BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ORLANDO DURAN, Claimant, v. SILVERWOOD, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-013270** **ORDER DENYING DEFENDANTS' MOTIONS TO STRIKE AND DENYING CLAIMANT'S MOTION FOR RECONSIDERATION** **October 2, 2018**

This matter is before the Idaho Industrial Commission ("Commission") on the July 12, 2018 filing of Claimant's Motion for Reconsideration or Rehearing Pursuant to Idaho Code § 72-718. Claimant contemporaneously filed his Memorandum and the Affidavits of Orlando Duran and Jacqui Duran in Support of the Motion. Defendant State of Idaho Industrial Special Indemnity Fund ("ISIF") filed its Response to Motion for Reconsideration on July 23, 2018. Defendant Silverwood and State Insurance Fund ("Employer/Surety") filed their Objection to Claimant's Motion for Reconsideration or Rehearing on July 27, 2018. Claimant filed his Reply Brief on August 2, 2018, and his Response to the Motions of the Employer/Surety and the ISIF to Strike the Affidavits on August 6, 2018.

The Commission filed its Findings of Fact, Conclusions of Law, and Order on June 22, 2018. It held:

1. Claimant suffered a compensable industrial injury which permanently aggravated a pre-existing degenerative condition in his right AC joint and shoulder blade area on May 25, 2011;
2. Claimant failed to show it likely that his cervical spine condition, carpal tunnel

syndrome and/or a possible thoracic spine condition were also aggravated by that event;

3. Defendants failed to show the existence of a subsequent intervening cause which affected Claimant's compensable industrial injury;
4. Claimant is entitled to temporary disability benefits from July 29, 2011 to November 10, 2011;
5. Claimant is entitled to permanent partial impairment rated at 5% of the upper extremity, and to permanent partial disability rated at 30% of the whole person, inclusive of impairment. Claimant failed to show he likely is totally and permanently disabled as an odd-lot worker;
6. Claimant's permanent partial disability from all causes is rated at 35% with 30% apportioned to the industrial accident of May 25, 2011 and 5% to pre-existing conditions;
7. Claimant is entitled to medical care provided to the date of hearing and to future palliative physical therapy as prescribed by a physician from time to time as needed for temporary aggravations and exacerbations of his compensable condition arising from Claimant's overuse of his right arm in his occupation;
8. Claimant failed to show he is entitled to an award of attorney fees; and
9. ISIF bears no liability.

Claimant presents two arguments in support of reconsideration: first, after Claimant made a *prima facie* showing of odd lot status by the method of futility, the Commission erred by failing to conclude that Defendants did not adduce proof sufficient to rebut the *prima facie* showing of odd-lot status, and second, there is new evidence that Claimant's employment at the time of hearing has since ended. A rehearing should be held in light of the new facts presented in his Affidavits if the Commission does not reconsider the record as it currently stands.

ISIF responds that Claimant has failed to present a new legal or factual basis for reconsideration and moves to strike the two affidavits Claimant submitted with his Motion; further, ISIF contends that the Commission relied on numerous factors in evaluating Claimant's disability, not just the fact that he happened to be employed at the time of the hearing.

Defendants Employer/Surety agree that Claimant's additional evidence should be struck as untimely under JRP 10 and respond that legal precedent requires the Commission to determine disability as of the date of the hearing, not some date after the issuance of a decision. In

reply, Claimant argues that the affidavits are appropriately submitted "new evidence" in the context of a reconsideration of an error of the Commission, namely that Claimant met his *prima facie* burden showing that attempts to find work have been futile. Having met this burden, Claimant argues the Commission should have shifted the burden of proof to Defendants to present evidence of "an actual job of that type exists within a reasonable distance from claimant's home and that the specific claimant, based upon his specific personal physical capabilities and education/training, can perform or could perform if training were provided by defendants." In a separate response to the two Motions to Strike, Claimant argues that the two affidavits are appropriate as relevant facts upon which a just decision can be made. Claimant invites the Commission to consider IRCP Rule 11.2(b) as guidance for how to treat new facts on reconsideration.

Motions to Strike

"The Commission can decide in its sole discretion that the interests of justice require any interested party the opportunity to present additional evidence for the record of the proceedings." *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 604, 272 P.3d 569, 576 (2012) (citing *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003); Idaho Code § 72-1368(7)). Generally, the admission of additional evidence is an issue left to the discretion of the Commission. *Slaven v. Road to Recovery*, 143 Idaho 483, 484, 148 P.3d 1229, 1230 (2006).

