

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LETICIA M. SALINAS,

Claimant,

v.

BRIDGE VIEW ESTATES,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Surety,

Defendants.

IC 2011-014120

**ORDER DENYING
DEFENDANTS' MOTION
FOR RECONSIDERATION**

Filed April 28, 2016

Pursuant to Idaho Code § 72-718, Defendants timely filed a motion for reconsideration of the Commission's March 4, 2016 decision in the above-captioned case. Defendants argue, first, that the Commission erred in awarding Idaho Code § 72-804 attorney fees; second, that the decision lacked substantial and competent evidence to support the findings relating to attorney fees; third, that the decision impermissibly penalized Defendants; fourth, that the decision unfairly shifted the burden of showing reasonableness to Defendants; and fifth, that the decision prejudiced Defendants by depriving them of a bifurcated hearing on attorney fees. Claimant did not file a response.

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)).

Claimant alleged she injured her back while lifting a patient on or about May 5, 2011. While she was receiving medical treatment, Claimant asserted that Surety “temporarily denied” her claim and refused to communicate with her. Defendants countered that Claimant canceled/no-showed to her appointments, and that such appointments were unnecessary. Around May 2015, Defendants’ expert, Dr. Michael Hajjar opined that Claimant’s industrial injury was a lumbar strain/sprain, and had resolved within six (6) months of the injury. While ultimately accepting Dr. Hajjar’s medical opinion, the Referee was critical of Defendants’ handling of the claim, including (1) denying Claimant’s medical care before a physician declared Claimant at MMI; (2) unreasonably delaying its decision on continuing coverage on an accepted claim; and (3) refusing to communicate with Claimant on her coverage status despite her repeated attempts to speak with the adjuster. The Commission adopted the Referee’s proposed findings in its March 4, 2016 Order including (1) Claimant has failed to prove her current low back condition was caused in whole or in part by the industrial accident of May 5, 2011; (2) Claimant has failed to prove her right to reimbursement for medical care for her low back after she reached MMI in November 2011; (3) Claimant has failed to prove she is entitled to permanent partial impairment (PPI) benefits from her industrial injury; (4) Claimant has failed to prove she is entitled to permanent partial disability (PPD) benefits from her industrial accident; and (5) Claimant has proven she is entitled to an award of attorney fees under Idaho

Code § 72-804 for Surety's prolonged denial of medical benefits without a reasonable ground. Pursuant to Idaho Code § 72-718, the Commission's decision was final and conclusive as to all matters adjudicated. For the reasons set forth in more detail below, the Commission declines to reconsider its March 4, 2016 Order.

Idaho Code 72-804 Attorney Fees

First, Defendants argue that the Commission erred in awarding Idaho Code § 72-804 attorney fees. Defendants contend that the plain and obvious meaning of Idaho Code § 72-804 is that Claimant must have compensation "justly due and owing" to obtain an award of attorney's fees. Defendants argue that Claimant cannot meet this statutory requirement because she did not receive additional workers' compensation benefits, and ask the Commission to strike findings No. 65 and 74.

Idaho Code § 72-804 states:

72-804. ATTORNEY'S FEES -- PUNITIVE COSTS IN CERTAIN CASES. 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 statute is written in the disjunctive, providing three routes to establish entitlement to attorney's fees: (1) unreasonably contesting a claim for benefits; (2) failing to pay benefits within a reasonable time after receipt of a written claim for compensation; and (3) discontinuing compensation justly due and owing an employee without a reasonable ground. After reviewing all three grounds, the Referee reasoned that Surety's actions fell under the third—discontinuing

compensation justly due and owing to Claimant without a reasonable ground, not *per se* by temporarily suspending her medical coverage, but by unreasonably delaying its decision on continuing coverage on an accepted claim and/or refusing to communicate with Claimant on her coverage status despite her repeated attempts to speak with the adjuster. Although the Referee found that Claimant was not entitled to further medical care and reached MMI at hearing, the Referee reasoned that Surety acted unreasonably in discontinuing her medical treatment and failing to communicate *at the time in question*.

Defendants' insistence that Claimant cannot be awarded Idaho Code § 72-804 attorney fees, because nothing is now "due and owing" is misplaced. Defendants are reminded that Claimant was actively treating for her industrial injury, which was an accepted claim, when Surety declined payment for additional treatment without a contemporaneous medical predicate, and gave Claimant the runaround about her claim status. No physician had declared Claimant to be at MMI at the time. Under the facts of this case, Surety's decision to discontinue payment of Claimant's treatment before Claimant had been declared MMI, and without appropriately communicating and/or investigating the matter denied Claimant benefits justly due during the pendency of her workers' compensation claim. Even though Defendants obtained a persuasive medical opinion that declared Claimant stable, this was procured years after Defendants' unsubstantiated denial. Defendants cannot excuse their actions by Claimant's subsequent recovery. To hold otherwise would cause an unjust result. While Defendants disagree with the Referee's findings, Idaho Code § 72-804 was not applied in error.

