BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DEACON EASTERLY, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2012-005507** **ORDER DENYING RECONSIDERATION**

Pursuant to Idaho Code § 72-718 and Rule 3 (G) of the Judicial Rules of Procedure (JRP), Claimant timely moves for reconsideration of the Industrial Commission's decision of October 20, 2023. Defendant Industrial Special Indemnity Fund (ISIF) responded on November 22, 2023. Claimant filed no reply.

In addition to a motion and supporting memorandum, Claimant filed Dr. Jacobsen's Declaration in Support of Motion for Reconsideration (Dr. Jacobsen's Declaration) as well as the Declaration of Deacon Easterly in Support of Motion for Reconsideration (Claimant's Declaration). The Response filed by ISIF does not address the Declarations' admissibility into the record or their content. However, according to Rule 10 (F), JRP, "only those documents which have been admitted as evidence shall be included in the record of proceedings of the case." However, because ISIF did not object, and because the evidence does not effect the outcome of this case, both Dr. Jacobsen's Declaration and Claimant's Declaration will be admitted into the record.

CONTENTIONS OF THE PARTIES ON RECONSIDERATION

Claimant's Argument. Claimant contends he met his burden of proving the fourth element of ISIF liability - that the pre-existing eye injury "combined with" his 2012 industrial injury to his right lower extremity - for the following reasons: First, Dr. Jacobsen has opined Claimant is totally and permanently disabled due to a combination of his pre-existing impairments and his February 24, 2012, industrial injury. Second, contrary to the Commission's findings, Claimant's headaches were a subjective hinderance to employment which qualifies the eye condition for consideration. The eye condition did limit his activities prior to the industrial injury. Third, Claimant's August 12, 2011, left eye injury with resulting photophobia and headaches precludes him from sedentary computer jobs which were recommended by vocational rehabilitation expert Sara Statz, so ISIF cannot meet its burden of proving a regular suitable job after the odd lot status was determined to exist.

In support of these reasonings, Claimant points out serval factual and legal considerations: First, Findings of Fact 105, 51, and 81 require revision in order to accurately convey the opinion of Dr. Jacobsen. In that regard, more than Dr. Jacobsen's opinion is relevant to the issue of the "combines with" element of ISIF liability. See *Green v. Green,* 160 Idaho 275, 285, 371 P.3rd 329, 339 (2016). Second, Finding of Fact 94 requires correction to accurately reflect that the headaches from the 2011 eye injury were a "subjective hinderance" before the 2012 industrial injury. This is evidenced by Dr. Jacobsen's chart notes generated in 2013, 2016, and 2020; Dr. Moffatt's chart notes of 2011; Dr. Bensinger's chart note of 2012; and Dr. Skoog's chart note of 2015. Third, Finding of Fact 104 is inaccurate because there is evidence that "... but for Claimant's left eye injury, Claimant would not be totally and permanently disabled." For one thing, this evidence can be found in Dr.

Jacobsen's medical records. For another thing, because vocational expert Barbara Nelson had not reviewed the doctor's March 2013 record regarding a history of headaches aggravated by bright lights, she was not able to testify to evidence proving the "but for" requirement. Finally, Idaho Code § 72-425 and *Lyons v. Industrial Special Indem. Fund,* 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977), require the Commission to consider whether he could have worked for Qualfon after a brief period of retraining. Claimant's own "extensive job search" performed with the aid of the Commission's Rehabilitation Division was unsuccessful. The application process for a customer service job at the sedentary level which fit within Claimant's restrictions ceased once the Qualfon representative learned Claimant wears a protective contact lens for computer work.

As general propositions, Claimant reminds the Commission to construe facts liberally in favor of compensability per *Sprague v Caldwell Transportation, Inc*, 116 Idaho 720, 779 P.2nd 395 (1989); and to apply statutes free from narrow technical construction per *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759, 910 P.2d 759 (1996).