Hearing in this matter was conducted on January 31, 2017. Briefing was delayed to allow a more complete evaluation by medical experts regarding the possibility of additional surgery. The matter finally came under advisement on January 16, 2018. The Commission issued its decision on June 22, 2018. In support of his Motion for Reconsideration, Claimant has offered the Affidavits of Claimant and Jacqui Duran. Ms. Duran's affidavit describes the efforts

of affiant's landlord to extract higher lease payments from Orlando's Food Service, Inc. The landlord's demands eventually led to the closure of the restaurant, and the cessation of Claimant's employment, on August 31, 2017. Claimant's affidavit reflects that following his employment by Orlando's Food Service, Inc., he unsuccessfully attempted work at another local restaurant before he had to stop "because of pain."

Therefore, in support of his Motion for Reconsideration, Claimant asks the Commission to consider certain new facts which have only arisen since the date of hearing. Idaho Code § 72-718 is silent on the question of whether the Commission may consider new evidence, i.e., evidence that was not before the Commission in connection with the earlier proceeding, in evaluation a motion for reconsideration. However, in *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005), the Court strongly suggested that to adequately support a motion for reconsideration, the moving party must come forward with new reasons, either legally or factually, that would support revisiting the original decision. In this regard, the Court stated:

> 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. Although *Curtis* presented a very detailed brief in support of her motion, she did not produce new law or evidence to necessitate a rehearing or reconsideration.

It is argued that the fact of Claimant's current unemployment has some bearing on the validity of the Commission's decision that Claimant has failed to prove total and permanent disability. Accordingly, the affidavits may be evidence of the type which arguably supports a motion for reconsideration. However, the Commission is puzzled by Claimant's failure to wait until now to present these facts for consideration. As noted above, though hearing on this matter was originally held on January 31, 2017, the matter did not come under advisement until January 16, 2018, well after Claimant's employment terminated in August of 2017. It would have been

much more economical, for both the parties and the Commission, for Claimant to have raised his change in circumstances in a timelier manner. Regardless, based on *Curtis*, we will consider the affidavits, and give them the weight we deem appropriate. The Motion to Strike is denied.

Motion for Reconsideration

A decision of the Commission, in the absence of fraud, is 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, as noted above, "[i]t 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, 925 (2005).

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence supports the legal conclusions reached in the underlying decision. The Commission is not compelled to make findings on the facts of the case during reconsideration. *Davidson 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 rehear 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 to reconsider pursuant to Idaho Code § 72-718 shall be made within 20 days from the date the final decision is filed and shall be supported by a brief filed with the motion. Judicial Rule of Practice and Procedure 3(G). 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.

We start with Claimant's first assignment of error: that the Commission failed to shift the burden of proof to Defendants after Claimant met his *prima facie* showing of permanent and total disability. Claimant argues that since the opinion of Dan Brownell establishes, "as a matter of law," that Claimant is *prima facie* totally and permanently disabled, the only justiciable issue before the Commission is whether Defendant's have met their burden of rebutting the presumption of total and permanent disability. The Commission rejects this assertion. Indeed, the focus of the Commission's analysis in the underlying decision was whether the evidence supported a finding of *prima facie* odd-lot status under one of the three recognized methods. We found that Claimant failed to prove odd-lot status by reason of futility, the only path to total and permanent disability relied on by Claimant: "Claimant has failed to establish a *prima facie* case to satisfy the "futility" prong of the odd-lot test." Findings of Fact, Conclusions of Law, and Order at ¶ 128.

Claimant offered the opinions of Mr. Brownell in support his claim for total and permanent disability. Determination of permanent disability is a fact based analysis, in which the Commission considers all relevant medical and non-medical factors, and evaluates the purely advisory opinions of vocational experts. See, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986) "A party presenting expert testimony has the burden of establishing the credibility of the expert. The credibility of an expert is not simply whether the expert is expressing an honest opinion. The Commission can take into consideration 'whether or not the

opinion takes into consideration all relevant facts.'" *Gerdon v. Con Paulos Inc.*, 160 Idaho 335, 372 P.3d 309, (2016) (quoting: *Waters v. All Phase Constr.*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014)).

