BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CINDY BROOKS, Claimant, v. GOODING COUNTY EMS, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2009-025823** **ORDER DENYING RECONSIDERATION** Filed April 18, 2014

This matter is before the Commission on Defendants' Motion for Clarification and/or Reconsideration filed on October 2, 2013, requesting clarification or reconsideration of the Industrial Commission's decision filed September 12, 2013, in the above referenced case. Claimant did not file a response. Thereafter, Defendants filed a Request for Telephonic Hearing on the motion.

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, 925 (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.

In this case, the threshold issue before the Industrial Commission was whether Claimant suffered an injury to her QLM as a consequence of the subject accident. Medical opinion on this foundational issue was divided. Claimant's treating physician, Dr. Jensen, and the IME physician, Dr. Friedman, concluded that Claimant's QLM injury could not be related to the subject accident. On the other hand, Drs. Steffens and Wiggins concluded that Claimant suffers from a QLM injury related to the subject accident. As explained at length in the original decision, the Commission found the opinions of Dr. Steffens and Dr. Wiggins to be more persuasive, notwithstanding that Claimant's treating physician, Dr. Jensen, came to a contrary conclusion.

It was in reliance on Dr. Jensen and Dr. Friedman that Surety denied responsibility for further medical care following Dr. Friedman's May 27, 2010 follow up evaluation of Claimant.

Thereafter, Claimant incurred medical expenses in connection with her treatment by Drs. Steffens, Pryor and Dille. The Commission ruled that because Surety had denied responsibility for further care, Claimant was not required to notify Surety of her intentions to continue treating with Drs. Pryor, Steffens and Dille. Rather, under Idaho Code § 72-432, Claimant was entitled to procure care on her own at the employer's expense. The Commission cited the case of *Reese v. V-1 Oil Co.*, 141 Idaho 630, 115 P.3d 721 (2005) in support of its decision in this regard. Further, citing *Neel v. Western Constr., Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), the Commission found that Defendants are responsible for the payment of the medical bills incurred by Claimant following Surety's denial of responsibility for further care at 100% of the invoiced amount. In their motion for reconsideration Defendants challenge the Commission's reliance upon *Reese, supra*, and contend that the Commission further erred in applying the rule of *Neal, supra*, to the facts of this case.

Defendants correctly note that the facts of *Reese* differ from the facts at issue in the instant matter. However, as developed *infra*, the factual differences are not ultimately important to the application of the rule of *Reese* to this case. In *Reese, supra*, claimant suffered a low back injury which was accepted as a compensable claim by surety. Surety provided medical care for a period of time until Claimant's treating physician, Dr. Dubois, recommended that claimant was a candidate for a dorsal column stimulator. At this recommendation surety balked and elicited an opinion from IME physician Robert Friedman to the effect that claimant was not a candidate for dorsal column stimulator implantation. Based on Dr. Friedman's recommendation surety had denied authorization for the dorsal column stimulator trial recommended by Dr. Dubois. Reese eventually moved to Baker, Oregon, and was referred by another physician to Samuel Jorgensen, a Boise surgeon. Eventually, Dr. Jorgensen performed an L3-4 fusion on claimant's back which

was successful in resolving some of claimant's pain. Claimant sought recovery of the medical expenses he incurred in connection with his treatment by Dr. Jorgensen following surety's denial of responsibility for the treatment that had been recommended by Dr. Dubois. The Industrial Commission concluded that claimant's request for the payment of bills he incurred in connection with Dr. Jorgensen's treatment should be denied because claimant had failed to acquire surety's approval to change physicians before obtaining care from Dr. Jorgensen. The Supreme Court reversed, stating that once an employer wrongfully fails to provide medical treatment the injured employee may do so at the expense of the employer. The Court's use of the term "wrongful" carries with it a possible connotation of bad faith. A more accurate adjective describing the surety's actions in *Reese* might be "incorrect". Surety certainly had a right to challenge Dr. Dubois' recommendation. In the opinion of Dr. Friedman, surety had a colorable medical predicate upon which to rely in declining to authorize the treatment recommended by Dr. Dubois. Surety's choice was subsequently deemed to be incorrect, but not wrongful in the sense that its choice was made in bad faith, or with ill will, at the time it chose to rely on Dr. Friedman's recommendation.

Here, too, Defendants relied on the opinions of Drs. Jensen and Friedman to decline to authorize further medical treatment. Defendants argue that their actions can in no wise be deemed "wrongful" because all they did was rely on the opinion of a treating physician that Claimant was not entitled to further care; Defendants did nothing but follow the treating physician's advice. We agree that the evidence does not support a conclusion that Defendants acted in bad faith, or with ill will, towards Claimant. However, the evidence that we have considered does persuade us that Defendants were ultimately "incorrect" in their judgment to rely on the opinions of Drs. Jensen and Friedman to deny responsibility for further care; Drs.

