

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AMANDA FOMICHEV,

Claimant,

v.

JAMES C. LYNCH,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2005-522775

**ORDER ON
RECONSIDERATION**

Filed February 20, 2012

Pursuant to Idaho Code § 72-718, Defendants moved for reconsideration of the Commission's decision in the above-captioned case. Defendants argue that Idaho Code § 72-435 does not require a Commission order before defendants may suspend workers' compensation benefits due to a claimant's injurious practices, and that the Commission's holding is impractical. Further, Defendants argue that the Commission should not have granted Claimant attorney fees, because no prior decision of the Industrial Commission suggests that the Commission must first find that the criteria of the statute are met before benefits can be suspended or reduced. Defendants contend they acted reasonably because multiple sources, including Claimant's attorney, warned her that her benefits were in jeopardy. Despite the warnings, Claimant's persisted in injurious actions. Claimant canceled or no-showed at more than forty appointments with various medical providers and an ICRD consultant. Decision, p.

16, para. 36. Defendants request that the Commission reconsider its statutory analysis and its award of attorney fees to Claimant.

On November 19, 2012, Claimant contemporaneously objected to Defendants' motion for reconsideration and requested attorney fees of \$28,173.88 (hourly fees plus \$6,255.63 in costs) or \$33,598.12 (contingency). Claimant argues that Idaho Code § 72-435 exclusively authorizes the Commission, not Defendants, to terminate benefits. Claimant contends that the Commission appropriately awarded Idaho Code § 72-804 attorney fees against Defendants, as Defendants should not usurp the Commission's statutory authority. As a neutral party, the Commission is best suited to approve or suspend benefits.

On November 28, 2011, Claimant appealed the Commission's decision to the Idaho Supreme Court. On December 10, 2012, the Idaho Supreme Court dismissed Claimant's appeal pending the Commission's order on reconsideration.

ISSUES

1. Did the Commission err in the interpretation of Idaho Code § 72-435?
2. Did the Commission err in granting Claimant attorney fees?

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, 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.

Idaho Code § 72-435

In the underlying order, the Commission held that Idaho Code § 72-435 gave the Commission exclusive authority to suspend benefits for a claimant’s injurious practices. Defendants did not secure a Commission order before unilaterally deciding to deny Claimant’s TTD benefits from March 7, 2007 through March 27, 2007. Therefore, the Commission found that Defendants unreasonably denied Claimant’s TTD benefits, and ordered attorney fees under Idaho § Code 72-804.

Idaho Code § 72-435 reads as follows:

Injurious practices -- Suspension or reduction of compensation. If an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the *commission may order* the compensation of such employee to be suspended or reduced.

Emphasis added.

A plain reading of the statute vests the Commission with the authority and discretion to suspend or reduce workers' compensation benefits for injurious practices. Nothing in the statute authorizes Employer to curtail income benefits without Commission approval. The question before us is whether the direction of the statute is satisfied where surety, under circumstances similar to those at bar, curtails benefits, and later seeks the Commission's ratification of surety's action.

Defendants have cited the Commission to the case of Profitt v. DeAtley-Overman, Inc., 86 Idaho 207, 284 P.2d 473 (1963), a case which, at first blush, appears to endorse the proposition that an aggrieved surety may unilaterally determine whether benefits should be curtailed under Idaho Code § 72-435, then take its chances that the Commission will later agree with the action it took. However, as developed below, Profitt is actually inapposite to the proposition for which it is cited by Defendants.

