

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,)
)
 Claimant,)
)
 v.)
)
 J.R. SIMPLOT COMPANY,)
)
 Self-Insured Employer,)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

**IC 2007-012004
2007-038938**

**ORDER DENYING
RECONSIDERATION**

filed August 18, 2010

Employer filed a motion for reconsideration on July 1, 2010. Claimant filed his response to the motion for reconsideration on July 14, 2010. The Industrial Special Indemnity Fund (ISIF) filed a response opposing the motion for reconsideration on July 21, 2010. In the underlying case, the Commission found that Claimant had proven that he is totally and permanently disabled, and that the ISIF is not liable for Claimant’s benefits and the Complaint against the ISIF should be dismissed with prejudice.

Employer argues that the Commission’s finding that the ISIF has no liability to Claimant is not supported by substantial and competent evidence as required by the law. Further, Employer argues that the Commission did not set forth its reasoning for determining that Claimant is totally and permanently disabled based solely on his five pound lifting restrictions, in contravention of the *Ellison v. Bunker Hill Company*, 96 Idaho 317, 528 P.2d 1999 (1974) and *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 521 P.2d 658 (1974) decisions. Employer also contends that Mr. William Jordan’s and Dr. Blair’s testimony was flawed. Employer

argues that the Commission should have relied on Dr. Nancy Collins' opinion. Employer argues that Claimant had significant restrictions following his 2001 injury, and that "Claimant was allowed to work at Simplot despite injuries and limitations that would have prevented him from doing so in the absence of his near-heroic efforts and Simplot's stalwart encouragement and assistance." Employer's Br., p. 11. Employer argues that that Commission is unfairly burdening Employer in this matter, given that the ISIF was created to encourage employers to hire employees with disabilities. Employer requests that the Commission enter an order reconsidering its decision, and reversing the finding that the ISIF is not liable for any portion of Claimant's benefits.

ISIF argues that the Commission correctly determined that Claimant was totally and permanently disabled due to his last accident. ISIF contends that Dr. Blair's testimony is not ambiguous in context of the case, and that it was appropriate to adopt Mr. Jordan's testimony over Dr. Collins' testimony. ISIF counters that Dr. Collins' testimony had weaknesses, particularly Dr. Collins' testimony about the availability of jobs in the relevant labor market. ISIF argues that this case had significant non-medical factors, including Claimant's age, education, lack of transferable skills, the current economic downturn, and the labor market, which influenced the case's outcome. ISIF requests that the Commission uphold the finding that the ISIF is not liable for Claimant's benefits, because Claimant's nonmedical factors, combined with his 5-pound lifting restriction from his last industrial accident, render him totally and permanently disabled.

Claimant fully supports the Commission's determination that he is totally and permanently disabled. However, Claimant will defer to the Commission's judgment as to whether and Employer and ISIF should share liability for his last industrial accident.

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. 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.” Generally, greater leniency is afforded to *pro se* claimants. 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 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)).

The Idaho Supreme Court has recognized that the ISIF was created for two purposes, “to encourage the hiring of the handicapped and, as a corollary, to relieve employers of the unfair burden of paying total permanent disability compensation when only part of the disability was due to the industrial accident.” *See, Gugelman v Pressure Treated Timber Co.*, 102 Idaho 356 at 360, 630 P.2d 148 at 152 (1981). However, it is noted that the ISIF shares the burden of paying

total disability compensation *when only part of the disability* was due to the industrial accident. A claimant must meet the four requirements under Idaho Code § 72-332 to show ISIF liability, as explained in *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). These requirements for ISIF liability include:

1. Whether there was indeed a preexisting impairment;
2. Whether that impairment was manifest;
3. Whether the alleged impairment was a subjective hindrance; and
4. Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

In this case, the Commission was persuaded that Claimant was totally and permanently disabled due to the restrictions and non-medical factors connected with his *last industrial accident alone*. As mentioned in the Commission's decision, there is no "combination" if the disability would have been total regardless of preexisting conditions. *Selzler v. State of Idaho, Industrial Special Indemnity Fund*, 124 Idaho 144, 857 P.2d 623 (1993).

In support of its motion for reconsideration, Employer argues that the evidence of record clearly establishes that Claimant's pre-existing impairment constituted a subjective hindrance to Claimant prior to the subject accident, and that it is only by virtue of the combined effects of the pre-existing impairment and the work accident that Claimant is rendered totally and permanently disabled. The Commission agrees that Claimant's pre-existing impairments did hinder him in his ability to engage in gainful activity prior to the work accident. However, the claim against the ISIF nevertheless fails since the Commission is persuaded that the injuries resulting from the subject accident, standing alone, are sufficient to cause permanent and total disability. In short, the "combining with" component of the test is not satisfied.

Claimant's limitations from the last industrial accident include a 5-pound lifting restriction and hoarseness from his damaged vocal cords. Employer's expert, Dr. Collins, argues that Claimant might be able to perform in a customer service position with his industrial accident impairments, if it were not for his pre-existing hearing loss. Thus, Employer argues that the "combining" element is satisfied because it was Claimant's pre-existing hearing loss plus Claimant's cervical lifting restriction that made customer service jobs unavailable to him. The ISIF argued that Claimant's relevant non-medical factors, including Claimant's temperament, sophistication, geographic locale, native intelligence, combined with his 5-pound lifting restriction, and hoarseness preclude the positions Dr. Collins suggested from being truly available to Claimant. Further, if Claimant is unable to talk after a while, due to his vocal hoarseness, the Commission is not persuaded that the customer service position was really an acceptable position for Claimant, regardless of his pre-existing hearing impairment.

The Commission has previously considered the relative merits of the opposing expert testimony in this case. Inconsistencies in testimony may affect the credibility of an expert, but witnesses and experts are not expected to be infallible in order to present credible testimony before the Commission. Viewed as a whole, it is clear from Dr. Blair's and Mr. Jordan's testimony that Claimant's was totally and permanently disabled due to the restrictions identified in his last industrial accident. It is understandable that Employer finds the testimony of their own witness more credible than that of the opposing side. However, Dr. Collins' testimony was not without weaknesses, particularly with respect to identifying positions realistically available to Claimant in the Soda Springs area.

Quite apart from the issue of the significance of Claimant's pre-existing limitations/restrictions, the evidence persuades the Commission that the subject accident alone is sufficient to render Claimant totally and permanently disabled.

For the foregoing reasons, Employer's Motion for Reconsideration should be, and is hereby, **DENIED**.

IT IS SO ORDERED.

DATED this 18th day of August, 2010.

INDUSTRIAL COMMISSION

 /s/
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 this 18th day of August 2010, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

WES L SCRIVNER
PO BOX 27
BOISE ID 83707-0027

LAWRENCE E KIRKENDALL
2995 N COLE RD STE 260
BOISE ID 83706

cs-m/cjh

 /s/ _____