

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

FRANCISCO AMEZQUITA,

Claimant,

v.

FILLER KING,

Employer,

and

INSURANCE COMPANY OF THE STATE  
OF PA,

Surety,

Defendants.

**IC 2018-000004**

**IC 2015-003000**

**ORDER GRANTING  
RECONSIDERATION  
AND VACATING DISMISSAL**

**Filed March 4, 2019**

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On January 31, 2019, Claimant filed his Motion for Reconsideration of the Commission's December 21, 2018 Order dismissing Claimant's Complaints. In support of his motion, Claimant argues that the Complaints should not have been dismissed since action had been taken on the cases by Claimant within the six-month period prior to the filing of the Commission's Notice of Intent to Recommend Dismissal on November 19, 2018. Claimant contends that on or about November 30, 2018, he prepared a response to the Notice of Intent to Recommend Dismissal. Counsel contends that because his response was lost, or for some other reason, it was not filed with the Industrial Commission. On or about December 21, 2018, the Commission entered its Order of Dismissal noting that neither party had responded to the November 19, 2018 Notice of Intent to Recommend Dismissal. The dismissal was without prejudice with respect to Claimant's Complaints. Claimant contends that it was not until receipt of the Commission's Order of

Dismissal that he realized that his November 30 response had not been filed with the Commission.

Thereafter, Claimant filed his Motion to Retain Case on Active Calendar with the Commission on December 31, 2018. Claimant contends that after the filing of said document he was contacted by a legal assistant employed by the Industrial Commission who advised him that his Motion to Retain was improper, and that since the Commission had entered its Order dismissing the Complaint, he would be required to file a Motion for Reconsideration under Idaho Code § 72-718 in order to revisit the matter. Further, Claimant contends that he was advised by the legal assistant that he had until February 1, 2019 within which to file his Motion for Reconsideration. Claimant filed his Motion for Reconsideration and supporting memorandum by fax on January 31, 2019. Claimant contends that because the case had been active within six months prior to the November 19, 2018 Notice of Intent to Recommend Dismissal, and because a timely motion for reconsideration had been filed, that it is appropriate to reinstate the Complaints.

In response, Defendants argue that no action was taken by Claimant to prosecute his claims within the six-month period prior to the Notice of Intent to Recommend Dismissal, that reinstatement of the Complaints is pointless since Claimant may simply refile his Complaints per the Commission's Order of Dismissal<sup>1</sup>, that Claimant's assertion concerning the preparation of his November 30, 2018 Motion to Retain, without more, is insufficient to prove a mistake or excusable neglect concerning the filing of the same and that the Motion for Reconsideration is not timely filed pursuant to Idaho Code § 72-718 and JRP 3(G).

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<sup>1</sup> Indeed, if Claimant is free to refile his complaints, why the hullabaloo? Possibly, the limitation provisions of Idaho Code § 72-706 apply to the claim for the 2017 accident; no benefits appear to be paid on that claim, giving Claimant only one year from the date of the claim within which to file his Complaint.

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 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 reconsideration. Davidson v. H.H. Keim Co., Ltd., 110 Idaho 758, 718 P.2d 1196 (1986). 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. 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.

### **ANALYSIS**

As noted, on or about November 19, 2018, the Commission served the parties with its Notice of Intent to Recommend Dismissal based on the appearance, from the legal file, that Claimant had taken no action within six months prior to November 19, 2018 in the prosecution of his claims. Claimant was given 21 days within which to demonstrate that the matter should be

retained on the Commission's calendar. Although Claimant prepared a response on November 30, 2018, that response was, for whatever reason, was not filed with the Industrial Commission. Defendants contend that, at the very least, Claimant's assertions should be supported with a copy of the document he prepared on November 30, 2018. From the documents filed by the parties we conclude that had Claimant filed a timely request with the Commission to retain this matter, that motion would most likely have been granted. The fact that no pleadings were filed in the case between approximately May of 2018 and November of 2018 does not demonstrate that no action had been taken in the case during the six months preceding November 19, 2018. Clearly, other communications and activities were ongoing. For example, Defendants assert that on September 12, 2018, Claimant's counsel advised defense counsel that a settlement offer had been prepared but was awaiting approval by Claimant. The settlement offer was evidently not forthcoming, causing Defendants to advise Claimant on or about November 13, 2018 that they wished to schedule his deposition. (See Defendants' Response to Claimant's Motion to Reconsider at pp.4-5). From the foregoing, and giving Claimant the benefit of the doubt, we conclude that action sufficient to have warranted the Commission's retention of the matter on its calendar could have been demonstrated. However, no evidence sufficient to warrant retention was received by the Commission within the time allotted, thus causing the Commission to enter its Order dismissing the Complaints without prejudice pursuant to JRP 12(b).

