

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY FERGUSON,)
)
 Claimant,)
)
 v.)
)
 CDA COMPUTUNE, INC., Employer,)
 and IDAHO STATE INSURANCE FUND,)
 Surety,)
)
 and)
)
 D & R AUTOMOTIVE, Employer,)
 and IDAHO STATE INSURANCE FUND,)
 Surety,)
)
 and)
)
 AUTO TECH NORTHWEST, Employer,)
 and IDAHO STATE INSURANCE FUND,)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
)
 _____)

IC 2001-005778
IC 2001-021764
IC 2004-504577
IC 2004-000161

**ORDER DENYING
RECONSIDERATION**

Filed May 16, 2011

On March 10, 2011, Claimant filed a Motion for Reconsideration and/or in the Alternative Motion for Partial Rehearing and Affidavit of Starr Kelso in support of the motion pertaining to the Industrial Commission’s decision filed February 25, 2011, in the above referenced case. Defendants filed a response on March 21, 2011. No reply was filed.

In the underlying decision Claimant contended that he is entitled to a total shoulder

arthroplasty, as recommended by his physician, Dr. Roger Dunteman. Defendants argued that the proposed treatment is not reasonable, because it is unlikely to improve Claimant's condition.

On the evidence presented, the Commission found that while Claimant's shoulder is in poor condition, Claimant did not prove that his condition is likely to benefit from a total shoulder replacement. Claimant's history of not fully complying with post-surgical requirement, his failure to recover or gain even temporary relief from past treatment, and the uncertainty as to the primary source of his pain, all establish that Claimant is not, at present, a good candidate for surgery. Thus, the Commission concluded that the proposed treatment was not reasonable.

In his motion for reconsideration, Claimant argues that additional information will establish that Claimant tried to obtain a complete physical exam but was denied by Defendants, that Claimant tried to comply with the psychological counseling but was denied by Defendants, and that Claimant is willing to stop smoking. Claimant avers that with the new information presented at a rehearing, the Commission will be persuaded to conclude that Claimant is ready for the shoulder replacement surgery.

Defendants contend that the newly submitted documents were not designated as exhibits pursuant to Rule 10, JRP, and not offered into evidence at hearing. The physical exam requested by Claimant is the one that Dr. Tingstad opined was not the responsibility of Surety. Further, Defendants argue that regardless of the physical examination in question, Claimant did have the injection on March 10, 2010 which failed to provide Claimant with any pain relief.

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 . . . and in any such events the decision shall be final upon denial or 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."

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 (1986). 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 requests that Commission hold a rehearing and admit additional evidence relevant to the issue raised and heard on March 18, 2010. All of Claimant's additional evidence was discoverable or held by Claimant at the time of the hearing. While it may be regrettable that Claimant did not present that evidence, the Commission will not grant a rehearing for the purpose of supplementing the record with evidence available prior to hearing.

Allowing evidence such as that contemplated by Claimant would lead to prolongation of the proceeding for rebuttal and possible surrebuttal of the parties after a final decision has been issued. Not only could the additional evidence have been discovered prior to the hearing, several

of the documents were created by Claimant's counsel.

Claimant also argues that Defendants have denied Claimant treatment, particularly a physical examination and psychological treatment, and if Claimant had received that treatment he would have been able to show he is ready for the shoulder surgery. The sole issue before the Commission at the March 18, 2010 hearing was whether a right shoulder replacement constitutes reasonable medical care pursuant to Idaho Code § 72-432. The Commission reviewed the medical records submitted by the parties and analyzed the facts in light of the specific question of whether the right shoulder replacement was reasonable. The Commission made no ruling on the compensability or reasonableness of any other medical treatment. Claimant may be entitled to other medical treatment currently and/or in the future.

The Commission's analysis took into account all the documentary evidence and testimony presented. The Commission will not address issues not noticed by the parties at hearing nor will it consider evidence available but not offered. The Commission finds the decision is supported by substantial evidence in the record and Claimant has presented no persuasive argument to disturb the decision.

Based upon the foregoing reasons, Claimant's Motion for Reconsideration and/or in the Alternative Motion for Partial Rehearing is DENIED.

IT IS SO ORDERED.

DATED this __16th__ day of __May__, 2011.

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 16th day of May , 2011, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

ALAN K HULL
PO BOX 7426
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/s/