In Profitt, *supra*, Claimant suffered a work-related low back injury. In July of 1962, Claimant was evaluated by Dr. Grieve, who recommended that Claimant undergo a myelogram in order to ascertain whether he suffered from a ruptured disc amenable to surgical treatment. Claimant stated that he would return for the myelogram, but never did. Surety discontinued workers' compensation benefits on July 3, 1962 on the grounds that Claimant had unreasonably refused medical treatment within the meaning of the former Idaho Code § 72-401. Claimant filed a complaint in which he sought reinstatement of workers' compensation benefits. The matter was set for hearing for January 15, 1963. On January 9, 1963, Claimant was evaluated by Dr. Colburn at the instance of Employer/Surety. After examining Claimant, Dr. Colburn proposed that before more aggressive therapy should be considered for Claimant he should

undergo a two week hospitalization during which time conservative therapies would be exhausted. Employer/Surety offered to authorize this care, and to reinstate workers' compensation benefits for the period of Claimant's hospitalization. Claimant refused to accept this proffered treatment unless Employer/Surety agreed to pay compensation from July 3, 1962, the date on which benefits had previously been suspended through January 15, 1963, the date of the board's hearing, and for the additional period required for the two week hospital stay. Employer/Surety declined to agree to Claimant's terms.

The provisions of the former Idaho Code § 72-401 specified:

Medical examination. After an injury and during the period of disability, the workman, if so requested by his employer, or ordered by the board, shall submit himself to examination, at reasonable times and places, to a duly qualified physician or surgeon designated and paid by the employer. If a workman refuses to submit himself to or in any way obstructs such examination, his right to take or prosecute any proceeding under this act shall be suspended until such refusal or obstruction ceases, and no compensation shall be payable for the period during which such refusal or obstruction continues. If an injured workman persists in insanitary, injurious or unreasonable practices which tend to imperil or retard his recovery, the board may, in its discretion, order the compensation of such workmen to be suspended or reduced.

The statute contains important elements of the provisions of the current Idaho Code § 72-434 and Idaho Code § 72-435.

In ruling on Claimant's entitlement to reinstatement of workers' compensation benefits, the Industrial Commission stated:

The Board finds and rules that claimant's refusal to submit to myelographic examination and his refusal of submitting to surgery, if a myelogram discloses the existence of a herniated intervertebral disc, are unreasonable and injurious practices which have impaired and retarded his recovery.

The strongest proof of claimant's intransigence was demonstrated at the hearing when he refused to accept defendants' tender of two weeks' hospitalization with diagnostic and conservative treatment under the ministrations of the very physicians whom he had called to the stand to testify on his behalf. The purpose

of the proffered treatment was to determine the feasibility of claimant's rehabilitation by means other than surgery.

Therefore, the Commission found that Claimant's refusal to undergo the myelogram in July of 1962 constituted an injurious practice. Further, the Commission found that Claimant acted unreasonably when he refused the hospitalization proffered by Employer/Surety. From the Court's decision on appeal, it does not appear that the Court addressed the question of whether or not Claimant's refusal to undergo myelogram examination in July of 1962 was an "injurious practice" warranting the suspension of benefits. Rather, on appeal Claimant urged the Court to find that the Commission erred in suspending compensation payments on the grounds that Claimant had unreasonably refused the two-week hospitalization recommended by Dr. Colburn. The Court evaluated the Commission's treatment of this issue under the following portion of the former Idaho Code § 72-401:

If a workman refuses to submit himself to or in any way obstructs such examination, his right to take or prosecute any proceeding under this act shall be suspended until such refusal or obstruction ceases, and no compensation shall be payable for the period which such refusal or obstruction continues

The Court noted that the question of the reasonableness of Claimant's refusal to submit to diagnostic and conservative treatment is a question of fact to be determined by the Industrial Commission. On the record before it, the Court concluded that there was substantial and competent evidence to support the Commission's decision that Claimant unreasonably refused to submit to the "investigational conservative treatment" to take place during the two week hospitalization. The Court's decision does not address the question of whether there was, or was not, evidence to support the Commission's conclusion that Claimant's refusal to undergo the myelogram in July of 1962 constituted an injurious practice which might tend to imperil Claimant's recovery. In short, Proffitt lends no support to the proposition that a surety may

unilaterally suspend or reduce workers' compensation benefits where it perceives that an injured worker is engaging in injurious practices, so long as it seeks subsequent ratification of its decision from the Industrial Commission.