Defendant's Arguments. Defendants argue the Commission is presented with no new factual or legal propositions to keep the Commission from simply "… rehashing evidence previously presented" as held in *Curtis v. MH King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). Primarily, the Defense argues Claimant has failed to prove that "but for" the pre-existing impairment, he would not have been totally and permanently disabled. First, Finding 104, accurately states that Claimant was rendered totally and permanently disabled by his ankle injury alone. Claimant and Dr. Jacobsen both testified that the injury and chronic nerve pain and the side effects of the pain medication (sedation and variable cognitive impairment) make working impossible for Claimant. Dr. Jacobsen's opinion, located in Finding of Fact 98,

states that: sedation and mental impairment make Claimant unable to commit to consistent and reliable work attendance; nerve damage and imbalance limits his ability to stand or walk for prolonged periods; and sitting in one position for prolonged periods triggers his nerve pain. She opines he is a fall risk, he cannot drive while sedated, and that his medication must be taken consistently to be effective. Citing the record, Defendant contends it has been proven by Dr. Jacobsen's deposition testimony that Claimant's 2012 industrial injury leads to three basic problems: intractable nerve pain, sleep deprivation, and a tenuous mood. Also in Finding 63, is Barb Nelson's testimony that Claimant's pre-existing visual impairment or wrist restriction are not necessary in order to make a total permanent disability finding; his industrial injury restrictions and the effects from the medication preclude Claimant from finding work.

Second, Defense contends Claimant is not qualified for sedentary work regardless of his photophobia and screen-induced headaches, as stated in Finding 99. Vocational experts Statz and Nelson agreed he is not qualified for sedentary work and has no transferable skills necessary for those positions. Statz pointed out Claimant's GED will likely cause him to be turned away from sedentary work in the future. Lack of computer skills and clerical skills would require extensive retraining before he could qualify for sedentary work. Nelson agreed in her deposition that Claimant is precluded from such employment for lack of computer skills. Statz also gave opinions about the impacts of Drs. Jacobsen's and McNulty's restrictions on Claimant's disability. Dr. Jacobsen's restrictions would render Claimant totally and permanently disabled. Dr. McNulty's would do the same. Statz even stated the emotional stress of work would be of concern.

Third, Defense contends the record will not support a finding that Claimant's eye injury was a subjective hinderance to employment prior to the 2012 industrial injury. Defense relies on this finding of the Commission for the proposition that "[s]pecifically, the Commission found that the Claimant did not complain of headaches related to screens until December of 2020…." ISIF Response, p. 9. *See,* Finding 49. The pre-existing light sensitivity was corrected with the dark contact lens prescription on December 13, 2011. Headaches from screen use were not recorded until 2020 by Dr. Jacobsen. And Dr. Berg released Claimant on November 29, 2011, (only 3 months before his industrial accident) without restrictions.

Finally, Defense argues Idaho Code § 72-425, which addresses a permanent disability evaluation, is irrelevant to the "combines with" element of ISIF liability analysis in light of the fact that legal analysis of that element turns on whether Claimant can prove that "but for" the pre-existing impairments, he would not have been totally and permanently disabled. *Eckhart v. State Indus. Special Indem. Fund*, 133 Idaho 260, 985 P.2nd 685 (1999) citing *Bybee v State Industrial Special Indem. Fund*, 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996), *Garcia v. J.R.Simplot Co.,* 115 Idaho 966, 772 P.2d 173 (1989); *Selzler v. State Indus. Special Indem. Fund*, 124 Idaho 144, 857 P.2d 623 (1993).

STANDARDS FOR MOTIONS TO RECONSIDER

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, "[i]t is axiomatic that a [party] must present to the Commission new reasons factually and legally to support a hearing on [a] 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). The Commission may reverse its decision upon a motion for reconsideration, or rehear 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. *Whitmore v. Cabela's*, 021611 IDWC, IC 2007-033768 (Idaho Industrial Commission Decisions, 2011). 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.

DISCUSSION

The over-arching and noticed issue on reconsideration is whether ISIF is liable to Claimant under Idaho Code § 72-332(1). The decision cites the appropriate statute and case law. Broadly speaking, the Commission has weighed the evidence and concluded Claimant was totally and permanently disabled under odd-lot theory as a result of the 2012 industrial ankle injury alone. Correspondingly, an analysis of ISIF liability, which turns on the fourth element of Idaho Code § 72-332(1) in this case, does not support a finding of ISIF liability.

Idaho Code § 72-332(1) - The Fourth Element

As it is dispositive in this case, the Commission will first consider arguments on reconsideration about the fourth element of ISIF liability under 73-332(1). Did the combined effects of the Claimant's pre-existing conditions and the industrial injury result in total permanent disability? The Commission remains convinced it did not.

