

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

GREGORY WEGNER,

Claimant,

v.

COEUR D'ALENE POWER TOOLS,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2012-031071**

**ORDER DENYING  
MOTION FOR REHEARING  
AND/OR RECONSIDERATION**

Filed October 9, 2015

This matter is before the Idaho Industrial Commission on Claimant's Motion for Rehearing and/or Reconsideration, timely filed June 8, 2015 requesting a reconsideration of the Industrial Commission's Findings of Fact, Conclusions of Law, Recommendation and Order filed in the above-captioned case on May 19, 2015. Claimant contemporaneously filed his Brief in Support of his Motion for Rehearing and/or Reconsideration. Defendants timely filed their Response and Motion to Strike on June 19, 2015. Claimant timely filed his Reply on June 26, 2015.

There is no dispute that Claimant suffered an accident at work on December 7, 2012 when he fell headfirst down a flight of stairs and painfully dislocated his right shoulder. At hearing, Claimant alleged that in addition to the shoulder injury, he also injured his neck, low back, right hip, and head. He also claimed that the severity of the shoulder injury masked his

other injuries. Defendants contended that Claimant's other pain issues were unrelated to his industrial accident and did not present until later.

The Idaho Industrial Commission's May 19, 2015 Findings of Fact, Conclusions of Law, Recommendation, and Order stated the following conclusions:

1. Claimant has failed to prove his cervical spine condition, headaches, vision changes, and dizziness are causally related to his industrial accident of December 7, 2012.
2. Claimant has proven a causally-connected exacerbation of his pre-existing low back condition as a result of his December 7, 2012 industrial accident; he is entitled to reasonable medical treatment for his low back/right hip area, to include at a minimum a lumbar spine MRI.
3. Claimant has failed to prove any condition in his right hip not associated with his low back complaints are causally connected to his industrial accident of December 7, 2012. As such, Claimant is not entitled to additional medical treatment specifically related to right hip complaints separate and apart from his low back complaints, including but not limited to diagnostic studies not associated with Claimant's lumbar spinal condition.

In his Motion for Reconsideration, Claimant contends that the "Referee's proposed FFCL&O is not supported by substantial competent evidence or based upon correct legal standards" for several reasons, each of which will be addressed below.

#### **Motion for Reconsideration**

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 (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 (1986). 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 his Motion, Claimant contends reconsideration is warranted for several reasons: first, that the conclusion of law that Claimant failed to prove his cervical spine condition is causally related to his industrial accident is not supported by substantial competent evidence; second, that the Referee improperly “gave more weight to the opinions of Dr. Moss than to the opinions of Dr. Dirks” as related to causation; third, that the Referee improperly characterized Claimant as “cognitively able” to provide accurate information at the Kootenai County Emergency Room immediately following his accident and therefore shouldn’t have relied on the emergency room records regarding Claimant’s later claims of neck pain; fourth, that the Referee used incorrect legal standards when determining the credibility of Claimant’s claims of neck pain and that

Claimant lacked corroborative evidence to establish that his neck injury was caused by his accident; and fifth, that the Referee was not present at the post-hearing deposition of Dr. Dirks and therefore should not be able to determine that the testimony was “simplistic”. Based on these arguments, Claimant concludes that he is either entitled to Commission reconsideration of the underlying decision, or that he is entitled to a new hearing in whole or in part to allow Claimant to present rebuttal testimony from Drs. Dirks and Coleman regarding Claimant’s alleged neck injury.

Defendants responded that the Decision was “based upon a thorough review of the evidence” and that “Claimant’s Motion for Rehearing and/or Reconsideration must be denied.”

**Substantial and competent evidence supports the conclusion that Claimant’s cervical condition was not causally connected to his industrial accident.** Claimant’s first argument is that because Claimant fell down stairs, “even a lay person can well appreciate that more probably than not the Claimant’s head, neck, and the rest of his body suffered trauma with each of the three or four times the Claimant impacted the stairs and ultimately the landing.”

“Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Curtis v. M.H. King Co.*, 142 Idaho 383, 385, 128 P.3d 920, 922 (2005), citing *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The burden on workers compensation claimants is to establish by the weight of the evidence that his injury was the result of a compensable accident or occupational disease to “a reasonable degree of medical probability”. Furthermore, “a worker’s compensation claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery.” *Evans v. O’Hara’s, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

Claimant has presented no new evidence that Claimant's cervical condition was related to the industrial injury. While a lay person might suppose that a neck injury could potentially accompany a fall down a flight of stairs, such does not constitute medical evidence. Expert testimony in matters involving medical disputes is necessary because it is frequently outside the ordinary knowledge of lay persons. *Mazzone v. Texas Roadhouse*, SC2 IIC 1308 (2013) (citing *Coombs v. Curnow*, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009)). The record is devoid of neck complaints from Claimant until July 2013. We find the Referee properly relied on medical testimony and evidence in record in making his determination that Claimant's cervical condition was not related to the industrial accident.

**The Referee properly handled Claimant's request for a formal site visitation.**

Claimant argues that the Referee visited the site of the accident outside of the presence of all parties, but then "failed to describe the stairs for the Commission" in the Decision. Defendants respond that the Referee "announced his intention to view the stairs prior to the hearing" during a telephone conference and then did so outside the presence of all parties in accordance with his Order.

Idaho Code § 72-714(4) grants authority to any member, hearing officer, referee and examiner of the Commission "the right to enter premises at any reasonable time where an injury, disease, or death has occurred and to make such examination of any tool, appliance, process, machinery or environmental or other condition as may be relevant to a determination of the cause and circumstances of the injury, disease or death."

Claimant's main contention regarding the site visitation is that the decision did not sufficiently describe the stairway to the Commission. The record is replete with information about the stairs visited by the Referee on August 28, 2014; photographs of the stairs were

admitted into the record, as was the testimony of Paden Severs, who described the stairs during his deposition. The Commission reviewed the extensive record and exhibits, including the photographs from the record that Claimant embedded in his brief on the instant matter. The fact that Claimant fell down these particular stairs is not under dispute. No abnormality in the stairs was offered into evidence. The Commission feels that it is sufficiently apprised of the circumstances of the accident.

**The Referee fully and properly considered the opinions of the doctors in the record.**

Claimant argues that the Referee was incorrect in giving more weight to the opinion of Dr. Moss than the opinion of Dr. Dirks. Claimant contends that Dr. Moss used the records of Dr. Russo and Dr. Greendyke in his opinion, both of which are inconsistent with Dr. Moss' ultimate conclusions regarding Claimant's shoulder injury. Claimant then concludes that "Dr. Russo's testimony is speculative assumption." Claimant also takes issue with Dr. Greendyke's chart notes and general system of practice. Defendants respond that the testimonies of Drs. Russo and Moss were "very impressive and logically presented" and that "Claimant's statement that, 'Dr. Moss...was less qualified than Dr. Dirks' simply is not true."

A referee is entitled to consider a physician's credibility and their methodologies. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 756, 302 P.3d 718, 724 (2013). Indeed, "[t]he Industrial Commission, as a factfinder, is free to determine the weight to be given to the testimony of a medical expert." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2013).

Claimant's arguments regarding the weight of medical testimony were previously considered by the Referee and the Commission. The Commission finds the record supports the

recommendation made by the Referee and finds no reason to disturb the findings on weight given to medical testimony in the above-captioned decision.

**The Referee properly considered Claimant’s cognitive abilities at the emergency room based on the record.** Claimant argues that the decision “erroneously asserted” that the Claimant was “cognitively able” to provide relevant information to the emergency room staff at Kootenai Medical Center on the day of the industrial accident.

