BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KELLI SEVY, Claimant, v. SVL ANALYTICAL, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-526107** **ORDER DENYING RECONSIDERATION** **Filed February 14, 2014**

Claimant made a timely motion for reconsideration of the Commission's decision in the above-captioned case on January 29, 2013. Claimant argues that the Commission erred in its findings, conclusions and order filed on January 9, 2013. In that decision, the Commission held that Claimant likely suffered disability in the range of 50% to 75% of the whole person from all causes combined. The Commission also found that Claimant failed to meet her burden of establishing total and permanent disability via the odd lot doctrine. Having found that Claimant was less than totally and permanently disabled, the Commission next concluded that except for a 2% PPI rating, the subject accident did not contribute to Claimant's disability from all causes combined. This conclusion derived from the Commission's adoption of the opinion expressed by Dr. Larson that the subject accident did nothing to increase Claimant's permanent

limitations/restrictions. Finally, the Commission concluded that even if it be assumed that Claimant is totally and permanently disabled, her claim against the ISIF would fail because the evidence fails to establish that she could satisfy the "subjective hindrance" and "combining with" components of the test for ISIF liability.

In support of her motion for reconsideration, Claimant argues that having found Claimant to be generally credible, the Commission cannot disregard her testimony, which establishes that the subject accident permanently worsened her ability to engage in physical activities. Next, Claimant argues that Dr. Larson's opinion concerning the impact of the work accident on Claimant's ability to engage in gainful activity should be disregarded because it conflicts with Claimant's testimony and the functional capacity evaluation (FCE) performed by Mark Bengston.

Claimant argues that the Commission erred in concluding that Claimant failed to establish total and permanent disability by the 100% method. She further argues that the Commission erred in rejecting her assertion that she is totally and permanently disabled under the odd lot doctrine. She contends that the evidence establishes that she has tried other types of employment without success. She contends that she, or others on her behalf, have searched for employment and found none available. She contends that because of her profound physical limitations/restrictions, and in particular, her restriction against overhead reaching on more than an occasional basis, it would be futile for her to seek suitable employment.

Defendant ISIF and Defendant Employer argue that Claimant has failed to present new reasons, factually or legally, to support reconsideration of the Commission decision. They argue that the Commission decision is well supported by the record. In addition, the ISIF argues that the evidence of record supports the Commission's determination that Claimant has failed to

prove odd lot status by any of the three methods articulated in *Huerta v. School District 431*, 116 Idaho 43, 773 P.2d 1130 (1989). The ISIF also argues that Claimant continues to misinterpret SkillTRAN analysis results, which figure in the vocational opinions rendered by Mr. Brownell and Dr. Collins.

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, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion." Generally, greater leniency is afforded to *pro se* claimants. 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 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)).

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.

Claimant's Credibility

This case was heard by Referee Donohue. In his proposed decision, which was not adopted by the Industrial Commission, Referee Donohue offered the following observations relating to Claimant's credibility as a witness:

> Claimant makes a good first impression. At hearing, she appeared to be minimizing her physical reactions to pain and discomfort. Her increase in emotional and physical behaviors while testifying about tripping over the dog and requiring a second surgery appeared modest and genuine.
>
> Claimant is credible. Her demeanor and testimony were consistent with other evidence of record.

In its decision, the Commission made the following finding concerning Claimant's credibility as a witness:

> Except as qualified below, Claimant is generally credible. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility

Thereafter, the Commission explained why it chose to accept Dr. Larson's opinion that Claimant had no additional limitations/restrictions referable to the subject accident over Claimant's testimony that the subject accident caused a significant permanent loss of function. Claimant argues that having taken no issue with the Referee's finding on Claimant's credibility, the Commission should have elevated Claimant's testimony over the opinion of Dr. Larson, especially where his opinion is challenged by certain internal inconsistencies in his testimony.

The Commission's findings on credibility are bifurcated into two categories, "observational credibility" and "substantive credibility". As stated in *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003):

> Observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. The Commission's findings regarding substantive credibility will only be disturbed on appeal if they are not supported by substantial competent evidence.