The Commission rejected Mr. Brownell's conclusions in the underlying decision:

> "It appears that a major basis upon which he assesses disability is Claimant's age. He did not provide a labor market analysis of jobs available to Claimant (at age 72) before the 2011 accident or at the time of medical stability or at the time of hearing (at age 77)… He did not analyze Claimant's disability based upon Dr. Friedman's restrictions or Dr. Greendyke's. Moreover, his critiques of other vocational experts contained *ad hominem* attacks which are inappropriate and unpersuasive…" Findings of Fact, Conclusions of Law, and Order at ¶ 86.
>
> "Mr. Brownell… only offered an ultimate opinion on whether Claimant is totally and permanently disabled." *Id.* at ¶ 121.
>
> "A vocational expert's speculation upon what might happen if Claimant lost this job is unpersuasive. Moreover, Mr. Brownell did not show how or whether he analyzed Claimant's labor market to arrive at his facile conclusion."

Id. at ¶ 128. Mr. Brownell's opinion was deemed "facile," speculative, unpersuasive, and inappropriate. The underlying decision did devote considerably more effort to discussing Mr. Crum's opinion, but this was because his was the most competent (but still flawed) opinion of the three the Commission considered. Claimant failed to meet his *prima facie* showing of odd-lot total and permanent disability via the futility prong.

Claimant's second assignment of error appears to be that the Commission's conclusion that Claimant was employable is incorrect in light of events subsequent to hearing, namely that Claimant was terminated from his time of hearing job and attempted another food preparation job without success. This does not persuade us to reconsider our decision for two reasons: (1) Claimant was terminated for reasons wholly unrelated to his work injury and his capacity for work and; (2) Claimant's affidavit does not show that his attempt at work was unsuccessful due to his work injury, or demonstrate that it was within his restrictions.

Ms. Duran's affidavit attests that the restaurant's landlord increased monthly rent payments. The company's directors, consisting of herself and her two brothers, determined that they would be unable to make the increased rent payments and had "no choice but to attempt to try to transfer the lease and sell the business equipment and building" or vacate the premises. Affidavit of Jacqui Duran ¶ 4. Thereafter, the restaurant ceased operating on August 31, 2017. Ms. Duran's affidavit reveals that the restaurant closed for purely financial reasons. There is nothing in the affidavit to show the restaurant closed due to Claimant's injury or that Claimant was no longer physically capable of working there. A change in a particular commercial lease subsequent to hearing does not persuade us to revisit our decision. The Commission's decision is supported by other testimony[1] tending to show that, aside from his time of hearing job, other employment opportunities making use of Claimant's considerable skills are available in his locale.

Claimant's avers that he has not worked since August 31, 2017, that he has looked for work, and that he has attempted work once, unsuccessfully. He describes:

> "[i]n one instance I was asked to make "my" burritos at a local Mexican "quick food" type restaurant so they would know how to them. I tried this on three separate days but each day I was only able to make about ten to twelve burritos before I had to stop because of pain."

Affidavit of Orlando Duran ¶ 4. There is nothing in the affidavit that suggests the work accident[2] caused Claimant's pain. Moreover, Claimant's affidavit leaves us unable to conclude what type of position he was attempting, especially whether it fit within his work restrictions. Claimant's assertion that he has "looked for work and personally spoken to employers in the Coeur d'Alene

[1] While we did not adopt Mr. Crum's or Mr. Jordan's ultimate conclusions, both Mr. Crum and Mr. Jordan persuasively opined that Claimant retained access to his local labor market utilizing his transferable skills. Our decision did not elaborate on this point, but Claimant is also qualified for jobs that do not take advantage of his skill set such as: security patrol, flagger, crossing-guard, greeter/host, and ticket-taker. See DE, p. 866; Jordan Depo., p. 51. Even Mr. Brownell admits "there are a lot of jobs in the sedentary category in Mr. Duran's labor market," though he did not believe Claimant had a reasonable chance of securing the same. CE, p. 1211.

[2] The underlying decision found Claimant had other pre-existing, non-industrial, progressive conditions.

area," without more, is insufficient to persuade us to reconsider our conclusion that Claimant is employable in his residual labor market as it existed at the time of hearing.[3]

Having reviewed the filings of the parties and the record as a whole, the undersigned Commissioners are not persuaded to disturb the underlying Decision in the above-captioned matter. Claimant's motion for reconsideration is DENIED. **IT IS SO ORDERED**.

DATED this __2nd_ day of ___October___, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

[3] This averment tells us nothing about the type of work for which Claimant searched, the scope of Claimant's search, what the employers he spoke to said, whether he was offered a job or not, or any other information that would reasonably allow us to conclude Claimant had searched for work without success.

CERTIFICATE OF SERVICE

I hereby certify that on the __2nd__ day of ___October__, 2018 a true and correct copy of the foregoing **Order Denying Defendants' Motions to Strike and Claimant's Motion for Reconsideration** was served by regular U.S. Mail upon each of the following persons:

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