This argument is a restatement of Claimant’s arguments at hearing, as well as an extension of his argument that Dr. Dirks should have been afforded more weight on the issue of Claimant’s cervical condition by the Referee. It is similarly an extension of Claimant’s argument that his shoulder injury distracted from and/or masked his neck injury. Claimant previously argued in his post-hearing brief that Claimant was in an altered mental state while he was at the emergency room. Claimant’s assertions run contrary to the weight of medical evidence in the record. We find no reason to disturb the Decision on this issue.

**The Referee applied the proper legal standards in the Decision.** Claimant contends that the Referee improperly utilized two legal standards in his Decision; a “sword and shield” standard and a “corroborative evidence” standard. Claimant points to three past decisions wherein the Commission found masking or distracting injuries to have occurred: *Lenz v. Bertram Construction, Inc.*, 2011 IIC 0075 (October 31, 2011), *Meierotto v. Express Personnel Services, Inc.*, 2006 IIC 0759 (November 9, 2006) and *Dahmer v. Buck Knives*, 2008 IIC 0251 (April 30, 2008). Claimant states that these three cases run contrary to the decision in the instant case.

In *Lenz*, the Claimant was able to provide medical office notes indicating that he had back pain that was later ignored by his physician. The Claimant in *Meierotto* was able to demonstrate via credible medical evidence that his injury was connected to his industrial

accident. *Dahmer* demonstrated via medical testimony that it was “more likely than not” that the Claimant’s left shoulder was injured at the time of the right shoulder, but was masked by the greater right shoulder pain during Claimant Dahmer’s physical therapy. While these three cases illustrate that masking or distracting injuries can exist, they all relied on medical and other evidences tending to establish the existence of those injuries. The Referee in the instant case found that there was a lack of medical evidence beyond Claimant’s own testimony to support his contention that Claimant’s neck was injured at the time of the accident. The Referee’s use of the shield and sword language was in response to Claimant’s arguments regarding the delay in his reporting of neck pain. Claimant first stated that he was unaware of the neck pain because the shoulder pain was so great, but later claimed that he was aware of his neck pain from the day of the injury. The language used by the Referee is not a “legal standard” as characterized by Claimant. We reiterate the language of the Decision in this matter; “[p]roviding a reasonable explanation for a lack of corroborating evidence is not a sufficient substitute for affirmative evidence.” The Referee properly considered the record regarding Claimant’s alleged neck condition and properly utilized the weight of precedent in making his determination.

**The Referee properly conducted the post-hearing depositions of medical experts in this case.** Claimant requests rehearing of the case if the Commission does not reconsider and amend the Decision of the Referee. He argues that the Referee was not present at the post-hearing deposition of Dr. Dirks, and therefore should not be allowed to make a determination of the credibility of Dr. Dirks’ testimony. Claimant states that this rehearing would provide an opportunity for Claimant to present rebuttal testimony from Dr. Dirks to “further clarify his opinions”. Claimant also requests that the opinion of Dr. Coleman, who was neither deposed nor



involved in Claimant's care, be admitted to rebut Dr. Russo's deposition testimony and opinions as offered in this case.

Under IC § 72-718, any party may move for reconsideration or rehearing of the decision. As Claimant points out, "[l]ay witness rebuttal evidence is only admissible post-hearing in the event new matters have been presented and the Commission so orders." JRP 10(E)(4). Dr. Dirks provided testimony in accordance with JRP 10(E)(4), in that "[e]xperts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing as well as on expert testimony developed in post-hearing depositions." Parties are not allowed to reexamine expert witnesses after the case has been decided without first establishing that there are new circumstances not discoverable at hearing. The Idaho Supreme Court has stated that it will not disturb the Commission's findings on weight and credibility unless they are clearly erroneous. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 735, 40 P.3d 91, 93 (2002). "In the presence of conflicting evidence in worker's compensation proceedings, this Court has consistently recognized the Industrial Commission as the arbiter of those conflicting facts and acknowledge that the weight to be accorded evidence is within the Commission's particular province." *Olvera v. Del's Auto Body*, 118 Idaho 163, 164, 795 P.2d 862, 863 (1990), citing *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

While one can imagine a case in which it could be helpful, the Commission, including the referee, is not required to attend post-hearing depositions. To insist that all referees attend all post-hearing depositions would be unduly burdensome and prohibitively expensive to the Commission. Aside from Claimant's speculation, the record reveals no reason why the Referee could not make an informed judgment about the weight to be given to Dr. Dirks' testimony without attending the deposition.