Since the Commission did not hear this case, the Commission may not make findings concerning Claimant's credibility on the witness stand. The Commission did not disturb the Referee's findings in this regard. However, the Commission is fully empowered to weigh the substance of Claimant's testimony against other facts of record and make its own decision about Claimant's substantive credibility.

Central to the Commission's original decision is the opinion of Dr. Larson, Claimant's treating physician. Dr. Larson performed Claimant's first spinal surgery in 2006, followed her during her period of recovery from that procedure and again treated her for the effects of the subject accident. He is peculiarly qualified to address the extent and degree to which Claimant's current limitations/restrictions are referable either to the subject accident, Claimant's pre-existing cervical spine condition or some combination of the two. Because of his unique knowledge concerning Claimant's pre-injury and post-injury condition, the Commission found persuasive his testimony that while the subject accident is responsible for causing or contributing to the failure of the C5-6 fusion, the accident did nothing to increase Claimant's permanent limitations/restrictions. Dr. Larson succinctly explained his opinion in this regard:

> Q. Now, focusing on the C5-6 issue, was there any limitations or restrictions that arose out of when she tripped over the dog at work?
>
> A. What do you meant?
>
> Q. Would there be any limitations or restrictions that would be - - I guess were there any limitations or restrictions to her - - to her from her C5-6 fusion?

A. I'll have to look and see. It was my opinion that she had been at MMI. I don't know if I did her - - I don't remember if anyone else did. I don't think there are any new limitations to her based on the pseudarthrosis that I treated.

Q. Okay. So if she had any limitations or restrictions related to her cervical condition, those would be related to the degenerative condition you treated in May of 2006; is that correct?

A. If they were at C5-6, yes.

Q. Okay. So there were no new limitations, restrictions just because of the fusion redo?

A. No.

This testimony is not challenged by other medical opinion of record. While Mark Bengston did find that Claimant had some limitations/restrictions referable to her cervical spine condition, Mr. Bengston's testing did not shed any light on whether those limitations/restrictions predated or postdated the accident. His findings are not inconsistent with Dr. Larson's opinion that Claimant has no limitations/restrictions referable to the subject accident. We recognize that Dr. Larson labored under the belief that the limitations/restrictions identified by Mr. Bengston do not contain any restrictions related to the cervical spine, while Mr. Bengston's testimony makes it clear that some of the limitations/restrictions he identified do relate to the cervical spine. However, we do not believe Dr. Larson's misunderstanding in this regard denigrates his opinion on the cause of Claimant's limitations/restrictions referable to Claimant's cervical spine.

Against Dr. Larson's testimony, Claimant has testified that as a result of the subject accident she has suffered a permanent worsening of her cervical spine condition. As explained in our original decision, in resolving this conflict in the evidence, we find the opinion of Dr. Larson and Dr. Stevens to be more persuasive.

There is another substantive credibility issue implicated in Claimant's motion for reconsideration. Claimant acknowledges that on cross-examination she conceded that she

performed no work search until November of 2011, which was several years after her date of medical stability, and shortly before the subject hearing. Claimant argues that this testimony was elicited from Claimant after being on the witness stand for several hours and was the result of fatigue, confusion, or pain medication. Claimant asserts that this testimony should therefore be ignored in favor of testimony elicited on redirect that Claimant performed a work search in October, November and December of 2007 following the termination of her employment with SVL. In fact, a careful review of the hearing transcript reveals that the explanation proffered by Claimant does not bear close scrutiny; there is other evidence of record which denigrates the assertion that the testimony she gave concerning a 2011 work search was the result of confusion, fatigue or overmedication.

At hearing, under examination by her attorney, Claimant testified, apparently for the first time, to a job search she performed after leaving SVL. She initially testified that she looked around a little bit for work after leaving SVL, but then described a number of employers she contacted about work. These included Harvest Foods, Yokes, Dave Smith Motors, Subway, Silver Spoon, McDonalds, Wayside Market, Wal-Mart, and Silver Mountain.