Steffens and Wiggins have persuasively testified that Claimant suffered from a QLM injury that was causally related to the subject accident. In *Reese*, the treating physician recommended further treatment which Surety denied, and in the instant matter, the treating physician recommended no further treatment which opinion the Surety accepted. Both decisions resulted in a denial of care for the injured worker, and both decisions ultimately proved to be incorrect. In both cases, following Surety's denial, Claimant was free to procure medical care on his own without further notice to Surety. We find that the rationale of the Court's holding in *Reese* applies with equal effect to the facts of this case, and that the factual distinctions between the two cases do not warrant a departure from what we perceive to be the rule of *Reese*; once a surety denies responsibility for medical care the injured worker is free to risk procuring medical care on his own without further notice to surety in the hope that the Commission will eventually determine that such care was in fact needed and was reasonable. Here we have made just that judgment. Sureties are well aware, or should be, that theirs is not the last word on whether an injured worker is or is not entitled to further medical care. Any time a decision is made to deny responsibility for further medical treatment, a workers' compensation surety should be cognizant of the possibility that the Industrial Commission will not endorse that judgment. Sureties deny responsibility for medical care in settings like this at their peril. At the same time, it is the surety's obligation to adjust the claim, and oversee the provision of medical care to which a claimant is entitled under Idaho Code § 72-432. It is inevitable that a surety's good faith decision to deny responsibility for further medical care will, from time to time be overturned by the Commission, and the risk to surety is that the Commission will find that the care claimant received on his own following surety's denial was needed and was reasonable. Defendants have suggested that this leaves sureties in an impossible position, and will force them to obtain the

blessing of the Industrial Commission before declining to authorize further medical care. We doubt very much that our decision in this case will change the lay of the land; there has always been some risk in relying upon this or that medical opinion to deny responsibility for further medical care in the case of an accepted claim.

Defendants also protest the perceived injustice of the Commission's application of the rule of *Neel v. Western Constr., Inc.*, 147 Idaho 146, 206 P.3d 852 (2009) to the facts of this case. The Commission is not unsympathetic to the problems created for sureties by the decision. However, it was evidently felt by the Court that these problems are the unfortunate consequence of avoiding what the Court perceived to be graver injustices. *Aspiazu v. Homedale Tire Service*, 2012 IIC 0004 (2012). *Neel* has been generally cited for the proposition that where surety has denied responsibility for medical treatment, surety is responsible for the payment of 100% of the invoiced amount of the bills incurred by the claimant upon the Industrial Commission's subsequent determination that surety is ultimately responsible for the care in question. The rationale underlying *Neel* is that where a surety denies responsibility for care, claimant is in the wilderness; he must come to his own agreement with treating physicians concerning payment for services. Sometimes this means a claimant obligates himself to pay the full invoiced amount of the medical bills in question. Sometimes this means that he has the ability to rely on nonoccupational health insurance to pay some portion of the bills he incurs. In either case, the *Neel* court made clear that where surety is ultimately found responsible for the care in question, it must pay 100% of the invoiced amount.

Defendants suggest that the rule of *Neel* should be limited to those situations in which the claim was denied from the very outset, and not to situations, such as the instant matter, in which the claim was initially accepted, but at some point responsibility for further care was denied.

Again, we do not perceive that this is a distinction which would warrant a departure from the rule announced by the Court in *Neel*. In both instances, claimant is still in the wilderness following the surety's denial of responsibility for care. In both cases, claimant must make whatever deal he can with the physicians from whom he seeks care. We fail to appreciate why a denial after initial acceptance should be treated any differently than an outright denial.

Finally, Defendants ask for clarification on whether they are responsible for bills incurred in connection with Dr. Wiggins' evaluation. Defendants further ask that the Commission identify who is Claimant's treating physician. Dr. Wiggins saw Claimant at the instance of Claimant's counsel for evaluation, not treatment. Defendants are not responsible for these expenses. Drs. Pryor, Steffens and Dille are all in the chain of referral, and all constitute treating physicians. It is not necessary or appropriate to identify one of these physicians as the one who will dictate all future medical care.

Based on the foregoing, Defendants' motion for reconsideration is hereby denied.

IT IS SO ORDERED.

DATED this _18th_ day of _April_____, 2014.

INDUSTRIAL COMMISSION

__/s/ _____
Thomas P. Baskin, Chairman

__/s/_____
R.D. Maynard, Commissioner

_PARTICIPATED BUT DID NOT SIGN__
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _18th_ day of __April_____, 2014, 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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