BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAGNY CRAMBLIT, Claimant, v. BEARABLE DENTISTRY, PLLC, Employer, and GENERAL INSURANCE COMPANY OF AMERICA, Surety, Defendants.	**IC 2010-000204** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** **NOT FILED**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Lewiston, Idaho, on November 30, 2011. Claimant appeared *pro se.* Kent W. Day of Boise represented Defendants. The parties submitted oral and documentary evidence and filed post-hearing briefs. The matter came under advisement on February 23, 2012 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604;

EXHIBIT A

2. Whether Claimant suffered an injury from an accident arising out of and in the course of employment on February 29, 2008;

3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition; and

4. Whether and to what extent Claimant is entitled to the following benefits:

A. Medical care; and

B. Temporary partial and/or temporary total disability benefits (TPD/TTD).

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

CONTENTIONS OF THE PARTIES

Claimant asserts that as a result of an undisputed fall at work on February 29, 2008, she sustained a tear in the peroneus brevis tendon in her left ankle, which ultimately required surgical repair.

Defendants assert that Claimant failed to file a claim for compensation with Employer within one year of the date of the February 2008 accident as required by Idaho Code § 72-701. Defendants also contend that Claimant has failed to carry her burden of proving that her tendon tear, discovered in December 2009, was, more probably than not the result of her February 2008 accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Suzanne Goodpaster, and Kristine Uravich, taken

at hearing;

2. Claimant's exhibits A through L, admitted at hearing; and

3. Defendants' exhibits A through O, admitted at hearing.

The Referee notes that the Commission's legal file is also a part of the record in this proceeding.

FINDINGS OF FACT

BACKGROUND

1. Claimant is a native of Iceland, and came to the United States in 1984. She has legal permanent resident alien status. Claimant has been married to her husband, Michael, for twenty-seven years. They have three children, the youngest of whom was nineteen at the time of hearing.

2. Before coming to the U.S., Claimant worked as a dental assistant on a U.S. military base in Iceland. She continued working in dental offices in various capacities after coming to the U.S.

EMPLOYER

3. Claimant first went to work for Employer in 2003 as a dental assistant for Dr. Schiavoni. She was unable to perform her duties and Employer demoted her to a position where she "floated," performing a variety of duties as needed. Employer discharged Claimant in April 2004 for poor performance. Employer rehired Claimant on May 1, 2004 as a sterilization technician. When Employer eliminated the sterilization technician position, Employer moved Claimant to a position as a dental hygienist assistant. Claimant continued in that position until Employer terminated her in October 2009 for insubordination.

ACCIDENT

4. It is undisputed that on February 29, 2008, Claimant slipped on a wet floor in a patient treatment room. She fell, landing on her right hip, and her left foot and ankle jammed underneath one of the cabinets. Claimant reported the fall to the office manager, Kristine Uravich. Claimant told Ms. Uravich that her ankle hurt, but she declined Ms. Uravich's offer of immediate medical care. Claimant completed her shift. By the time Claimant returned to work on the following Monday, her ankle symptoms had resolved.

MEDICAL CARE

5. Claimant contacted her treating nurse practitioner on March 3 and March 18, 2008 concerning unrelated matters. At neither appointment did Claimant complain of ankle pain or request an appointment to address ankle pain. Claimant saw her nurse practitioner on March 24 for her blood pressure, and Claimant asserted that she inquired about her ankle at that visit, though there is nothing in the chart notes regarding an ankle complaint. Claimant did not inform Ms. Uravich of her medical inquiry concerning her ankle.

6. In December 2008, Claimant sustained a non-industrial injury to her left little toe. She sought treatment for the toe on January 22, 2009 with Yew Por Ng, M.D. The chart note indicates that the visit was for depression and on-going care for her hypertension. Claimant testified that she discussed her ankle complaints with Dr. Ng, but there is nothing in the chart notes regarding treatment of her ankle or foot. Claimant did not inform Ms. Uravich about her visit to Dr. Ng or her inquiry about her ankle.

7. In April 2009, Claimant saw Brad Capawana, M.D., concerning continuing pain in her left little toe resulting from her December 2008 non-industrial accident. An

x-ray showed a non-union fracture of the mid- to proximal phalanx. Claimant testified that Dr. Capawana informed her that the x-ray showed nothing unusual in her left ankle. Dr Capawana surgically repaired Claimant's little toe in late April 2009.

