BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUDY HULSE, Claimant, v. IDAHO STATE LIQUOR DISPENSARY, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2012-013397** **2008-000306** **ORDER GRANTING REQUEST FOR RECONSIDERATION, AND VACATING ORDER OF NOVEMBER 7, 2014** Filed January 20, 2015

On November 7, 2014, the Commission entered its Order adopting the recommended Findings of Fact and Conclusions of Law authored by Referee Brian Harper. In that decision, the Referee recognized that pursuant to the statutory definition, an "accident" cannot be said to have occurred until Claimant demonstrates the occurrence of an untoward mishap or event which produces injury to the physical structure of her body. See Idaho Code § 72-102(18)(b). In other words, merely demonstrating the occurrence of an untoward mishap or event, without proof of a concomitant injury, is insufficient to prove the occurrence of an "accident."

However, quite apart from the technical requirements of the statutory definition, it is quite common for even experienced workers' compensation practitioners to treat the "accident" as the untoward mishap or event, and the "injury" as the damage to the body caused by the

accident. The disconnect between this common (though possibly sloppy) usage, and the technical requirements of the statute may explain the current dilemma.

In the underlying decision, Referee Harper relied on the statutory definition of "accident" to conclude that because Claimant put on no proof to demonstrate that her claimed mishap of March 16, 2012, caused damage to the physical structure of her body, the inquiry stopped there. It makes no difference whether there was an untoward mishap of March 16, 2012, if Claimant cannot also prove that an injury resulted from that mishap. The claim was denied. The Referee did not reach the issues of timeliness of notice, and did not even address whether an untoward mishap or event had occurred as claimed, because the claim failed due to lack of proof that the claimed mishap produced an injury.

From this Decision, Claimant has filed a timely motion for reconsideration under Idaho Code § 72-718. Claimant argues that the issue for hearing was limited to whether or not there was an untoward mishap or event which could be reasonably located as to time when and place where it occurred. Specifically, Claimant asserts that the issue of whether or not the claimed mishap/event caused an injury was deferred, and by agreement of the parties, was not at issue at the subject hearing. In support of her position, Claimant has provided the affidavit of her attorney which essentially asserts that at a prehearing conference, the parties agreed that the issues for hearing should be so limited. Opposing this affidavit is the affidavit of Defendants' attorney, Bridget Vaughan, in which she avers that at the time of the prehearing conference, the parties agreed that the issues would be limited to whether or not there was an accident, and whether or not Claimant gave timely notice. However, Ms. Vaughn has no recollection that the parties agreed to further parse the issue of whether or not there was an "accident" by reserving

for future determination the question of whether the accident produced a physical injury to Claimant.

DISCUSSION

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, that within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. 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)).

Here, the parties dispute the substance of the discussions at the prehearing telephone conference with the Referee. Claimant argues that the parties agreed at that prehearing telephone conference to exclude "injury" as a hearing issue. Defendants do not remember agreeing to exclude "injury."

The record reflects that the initial notice of hearing was issued on January 18, 2013, from Referee Rinda Just with the noticed issues as follows:

1. *Whether Claimant suffered an injury from an accident arising out of and in the course of employment;*

2. Whether and to what extent Claimant is entitled to the following benefits:
   a. medical care
   b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
   c. Permanent partial impairment (PPI);

d. Permanent partial disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine; and
e. Attorney fees;

3. Whether Claimant is totally and permanently disabled.

Emphasis supplied.

Thereafter, Referee Just retired, Claimant obtained a new attorney, and the parties agreed to bifurcate the hearing issues. Referee Brian Harper sent the parties a notice of hearing on March 6, 2014, as follows:

1. *Whether Claimant suffered an injury from an accident arising out of and in the course of employment.*

2. Whether and to what extent Claimant is entitled to the following benefits:

   a. Permanent partial disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine;

3. Whether the Commission should retain jurisdiction beyond the statute of limitations.

Emphasis supplied.

The hearing was to be held on July 22, 2014, in Boise, Idaho, for four hours duration.

