

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRAND POOLE,

Claimant,

v.

DOUG ANDRUS DISTRIBUTING, INC.,

Employer,

and

CONTINENTAL CASUALTY COMPANY,

Surety,
Defendants.

IC 2006-003863

**ORDER DENYING
RECONSIDERATION**

Filed March 20, 2013

This matter is before the Commission on Defendants' Motion for Reconsideration and Memorandum in support, requesting reconsideration of the Industrial Commission's decision filed August 23, 2012, in the above referenced case. Claimant filed a response and Defendants filed a reply on November 14, 2012.

At hearing, Claimant alleged that his recurrent disc herniation with resultant need for his second, third, and fourth lumbar surgeries was causally related to his March 26, 2006 industrial accident. Defendants accepted liability for Claimant's first lumbar surgery, but deny liability for the balance of the medical care arguing that it is related to one or more subsequent intervening events.

The Commission's Recommendation and Order found the opinions of Dr. Allen and Dr. O'Brien more persuasive than Dr. Stromberg, and established that no intervening event

caused the herniation, but instead it was a natural progression as a result of his original 2006 accident and surgery. The Commission concluded that Claimant had proven his L5-S1 disc reherniation and resulting medical treatment, including subsequent surgeries, are causally related to his industrial accident.

In the motion for reconsideration, Defendants argue that the Commission's decision is not based on substantial competent evidence, and the findings do not as a matter of law support the order and award. Claimant avers that Defendants are merely asking the Commission to reweigh the evidence and come to a different conclusion.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. 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 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)).

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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.

Defendants argue that the finding that Claimant's acute herniation predated an alleged May 2008 industrial accident and that medical treatment after May 2008 was related to the 2006 industrial accident, is not supported by the evidence. Defendants also aver that the Referee failed to determine whether the May 20, 2008 incident constituted an intervening industrial accident.

Claimant contends that the Referee considered all of the evidence discussed by Defendants and that the motion simply asks the Commission to reweigh the evidence already considered.

The 2012 decision clearly set forth the pivotal issue in this case as to whether Claimant's 2008 reherniation was causally related to his 2006 accident. The Referee was very aware of the incidents which Defendants argued caused the reherniation. The timeframe between the 2006 accident and surgery and the 2008/2009 surgeries was closely analyzed. The findings focused on whether Claimant could prove that his 2006 accident caused the reherniation and subsequent surgeries. Claimant bears the burden of proof and the evidence supported a conclusion that Claimant's subsequent surgeries were caused by the 2006 accident. Claimant established, through the testimony of Drs. Allen and O'Brien, that the need for Claimant's later surgeries was the result of his 2006 industrial accident.

Thereafter, Defendants were not able to prove that a subsequent intervening incident

caused the 2008 and 2009 lumbar surgeries. Dr. Stromberg's testimony was unclear and does not establish a causal link between the injury and the alleged intervening incident, Claimant climbing out of the cement truck. Dr. Stromberg was unconcerned with pinning down the dates of the events. He acknowledged that the radicular pain reported in the April 2008 medical record is the same type of symptom that one would expect to see in an individual with a recurrent herniated disk in the low back. Stromberg Deposition, p. 35. Yet, Dr. Stromberg also opined that it was the cement truck incident, in May 2008, which caused the reherniation and need from the subsequent surgeries. However, the April 2008 medical record establishes Claimant presented with symptoms consistent with a reherniation prior to the cement truck incident.

Although the critical April 20, 2008 medical note referenced above does appear to relate the onset of radicular symptoms to an episode of lifting tires at work, Claimant credibly explained that there was no tire lifting incident; he was moving tires with a forklift, not by hand. Nor did Claimant testify that he experienced a sudden change in symptoms while performing this work. Claimant testified that it was not a specific accident, injury, or unusual event that caused him to seek medical care in April. Instead, he was prompted to seek medical attention because he had recently moved in with his mother and she encouraged him to get treatment for his back pain. Transcript, pp. 10789. The April 2008 medical record states that Claimant was, "Unsure of mode of injury, but may have hurt it 2 days ago lifting tires while on the job. States 'yesterday it was just low back pain, today it radiates down the left leg and to the foot.'" Defendants' Exhibit 6, p. 147. At hearing Claimant explained how he relayed the information to the nurse which created the note quoted above.

The nurse come in and asked me, you know, if I'd done anything to injure or aggravate my back. I told her no. She asked if there was anything that I'd done

unusual and I said no. She says you haven't done anything at work or at home that you have done other than what you normally do. I says, well I'm moving tires with the loader, but that was it. She wrote down her stuff and took my blood pressure and then told me the doctor would be in.
Transcript, p. 108.

Claimant explained that the statement about lifting tires was purely an answer to a question about what he had done and not a statement relating his back pain to any recent accident at work. The Commission concluded that the evidence as a whole, including Claimant's credible testimony, establishes that there was no tire incident which led to the April 20, 2008 medical report.

Claimant credibly testified that he suffered no subsequent intervening accidents and the persuasive medical experts support the conclusion that Claimant's subsequent treatment including the surgeries were due to the March 26, 2006 industrial accident. The Commission's analysis took into account all the documentary evidence and testimony and found the opinions of Drs. Allen and O'Brien to be more persuasive in establishing that the need for Claimant's later surgeries was the result of his industrial accident.

The Commission has reviewed the record with a focus on the concerns that Defendants have raised in the motion for reconsideration and we remain of the view that the facts support the decision. Based on the record as a whole, the Commission determined that Claimant had proven that his L5-S1 disc reherniation and resulting medical treatment were causally related to his 2006 industrial accident. Although Defendants disagree with the Commission's findings and conclusions, the Commission finds the decision of August 23, 2013 is supported by substantial evidence in the record and Defendants have presented no persuasive argument to disturb the decision.

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

IT IS SO ORDERED.

DATED this __20th____ day of _____March_____, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Thomas P. Baskin, Chairman

/s/ _____
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 20th day of March, 2013, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

LORA RAINEY BREEN
1703 W HILL ROAD
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/s/ _____