At the time of the hearing, and with the benefit of the opinions of the vocational experts, the Commission recognized that the effects of the industrial injury eclipse the effects of any pre-existing conditions in this case. One piece of evidence is especially informative. Dr. Jacobsen, Claimant's general treating physician, issued an all-encompassing open letter, dated September 10, 2021, regarding Claimant's physical conditions and employment considerations. The limitations discussed in that letter which are relevant to Claimant's ankle injury alone include: sedation, cognitive impairment, and fall risk from Gabapentin and Nortiptyline prescribed for the nerve pain in his foot; no working or driving while experiencing medication-induced cognitive fog; no standing or walking for long periods; climbing or ambulating on even, dry surfaces only; sitting in one position is problematic because it causes nerve pain in his lower extremity.

Beyond the ankle injury and its restrictions, the Commission considers Claimant's non-medical factors. Claimant has little to no computer skills, a GED, and his age at the time of hearing is 51. With a residence in Post Falls, his labor market is the Spokane/Coeur'd Alene area.

The effects of the ankle injury for this Claimant in this labor market are so pervasive and all-encompassing, that the effects of the pre-existing conditions are either directly eclipsed or indirectly subsumed. It was clear to the vocational experts that the effects of the ankle injury impact every reasonable opportunity Claimant has for employability. They understood the medical experts' restrictions - those in effect before February 2, 2012, and those which arose exclusively from the industrial injury. They understood the medical experts' restrictions well enough to issue their pertinent opinions credibly. In paragraph 100 of the Decision, the pertinent mutual conclusion of both experts was that "Dr. Jacobsen's

restrictions render Claimant totally and permanently disabled." On reconsideration, this Commission still agrees. Gabapentin and Nortrypteline have strong sedative effects which prevent Claimant from driving to work, from being reliable for work, and from performing employment tasks in a safe manner. Even if the sedative effects of the medication were not considered, Claimant's sitting restriction originating from the ankle injury would prevent him from performing sedentary work.

On this point, and contrary to the Commission's conclusion above, Claimant's Declaration brings forth the following most-formidable facts:

> 1. Claimant has experienced light sensitivity and light-induced headaches since the 2011 eye injury. Declarations 3 and 4
>
> 2. After the 2011 eye injury, and until being discharged from Ground Force (for whom he was employed when he incurred the subject ankle injuries in 2012 and 2013) in 2016, he typically viewed computers for no more than a few minutes at a time. Declaration 5.
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> 3. During his work search he was informed by Qualfon and US Bank call center in Coeur d'Alene "... that they could try to accommodate my ankle/leg injury restrictions but viewing a computer screen for hours each day is one of the essential duties of that job...." Declaration 8.

As in the initial decision, the Commission on reconsideration invokes case law precedent which denies ISIF liability under the "combined effects" element of Idaho Code § 72-332. See, *Andrews v State Industrial Special Indemnity Fund*, 162 Idaho 156, 395 P.3d 375 (2017) citing *Eckhart v State, Indus. Special Indem. Fund*, 133 Idaho , 985 P.2d 688 (1999)

The fact that the headaches existed between 2011 and 2016, does not mean they were a subjective hinderance under Idaho Code § 72-332. In order to qualify for ISIF liability, pre-existing conditions must be a subjective hinderance to the Claimant's employment. At the

time of the industrial injury in 2012 Claimant was working, the contacts he had been prescribed enabled him to weld and drive. Findings 8 and 9. Just two months after the 2012 industrial injury, Dr. Besinger had declared the pre-existing eye condition stable, issued no restrictions other than the "self-imposed one of wearing his dark lens so he could…" weld, and rated it 3% of the whole person. Finding 9.

The Commission is also not persuaded by the final two most-formidable facts contained in Claimant's Declaration – that, between the 2011 eye injury and the time he was discharged in 2016, he typically viewed computer screens at work for no more than a couple minutes at a time; and that his work search was unsuccessful because the eye injury was perceived by Qualfon and US Bank as an insurmountable barrier to the essential job duties in their sedentary positions which require hours of viewing a computer screen each day. These facts go toward the fundamental analytical question asking, "what caused Claimant to be totally and permanently disabled?" The full effects of Claimant's industrial injury are determinative to this issue. They took time to evolve, most fundamentally between 2016 and 2018, by which time a heavy pain medication protocol, a foot brace, and maximum medical improvement were established. The vocational experts, who both agreed on a singular cause of total disability based on Dr. Jacobsen's September 10, 2021, letter, continue to persuade this Commission that the ankle injury alone rendered Claimant totally and permanently disabled. In other words, it was not Claimant's eye injury which rendered these positions unsuitable, but the sedative effects of his medication. Regarding Claimant looking at computer screens for only minutes at a time prior to the industrial injury, that is not affirmative evidence of a subjective hinderance to employment and, therefore, it is irrelevant to the ultimate question Claimant asks us to reconsider.