A case that comes somewhat closer to dealing with the issue before us is Brewer v. LaCrosse Health and Rehabilitation, 2001 IIC 042 (2001). In Brewer, Claimant suffered a work-related injury on September 13, 2000. In early 2001, Employer/Surety arranged for Claimant to undergo an Idaho Code § 72-433 exam with Dr. Vincent. Although Claimant showed up for the scheduled exam, she refused to fill out intake paperwork which asked general questions about Claimant's family medical history, her medical history and included a pain diagram. By letter dated March 5, 2001, Employer/Surety ceased paying benefits pursuant to Idaho Code Section § 72-434, explaining that by refusing to indulge Dr. Vincent in his need for completed questionnaires, Claimant had unreasonably refused or obstructed the Idaho Code §72-433 exam. The Commission ruled that it was appropriate to suspend benefits until Claimant's obstruction ceased. Claimant next argued that under Idaho Code §72-434, it was inappropriate for Employer/Surety to terminate benefits without a prior order of the Commission. Idaho Code § 72-434 provides:

Effect of refusing medical examination -- Discontinuance of compensation. If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues."

In rejecting Claimant's argument, the Commission stated:

A review of Industrial Commission decisions also presents no such challenge to a surety's ability to terminate benefits prior to an order by the Commission under Section 72-434. Particularly telling is the Legislature's explicit requirement for a Commission order prior to suspending or reducing benefits under Idaho Code Section 72-435, Injurious Practices -- Suspension or reduction of compensation.

Such an explicit requirement is entirely absent from Section 72-434 despite the fact that both Code sections were added at the same time in 1971. Idaho Code Section 72-435 specifically empowers only the Commission to suspend or reduce benefits; Idaho Code Section 72-434 does not.

Brewer, *supra*.

Claimant appealed this decision to the Idaho Supreme Court. *See* Brewer v. LaCrosse Health & Rehabilitation, 138 Idaho 859, 71 P.3d 458 (2003). On appeal, the Court upheld the Commission's decision that Claimant's refusal to complete the intake questionnaire constituted an unreasonable objection of an Idaho Code § 72-433 exam. The Court further determined that there was substantial and competent evidence to support the Commission's conclusion that Claimant did obstruct the exam process. As she did before the Commission, Claimant also argued that Idaho Code § 72-434 does not allow Employer/Surety to curtail benefits without first obtaining an order from the Industrial Commission. In rejecting this argument, the Court did not comment on the distinction drawn by the Commission between the provisions of Idaho Code § 72-434 and Idaho Code § 72-435. The Court simply stated that Idaho Code § 72-434 neither expressly nor implicitly requires that an employer/surety obtain an order of the Commission prior to suspending benefits for the obstruction of an IME.

Of course, Idaho Code § 72-435 does expressly provide that a surety's designs upon curtailing benefits due to an injured workers' injurious practices must be approved by the Industrial Commission. The statute does not expressly state that prior approval is required, thus admitting Defendant's argument that the Commission's subsequent ratification of a surety's

decision to curtail benefits will satisfy the statute. We reject this argument for the following reasons:

During an injured workers' period of recovery following an industrial injury, it is not unusual for workers' compensation benefits to provide the worker's only source of income. Interruption of the benefit stream as a punitive or coercive measure is not to be taken lightly. We are mindful of the general rule of statutory construction which applies to our application of the Act. When interpreting the Act we must liberally construe its provisions in favor of a finding of compensation in order to serve the humane purpose for which the act was promulgated. Wernecke v. St. Maries Joint School District #401, 147 Idaho 277, 207 P.3d 1008 (2009); Gibson v. Ada County Sheriff's Office, 147 Idaho 491, 211 P.3d 100 (2009); Nelson v. City of Bonners Ferry, 149 Idaho 29, 232 P.3d 807 (2010). We conclude that an employer/surety may not curtail workers' compensation benefits under I.C. § 72-435 without first having an applied for and obtained a Commission order authorizing the same.

