## BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE M. PERRY,	)
Claimant,	)
v.	) IC 1998-022572
KELLER SUPPLY COMPANY, INC.,	)
	) ORDER DENYING
Employer,	) RECONSIDERATION
and	
IDAHO INSURANCE GUARANTY	) filed April 12, 2010
ASSOCIATION, as successor in interest	)
to FREMONT INDEMNITY COMPANY,	)
Surety,	)
Defendants.	)
	)

On February 16, 2010, Claimant filed a motion requesting reconsideration of the Industrial Commission's decision filed January 29, 2010, in the above referenced case. Defendants filed a response on March 2, 2010. No reply was filed.

In the underlying decision Claimant sought additional medical care including reimbursement for an artificial disk replacement (ADR) surgery and an award of attorney fees for Defendants' unreasonable denial of that treatment. Claimant injured his low back while swinging a golf club at an Employer sponsored event on July 4, 1998. Claimant underwent two back surgeries, but neither relieved his pain. Several physicians advised against further surgery due to Claimant's severe degenerative disk disease. Claimant was declared stable on November 29, 2000, and given an impairment rating. Claimant's pain continued and he researched the artificial disk replacement surgery on the internet. In March 2005, without Surety's knowledge or approval, Claimant traveled to Germany and underwent an ADR surgery.

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The Commission found the evidence failed to show a meaningful physical improvement, that the majority of medical experts considered Claimant a poor candidate for an ADR surgery, and the record did not establish whether the ADR surgery was with the standard of practice in the United States. Thus, Claimant failed to prove his entitlement to medical treatment.

In his motion for reconsideration, Claimant argues that the ADR surgery did improve his symptoms because he was able to reduce his use of pain medication and was able to increase his activity level. Claimant contends that physicians did recommend surgical intervention but they could not agree on the type, and the only real hope of recovery was the ADR surgery. Finally, Claimant states that the ADR surgery was within the standard of practice of the physicians that performed the operations because Drs. King and Frizzell testified that the physicians in Germany pioneered the surgery.

Defendants aver that consideration of Claimant's motion is discretionary, and the Commission should deny the request because Claimant's arguments could have been made earlier but were not because Claimant failed to file a brief or reply brief. Defendants further argue that even if the Claimant's motion is addressed it is unpersuasive. Claimant ADR surgery was done on Claimant's own initiative without referral or notice to Surety and the treatment does not satisfy the <u>Sprague</u> criteria.

Under Idaho Code § 72-718, a decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudication; 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."

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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. <u>Davison v. H.H. Keim Co., Ltd.</u>, 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*, <u>Dennis v.School District No. 91</u>, 135 Idaho 94, 15 P.3d 329 (2000) (<u>citing Kindred v. Amalgamated Sugar Co.</u>, 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.

As set forth in the Commission's decision, Idaho Code § 72-432 obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician. Relevant factors in assessing reasonableness include the following: 1) a claimant should benefit from gradual improvement from the treatment, 2) the treatment was required by a claimant's treating physician, and 3) the treatment was within the physician's standard of practice and the charges were fair and reasonable. Sprague v. Caldwell Transportation, Inc. 116 Idaho 720, 779 P.2d 395 (1989).

Defendants argue that because Claimant did not file any post-hearing briefs, he has forfeited his right to present argument in support of his position. The Commission agrees that all parties are better served when briefing is completed prior to the issuance of the Commission's ORDER DENYING RECONSIDERATION - 3

decision. In this case, Claimant missed the original deadline for filing his brief. The parties then stipulated to a new briefing schedule which Claimant again ignored. Claimant's needless delay showed a serious disregard for the importance of litigated workers' compensation cases. Nonetheless, Claimant has filed a timely motion for reconsideration and the Commission will address his contentions.

Claimant argues that his testimony demonstrates that some of his pain had been relieved by the surgery, thus proving that the ADR surgery improved Claimant's situation. But Claimant fails to note the many medical records that explain the return of Claimant's back pain after the ADR surgery. Dr. Sant noted increased pain in Claimant's low back and increasing radicular pain after the ADR surgery. After the ADR surgery, Dr. Hajjar reported that Claimant continued to have severe back pain as well as lower extremity pain and numbness. Claimant's subjective testimony that he improved after his ADR surgery is also challenged by the fact that Claimant left his job due to the pain in 2005 after his ADR surgery. In all, the evidence supports the conclusion that Claimant did not show improvement after his ADR surgery.

Claimant argues that the ADR surgery was required by his physician because Dr. Binegar suggested it as an alternative. That Dr. Binegar may have made such a suggestion does not prove that a treating physician required this treatment. Drs. Larson, Regan, and King did not recommend the ADR surgery. As stated in the decision, although the physician performing the ADR surgery presumably recommended the surgery, the greater weight was given to the medical opinion arguing against the suitability of the ADR surgery for Claimant, an opinion later validated by Claimant's poor outcome.

Finally Claimant argues that the ADR surgery was within the standard for practice of the physician that performed the operation in Germany and the cost was less than other surgeries

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recommended by the local physicians. The Commission found that Claimant did not meet his burden of showing the treatment was within the physician's standard of practice and the charges were fair and reasonable because the record is void of any facts on this issue. Claimant contends that Drs. King and Frizzell testified that physicians in Germany developed and pioneered the surgery. Claimant further argues that he testified that the cost of the surgery in Germany was less than other surgeries recommended by the local physicians. The Commission finds that the vague facts pointed out by Claimant do not prove that the treatment was within the physician's standard of practice and the charges were fair and reasonable.

The Commission has reviewed the record with a focus on the concerns that Claimant has raised in the motion for reconsideration, and we still feel that the facts support the decision issued on January 29, 2010. The Commission's analysis took into account all the documentary evidence and testimony and found that Claimant failed to prove his entitlement to additional medical treatment including the ADR surgery. 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 finding that the care presumably "required" by Claimant's German surgeon was not reasonable.

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

IT IS SO ORDERED.

DATED this \_\_12th\_\_\_\_ day of April, 2010.

INDUSTRIAL COMMISSION

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	_/s/ Thomas E. Limbaugh, Commissioner
	_/s/Thomas P. Baskin, Commissioner
ATTEST:	
_/s/_ Assistant Commission Secretary	
CERTIFI	CATE OF SERVICE
I hereby certify that on foregoing <b>ORDER DENYING RECOM</b> Mail upon each of the following:	day of April, 2010, a true and correct copy of the ISIDERATION was served by regular United State.
CLINTON E MINER 4850 N ROSEPOINT WAY STE 104 BOISE ID 83717	
MARK PETERSON PO BOX 829 BOISE ID 83701	
sb/cjh	