The Commission has reviewed the record with a focus on the concerns that Claimant has raised in his Motion for Reconsideration and we conclude that the facts support the Decision as written. Claimant's Motion for Reconsideration presents the same evidence and arguments previously considered in the underlying Decision. The Commission finds that the May 19, 2015 Decision is supported by substantial and competent evidence of record and we find no reason to disturb the findings of the Referee. For the foregoing reasons, Claimant's Motion for Reconsideration and/or Rehearing is DENIED.

### **Defendants' Motion to Strike**

Defendants filed a Motion to Strike Exhibits 1 through 4 as included by Claimant with his Brief, stating that "[t]he Exhibits are not part of the hearing record. Claimant had ample opportunity to present his case. Dr. Dirks testified as to his opinions and his opinion of Dr. Moss. There is no authority to supplement the record post decision and to do so prejudices Defendants."

Claimant responded that Exhibits 1 through 4 were offered as "new evidence" in accordance with the Idaho Supreme Court's interpretation of Idaho Code § 72-718. Claimant maintains that the Exhibits are appropriate responses to Defense post-hearing witnesses, as it would be "literally an impossible burden for a claimant to be required to have to guess what facts a defendant's post-hearing deposition of his expert witness will fabricate." He further maintains that claimant "did not have any opportunity (let alone 'ample' opportunity) to rebut Dr. Russo's fictitious factual claims and opinions based thereon." Claimant states he is therefore allowed his new rebuttal evidence to discredit the opinion of Dr. Russo.

Exhibit 1 is a print-out from a Group Health website providing information from the Provider Manual. This information was available to Claimant during the discovery process and

could have been submitted at that time. Defendants' Motion to Strike is granted regarding Exhibit 1.

Exhibit 2 is a copy of a decision from the Vermont Workers' Compensation system. This case was available to Claimant during the discovery process and it could have been submitted either at that time or discussed in his post-hearing briefing. Defendants' Motion to Strike is granted regarding Exhibit 2.

Exhibits 3 is a letter from Dr. Dirks dated June 4, 2015. Exhibit 4 is a letter from Dr. Coleman dated June 8, 2015. Both of these doctors and their opinions regarding Claimant's herniated disc and standard practice of medical documentation respectively were available before and after the hearing and before the decision was issued, and therefore do not constitute "new" evidence as contemplated by the Idaho Supreme Court or Idaho Code § 72-718. Defendants' Motion to Strike is granted regarding Exhibits 3 & 4.

Idaho case law states "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on [his] 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). Claimant's allegation that "Dr. Russo's fictitious factual claims and opinions" prejudiced Claimant is unfounded. Exhibits 1 through 4 as provided by Claimant with his Brief in Support of His Motion for Rehearing and/or Reconsideration were available during the discovery period and could have been submitted prior to the Referee's decision. Defendants' motion to strike is GRANTED.

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**ORDER DENYING RECONSIDERATION**

Claimant has failed to present any new evidence or legal reason to disturb the underlying Decision, and his motion for reconsideration is hereby DENIED. IT IS SO ORDERED.

DATED this 9th day of October, 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 9th day of October, 2015, a true and correct copy of the foregoing **ORDER DENYING MOTION FOR REHEARING AND/OR RECONSIDERATION** was served by regular United States Mail upon each of the following:

STARR KELSO  
PO BOX 1312  
COEUR D ALENE ID 83816

JAMES MAGNUSON  
PO BOX 2288  
COEUR D ALENE ID 83816

ka /s/