Defendants have raised a number of practical objections to this construction of the statute. It is argued that no procedural mechanism exists to process applications for the curtailment of benefits under the statute. We believe that such a mechanism does exist. In a case in which a complaint has been filed, the Judicial Rules of Procedure recognize a motion practice and application for emergency hearings. When an employer/surety believes that an injured worker is engaging in activities which imperil his or her recovery, employer/surety may file a motion seeking an order from the Commission approving the suspension or reduction of benefits. If necessary, an emergency hearing could be set to allow the parties to put on proof. In the alternative, nothing would prevent the Commission from entertaining the Idaho Code § 72-435 issue at a subsequent hearing on the merits of the case. On proof that the claimant's conduct

imperiled or retarded his recovery, it could be found that the claimant was not entitled to benefits paid during the period in which his actions imperiled or retarded his recovery. Employer/surety could then apply the overpayment as credit against benefits yet due per Idaho Code § 72-316. In a case in which no complaint has been filed, nothing in the Judicial Rules of Practice and Procedure would prohibit an aggrieved surety from filing a complaint for the limited purpose of seeking curtailment of benefits where the claimant is engaging in injurious practices which imperil his or her recovery. Contrary to Defendants' assertions, we believe that to require prior approval by the Industrial Commission before benefits can be suspended does nothing to diminish the purpose of requiring injured workers to do what is in their power to advance their recovery from work-related injuries.

Attorney Fees

In its original decision, after having found that Defendants should not have withheld workers' compensation benefits absent a Commission order authorizing them to do so, the Commission made an award of attorney's fees under Idaho Code § 72-804, finding that Defendants acted unreasonably, and in derogation of the direction of the statute. Defendants argue that a long line of Commission cases implicitly recognize the practice of curtailing benefits before obtaining a Commission order. Defendants argue that in none of those cases did the Commission penalize an employer/surety for seeking subsequent ratification of a decision to suspend benefits under Idaho Code § 72-435. Defendants argue, and the Commission agrees, that the issue raised in this matter is one of first impression before the Commission, and even though the Commission has sided with Claimant, it is inappropriate to subject Defendants to an award of attorney's fees for what may have been, until today, an accepted convention in the workers' compensation community.

After having reviewed the numerous Commission cases cited by Defendants, we agree that it is inappropriate to sanction Defendants for their conduct by making an award of attorney's fees to Claimant under Idaho Code §72-804. Aside from the discussion contained in Brewer, *supra*, the Commission is unaware of any case which addresses the issue of whether or not Idaho Code § 72-435 requires prior approval of the Industrial Commission. The discussion concerning Idaho Code § 72-435 contained in Brewer, *supra*, was tangential to the central issue before the Commission in that case and is probably best treated as dicta. In no other case that we have been able to locate, has the Commission addressed whether Idaho Code § 72-435 anticipates that an Employer/Surety may seek subsequent ratification of the unilateral decision to curtail benefits due to injurious practices. Without notice of our construction of Idaho Code §72-435 it would be inappropriate to make an award of attorney's fees against Defendants for their failure to abide by what we believe the statute requires. However, practitioners should take note that henceforth failure to obtain Commission approval before suspending or reducing an injured worker's benefits pursuant to Idaho Code § 72-435, will create exposure for the payment of attorney fees under Idaho Code § 72-804. Having found, on Reconsideration, that an award of attorney's fees is not appropriate, the Commission will not address the merits of Claimant's attorney fee memorandum.

ORDER

1. The Commission continues to abide by its ruling that the provisions of Idaho Code § 72-435 require prior approval by the Industrial Commission before workers' compensation benefits can be suspended or reduced for the reasons set forth in the statute.

2. Defendants have shown that the Commission's Order granting attorney's fees to Claimant for Defendant's failure to pay TTD benefits during the period March 7, 2007 through

March 27, 2007 should be **REVERSED**. The issue of the extent of Claimant's entitlement to attorney's fees is moot. **IT IS SO ORDERED.**

DATED this 20th day of February, 2013.

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 20th day of February, 2013, a true and correct copy of the foregoing **ORDER ON RECONSIDERATION** was served by regular United States Mail upon each of the following:

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/s/ _____