Substantial and Competent Evidence Supporting the Idaho Code § 72-804 Award

Defendants argue that the Order lacks substantial and competent evidence to support the award of Idaho Code § 72-804 attorney fees. First, Defendants are critical of any reliance on

Claimant's testimony, given the finding that Claimant's contested testimony was diminished unless corroborated. Second, Defendants urge the Commission to reject the "speculation that Claimant would have 'little reason' to no-show her appointments except that she could not afford to pay." Third, Defendants argue that the Referee relied on incompetent hearsay testimony, i.e., Dr. Sirucek's opinion letter cited to a letter allegedly dated in August 2011 purporting to confirm the Surety's denial of Claimant's benefits. Finally, Defendants ask the Commission to strike the "speculation and conjecture regarding the cause of the litigation" in findings Nos. 72 and 73.

First, the Commission appreciates that Defendants raised a different narrative as to what caused Claimant to miss appointments, and whether the case was reasonably handled and or denied, but those issues were resolved in the decision below. The Referee was completely transparent with his assessment of Claimant's credibility, identifying exaggerations and inconsistencies in her testimony, and that she appeared somewhat self-serving. However, as detailed in the Decision, the Referee did not think Claimant was scheming to deceive, or that she had such a comfort level with communicating untrue statements that the entirety of her testimony should be discarded. The Commission has never required witnesses and experts to be infallible in order to be believed, and finds that the Referee's careful treatment of Claimant's credibility shows he was not improperly reliant on her testimony.

Second, the parties disputed what caused Claimant to miss appointments and the Surety's handling of the claim. Defendants insist that Claimant's explanation cannot be believed, and that she could have paid for medical care if she needed it because she was continuously employed during the relevant period. The Commission disagrees. Not only are Defendants attempting to re-litigate the facts, but financial pressures are a reasonable, common sense explanation of

Claimant's actions. Being regularly employed does not necessarily equate with having the financial means to assume responsibility for medical care.

Third, Defendants argue that the Referee improperly relied on hearsay evidence, specifically Dr. Sirucek's opinion letter. The Referee did not exclusively rely on Dr. Sirucek's opinion letter which allegedly confirmed Surety's denial of Claimant's benefits to determine that Surety suspended Claimant's medical benefits. The Referee acknowledged the controversy between the parties, considered the conflicting narratives, and found Claimant's version of events persuasive based on the evidence *in its entirety*. The Commission is not persuaded that the Referee gave Dr. Sirucek's letter improper weight, and rejects Defendants' arguments.

Finally, the Commission disagrees with Defendants' objection to the "speculation and conjecture regarding the cause of the litigation" in findings Nos. 72 and 73. While litigation cannot always be avoided, the Referee could not overlook the obvious consequences of Surety's unreasonable behavior, and took great care to outline why Surety's actions were unacceptable and undoubtedly led to the uncertainty which helped fuel this litigation. The Commission will not revisit this finding on reconsideration.

Idaho Code § 72-804 is not a Penalty

Defendants assert that the Commission impermissibly penalized them by awarding attorney fees where Claimant did not secure further medical benefits. The Commission agrees that Idaho Code § 72-804 is not a penalty; the award is said to be compensatory, the underlying rationale being that the claimant should not have workers' compensation benefits lessened by legal expenses incurred as a result of the employer's and surety's unwarranted conduct in refusing or delaying compensation of an otherwise compensable claim. Clark v. Sage, 102 Idaho 261, (1981). Idaho Code § 72-804 applies only where unreasonable conduct appears.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination which rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). The Order extensively addresses why the Surety's actions were an unreasonable denial of compensation justly due to the Claimant. Surety simply cannot excuse their unreasonableness with Claimant's subsequent recovery. The Commission declines to revisit these factual findings and rejects the argument that Defendants were penalized.

The Burden of Proving Unreasonableness

Defendants argue that the evidence Claimant presented was insufficient to prove that Defendants acted unreasonably. Defendants contend that they provided Claimant the "full gamut of medical care," and that the attorney fee award should be reversed. This is but a variation of the factual arguments Defendants presented below and on reconsideration. Defendants continue in their perception that Claimant's case was so weak that she could not possibly have prevailed against them. Not so. While Claimant's case was not without weaknesses, the Referee found Claimant's version of events surrounding how and why her medical care abruptly ended persuasive, and how (poorly) Surety handled its obligation to Claimant. The Commission declines to revisit these findings.

Defendants' Request for a Bifurcation

Defendants insist that their request for bifurcation of issues motion was unopposed, and should have been granted to bifurcate Idaho Code § 72-804 attorney fees from the other issues. Commission Referees are empowered and authorized to conduct hearings with a view toward promoting judicial economy and efficient case resolution. Parties are not entitled to a bifurcation simply because they request it. The Referee thoughtfully addressed Defendants' arguments for bifurcation in his March 17, 2015 Order Denying Motion to Bifurcate. The Referee reasoned

that Defendants did not present a cogent reason to bifurcate the attorney fee issue. The Referee also reasoned that finality is important, and there was no reason presented to drag this matter out longer than necessary, or require a separate hearing on whether Defendants' conduct subjects them to an award of attorney fees under Idaho Code § 72-804. The Commission finds that Defendants were not prejudiced by the Referee's denial of the request to bifurcate.

ORDER

Based on the foregoing, Defendants' request for reconsideration is DENIED.

DATED this 28th day of April, 2016.

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 28th day of April, 2016, a true and correct copy of the foregoing **Order Denying Defendants' Motion for Reconsideration** was served by regular United States Mail upon each of the following:

ALAN GARDNER
PO BOX 2528
BOISE ID 83701

PATRICK BROWN
PO BOX 125
TWIN FALLS ID 83303

ka

_____/s/_____