BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD, Claimant, v. KENTUCKY FRIED CHICKEN, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2004-526113** **ORDER DENYING RECONSIDERATION** Filed May 12, 2014

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's June 7, 2013 decision in the above-captioned case. In the decision, the Commission found that 1) Claimant suffered a partial posterior cruciate ligament (PCL) injury as a result of his industrial accident; 2) Claimant is entitled to 3% whole person permanent partial impairment (PPI); and 3) Claimant failed to prove that he is entitled to disability in excess of impairment. Claimant asks for reconsideration on the issue of disability. He argues that the Commission's conclusion was based on a flawed vocational opinion by Douglas Crum. Claimant also disputes the Commission's finding on his credibility.

Defendants reply that the Commission's findings and conclusions are well-supported by the record, and that Claimant is essentially rehashing arguments that have already been made. Defendants request that the motion be denied.

A decision of the Commission, in the absence of 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 is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party's favor.

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions 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).

A.

Credibility

The Commission has considered Claimant's arguments concerning the finding that Claimant did not present as a credible witness. We see no reason to disturb that finding on reconsideration, as it is fully supported by the record, notwithstanding Claimant's attempts to explain away a number of inconsistencies noted by the Commission in the original decision.

For example, Claimant argues that his hearing testimony concerning how he came to leave his position with Employer is not inconsistent with his testimony at deposition. Claimant's industrial accident occurred on November 13, 2004. At the time of his April 19, 2005 deposition, he testified that he only worked two additional shifts following the accident. During his third scheduled shift, Claimant did not go to work. Instead, he decided to play at a concert, but evidently did not notify Employer of this decision:

> CLAIMANT: [I] received a call from Damien asking where I was. And I told him that I'm sorry my knees hurt and that I would rather

> play the concert instead of going to work because at a concert you just sit, I guess, and play. And it's a lot easier to sit and play than it is to cook chicken and haul around 40-pound boxes of chicken all day. Well, I guess it wouldn't be all day. But it was just a lot easier to go to the concert than work.
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> MR. MAGNUSON: And who did you talk to from KFC?
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> CLAIMANT: Damien.
>
> MR. MAGNUSON: Did you have any conversations about getting rescheduled for further work or anything like that?
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> CLAIMANT: No, I did not. I just remember going. And I had wrote down my next schedule. I think it was Sunday or Tuesday. I'm pretty sure it was Tuesday that I was scheduled next to work. But I went in. And I'd noticed that my name was not on the schedule. So I asked someone about it. I can't remember who I asked. But they said usually that means that you're terminated.
>
> So then I called about four days later to see when my next days on the schedule was or if there was a mistake on the schedule. And I was talking to Treasha about it on that phone call that I was just describing. And I was told to bring in my clothes and to bring in any other business that I had from KFC.
>
> MR. MAGNUSON: What concert did you go to?
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> CLAIMANT: It was the — I play in the Coeur d'Alene Symphony.

D.E. 9, pp. 96-97.

When Claimant returned to the workplace for what he thought was his next-scheduled shift, he found that he was not on the schedule, and he was never placed on any future schedules. He was eventually asked to return any of Employer's property in his possession to Employer. This testimony stands in marked contrast to Claimant's testimony at the April 17, 2012 hearing, in which he gave another version of how his employment came to an end:

> MR. KELSO: After the accident, okay, were you able to continue on in your job at KFC?

> CLAIMANT: They would not work with my limitations. They didn't really comply to not being able to lift or not being able to move quickly to their standards or to their customer demand. So I was able to do some light duties. And I did ask them just to find — maybe if I can just stay on register all day or do some light cleaning up for them. But they ultimately found that there was nothing that I could do in the company that would benefit them. So I — my employment ended after they found no use for me.

Hearing Tr. 29-30.

Contrary to Claimant's assertions, there is considerable disagreement between the two versions of how his employment ended. In 2005, he testified that without notifying Employer, he failed to show up for a scheduled shift; Employer appears to have treated Claimant as though he quit his job. In 2012, however, Claimant testified that his employment ended because Employer could not or would not accommodate his injury-related limitations. It is difficult to reconcile these conflicting accounts. For that reason and the other reasons set forth in ¶ 28 of the decision, the Commission will abide by its finding on Claimant's credibility.

B.

Disability

Claimant challenges several findings related to the disability issue. First, he argues that the Commission was incorrect in stating that "neither Dr. Sims nor any other medical doctor who evaluated Claimant assigned permanent physical restrictions to Claimant." *See Fairchild v. Kentucky Fried Chicken*, 2013 IIC 0044.12 (June 7, 2013). Claimant alleges that Dr. McNulty, who evaluated Claimant for permanent impairment, did, in fact, impose restrictions. Second, Claimant argues that the functional capacity evaluation (FCE), which was performed by Mark Bengtson, M.P.T., in 2009, was an accurate reflection of Claimant's post-accident limitations. Finally, Claimant argues that the Commission erred in relying on the disability evaluation of Douglas Crum, because Mr. Crum's evaluation failed to take the FCE into account and was thus

flawed.[1] Defendants reply that Dr. McNulty did not, contrary to Claimant's assertions, impose restrictions; they further argue that the FCE, as a one-day "snapshot" of Claimant's condition, was not a reliable indicator of Claimant's injury-related limitations. *See* Defendants' Reply, p. 3.

