

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SCOTT RAZWICK,

Claimant,

v.

MDM CONSTRUCTION, INC.,

Employer,

and

ALASKA NATIONAL INSURANCE
COMPANY,

Surety,

Defendants.

IC 2016-032272

**ORDER DENYING REQUEST FOR
RECONSIDERATION**

Filed November 12, 2019

On October 30, 2019, Defendants filed a timely motion for reconsideration with supporting brief. Defendants argue that Claimant should be denied his fusion surgery and associated TTD benefits until Claimant stops smoking, as confirmed by medical provider nicotine testing. Therefore, the Commission's should clarify its order, as smoking is a recognized "injurious practice," and suspend the award of care until Claimant's nicotine use is resolved.

On November 5, 2019, Claimant filed a timely response to the motion for reconsideration. Claimant argues that Defendants withdrew the Idaho Code § 72-435 defenses as to injurious practices, and that Claimant has no issue with taking a nicotine test. However, Claimant passed a nicotine test in 2018, for which Defendants failed to pay, and has already stopped smoking in preparation for the fusion surgery currently scheduled for December 11, 2019. Claimant contends that Defendants are increasing the danger of permanent nerve damage

to Claimant and effectively starving him out by refusing to pay TTD benefits during his period of recovery. Claimant will be unfairly prejudiced by further delay of benefits and medical treatment.

Defendants filed a reply brief. Defendants insist that they are raising a good faith concern that the Claimant should not be brought to surgery while he continues to use nicotine. Defendants argue that adding the requirement that Claimant complete a pre-operative nicotine program and testing, as monitored by Dr. Dirks, is prudent and should be included in a modified order.

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.

In this case, Claimant's counsel requested an emergency hearing on September 24, 2018 due to the danger of permanent nerve damage caused by the Surety's refusal to authorize the lumbar fusion surgery as requested in June of 2017 by Dirks. The Commission found that Claimant was entitled to reasonable medical care, including the proposed fusion surgery. Defendants' concern seems reasonable on the surface; there is medical testimony that smoking increases the chances of a failed fusion. However, Defendants had every opportunity to raise this concern at hearing, and the medical opinion found persuasive endorsed the proposed surgery, fully cognizant of Claimant's smoking history. The Commission finds it unreasonable to suspend all of Claimant's TTDs on the basis of Defendants' assertions. Defendants' arguments are at odds with their alleged refusal to pay for a 2018 nicotine test. Further, Defendants' concern appears moot as Claimant has asserted that he has ceased nicotine use in preparation for his fusion surgery, currently scheduled for December 11, 2019. Defendants' request for reconsideration is DENIED.

///

///

///

///

ORDER

Based on the foregoing reasons, Defendants’ request for reconsideration is **DENIED. IT IS SO ORDERED.**

DATED this 12th day of November , 2019.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

_____/s/_____
Aaron White, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November , 2019, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

STEPHEN J NEMEC
1626 LINCOLN WAY
COEUR D’ ALENE ID 83814

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701-1007

_____/s/_____