8. In October 2009, Claimant sought treatment at a vein clinic for pain in her left leg from her calf up through her left knee. Venous ultrasound showed no abnormalities. Claimant then returned to Dr. Ng and requested an x-ray of her ankle. Dr. Ng ordered a left ankle x-ray, which was normal but for a small plantar calcaneal spur.

9. In early December 2009, Claimant saw Edwin Tingstad, M.D., an orthopedic surgeon, regarding her left ankle complaint. On exam he found Claimant had full range of motion, and walked with a normal gait, though she demonstrated some soreness in the left ankle. Dr. Tingstad ordered an MRI, which revealed a peroneus brevis tendon tear. Dr. Tingstad opined that the tear was minor and could be managed conservatively or surgically, depending upon the severity of Claimant's symptoms.

NOTICE

10. On January 4, 2010, Claimant signed a First Report Of Injury (FROI), seeking benefits for her ankle injury which she attributed to the February 29, 2008 slip and fall. The Commission received and filed the FROI on January 5, 2010.

11. Dr. Tingstad performed a surgical repair of Claimant's left ankle tendon tear in March 2010. Claimant continued to experience ankle pain and numbness following her surgery. The etiology of her continuing complaints remains unresolved, but further discussion is not relevant to the determination of this matter.

12. While she continued to work for Employer, Claimant made general complaints about her left foot and ankle, but she never advised Employer that she believed

her complaints related directly to her February 2008 slip and fall. During this period Claimant also suffered her non-industrial left little toe injury that caused her pain and took her off work for a period of time.

CREDIBILITY

13. The Referee found Claimant to be a credible witness. A review of Claimant's testimony at hearing, and the record of hearing suggests that Claimant is intelligent and truthful. She presents as passive in the face of conflict, and in her interactions with her employer and her physicians she appears quite meek. At hearing, she relied heavily on her husband for guidance.

DISCUSSION AND FURTHER FINDINGS

14. The provisions of the Idaho workers' compensation law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods,* 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc*., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

15. Idaho Code § 72-701 sets out the requirements for making a timely claim for workers' compensation benefits. In pertinent part the statute provides:

> No proceedings under this law shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, *and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident* . . . If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required. (Emphasis added).

16. Claimant complied with the first requirement of Idaho Code § 72-701 by reporting her *accident* to her Employer on the day that it happened. Although Claimant's ankle was painful immediately following the accident, she did not require medical care at that time, and continued to work the remainder of her shift. Claimant is of the opinion that Employer was more concerned about whether Claimant could continue to work than with Claimant and her condition. Employer offered medical care which Claimant declined; and presumably, had Claimant said that her ankle was too painful to continue working, she would have been released from work. By Monday, Claimant's ankle pain had resolved. So far as Employer was aware, Claimant had suffered an *accident,* but had not sustained any *injury.* Thereafter, Claimant never advised Employer that she suspected an ankle injury that she attributed to the work accident. Claimant's subsequent non-industrial injury to the same foot, and her passive manner likely contributed to Employer's lack of awareness of an industrial injury. Vague statements to supervisors regarding incidents or physical conditions that are ambiguous are insufficient to give notice to an employer of an injury. *Murray-Donahue v. National Car Rental Licensee Ass'n,* 127 Idaho 337, 900 P.2d 1254 (1995).

17. Although Claimant's report of her accident may have been sufficient to meet the first requirement of Idaho Code § 72-701, her claim is time barred because she did not comply with the additional requirement that she make a claim for benefits within one year of the date of injury. Claimant's accident occurred on February 29, 2008. The time for making a claim for benefits ended on February 29, 2009. Claimant did not make any claim for benefits until she filed a first notice of injury or illness on January 5, 2010, some eleven months after the statute of limitation for filing a claim had run. Claimant did not require

medical care immediately following the accident, and she suffered no time loss, so the exception contained in the last sentence of the statute is inapplicable on these facts.

REMAINING ISSUES

18. Because this matter is decided on the notice issue, the remaining issues are moot and are not addressed in these findings and conclusion.

