

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY GEE,)
)
 Claimant,)
)
 v.)
)
 LONGVIEW FIBRE COMPANY,)
)
)
 Employer,)
)
 and)
)
 TRAVELERS PROPERTY CASUALTY)
 COMPANY OF AMERICA,)
)
 Surety,)
)
)
 Defendants.)
)
 _____)

IC 2006-005130

**ORDER DENYING
RECONSIDERATION**

Filed November 17, 2011

On September 20, 2011, Defendants filed a motion requesting reconsideration of the Industrial Commission's decision filed September 1, 2011, in the above referenced case. Claimant did not file a response.

In the underlying decision Claimant contended that he suffered an industrial accident while driving a hyster over some tracks on April 3, 2005, which caused cervical injury and the need for subsequent cervical surgery. Defendants pointed out that Claimant had significant pre-existing cervical spine disease and argued that he had proven no accident occurred on April 3, 2005, and that his subsequent cervical surgery was due to his pre-existing degenerative disease.

The Commission concluded that Claimant suffered an industrial accident causing cervical injury on April 3, 2006, while working for Longview, necessitating cervical surgery on May 25, 2006 and the payment of temporary total disability benefits.

In the motion for reconsideration, Defendants argue that Claimant's pre-existing

condition was not mildly symptomatic, but was severe and Dr. Surbaugh was amazed that Claimant could work before his alleged accident. Further, Defendants aver that footnote 3 on page 12 infers that the Referee disregarded the opinions of several doctors because Defendants did not identify Claimant's self-described onset of symptoms. Finally, Defendants argue that there is no explanation as to why Dr. Montalbano's opinion was not reasonable and more probative than Dr. Verst's opinion.

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 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. JRP 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. 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

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Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

Defendants argue that Claimant's pre-existing condition was not mildly symptomatic, but was extremely severe. The Commission does not dispute that Claimant had a pre-existing condition but the degree to which it effected Claimant's life is questionable. Dr. Surbaugh was amazed that Claimant could work before his April 3, 2006 accident, but the fact remains that Claimant continued working for ten years before the 2006 accident, as well as hunting and fishing. The Commission reviewed the evidence presented and remains firm in its conclusion that Claimant's mildly symptomatic pre-existing condition became acutely symptomatic and debilitating by reason of the April 3, 2006 accident.

Along those lines, Defendants point out a medical record which has a portion blanked out. Defendants' Exhibit 3, pp. 20-21. The Commission concedes that the portion is blank, but one unknown portion of a medical record is not enough uncertainty to negate what does exist in the remaining record. Further, Defendants did point the oddity out in their opening brief and the Referee was aware of the situation.

Regarding footnote 3 at page 12, the recommendation is merely pointing out the question that the doctors were asked focused on the general activity of driving the hyster, while the onset of symptoms described by Claimant focused on the specific event of driving over the tracks while his head was turned. The footnote is attempting to clarify what the Commission finds to be a notable distinction in the framing of the questions posed by Defendants to several doctors.

Finally, Defendants argue that there is no explanation as to why Dr. Montalbano's opinion was not reasonable and more probative than Dr. Verst's opinion. The Commission, as discussed above, was unable to ignore Claimant's actual ability to perform work and enjoy his

outside interests with his pre-existing condition. The dramatic change that occurred in Claimant after the industrial accident led Dr. Verst, and the Commission, to find that Claimant's accident caused the need for cervical surgery.

Defendants take issue with many of the decision's findings but they present no new arguments which cause the Commission to revise its conclusions. As is the situation with most cases, the record here contains conflicting reports and opinions from which a final decision must be made. Clearly Defendants view many of the statements in the decision in a different light, yet all of the findings and conclusions are supported by the record.

The Commission has reviewed the record with a focus on the details presented by Defendants in the motion for reconsideration and we still feel the facts support the decision issued on September 1, 2011. The Commission's analysis took into account all the documentary evidence and testimony. Although Defendants disagree with the Commission's findings and conclusions, the Commission finds the decision is supported by substantial evidence in the record and Defendants have presented no persuasive argument to disturb the decision.

Based upon the foregoing reasons, Defendants' Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED this ___17th___ day of ___November___, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

Recused _____
Thomas P. Baskin, Commissioner

/s/ _____
R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 17th day of November, 2011,
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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/s/