**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| FRANCISCO SERRANO,<br>Claimant,<br>v.<br><br>FOUR SEASONS FRAMING,<br><br>Employer,<br>and<br><br>LIBERTY NORTHWEST INS. CORP.,<br><br>Surety,<br>Defendants. | ) | **IC 2004-501845**<br><br>**ORDER DENYING RECONSIDERATION**<br><br>Filed December 21, 2010 |

On September 14, 2010, Claimant filed a Motion for Reconsideration, requesting reconsideration of the Industrial Commission's Order filed September 7, 2010, in the above referenced case. Defendants filed a response on September 17, 2010.

The Commission ruled that since Claimant refused to provide Defendants with a response to discovery intended to ascertain Claimant's immigration status, and since Claimant's status is relevant to Claimant's entitlement to disability in excess of impairment, the sanction for failing to provide the requested information is the dismissal of the claim for disability in excess of impairment, at least until such time as Claimant provides the requested information.

In his motion for reconsideration, Claimant argues that any admission by Claimant that he is not a United States citizen would give rise to the immediate conclusion that Claimant committed perjury, document fraud, Social Security fraud, identity theft, or other crimes. Claimant also contends that the Commission's Diaz v. Franklin Building Supply, I.C. 2006-

507999 is not applicable, that Claimant's relevant labor market may not be the United States, that Defendants' discovery request is overly broad, and that Defendants are estopped from taking a position contrary to their previous position that the Industrial Commission does not have jurisdiction over constitutional issues.

Defendants aver that all pertinent arguments and authorities have already been briefed and discussed in the prior motions filed on this exact issue. Defendants request the Commission deny Claimant's motion.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." Curtis v. M.H. King Co., 142 Idaho 383, 388, 128 P.3d 920 (2005).

On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. 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.

On his motion for reconsideration Claimant's principal argument is that any statement from Claimant about his immigration status could be used against him in a criminal matter. In its original decision the Commission ruled, inter alia, that although Claimant's immigration status might subject him to a risk of deportation, deportation is a civil, rather than criminal procedure, and therefore Fifth Amendment considerations do not apply. Claimant evidently concedes this point, but also argues that because of the way he may have filled out the Form I-9 Employment Eligibility Verification, to require him to respond to Defendants' discovery requests may put him at risk for criminal prosecution for perjury, false use of a Social Security number, identity fraud, etc. Is it worth noting that it is unknown whether Claimant did fill out a Form I-9, or if he did, what averments he made on that form. However, to move this matter forward, the Commission will assume, for the sake of discussion, that Claimant made one or more false averments.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274, 281 (1973). Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (1984). The availability of the Fifth Amendment privilege against self-incrimination "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527, 558 (1967). A witness protected by the privilege may rightfully

refuse to answer unless and until the witness is granted immunity from the use of the compelled answers in any subsequent criminal case in which the witness is a defendant. Murphy, 465 U.S. at 426, 104 S.Ct. at 1141, 79 L.Ed.2d at 418. If he or she is nevertheless compelled to answer without immunity, the answers are inadmissible against the witness in a later criminal prosecution. Id.

> "To claim the privilege validly a defendant must be faced with ' "substantial hazards of self incrimination" ' ... that are ' "real and appreciable" and not merely "imaginary and unsubstantial." ' [Citations.] Moreover, he must have 'reasonable cause to apprehend [such] danger from a direct answer' to questions posed to him....
> In determining whether such a real and appreciable danger of incrimination exists, a trial judge must examine the 'implications of the question[s] in the setting in which [they are] asked ....' [Citations.] He ' "[m]ust be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." ' [Citations.] If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists, it then becomes incumbent 'upon the defendant to show that answers to [the questions] might criminate him.' [Citations.] This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him ' "to prove guilt to avoid admitting it." ' [Citations.] But neither does the law permit the defendant to be the final arbiter of his own assertion's validity. 'The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself-his say-so does not of itself establish the hazard of incrimination. It is for the court to decide whether his silence is justified ....' [Citations.]"
> Idaho State Tax Commission v. Peterson, 107 Idaho 260, 262, 688 P.2d 1165, 1167 (1984).

Accordingly, to assert a valid claim of privilege, Claimant must demonstrate that the hazards of self-incrimination are real and appreciable, and that he has reasonable cause to apprehend such danger from a direct answer to the questions posed to him in Defendants'

discovery request. In making this determination, the trier of fact is charged with examining the implications of the questions and the setting in which they are asked and making some determination as to whether or not, under the particular facts of the case, a threat of self-incrimination exists. Here, the Commission has considered the facts of this case in view of the peculiar issues before the Industrial Commission on a claim for disability in excess of physical impairment. We find that the hazard of self-incrimination is not real and appreciable, and that the Claimant does not have cause to fear criminal prosecution from a direct answer to the questions posed to him by Defendants in their discovery request. It strikes the Commission that the principal risk Claimant faces if he is indeed in this country illegally, is deportation which, as we have noted, is a civil, not a criminal, proceeding.

Claimant makes additional arguments regarding the proper labor market for the disability analysis. A discussion and determination on the issue of Claimant's relevant labor market is not necessary at this point in time nor is the issue currently before the Commission.

Claimant also alleges that Defendants are estopped from taking a position contrary to their previous position that the Industrial Commission does not have jurisdiction over constitutional issues. Defendants made an argument in the alternative in their prior filings which is reasonable and does not bar them from responding to Claimant's motion.

Finally, the Commission will not grant immunity for any statements Claimant may provide. The Commission is granted specific powers and it is without the power to grant or enforce such a request. The Commission has jurisdiction over all questions arising under the workers' compensation law. Idaho Code § 72-707. This includes the discovery motions that the parties have filed in this matter, including Defendants' motion to compel.

The Commission has reviewed the file with a focus on the concerns that Claimant has

raised in the motion for reconsideration and we maintain that facts of the case and the legal analysis support the order. Although Claimant disagrees, the Commission finds that the Order filed September 7, 2010, is correct and that Claimant has not presented persuasive argument to disturb the order.

Claimant has urged us to read Diaz v. Franklin Lumber Company, *supra*, narrowly, and argues that even if read broadly, it should not be applied to make Claimant's immigration status relevant in this matter. Without deciding how Diaz, *supra,* might apply to the facts of this case, it is clear, under either the majority or minority opinion in that case, that Claimant's immigration status is, at the very least, relevant to a determination of the issue of Claimant's disability in excess of physical impairment.

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

IT IS SO ORDERED.

DATED this __21st_____ day of December, 2010.

INDUSTRIAL COMMISSION

_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on __21st_____ day of___December_____, 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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sb/amw _/s/_____