

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LISA MCCULLOUGH,

Claimant,

v.

JOHNSON BROTHERS HOSPITALITY,
LLC, Employer, and EMPLOYERS
COMPENSATION INSURANCE
COMPANY, Surety,

and

STATE OF IDAHO INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendants.

IC 2008-017893

**ORDER DENYING
RECONSIDERATION**

Filed 12/23/15

This matter came before the Idaho Industrial Commission (“Commission”) on the November 12, 2015 motion of the State of Idaho Industrial Special Indemnity Fund (“ISIF”) seeking reconsideration of the Commission’s October 23, 2015 Order Dismissing Complaint Against the Industrial Special Indemnity Fund.

On October 8, 2015, the ISIF filed a Stipulation to Dismiss ISIF with Prejudice, wherein the parties stipulated that “at the present time, the claimant is not totally and permanently disabled as she is gainfully employed.” In its October 23, 2015 Order Dismissing Complaint Against the ISIF, the Commission granted the dismissal without prejudice.

The ISIF requests reconsideration of the “without prejudice” language in the Commission’s Order. The Brief in Support states that because the parties stipulated to Claimant’s present employment and that Claimant is “thus not totally and permanently disabled, good cause was shown that the ISIF has no liability and should have been dismissed from the

case with prejudice as required by Rule 12 (d) of the Judicial Rules of Practice and Procedure.” ISIF requests either a Dismissal With Prejudice per the Stipulation, or in the alternative, that the October 23, 2015 Order Dismissing Complaint Against the ISIF be vacated so that the ISIF may pursue a dismissal with prejudice at hearing.

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. 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.

The legal file of the Commission reflects that shortly before a scheduled hearing, employer/surety filed a complaint against the ISIF. This resulted in the rescheduling of the hearing, but shortly in advance of the rescheduled hearing employer/surety moved the Commission for its order dismissing the complaint against the ISIF, acknowledging that there was no evidence “at present”, to suggest that Claimant was, in fact, totally and permanently disabled. Though not couched as a motion to dismiss without prejudice, a review of Defendants’ September 9, 2015 motion clearly reflects that it was the intention of Defendants that the dismissal be without prejudice. Claimant objected, arguing that she intended to adduce proof that she was totally and permanently disabled, and that it would be prejudicial to her case to dismiss the ISIF. Referee Donohue denied the motion to dismiss the ISIF.

As sometimes happens, Defendants and Claimant reached a settlement of Claimant’s claim against Defendants on the eve of hearing. That settlement was resolved via a Lump Sum

Settlement Agreement. This left hanging the complaint which Defendants had previously filed against the ISIF. On or about October 9, 2015, the parties filed with the Industrial Commission their stipulation to dismiss the complaint against the ISIF with prejudice. That stipulation reads in its entirety as follows:

The parties, by and through their respective counsel of record, hereby stipulate to an order dismissing the Industrial Special Indemnity Fund (“ISIF”) with prejudice from this case. The claimant and ISIF further stipulate that, at the present time, the claimant is not totally and permanently disabled as she is gainfully employed. Any stipulation or agreements between the claimant and the Employer/Surety shall be controlled by a separate lump sum settlement agreement.

Notably, this stipulation, while reflecting that Claimant and ISIF are in agreement that Claimant is not totally and permanently disabled “at the present time”, contains nothing to reflect any meeting of the minds between ISIF and Defendants, nor any other points of agreement which might support a conclusion that good cause exists to dismiss the complaint with prejudice against the parties who actually filed the complaint.

In its Brief in Support of the Motion for Reconsideration, ISIF urges that the dismissal must be with prejudice in order to protect it from a change of heart that one or both of the parties may have about ISIF liability. ISIF further suggests that if the Commission continues to insist upon a dismissal without prejudice, then it will have no choice but to request a hearing on the issue of ISIF liability.

To the first argument, the fact that one or both of the parties may have a change of heart about ISIF liability is exactly the reason for declining to dismiss this matter with prejudice. As Defendants noted in their original motion to dismiss, the circumstances of the parties may change, and what might at the present time seem to be clearly a case of less than total and permanent disability might turn into something else in the future. As to ISIF’s second point, it is

unclear to the Commission how a request for calendaring by the ISIF could be entertained. The Commission's October 23, 2015 order dismissed the Defendants' complaint against the ISIF, albeit without prejudice. Absent the filing of a new complaint by someone, there is nothing to have a hearing on.

In summary, the Commission sees nothing in this matter which persuades it to depart from the default rule of JRP 12(a), which specifies that in the absence of "good cause" shown, a dismissal of the complaint shall be without prejudice. ISIF's motion for reconsideration is thereby denied.

DATED this 23rd day of December 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 23rd day of December, 2015, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

DANIEL J LUKER
PO BOX 6190
BOISE ID 83707

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701

ka

_____/s/_____
