

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

STEVE GARDNER,

Claimant,

v.

MAGIC VALLEY BUSINESS SYSTEMS,

Employer,

and

BANCINSURE,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2010-007524

**ORDER DENYING
RECONSIDERATION**

Filed September 3, 2013

Pursuant to Idaho Code § 72-718, Claimant seeks reconsideration of the Commission's April 17, 2013 decision in the above-captioned case. Claimant argues that the Commission erred by relying on the causation opinion of Dr. Tallerico because the opinion should have been excluded. Additionally, Claimant argues that his expert, Dr. Poole, provided a more persuasive opinion than Dr. Tallerico; thus, the Commission should have relied on Dr. Poole's opinion in coming to its conclusions. Defendants reply that Claimant is making arguments that have already been considered and rejected by the Commission. As such, Claimant's motion for reconsideration should be denied.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to 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.

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*, 110 Idaho 758, 718 P.2d 1196 (1986).

Claimant argues that Dr. Tallerico’s causation opinion should have been excluded because it was not timely disclosed. According to Claimant, Dr. Tallerico’s post-hearing deposition testimony included new opinions in addition to those expressed in his IME report and should not have been considered by the Commission. However, experts are allowed to “expound” on IME reports at post-hearing deposition. *See Watson v. Joslin Millwork*, 149 Idaho 850, 857-858, 243 P.3d 666, 673-674 (2010). It is “permissible for experts to provide greater detail and explanation in their testimony than was previously provided in reports or medical records, and even to state opinions that were not explicitly stated before, as long as the conclusions are based on evidence in the record and may be reasonably inferred from earlier records or reports.” *Serrano v. Four Seasons Framing*, 2013 IIC 0021.10 (March 20, 2013).

Claimant is aware of the holding in *Watson* and concedes that the Commission’s analysis in *Serrano* did not “misconstrue” it. Claimant’s Motion and Brief for Reconsideration, p. 6. Nevertheless, Claimant argues that Dr. Tallerico’s opinion should be excluded due to issues of “fundamental fairness.” *Id.* at 9. It would be impossible, Claimant avers, for him to adequately

prepare for post-hearing deposition and to rebut opinions expressed therein if Claimant is not aware of what the opinions expressed will be. This argument is unpersuasive. Claimant was aware, pre-hearing, of Dr. Tallerico's opinion that Claimant's need for bilateral knee surgery was unrelated to Claimant's work. Additionally, the testimony in question was elicited from Dr. Tallerico as a result of questions posed by Claimant's counsel. No objection was made to this testimony until after the close of evidence and the start of post-hearing briefing. For these reasons, it was not error for the Referee to deny Claimant's motion to exclude the testimony.

Regarding the matter of whether Dr. Tallerico or Dr. Poole was more persuasive, we note that the Commission's reasons for finding Dr. Tallerico more persuasive were discussed in the decision. Thus, as Defendants argue, Claimant's motion merely asks the Commission to reweigh evidence and arguments already considered. Accordingly, Claimant's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this 3rd day of September, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Thomas P. Baskin, Chairman

Participated but did not sign.

R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2013, 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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