appreciate receiving the clinic's expert opinion. A signed medical release is attached.

...

C. Ex. 2, p. 17. Claimant confirmed that or about the time he was contacted by Advanced Arm Dynamics, he also received a call from his attorney concerning the evaluation. (Hr. Tr. 47/25-48/10).

Dr. Gross testified that he has no familiarity with Advanced Arm Dynamics, but acknowledged receipt of Mr. Lang's report sometime in early April 2011. (Gross Dep. 60/9-20; 11/12-17).

Had Dr. Gross made the referral to Advance Arm Dynamics, it seems unlikely that counsel for Claimant would "seek" from that entity "an independent expert evaluation" of Claimant's suitability for finger prostheses. As well, there would have been no need to worry about who would pay for Claimant's travel to and from Portland since a referral by a treating physician would obligate Surety to pay for the cost of travel. Finally, long before the March 18, 2011 evaluation, Dr. Gross had clearly and unequivocally stated his position that Claimant would not benefit from finger prostheses. In view of his conclusion, it seems unlikely that Dr. Gross would make a referral to an out-of-state prosthesis fabricator of whom he had no prior knowledge.

In view of the foregoing, and notwithstanding that Mr. Lang's testimony is to the contrary, we find, on balance, that the record makes it unlikely that Dr. Gross, as Claimant's treating physician, referred Claimant to Advanced Arm Dynamics for evaluation.

Next, Claimant charges that Dr. Gross's insistence that Claimant is a poor candidate for finger prostheses must be weighed against the statement first made in Dr. Gross's letter of November 1, 2011, that as part of a settlement, he would be happy to write a prescription for Claimant for finger prostheses. Claimant contends that Dr. Gross's advocacy on the topic of Claimant's entitlement to finger prostheses vacillates depending on the perceived posture of the underlying claim, thus making the opinion on which the Commission chose to rely inherently untenable.

We have carefully reviewed Dr. Gross's writings and testimony, and fail to appreciate an inconsistency that would cause us to re-evaluate our reliance on his deposition testimony. From the outset, Dr. Gross has consistently opined that finger prostheses are not efficacious for Claimant. Accordingly, he did not feel it appropriate to make a recommendation to Surety that it should authorize such treatment as medically necessary. Claimant has argued that this demonstrates that Dr. Gross is somehow in league with Surety, and will simply say anything that will provide Surety with a medical predicate for denial of the care recommended by Mr. Lang. Our sense, from review of the record, is that no such unsavory relationship between Dr. Gross and Surety is suggested by his actions. We perceive that Dr. Gross has a sincerely and firmly held belief that the care recommended by Mr. Lang will only hinder Claimant, and that Dr. Gross has an equally sincere conviction that the workers' compensation Surety should not be made to pay for such needless care.

However, it is beyond cavil that Dr. Gross did make the statement that, in connection with a settlement, he would be happy to prescribe the care recommended by Mr. Lang. We do not believe that this statement is inconsistent with the general tenor of his aforementioned objection to finger prostheses. Our gestalt is that Dr. Gross simply recognized that Claimant is ultimately entitled to do what he wants to do. If the settlement of his case leaves him with funds to procure the prostheses, coupled with a desire to obtain the same, Dr. Gross would not stand in Claimant's way; notwithstanding that it is Dr. Goss's view that this amounts to throwing good money away. (See Gross letter of December 19, 2011, Gross Depo. Ex. 12). We believe that Ms. Carr came close to getting it right when she said of Dr. Gross's motives:

Q (by Seiniger) Now, it sounds me to [sic] like what he's saying is, well, I will write the prescription if you will settle with the insurance company, but other than that I'm not doing it. How do you read that?

A Well, I don't know – I can't tell you what was going through his brain, but my interpretation seems to be that he thought settlement of the case would enable Bryan to obtain the fingers if he so desired, but it wasn't his opinion to recommend them.

Hrg. Tr. 101/13-21.

In view of the foregoing, and after carefully reviewing Dr. Gross's writings and testimony, we find no reason to discard his testimony in favor of the views expressed by Mr. Lang. Claimant's motion for reconsideration is, therefore, DENIED.

For the reasons set forth above, Claimant's alternate motion that the Commission rehear the case is also DENIED.

IT IS SO ORDERED.

DATED this 14th day of \_\_December\_\_\_\_\_, 2012.

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 this 14th\_\_\_\_\_ day of December, 2012, a true and correct copy of the foregoing **ORDER ON ALTERNATIVE MOTIONS TO RECONSIDER OR REHEAR CASE *EN BANC*** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER  
942 MYRTLE STREET  
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R DANIEL BOWEN  
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BOISE ID 83701-1007

cs-m

/s/\_\_\_\_\_