BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID P. DUNCAN, Claimant, v. VARSITY CONTRACTORS, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-013130** **IC 2012-001259** **ORDER ON RECONSIDERATION** Filed September 25, 2014

Pursuant to Idaho Code § 72-718, Claimant filed a motion for reconsideration of the Commission's June 2, 2014, decision in the above-captioned case. Claimant disputes the Referee's finding that Claimant was not credible is not supported by substantial and competent evidence. Further, Claimant asserts that there is not substantial and competent evidence to support the Referee's apportionment. Defendants, Varsity Contractors and Travelers Property Casualty Co. of America, filed their response to Claimant's motion for reconsideration on July 3, 2014, arguing the Commission's June 2, 2014 decision should be upheld because Claimant failed to present new factual or legal reasoning that would support reconsideration. Claimant did not file a reply to Defendants' response.

The Commission's decision, absent fraud, shall be final and conclusive as to all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must "present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005).

The Commission will not reweigh evidence and arguments simply because the case was not resolved in the moving party's favor. On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions set forth in the Decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

Here, Claimant contends that the Commission erred in determining that Claimant's recitation of his subjective limitations/restrictions was not entirely credible. Second, Claimant alleges that the Commission inappropriately apportioned Claimant's 60% disability between his pre-existing conditions and the effects of the work accident. In this regard, Claimant argues that if the Commission accepts that Claimant has a 15 pound lifting restriction because of his cervical spine condition, then Claimant's 60% disability is <u>wholly</u> attributable to the subject accident since this cervical spine restriction is significantly more onerous than any of the limitations/restrictions related to Claimant's pre-existing conditions. For the reasons set forth below we reject Claimant's argument and continue to endorse the Referee's recommendation.

One of the factors relating to the evaluation of Claimant's disability is whether he has credibly testified to the extent and degree of his subjective limitations. In *Stevens McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008), the court distinguished between "observational credibility" and "substantive credibility". The former goes to the demeanor of the witness on the stand, while the latter may be judged on the basis of internal inconsistencies in the witness' testimony, or a comparison of the witness' testimony with other facts of record. Here, the Referee's finding on Claimant's credibility is based on both observational and substantive factors. (*See* Findings of Fact, Conclusions of Law and Recommendation at ¶ 45). We have reviewed the record and conclude that the Referee adequately explained his basis for concluding that Claimant tends to overstate his limitations/restrictions. We would note that while Claimant did explain that he was only able to sit for an hour at hearing with the benefit of pain medication, we continue to feel that the evidence, on the whole, tends to challenge Claimant's credibility when it comes to what he can and cannot do as of the date of hearing.

Next, Claimant contends that if the opinions of Drs. Blair and Walker are accepted as true, then the Commission must conclude that Claimant has a 15 pound lifting restriction referable to the subject accident.[1] From this, Claimant argues it necessarily follows that all of Claimant's disability is referable to the subject accident and that no portion of Claimant's disability can be apportioned to his pre-existing upper extremity and low back conditions. Claimant's argument is flawed because even though Claimant's accident-produced limitations/restrictions are greater than his pre-injury limitations/restrictions, it does not follow that all of Claimant's current disability is referable to the subject accident.

[1] Although Claimant correctly notes that the Referee was skeptical of the 15 pound lifting restriction because it was premised on an acceptance of Claimant's statements concerning what he can and cannot do, the 15 pound restriction was nevertheless considered by the Commission when evaluating the issue of Idaho Code § 72-406 apportionment.

The evidence establishes that Claimant did have significant limitations/restrictions before the subject accident. These limitations/restrictions were against lifting more than 25 to 35 pounds. (See Findings of Fact, Conclusions of Law and Recommendation at ¶¶ 87-94). These limitations/restrictions had an impact on Claimant's ability to access the labor market on a pre-injury basis. The subject accident further diminished Claimant's ability to engage in gainful activity but the subject accident is not responsible for the totality of Claimant's loss of access to the labor market; some portion of Claimant's time of hearing disability predated the subject accident and was referable to his pre-existing impairments.

The evidence adequately supports the Referee's decision to apportion responsibility in the way that it was apportioned. The Referee concluded that Claimant was "entitled to a PPD rating of 60%, inclusive of PPI," but not additional PPI benefits. Employer previously paid PPI at 21.5%. The Referee apportioned the PPD rating attributing half of the 60% disability to the cervical spine injury. Thus, the Referee determined that because Employer already paid PPI at 21.5%, Claimant is entitled to 8.5% PPD. We decline to disturb this finding as well.

Based on the foregoing, Claimant's motion for reconsideration is hereby denied.

IT IS SO ORDERED.

DATED this __25th_ day of _September__, 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 _25th__ day of _September _____, 2014, a true and correct copy of ORDER ON RECONSIDERATION was served by regular United States Mail upon each of the following:

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