

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GEORGE SKRUDLAND,

Claimant,

v.

SUPERVALU, INC.,

Self-Insured Employer,

Defendant.

IC 2012-002491

**ORDER DENYING
RECONSIDERATION**

Filed June 9, 2014

The Commission issued its Findings of Fact, Conclusions of Law and Order on March 19, 2014. On March 31, 2014, Defendant filed a Motion for Reconsideration and brief in support. On April 11, 2014, Claimant filed a response and on April 21, 2014, Defendant filed a reply.

At hearing, Claimant alleged he suffered an L4-5 disc herniation on December 9, 2011 when he fell while trying to steady a heavy load of milk. Defendant contended that Claimant had no symptoms on or after December 9, 2011, until he lifted his 100-pound dog on December 28, 2011. Defendant alleged that a January 1, 2012 chart note raising the possibility of dog lifting provided an adequate factual predicate to deny benefits without further investigation, even after learning that Dr. Christensen did not believe the dog lifting incident, if it occurred, was implicated in causing/contributing to Claimant's low back problem.

The Commission's Recommendation and Order found that Dr. Christensen's unrebutted opinion established that Claimant's disc herniation requiring a discectomy was related to his industrial accident on December 9, 2011. The Commission concluded that Claimant proved his

L4-5 disc herniation was caused by his industrial accident on December 9, 2011; that he was entitled to medical benefits and impairment; and that he was entitled to an award of attorney fees, provided by Idaho Code §72-804, for Surety's failure to authorize benefits following the receipt of Dr. Christensen's opinion on February 23, 2012.

In its motion for reconsideration, Defendant argues that the Commission applied an erroneous legal standard and failed to evaluate all the evidence in determining the award of attorney fees. Defendant contends that the Commission incorrectly interpreted Idaho Code § 72-804 when it precluded evaluation of the evidence in the record developed during the hearing process which supported Defendant's position of the substantive issue of causation.

Claimant states that the legal and factual basis for awarding attorney fees was specifically outlined by the Referee and Defendant is simply revisiting only the facts supporting its position. Further, Defendant has presented no persuasive argument which would disturb the decision as to the issue of causation.

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)).

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.

Defendant's argument is focused on the award of attorney fees pursuant to Idaho Code § 72-804. Defendant contends that the standard for evaluating attorney fees in this case is whether a denial of the claim would have been supported on appeal. In other words, begin by assuming a conclusion in favor of Defendant on the causation issue and if the Commission finds that the evidence would have been sufficient to sustain the Commission on appeal, then there is no basis for an award of attorney fees.

Defendant makes the following statements to explain its adoption of the substantial and competent evidence standard:

There is nothing in Idaho Code §72-804 which requires that an employer or surety prevail on the underlying contested issue – e.g., causation – in order to avoid an award of attorney fees. Rather, there has to be evidence from which it can be concluded that it had reasonable grounds for contesting that issue. And that is why the substantial competent evidence standard used on appeals has relevance at the Commission level regarding attorney fee determinations, since that standard is also inherently tied to reasonableness.

Defendant's Brief in Support of Motion for Reconsideration p. 7.

First, the Commission finds that the standard set forth by Idaho Code §72-804 is unambiguous and uncomplicated. Idaho Code §72-804 reads:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The standard applied is whether a defendant contested a claim without reasonable grounds. Idaho Code § 72-804 provides for an award of attorney fees in the event an employer unreasonably denies a claim, or neglects to pay or refuses to pay an injured employee compensation within a reasonable time. Of course, a finding that an employer or surety acted unreasonably must be supported by substantial and competent evidence in order to withstand scrutiny on appeal. The Commission finds no need to apply a different or additional standard to the evaluation of entitlement to attorney fees pursuant to Idaho Code §72-804.

The Commission does agree with Defendant that nothing in Idaho Code § 72-804 requires that an employer or surety prevail on the underlying issue in order to avoid an award of attorney fees. No implication can be made from the decision of March 19, 2014, that such a requirement was established.

Additionally, Defendant argues that all evidence in the record, including Dr. Christensen's September 3, 2013 post-hearing deposition, must be considered when determining whether the denial made on February 28, 2012 was reasonable. In his deposition, Dr. Christensen was told to assume that Claimant lifted a 100-pound dog into the back of a pickup and then asked if such an event would account for Claimant's symptomology. Dr. Christensen answered that a "100-pound

load, it's probable, I suppose, yes." Christensen Dep., p. 25. Defendant argues that Dr. Christensen's deposition, in conjunction with the rest of the record, should be considered in assessing the propriety of Surety's denial. While Dr. Christensen's deposition testimony may support a denial, Defendant's argument that this evidence should be considered in determining whether the denial was reasonable is illogical. Defendant did not have Dr. Christensen's deposition testimony available at the time of the denial and it is not possible to use it as justification for the denial on February 28, 2012. The true facts of a case may vary greatly from the facts available to a surety at the time it is called upon to make a decision concerning acceptance or denial of a claim. However, the reasonableness of an adjusting decision can only be based on information known or available at the time the adjusting decision is made. We doubt very much that the insurance community would have us adopt a standard for reasonableness that charges an adjuster with knowledge of opinions that have not yet been developed, or testimony that has not yet been adduced.

The decision properly considered the facts relevant to Defendant's denial, which are the facts available at the time of the denial. It is clear that Defendant believes the information regarding lifting a 100-pound dog severed the chain of causation. Yet, when Surety notified Dr. Christensen of the dog-lifting reports, he still opined that Claimant's L4-5 disc herniation was related to Claimant's industrial accident. As stated in the decision, once Dr. Christensen rendered an un rebutted causation opinion inconsistent with Surety's denial, it was incumbent upon Surety to further investigate the claim, from both a lay witness standpoint (to investigate the truth of the chart note), and an expert witness standpoint (to investigate the truth of the chart note, and also to investigate the medical plausibility of Dr. Christensen's opinion). Even if the truth of the dog lifting incident be admitted, after Dr. Christensen offered his opinion on causation there was no

medical evidence supporting the conclusion that Claimant's condition was caused by anything other than the claimed accident.

The Commission has reviewed the record with a focus on the concerns that Defendant has raised in the motion for reconsideration and we remain of the view that the facts support the decision. Specifically, Defendant's failure to authorize benefits following the receipt of Dr. Christensen's opinion of February 23, 2012, was an unreasonable denial of benefits which entitles Claimant to an award of attorney fees, as provided by Idaho Code §72-804. Although Defendant disagrees with the Commission's findings and conclusions, the Commission finds the decision of March 19, 2014 is supported by substantial evidence in the record and Defendant has presented no persuasive argument to disturb the decision.

IT IS SO ORDERED.

DATED this 9th day of June, 2014.

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 the 9th day of June, 2014, a true and correct copy of the **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

MARK R WASDEN
PO BOX 2907
TWIN FALLS ID 83303-2907

ALAN R GARDNER
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/s/_____