

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANE M. MCCROREY,)
)
 Claimant,) **IC 2000-025583**
 v.)
)
 BOISE PAVING & ASPHALT CO.,) **ORDER DENYING**
) **RECONSIDERATION**
 Employer,)
 and)
)
 EXPLORER INSURANCE CO.,)
) Filed June 23, 2011
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL SPECIAL)
 INDEMNITY FUND,)
)
 Defendants.)
)
 _____)

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission’s decision in the above-captioned case. Claimant asserts that the Commission’s finding that Claimant was medically stable from June 30, 2009 until May 20, 2010 is not supported by substantial, competent evidence. Defendants argue that the finding is supported by the evidence in the record and that Claimant is merely rehashing evidence already considered.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must “present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented.” *Curtis v. M.H. King Co.*, 142 Idaho 383, 128

P.3d 920 (2005). The Commission is not inclined to re-weigh evidence and arguments simply because the case was not resolved in the party's favor.

A motion for reconsideration must be properly supported by a recitation of the factual findings or legal conclusions with which the moving party takes issue. On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986).

Claimant argues that her condition continued to deteriorate during the period of time that the Commission found her to be medically stable. She asserts that there is nothing medically significant about the dates June 30, 2009 or May 20, 2010.

As noted by the parties, Dr. Collins pronounced Claimant medically stable on or about March 26, 2009. At about the same time, Dr. Moore, Claimant's treating physician, was still searching for an explanation for Claimant's ongoing complaints. On or about April 22, 2009, Dr. Moore proposed that Claimant should be considered medically stable *if* nickel sensitivity could be ruled out as a possible explanation for Claimant's symptomatology. To that end, metal sensitivity testing was performed, the results of which were returned on June 30, 2009. The test showed that Claimant is sensitive to nickel. Thus, Dr. Moore concluded that Claimant was not medically stable, in that the test results suggested that her condition could be improved by replacement of the femoral component with a non-nickel bearing component.

In its decision, however, the Commission rejected the theory that Claimant's nickel sensitivity is implicated in explaining her ongoing symptomatology. Since this theory was rejected, it follows that the medical evidence fails to establish that Claimant's condition could be

improved by replacing the femoral component. One supposes that if Dr. Moore was asked to assume that his theory concerning nickel sensitivity was incorrect, even he would concede Claimant's medical stability, in keeping with his April 22, 2009 letter. Since the Commission did reject the theory proposed by Dr. Moore concerning the import of nickel sensitivity, we believe that the finding on medical stability is well-supported by the record.

As to why the Commission identified June 30, 2009 as the date of medical stability, we note that while neither Dr. Collins nor Dr. Moore identified this date, it is the date on which Dr. Moore received the results of the diagnostic studies that would allow him to determine whether Claimant was medically stable or in need of further treatment. Although the Commission ultimately rejected Dr. Moore's opinion on nickel sensitivity, we did find that the metal sensitivity test was reasonable for diagnostic purposes. As such, it is appropriate to find medical stability on the date that such testing was concluded and the results received. For this reason, the Commission adheres to the finding of medical stability as of June 30, 2009.

Concerning the Commission's finding that Claimant became medically unstable on May 20, 2010, this was the date on which Claimant's femoral component was noted to have loosened. Had there been persuasive evidence of femoral component loosening prior to May 20, 2010, then a different date of medical instability would be suggested. However, as we have reviewed the record, the most persuasive evidence suggests that the earliest date of femoral component loosening is May 20, 2010. Even though the Commission ruled that Claimant's nickel sensitivity theory is not implicated in the cause of her symptoms, the record nevertheless tends to establish that the femoral component loosening is a natural and probable consequence of the original injury and subsequent surgeries. In other words, the record does not establish any superseding intervening cause of the femoral component loosening that might break the chain of causation

between the original injury, and the loosening noted on the May 20, 2010 X-ray.

With regard to the opinions rendered by Dr. Collins between June 30, 2009 and May 20, 2010, it is clear that Dr. Collins was not of the view that Claimant was a surgical candidate. Had Dr. Collins been of that view, then such evidence would tend to support a conclusion that Claimant was not in a period of medical stability between June 30, 2009 and May 20, 2010. However, a review of Dr. Collins' records indicates that his discussions concerning a knee fusion were rendered with one important caveat. In his October 26, 2009 letter, he stated that *if* there was evidence of femoral component loosening, he would consider Claimant a candidate for a knee fusion, as opposed to a total knee arthroplasty revision. As we have discussed, there was no evidence of a femoral component loosening until May 20, 2010, and no persuasive evidence that the femoral component loosening predated the X-rays of that date.

Consequently, while we understand Claimant's position and appreciate the thorough discussion of the record in her brief, we are not persuaded by her arguments. We carefully considered all the evidence in the record, including the evidence Claimant discusses, before rendering the decision. The finding of medical stability is supported by the substantial, competent evidence in the record. For that reason, Claimant's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this 23rd day of June, 2011.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day June, 2011, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

JOHN F GREENFIELD
PO BOX 854
BOISE ID 83701-0854

THOMAS V MUNSON
PO BOX 7426
BOISE ID 83707-7426

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680-0857

eb

/s/