

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MEGAN KELLY,

Claimant,

v.

LIFE CARE CENTERS OF AMERICA,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Surety,

Defendants.

IC 2008-035577

**ERRATUM AND
ORDER DENYING RECONSIDERATION**

Filed July 18, 2012

ERRATUM

The Commission wishes to correct a clerical omission made on page 14 in paragraph 34 of the Decision and Order filed February 17, 2012. The final sentence of paragraph 34 is missing the word “not.” The corrected sentence should read “She does not have grossly evident patellar instability, although she does exhibit patellar apprehension.”

MOTION TO RECONSIDER

On March 7, 2012, Claimant filed a Motion for Reconsideration and supporting brief requesting reconsideration of the Industrial Commission’s decision filed February 17, 2012, the Order denying Claimant’s motion for post-hearing rebuttal testimony filed August 17, 2011, the

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Order sustaining Defendants' Objection to Exhibit 5, and the Order sustaining Defendants' objection to questions posed to Dr. King. Defendants filed a response and supporting affidavit on March 19, 2012. Claimant filed a reply on March 27, 2012.

In the underlying case Claimant contended that she is entitled to a referral to a patellofemoral specialist recommended by Dr. Douglas McInnis. Defendants argued that Claimant's long-standing history of significant right knee pathology, not her fall at work, is the cause of her persistent symptomatology.

The Commission found that the October 2008 injury temporarily exacerbated her preexisting condition and that she reached MMI from this temporary exacerbation on June 24, 2009. The Commission concluded that Claimant was entitled to medical care through June 24, 2009 and the diagnostic care received from Dr. McInnis through the end of 2010, but that she failed to prove entitlement to attorney fees pursuant to Idaho Code §72-804.

In her motion for reconsideration, Claimant argues that the Referee allowed inadmissible testimony which prejudiced the Referee's perspective. Claimant points out a variety of findings of fact which she contends are not supported by the record. Additionally, Claimant asks the Commission to reconsider the order denying rebuttal testimony and the ruling sustaining Defendants' objection to Exhibit 5 to Dr. King's deposition.

Defendants contend that Claimant wants the Commission to revisit the same issues and arguments presented at length at hearing and in her prior briefs. Defendants aver that the decision is supported by substantial and competent evidence and reflects the clear weight of the evidence.

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. 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. 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.

First, Claimant objects to the Referee's overruling of Claimant's objection to permitting Bonner County deputy prosecutor's testimony as to Claimant's reputation for veracity in the legal community. The decision took into account all the evidence and identifies a number of factors supporting the conclusion concerning Claimant's credibility, including Mr. Robinson's

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observation of Claimant walking with and without difficulty; Drs. King, McInnis, and Provencher all noted subjective complaints in excess of objective findings on exam; a surveillance video arguably showing Claimant walking with less difficulty than should have been expected; and Claimant's repeated failure to report her extensive history of right knee pathology when obtaining treatment. Of course, there is also some evidence supporting a conclusion that Claimant is a credible witness, but on the whole the Referee found Claimant was not credible.

Claimant points out numerous other facts that could have been added to the decision or could have been drafted in a different manner. The Commission is aware that the Recommendation does not contain a recitation of all facts contained in the record, or adduced at hearing. However, the Commission is persuaded that the decision was crafted with the benefit of all the facts, and references those that are central to the decision. The Commission agrees that facts can be restated in variety of ways. Dr. McInnis' chart note from December 15, 2010 states that Claimant may benefit from physical therapy and she may find another doctor who has a more optimistic opinion of surgery. However, the fundamental base of Dr. McInnis' opinion remained that Claimant was stable and that she was not a surgical candidate.

Clearly, Claimant views the evidence presented in a different light but the Commission finds that the decision as issued is a fair representation of the evidence necessary for making a determination. The decision, read as a whole, sets forth appropriate facts and supports the final conclusions. Particularly the only opinions on medical causation are those of Drs. McInnis and Provencher which establish that Claimant is not a surgical candidate and that the October 2008 injury was temporary and has healed.

Additionally, Claimant argues that many of the medical records recommend further

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treatment. Claimant has a well documented preexisting right knee condition. There is no doubt that Claimant is going to require future treatment for care of her knee. The evidence established that Claimant's fall at work on October 28, 2008 caused a temporary exacerbation of her preexisting right knee condition. Further treatment may be necessary for Claimant's right knee condition, but it was not proven that more treatment is necessary due to her 2008 industrial accident.

Claimant also requests reconsideration of the Referee's August 17, 2011 Order denying Claimant's Motion for Post-Hearing Rebuttal Testimony or Motion to Reopen the Evidence. The Referee was not persuaded that new matters had arisen such as would constitute good cause to allow for the admission of post-hearing rebuttal evidence from lay witnesses or the reopening of the record on any other ground. These additional witnesses would be used to explain why Dr. King stopped his treatment of Claimant so abruptly. The Commission has already found, from the whole of Dr. King's testimony, that the information conveyed by the unknown caller would not have altered his view of Claimant's case. The Commission finds no reason to reverse the order denying rebuttal testimony.

Claimant also requests reconsideration of the Referee's ruling sustaining Defendants' objection and not admitting Exhibit 5 to Dr. King's deposition. Exhibit 5 is Dr. King's Notice of Privacy. The Commission does not find that it has relevant or probative value in this case and will not reconsider the prior ruling. Further, Claimant was aware that Dr. King's record stating that he learned Claimant may be functioning beyond the ability she displayed at his office and that Dr. King then stopped treating Claimant. Claimant had ample opportunity pre-hearing to investigate and depose necessary individuals.

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The Commission has reviewed the record with a focus on the details presented by Claimant in the motion for reconsideration and we still feel that the facts support the decision issued on February 17, 2012. The Recommendation's analysis took into account all the documentary evidence and testimony. Although Claimant disagrees with the Commission's findings and conclusions, 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 is DENIED.

IT IS SO ORDERED.

DATED this ___ 18th ___ 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 18th day of July, 2012, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION AND ERRATUM** was served by regular United States Mail upon each of the following:

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/s/ _____