On June 26, 2014, the parties had an impromptu telephone conference with Referee Brian Harper after a separate workers' compensation case (same attorneys) vacated. The prehearing telephone conference was initially scheduled for July 3, 2014. No transcript of the prehearing telephone conference exists. Unfortunately, Claimant and Defendants disagree on how the June 26, 2014 telephone conference impacted the hearing issues. Claimant understood that the prehearing telephone conference excluded the "injury" component of "accident," retaining for hearing only the question of whether Claimant suffered an untoward mishap or event on March 16, 2012, as claimed. Defendants disagree. Both submitted affidavits in support of their position. No amended notice of hearing was requested or sent.

On July 22, 2014, Defendants repeated their understanding of the hearing issues as follows:

> (Ms. Vaughan): . . . It's my understanding that the issues with respect to the March 2012 accident date are limited today of whether or not, in fact, there was an accident on the date as alleged, and whether or not Notice was given within 60 days of that accident date.
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> (Referee Harper): And that is correct. And worth noting, because the Notice of hearing has more expansive issues listed. But in our pre-hearing conference, we narrowed those down to the two issues that were accurately stated by defense counsel. All other issues are reserved at this time.
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> Hr. Tr. p. 6, ll. 1-13.

Claimant raised no objection to the hearing issues.

As noted above, the opportunity for confusion in this case arises by virtue of the way that "accident" is defined in Idaho Code § 72-102(18):

> (b) "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

Therefore, under this section, an accident cannot be said to occur unless it produces an "injury". From this, Defendants argue that even though the narrowly-drawn issue is whether an "accident" occurred as alleged, this necessarily includes a determination of whether the accident caused an "injury", otherwise, an accident cannot be proven. Defendants argue that it was their understanding that both accident and injury were at issue since an accident cannot occur under the statutory definition absent an "injury". Equally persuasive is Claimant's assertion that while the issues as noticed include whether there was an "injury" caused by an "accident", the parties agreed at the time of the prehearing telephone conference of June 26, 2014, to limit the issue for hearing to whether there was an "accident", i.e. whether there was an untoward mishap or event which could be reasonably located as to time when and place where it occurred. Certainly, that

portion of the hearing transcript quoted above would support Claimant's argument in this regard since it differs substantially from the formal notice of hearing which includes both "accident" and "injury" among the noticed issues. That Claimant's understanding was as she asserts is further bolstered by the fact that she did not address the question of whether the alleged mishap/event caused an "injury" in post-hearing briefing; Claimant's briefing focuses largely on demonstrating that there was an untoward mishap on March 16, 2012, and explaining why that event is not referenced in contemporaneous treatment notes.

Both attorneys involved in this case are competent in the area of workers' compensation, and have regularly appeared before the Industrial Commission for many years. Because counsel for Claimant is familiar with the statutory scheme, and so must be aware that the definition of "accident" requires a demonstration of a concomitant injury, he can perhaps be criticized for not reiterating for the record his understanding of the narrow issue before the Industrial Commission for hearing. However, we have no reason to challenge what he contends his understanding was, as set forth in his affidavit. We are left to conclude that an unfortunate misunderstanding leaves the parties in disagreement as to the issues actually to be heard by the Commission. Under these circumstances, the Commission deems it appropriate to vacate the November 7, 2014 Decision, and to remand the matter to Referee Harper for further proceedings, with the understanding that the parties will take adequate steps to define what is and what is not at issue in subsequent proceedings before the Referee.

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ORDER

Based on the foregoing reasons, Claimant's request for reconsideration is GRANTED. The decision of November 7, 2014, is hereby **VACATED** and the matter is **REMANDED** to Referee Harper for further proceedings.

IT IS SO ORDERED.

DATED this _20th_ day of _January____ 2015.

INDUSTRIAL COMMISSION

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

__/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of _January_____, 2015, a true and correct copy of the foregoing **ORDER GRANTING REQUEST FOR RECONSIDERATION** was served by regular United States Mail upon each of the following persons:

RICHARD OWEN
PO BOX 278
NAMPA ID 83653

BRIDGET VAUGHAN
1311 NORTH 25TH ST
BOISE ID 83702

__/s/_____