It is true that Dr. McNulty did not assign limitations or restrictions in his initial PPI evaluation of Claimant. *See* C.E. H. However, at his deposition, Dr. McNulty was asked by Claimant's counsel for his opinion on the FCE:

> Q. And in the course of doing the impairment rating, you indicated you had a copy of the functional capacities evaluation.
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> A. Yes.
>
> Q. By Mark Bengtson?
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> A. Yes.
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> Q. And you reviewed that before your examination of Mr. Fairchild.
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> A. Yes.
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> Q. Was there anything about Mr. Bengtson's functional capacity evaluation that you have a disagreement with?
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> A. I guess my single evaluation of Mr. Terence I would think he would be able to stand and walk for a little more than Mr. Bengtson mentioned. He only has a maximum 50 percent of an eight hour day. I think he can probably I would say 75 or 80 percent stand and walk in an eight hour day. I think the light duty assessment is fairly reasonable. *My evaluation noted he had moderate instability of his posterior cruciate ligament. And over time that with strenuous activities that's probably going to even loosen up a little more. So that's why I think he should be in a lighter duty category.*

McNulty Depo. 6-7, ll. 25, 1-24 (emphasis added).

[1] Claimant also argues that the appropriate labor market for his disability evaluation would be Coeur d'Alene instead of Vancouver, Washington. We do not address this argument, because the Commission, having found no disability, did not base any of its conclusions on a labor market finding.

Thus, Dr. McNulty based his opinion that light duty was appropriate for Claimant on the understanding that Claimant suffered moderate laxity as a result of his industrial injury. However, the Commission did not find Dr. McNulty's opinion that Claimant suffered moderate laxity persuasive. The Commission was more persuaded by the opinion of Dr. Sims, Claimant's treating physician:

> 37. Two PPI ratings for Claimant's PCL injury are in the record. In 2007, Dr. Sims assigned a 3% whole person rating for mild laxity. In 2011, Dr. McNulty assigned a 7% whole person rating for moderate laxity. Both ratings were based on the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition.
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> 38. Dr. Sims's rating was contemporaneous in time to the finding that Claimant was medically stable, whereas Dr. McNulty's rating was based on an examination conducted several years later. Dr. Sims's rating was also based on his knowledge as Claimant's treating physician, whereas Dr. McNulty's rating was based on a single examination. We find Dr. Sims's rating to be more credible.

Fairchild, 2013 IIC at 0044.11.

In this case, there were significant differences in the medical opinions regarding the nature and extent of Claimant's industrial injury. Dr. Sims, who treated Claimant in several appointments from 2005 to 2007, diagnosed a partial PCL injury with mild laxity. Dr. Kersten, who was solicited for a second opinion in April 2007, concurred with Dr. Sims's diagnosis. Dr. Pace, who conducted an IME in September 2007, observed no PCL injury and no laxity, and assigned no permanent impairment. Mr. Bengtson, the physical therapist who performed the FCE in 2009, observed that Claimant likely had "chronic PCL instability." C.E. B, p. 3. Dr. Pace, conducting a second IME in September 2010, once again found no PCL injury or laxity; he diagnosed Claimant with patellofemoral pain syndrome, and specifically noted that he saw no basis for the limitations or restrictions recommended in the FCE: "I looked carefully at the

functional capacities evaluation and failed to see the basis for restricting this man to light industrial work with limited standing." D.E. 1, p. 6. Finally, as mentioned above, Dr. McNulty diagnosed a PCL injury with moderate laxity.

These individuals are all medical experts qualified to opine on Claimant's condition, but Dr. Sims and Dr. Pace are the only ones who saw Claimant more than once, and Dr. Sims was the only one who treated Claimant over a period of years. He did not assign any limitations or restrictions. Asked specifically if he agreed or disagreed with Dr. Pace's first IME — in which, among other things, Dr. Pace concluded that Claimant did not require any limitations or restrictions — Dr. Sims noted the findings with which he disagreed. The lack of limitations and restrictions was not one of them. *See* D.E. 5, p. 50.

In considering these conflicting opinions and weighing their credibility, the Commission was persuaded by the diagnosis and opinion of Dr. Sims, who was most familiar with Claimant's condition. There are no limitations or restrictions associated with the injury as diagnosed by Dr. Sims. It was therefore not error for the Commission to rely on the vocational opinion of Mr. Crum, which was based on the conclusion that Claimant suffered no accident-related limitations or restrictions.

Based on the foregoing analysis, IT IS HEREBY ORDERED that Claimant's motion for reconsideration is DENIED.

DATED this __12th__ day of ____May_____, 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 12th day of ____May_____, 2014, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States mail upon each of the following:

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eb _/s/_____