CONCLUSION OF LAW

1. Claimant failed to file a claim for benefits within one year after her industrial accident; her claim is barred by Idaho Code § 72-701.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusion of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this ___1st___ day of May 2012.

INDUSTRIAL COMMISSION

_/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAGNY CRAMBLIT, Claimant, v. BEARABLE DENTISTRY, PLLC, Employer, and GENERAL INSURANCE COMPANY OF AMERICA, Surety, Defendants.	**IC 2010-000204** **ORDER DENYING MOTION FOR RECONSIDERATION** **Filed July 27, 2012**

On June 8, 2012, Claimant filed a timely motion for reconsideration with supporting brief.

On June 13, 2012, Defendants filed a response to the Claimant's motion for reconsideration.

On June 19, 2012, Claimant filed a reply to Defendants' reply.

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, that 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.

Claimant takes issue with the Commissions' decision concerning the applicability of the provisions of Idaho Code § 72-602, et seq. to the facts of this case.[1] As noted in the original decision, Idaho Code § 72-602 imposes on an employer an obligation to file an employer's first report no later than ten days following the occurrence of any accident which (a) requires

[1] As noted by Claimant, the Industrial Commission did not adopt all aspects of the proposed findings of fact, conclusions of law and recommendation submitted to the Industrial Commission for review and approval by the Referee assigned to this case. Instead, the Commission chose to revise the decision to address additional matters thought to be relevant to the disposition of the case. As requested, a copy of the Referee's proposed findings of fact, conclusions of law and recommendation is attached to this decision as Exhibit A hereto.

treatment by a physician, or (b) results in the absence from work for one day or more. An employer who is aware of the occurrence of such an accident, yet who "willfully fails" to file the required employer's first report, may not rely upon the statute of limitation contained in Idaho Code § 72-701.

In order to ascertain whether Employer "willfully failed" to file the required Idaho Code § 72-602 report, it is first necessary to understand whether, following the subject accident, Employer was ever apprised of facts suggesting that Claimant's accident was of the type which required it to file the Idaho Code § 72-602 employer's first report.

Here, the Commission found that Employer was immediately aware of the occurrence of the subject accident. However, the record fails to reflect that within the one year period following the subject accident, Claimant missed at least one day of work as a result of the subject accident, or if she did, that Employer was aware that Claimant missed work as the result of the subject accident.

Further, the record fails to reflect that within the one year period subsequent to the occurrence of the subject accident, Employer had any knowledge that Claimant's accident resulted in a need for medical treatment.

In connection with this requirement, it is first notable that the medical records in evidence fail to reflect that Claimant sought any medical treatment for her ankle injury within the one year period subsequent to the subject accident. Admittedly, Claimant contends that she sought medical treatment from Ms. McHugh within a few weeks following the accident for her complaints for left ankle pain. However, Ms. McHugh's records, as do all other medical records generated within a one year period subsequent to the accident, fail to substantiate Claimant's assertions in this regard.

The record reflects that although Ms. Uravich was immediately aware of the occurrence of the subject accident, the evidence fails to establish that Claimant said anything to Ms. Uravich on that date that could reasonably have put Ms. Uravich on notice that Claimant alleged the occurrence of an injury for which she either requested, or required medical treatment. For example, in her opening statement, Claimant described her interactions with Ms. Uravich on the date of the accident as follows:

> I immediately reported the accident to Kristine Uravich, the office manager at Bearable Dentistry. She had previously stated in office meetings that no matter how minute the fall, to always inform her of it. But my accident occurred Friday afternoon, and Kristine Uravich usually left early on Fridays. She looked me over in the hygiene room and was more concerned if I was well enough to finish my shift.
>
> Kristine Uravich came out in the hallway and where I was in front of the computer and in front of Suzanne Goodpaster, repeatedly said to me, but can you work? Can you work? Can you work? She was very loud and forceful, and I felt intimidated. There was no one to take over for me; and although it hurt extremely bad, I agreed to finish my shift. Kristine Uravich seemed only concerned with whether I could finish my shift. She then said, if it hurts next week, we'll do this injury report. And then she went out the door.

