

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARSHA BROOKS,)
)
 Claimant,)
)
 v.)
)
 IDAHO HOME HEALTH & HOSPICE,)
 INC.,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

IC 2004-510731

**ORDER DENYING
RECONSIDERATION**

filed October 21, 2010

Claimant filed a motion for reconsideration on September 13, 2010. The Industrial Special Indemnity Fund (ISIF) filed a response opposing the motion for reconsideration on September 23, 2010. In the underlying case, the Commission found that Claimant had not proven ISIF liability pursuant to Idaho Code § 72-332.

Claimant argues that the Commission’s finding that the ISIF has no liability to Claimant is not supported by substantial and competent evidence as required by the law. Claimant contends that the Commission inappropriately determined that in order to hold ISIF liable Claimant must demonstrate that the industrial accident caused additional injury to the part of Claimant’s body that had already sustained some damage or infirmity such as to constitute a

preexisting physical impairment. Claimant urges the Commission to find that Claimant's pre-existing conditions do combine with her industrial accident to render her totally and permanently disabled.

ISIF argues that the Commission correctly determined that Claimant was totally and permanently disabled due to her 2004 accident, a chain-reaction motor vehicle accident in which Claimant's vehicle was rear-ended with enough force to push Claimant's vehicle into another vehicle. ISIF contends that Claimant is asking the Commission to rehash evidence the Commission already considered. ISIF requests that the Commission uphold the finding that the ISIF is not liable for Claimant's benefits.

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. In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration. 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)).

The Idaho Supreme Court has recognized that the ISIF was created for two purposes, “to encourage the hiring of the handicapped and, as a corollary, to relieve employers of the unfair burden of paying total permanent disability compensation when only part of the disability was due to the industrial accident.” *See, Gugelman v Pressure Treated Timber Co.*, 102 Idaho 356 at 360, 630 P.2d 148 at 152 (1981). However, it is noted that the ISIF shares the burden of paying total disability compensation *when only part of the disability* was due to the industrial accident. A claimant must meet the four requirements under Idaho Code § 72-332 to show ISIF liability, as explained in *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). These requirements for ISIF liability include:

1. Whether there was indeed a preexisting impairment;
2. Whether that impairment was manifest;
3. Whether the alleged impairment was a subjective hindrance; and
4. Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

In this case, the Commission was persuaded that Claimant was totally and permanently disabled due to the restrictions and non-medical factors connected with his *last industrial accident alone*. As mentioned in the Commission’s decision, there is no “combination” if the disability would have been total regardless of preexisting conditions. *Selzler v. State of Idaho, Industrial Special Indemnity Fund*, 124 Idaho 144, 857 P.2d 623 (1993).

The Commission found Claimant's testimony insufficient to persuasively show that she was permanently disabled due to the combination of her pre-existing conditions and the 2004 industrial accident. Claimant argues that her experience in the medical profession entitles her testimony to greater weight in the matter. The Commission requires more than Claimant's argument that since her bones are connected, her pre-existing cervical condition combined with her industrial accident injuries increase her disability. While the Commission recognizes that Claimant has experience in the medical profession, the Commission declines to adopt her position. Instead, the Commission relies on the extensive expert medical and vocational evidence presented by the parties.

The ISIF argues the overwhelming volume and weight of medical evidence in the record from physicians and vocational experts, whom were not even retained by the ISIF, support that Claimant was totally and permanently disabled due to the 2004 accident alone. As discussed in the decision, Claimant's expert testimony did not persuade the Commission that she met the "combined with" requirement of ISIF liability.

54. Claimant retained two vocational rehabilitation experts, Dr. Collins and Dr. Taylor. Neither one opined that any portion of Claimant's disability arose from any preexisting condition. On the contrary, each one attributed her or his respective disability findings solely to the injuries Claimant incurred in the 2004 accident. Dr. Collins relied on Dr. Huneycutt's and Dr. Himmler's records, and Dr. Taylor relied on a report prepared by Sherwin D'Sousa, M.D., an internist, in connection with Claimant's application for Social Security Disability Insurance benefits. Dr. D'Sousa's report is not in evidence.

55. No physician has opined that any of Claimant's current restrictions or physical limitations are due to any preexisting condition. In fact, Dr. Huneycutt opined on June 7, 2005, that Claimant's cervical symptoms were due to the 2004 accident alone, and Dr. Reedy strongly concurred.

56. Dr. Simon opined that Claimant's hand problems were most likely due to her carpal tunnel syndrome, which he strongly stated was not caused by the 2004 accident. He further opined that Claimant's hand problems are probably her greatest impediment to returning to work. Dr. Simon's conclusions contradict the

opinions of Dr. Huneycutt and Dr. Himmler. Both of these physicians opined that Claimant's restrictions and inability to return to work stem from her 2004 cervical spine injury. As Claimant's treating physicians, Dr. Huneycutt and Dr. Himmler are more familiar with Claimant's condition than Dr. Simon, who reviewed her records and some test results and met with her for 59 minutes. Thus, their testimony regarding the extent and etiology of Claimant's symptomatology is more credible.

Brooks v. State of Idaho, Industrial Special Indemnity Fund, filed August 27, 2010.

The Commission does not require, as Claimant suggests, that a combination of preexisting and subsequent injuries can only exist when the subsequent injury is to the same body part. In this case, the expert testimony showing that Claimant was disabled due to her 2004 accident alone was more credible. The Commission has previously considered the relative merits of the opposing expert testimony in this case. The Commission finds that Claimant has not presented new reasons factually and legally to support a hearing on her motion for reconsideration.

For the foregoing reasons, Claimant's Motion for Reconsideration should be, and is hereby, **DENIED**.

IT IS SO ORDERED.

DATED this 21st day of October, 2010.

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 this 21st day of October 2010, 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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cs-m/cjh

/s/ _____