BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEITH E. GODFREY, Claimant, v. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, Self-Insured Employer, Defendant.	)	**IC 2005-012945** **2009-028453** **2007-020643** **2008-012881** **ORDER DENYING MOTION TO RECONSIDER** Filed July 27, 2011

The Commission issued its Findings of Fact, Conclusions of Law, and Order on April 20, 2011. On April 26, 2011, Defendant filed a Motion to Reconsider. On June 2, 2011, Claimant filed Claimant's Memorandum Opposing Defendant's Motion to Reconsider. The Commission has previously denied Claimant's motion for extension of time and thus, will not consider Claimant's Memorandum Opposing Defendant's Motion to Reconsider.

The Commission's decision concluded, in part, that Claimant had proven that his April 2, 2008 injury "arose out of" his employment, and that Claimant had proven to a reasonable degree of medical probability that his low back injury was permanently aggravated by his April 2, 2008 industrial accident.

On reconsideration, Defendant argues that the decision went beyond the scope of the issues designated for hearing and set forth in the notice of hearing. Defendant states that the

Commission erred when it used the issue of "arising out of" to segue to a discussion of causation, especially as it related to surgical procedures and impairment.

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.

I

There is no dispute that the noticed issue addressed in this motion was "[w]hether or not an injury on April 2, 2008, 'arose out of' Claimant's employment." For whatever reason, Claimant did not address this issue in his opening brief. However, Defendant did address the issue, discussing in its brief, both the applicable law, and the evidence upon which it relied in support of its position that the accident of April 2, 2008, was not one which could be said to have arisen out of Claimant's employment. In this regard, it is important to note how Defendant chose to characterize the "arising out of" issue. In its brief, Defendant argued that in order for an accident to be said to arise out of employment, it must be shown not only that the accident occurred as the result of an employment created risk, but also that a causal connection be shown to exist between the accident and Claimant's condition. In this regard, Defendant stated:

> Idaho Code § 72-102(18)(a) defines an injury as a "personal injury caused by an accident arising out of and in the course of employment…." An injury occurs in the course of employment if the worker is doing the duty that he is employed to perform. *Kiger v. Idaho Corp.*, 85 Idaho 424, 430, 380 P.2d 208, 210 (1963) (quoting *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951)). An accident arises out of an employee's work when it arises out of a "risk incidental to employment." *Colson v. Steele*, 73 Idaho 348, 352, 252 P.2d 1049, 1051 (1953). In addition, the Idaho Supreme Court has held that an accident arises out of employment, "when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *O'Loughlin v. Circle A Const.,* 112 Idaho 1048, 1051, 739 P.2d 347, 350 (1987) (quoting *Kiger v. Idaho Corp*., 85 Idaho at 430, 380 P.2d at 210-11 (1963)). Given this, it follows that the issue of causation is subsumed in the issue of whether an accident "arises out of" employment.
>
> In our case, both parties presented evidence and argument regarding causation and whether Claimant's April 2, 2008, injury arose out of his employment with Employer. The parties do not dispute that Claimant was in the course of his employment at the time of his April industrial accident. It is Defendant's position, however, that Claimant's April injury did not arise out of his employment at the Temple because he had significant low back symptomatology prior to that time, had been receiving regular manual therapy for back pain, was functionally limited in his physical abilities because of his back

> pain, and had objective medical findings of a disc bulge, degenerative stenosis, and a large disc protrusion five days prior to his April accident.
>
> Based on the medical records and Claimant's testimony, his April accident was not causative of his low back problems or need for surgery, not did it aggravate his pre-existing back condition.
>
> Defendant's Post-Hearing Brief filed January 7, 2011, pp. 27-28.

There followed a discussion of the medical evidence upon which Defendant relied in support of its position that no causal relationship existed between the April 2, 2008, accident and Claimant's low back condition. Defendant concluded this section of its brief stating:

> Consequently, the weight of the evidence demonstrates that Claimant's April accident did not cause, contribute to, or permanently aggravate his low back condition because it was objectively documented and symptomatic in the months prior.
>
> Defendant's Post-Hearing Brief filed January 7, 2011, p. 29.

The Commission is in agreement with the Defendant that in order for it to be said that the April 2, 2008, accident is one "arising out of" Claimant's employment, Claimant bears the burden of demonstrating the requisite causal relationship between that accident and his injury. Given Defendant's concession on this point, we find that the issue of medical causation is subsumed within the broadly framed issue of whether or not the accident of April 2, 2008, is one which arises out of Claimant's employment. Therefore, it was appropriate for the Industrial Commission to consider medical causation, particularly where the Commission was unambiguously invited to do so by Defendant.

II

As noted, Claimant did not address the noticed issue in his opening brief. Neither did Claimant respond to Defendant's arguments in his closing brief, although this would certainly have been the place to challenge Defendant's interpretation of the medical evidence on the issue of causation, or perhaps more importantly, to challenge Defendant's assertion that medical causation was, in fact, at issue. Claimant did neither, and from this, we can reach no other

conclusion than that Claimant had no opposition to the Commission's consideration of the issue of medical causation vis-a-vis, the April 2, 2008, accident.

Therefore, even if, as Defendant now argues, the issue of medical causation constitutes a non-noticed issue, it is clear that by raising the issue, Defendant invited the Commission to consider the same, and that by failing to object to discussion of the issue, Claimant, too, acceded to the Commission's consideration of both the issue and the evidence thereon. Although the Industrial Commission is not bound by strict application of the Idaho Rules of Civil Procedure, the Rules do provide the Commission with some guidance on this matter. I.R.C.P. 15(b) specifies in relevant part:

> When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings…

If the issue of medical causation is indeed a "new" issue, first raised in Defendant's post-hearing brief, then it is nevertheless an issue which is included for consideration by the Industrial Commission with the "express or implied consent" of the parties.

For these reasons, the Commission declines to reconsider its decision to treat the issue of medical causation, vis-a-vis, the April 2, 2008, accident. Having invited the Commission to consider the issue, and having adduced proof on the issue, the Defendant may not be heard to argue surprise when faced with an outcome that is contrary to its expectations.

The Commission's analysis of the issue of medical causation, took into account all documentary evidence and testimony presented. On the evidence before it, the Commission

determined that the subject accident of April 2, 2008, permanently aggravated Claimant's low back injury.[1]

The Commission finds that the Decision is supported by substantial and competent evidence and Defendant has presented no persuasive argument to disturb the Decision. Based on the foregoing, Defendant's motion for reconsideration is denied.

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

IT IS SO ORDERED.

DATED this __27th_____ day of _____July_____, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

[1] In deciding that the April 2, 2008, industrial accident permanently aggravated Claimant's low back condition, the Commission has not expressed any opinion on the extent to which the April 2, 2008, accident contributed to Claimant's underlying low back condition, much less whether apportionment of disability under I.C. § 72-406 is appropriate.

CERTIFICATE OF SERVICE

I hereby certify that on the ___27th_____ day of ____July_____, 2011 a true and correct copy of **ORDER DENYING MOTION TO RECONSIDER** was served by regular United States Mail upon:

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__/s/_____