For these reasons stated above, it remains impossible to find that "but for" the combined effects of Claimant's pre-existing impairments and those of the industrial injury, he would not be totally and permanently disabled.

Subsumed Arguments of the Parties

We now turn to the other arguments of counsel. These factual and legal assertions are subsumed in the analysis above. They are listed as follows:

Claimant assertions:

1. Claimant's cornea injury and resulting light-induced headaches pre-existed the industrial injury and were a subjective hinderance to employment.
2. Statz found a path to a total perm finding that includes the eye injury; and Nelson did not understand an important fact about the serious effect of the eye injury which happened in March, 2013.
3. Idaho Code § 72-425 necessitates the left eye injury be considered in calculating permanent disability, thereby satisfying the "combines with" element of ISIF liability. Since odd lot total permanent disability is declared by the Commission, the burden shifts to ISIF to show a job that is regularly available and suitable to Claimant under *Lyons v State Special Indem. Fund,*98 Idaho 403, 565 P.2d 1360 (1977).

ISIF assertions:

1. Regardless of the effects of the cornea injury, Claimant is not qualified to work sedentary jobs because of his education, lack of skills, and the restrictions issued by Dr. McNulty in September, 2022.
2. The left eye cornea injury was not a subjective hinderance because his screen-induced headaches were not mentioned until well after the industrial injury, and he was able to keep working until sometime after the industrial injury.

Dr. Jacobsen's Full Opinion and Its Effect on Decision Paragraph 105

The Commission now turns to address the last viable argument of Claimant. Claimant argues that Dr. Jacobsen's testimony, 2021 letter, and Declaration amount to a medical opinion that "it is a combination of Claimant's pre-existing conditions and his accident-produced restrictions that result in total permanent disability." Therefore, it is argued, paragraph 105 is erroneous.

As Claimant points out, the Idaho Supreme Court has ruled as follows:

> There is no requirement that a precise "but for" question be directed to a physician as a prerequisite to ISIF liability. The issue of whether a total permanent disability is the result of the combined effects of a pre-existing and work-related injury is more expansive than a simple medical inquiry because a determination of total permanent disability necessarily takes into account non-medical factors.

Green v Green, 160 Idaho 275, 285, 371 P.3d, 339 (2016). However, in Claimant's case, the precision of the "but for" concept as it is worded by the doctor is not called into question by this Commission. It is the broader picture painted by her medical opinion - the letter and its contents about the effects of medication in particular - which is especially persuasive. Even Dr. Jacobsen's newly admitted statement that "I believe that the Claimant is totally and permanently disabled due to a combination of his pre-existing impairments to include his 2011 left eye injury in combination with his 2012 right lower extremity injury, as previously stated in my letter dated 9-10-21...." will not meet the "combined effects" requirement of Idaho Code § 72-332(1) in the context of this case. Just as the Commission cannot "inject its own unqualified medical opinion to draw a conclusion from the evidence" (*Corgatelli v Steel W., Inc.,* 157 Idaho 287, 297, 335 P.3d 1150, 1160 (2014)), it is the Commission who weighs the expert medical opinions, including Dr. Jacobsen's more recent, pointed opinion. We remain unpersuaded that it was the combined effects of his eye injury and ankle injury which rendered Claimant totally and permanently disabled. As explained above, the effects of the industrial accident alone render Claimant totally and permanently disabled. Therefor it cannot be said that "but for" the pre-existing conditions the Claimant would not be totally and permanently disabled.

However, Dr. Jacobsen's post-decision declaration has been admitted by the Commission on reconsideration, thereby rendering the first sentence in paragraph 105 of the

Decision inaccurate. A physician has now declared that Claimant's total and permanent disability is the result of the combined effects of his pre-existing impairments and accident-produced impairment. We simply point out now, on reconsideration, that we have dealt with the complexity of the doctor's full opinion and addressed its significance in this case. The ISIF presented evidence that the elements of ISIF liability were not met, and the Referee found that evidence persuasive.

ORDER

Based on the foregoing, Defendants' request for reconsideration is DENIED. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this _16th_____ day of __February_____, 2024.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Attest:

Kamerron Slay
Commissioner Secretary

Aaron White, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on the _16th_____ day of __February_____ 2024, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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