

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 Sprague 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. 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.

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

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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

/s/
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on _____ day of April, 2010, 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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