Tr. 15/17-16/9. This testimony does not establish that Claimant told Ms. Uravich that she (Claimant) was injured and/or required medical treatment. Claimant testified that although she spoke with Ms. McHugh about her left ankle pain, there was no testimony of record which reflects that she had some contemporaneous discussion with Employer about her visit with Ms. McHugh. Claimant testified that following her visit with Ms. McHugh her left ankle pain subsided and that she had no further medical treatment/work-up for the left ankle until the fall of 2009. However, Claimant testified that some point between the date of her visit with McHugh, and the fall of 2009, she did have some additional discussion with Employer concerning the left ankle:

> Some months after my accident, Kristine Uravich asked me about my ankle. Doctors had already told me not to be concerned about my ankle, and I tried telling her I didn't know what to do about it. I was hoping, again, for guidance from Kristine Uravich, but she just walked away before I could say any more.

Tr. 17/4-9.

. . .

> (By Referee Just)
> Q. Ok. All right. So, now let me go back again. You indicated in your opening statement that after you fell, you went and you talked to Ms. Uravich. And you told me a little bit about what your conversation was.
>
> Can you go back and just tell me what process you engaged in with your employer with regard to your complaints about your ankle? I mean, I understand you had a conversation that day. Did you have additional conversations about your ankle, about needing medical care, about – I mean, tell me what kind of conversations.
>
> A. A couple of times, but I could never finish it. She would walk away from me in mid sentence. She would just walk away.

Tr. 45/9-22.

These alleged discussions with Ms. Uravich are also referenced in the investigative report prepared by the Idaho Human Rights Commission:

> Complainant states that she fell at work on February 28, 2008, and she believes this caused a tear in the left peroneal tendon, near her ankle. She believes that over time, the tendon continued to tear. She admits that she did not seek treatment or file a worker's compensation claim until January 2010, after her employment at Respondent ended. She states that on the two occasions that Ms. Uravich asked her how her ankle was doing, Complainant told her, "I'm not sure." Following unrelated foot surgery on April 24, 2009, Complainant had to wear a surgical boot and a pin protruded from the end of the affected toe. She believes having to walk with the surgical boot made the tendon condition worse. It was after this that she sought medical attention for her ankle, which was treated surgically in March, 2010.

D. Ex. O, p. 5.

Neither Claimant's testimony, nor the findings made by the Idaho Human Rights Commission investigator actually support the proposition that Ms. Uravich was apprised on the two occasions in question that Claimant was either seeking, or required, medical care for her condition. Other of Claimant's statements tend to suggest that Claimant did not have any conversations with Ms. Uravich in the months following the subject accident. In a note dated July 6, 2010, Claimant stated:

> On February 29, 2008 I fell on overspray of Byrex on a just waxed floor at work. I fell hard and my left leg slid into and under a cabinet door. I immediately reported it to the manager who did not think a report was needed. A couple of weeks later I had an appointment with my regular doctor and I mentioned my left ankle to her and she felt that my ankle was fine. So from there I decided whatever happened during my accident would heal.

D. Ex. A, p. 1.

In a journal entry dated April 24, 2009, Claimant stated:

> Have been afraid to mention it [the left ankle injury] again to the manager, she was so hesitant last year when it happened.

C. Ex. A, p. 2.

For her part, Ms. Uravich acknowledged the occurrence of the subject accident, and testified that she had a specific discussion with Claimant concerning whether Claimant had suffered an injury and/or needed medical treatment. Per Ms. Uravich, Claimant denied having suffered any injury, and denied needing medical treatment. Indeed, Ms. Uravich testified that the reason she did not file an employer's first report is because Claimant had denied injury and needing medical treatment. Ms. Uravich had no recollection of subsequent conversations with Claimant about the left ankle. Her first notice concerning the Claimant's current allegations about an accident related left ankle injury came with the filing of the claim in 2010.

In summary, although there is no dispute that Employer had actual knowledge of the subject accident as soon as it occurred, the evidence fails to establish that within the one year period following the occurrence of the subject accident Employer had any knowledge of the type that would require the filing of an employer's first report under Idaho Code § 72-602.

ORDER

Based on the foregoing reasons, the Commission declines to reconsider its Findings of Fact, Conclusions of Law and Order dated May 22, 2012. Claimant's request for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this __27th___ day of __July_____ 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _27th__ day of __July_____, 2012, a true and correct copy of the foregoing **ORDER DENYING MOTION FOR RECONSIDERATION** were served by regular United States Mail upon each of the following persons:

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__/s/_____