On cross-examination, counsel for Defendants asked Claimant why, if she had actually looked for work at the places she identified in 2007, she failed to describe this search in her 2009 and 2011 depositions, and in her answers to interrogatories. Claimant explained that the answers she gave during discovery were accurate; she did not start her work search until after her 2011 deposition. (*See* hearing transcript 176/21-177/16). On redirect, Claimant recanted and again testified that the work search she performed was undertaken in October, November and December of 2007. Claimant's testimony is internally inconsistent, and the explanation she has offered to explain this inconsistency on reconsideration is inconsistent with the fact that on at

least three separate occasions prior to the date of hearing she denied looking for or applying for work prior to 2011. We find Claimant's explanation for her testimony that her work search was performed in the fall of 2011 to be untenable.

In summary, we continue to abide by our decision that certain aspects of Claimant's testimony are challenged by other facts of record. Specifically, we continue to believe that Dr. Larson's testimony is entitled to greater weight than that of Claimant on the issue of whether Claimant has any limitations/restrictions referable to the subject accident.

Odd-Lot Determination

Next, Claimant takes issue with the Commission's treatment of the elements of proving odd lot status. An employee may prove total disability under the odd lot doctrine in one of three ways:

> (1) By showing that she has attempted other types of employment without success;
> (2) By showing that she or vocational counselors or employment agencies on her behalf have searched for other work and other work is not available; or
> (3) By showing that any efforts to find suitable employment would be futile.

In its decision, the Commission ruled that Claimant could not meet her burden of proving odd lot status by the first method, since she had failed to adduce evidence demonstrating that she had attempted other work without success. In fact, Claimant demonstrated an ability to work 40 hours per week under the Idaho Child Care Program (ICCP), providing child care to a five year old, an eight year old and a newborn. Claimant argues that the fact of her employment by the ICCP should be disregarded since, per the testimony of Dan Brownell, such employment is "sheltered" and "sympathetic". (*See* transcript of hearing 266/6-267/6). Notwithstanding that Mr. Brownell's testimony in this regard is somewhat lacking in foundation, we do not believe that his assertions, even if true, do anything to assist Claimant in meeting her burden of proof

under the first method. Simply, the fact that Claimant may have found work in a sheltered environment does nothing to prove that she has attempted other types of employment without success.

Next, Claimant challenges the Commission's conclusion that the evidence fails to establish that Claimant, or someone on her behalf, searched for other work, yet found none available. Claimant testified that between her 2007 date of medical stability and the date of hearing she made contacts with 10 potential employers. Regardless of whether these contacts took place in 2007 or in the fall of 2011, we deem this work search to be inadequate to meet Claimant's burden of proving odd lot status under the second method.

Finally, Claimant alleges that the testimony of Mr. Brownell establishes that it would be futile for Claimant to search for work, as demonstrated by the results of the SkillTRAN analysis performed by Mr. Brownell, or at his instance. As we pointed out in our original decision, we believe the reliance on the results of the SkillTRAN analysis is misplaced. Claimant has restrictions against engaging in overhead reaching on more than an occasional basis. She has no restrictions against other types of reaching that might be required in other types of employment. However, because of the way data is collected by the U.S. Department of Labor, the SkillTRAN system is incapable of applying Claimant's specific restriction to the database of jobs; SkillTRAN only allows the evaluator to screen out jobs that involve upper extremity reaching generally, without the ability to fine tune for a specific type of prohibited reaching. (Truthan deposition 68/25-74/15). Most jobs in the workplace require upper extremity reaching of some type. Withdrawing jobs that require some type of reaching from Claimant's labor market results in a loss of up to 90% of the labor market. However, using SkillTRAN in this fashion would

remove from Claimant's labor market any number of jobs (how many, we do not know) that she is actually capable of performing per Mr. Bengston.

In short, we find no reason to reconsider our decision that Claimant has failed to adduce evidence demonstrating that it would be futile for her to search for employment.

For the reasons stated above, the Commission declines to reconsider the previously issued decision.

ORDER

Based on the foregoing reasons, Claimant's request for reconsideration is **DENIED**. **IT IS SO ORDERED.**

DATED this _14th__ day of _February__, 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 14th day of February, 2014, a true and correct copy of the foregoing **ORDER DENYING ON RECONSIDERATION** was served by regular United States Mail upon each of the following:

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