Per Idaho Code § 72-718, Claimant had twenty (20) days from December 21, 2018 within which to file a motion for reconsideration and supporting brief as contemplated by JRP 3(G). Instead, on or about December 31, 2018, Claimant filed his Motion to Retain Case on Active Calendar. No supporting brief was filed. However, in his motion, Claimant asserted that the case

had been active prior to dismissal and that the Commission should reverse its dismissal and retain the case on its calendar.

Counsel next asserts that on or about January 4, 2019, his office was contacted by “Shanoa” [sic - Shannowa] from the Industrial Commission who made the following request of Claimant concerning the December 31, 2018 Motion to Retain:

That day, Shanoa contacted my assistant and requested we file a motion for reconsideration, rather than a motion to retain, and that we do so by February 1, 2019.

(Affidavit of Randall Schmitz in support of Motion for Reconsideration at p.2).

Notably, Mr. Schmitz did not talk with “Shanoa,” and the statements attributed to her were reported by Mr. Schmitz’s assistant. What the Industrial Commission legal assistants did or did not say is not made of Mr. Schmitz’s personal knowledge.

The Industrial Commission legal file contains a note prepared by Shannowa Carver, Legal Assistant to Alan Taylor, the referee assigned by the Commission to this case. The note references the conversation alluded to in Mr. Schmitz’s Affidavit, and reads in its entirety as follows:

On January 4, 2019 around 10 am after receiving Claimant’s Motion to Retain, I called Skaug Law and spoke to Mr. Schmitz’s assistant. I stated that due to the dismissal being signed on December 20, 2018 the Motion to Retain would not suffice and that if they wanted the Dismissal to be reconsidered they would need to file a Motion for Reconsideration. I also stated that the sooner the better for filing the Motion for Reconsideration, as the Legal file would completely close out on February 1, 2019.

Per Ms. Carver, she did not advise Claimant that he had until February 1, 2019 to file his motion for reconsideration. Rather, she advised that a motion for reconsideration would have to be filed in lieu of the motion to retain, and that it should be filed sooner rather than later in view of the fact that the legal file would completely close out on February 1, 2019. That date is significant

because it demarks the end of the period within which Claimant could take an appeal of the Commission's Order to the Supreme Court, and we do not believe that Ms. Carver's notation of her conversation with counsel's office, read literally, signaled to Claimant that the Commission intended to suspend the time within which to file a motion for reconsideration under Idaho Code § 72-718. We have no way of knowing what counsel's assistant heard or thought she heard in Ms. Carver's remarks because, as noted, we have no evidence before us on that point other than counsel's representation, a representation to which we assign no evidentiary value. Having said that, it was not a best practice for an agent of the Commission to tender advice to a party on the sufficiency of a particular pleading. This discussion was ex parte and left Defendants out of the loop. Defendants might argue that the Commission's action increases the chances that the Commission will favorably view the motion filed per its instructions. While we are confident that this would not be the case, we are nevertheless mindful of the appearance that such involvement in a case might create. The best course would have been to say nothing, and allow these matters to work themselves out based on the pleadings filed by the parties.

Having taken the laboring oar to advise Claimant concerning what to file, and possibly, when to file it, we might be inclined to give Claimant until February 1, 2019 within which to file his Motion for Reconsideration were it not for the express language of Idaho Code § 72-718, which does not admit any leeway in the time allotted for the filing of a motion for reconsideration. The statute does not make it discretionary with the Commission as to whether the time within which to file a motion for reconsideration may be enlarged. Therefore, we conclude that the Commission is without statutory authority to enlarge the time within which a motion for reconsideration may be filed, even if that was the understanding of the recipient of Ms. Carver's phone call.

Counsel waited until January 31 to file his eventual Motion for Reconsideration with the Commission. For the reasons set forth above, we conclude that the motion is untimely, filed as it was more than twenty (20) days following the Order of Dismissal.

However, it is possible to construe the December 31, 2018 Motion to Retain Case on Active Calendar as a motion for reconsideration. Essentially, the December 31, 2018 motion contains the same averments and requests for relief that are contained in the Motion for Reconsideration; Claimant argues that the case was active within the six (6) months preceding the Notice of Intent to Recommend Dismissal, and requests that the Commission reverse its dismissal and retain the matter on its active calendar.

Based on the facts and circumstances of this case, and in an effort to remedy whatever confusion may have been sowed by the direction that may have been given by the Commission, we conclude that it is appropriate to treat the December 31, 2018 Motion to Retain Case on Active Calendar as a timely motion for reconsideration pursuant to Idaho Code § 72-718. We further conclude that it is appropriate to reverse our previous dismissal of the Complaint on the basis that the case has not been inactive in the six months prior to November 19, 2018.

The Complaints are hereby **ORDERED** reinstated.

DATED this \_\_4<sup>th</sup>\_\_ day of \_\_March\_\_2019.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas P. Baskin, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
Aaron White, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_4<sup>th</sup>\_\_\_ day of \_\_\_March\_\_\_ 2019, a true and correct copy of the foregoing **ORDER GRANTING RECONSIDERATION AND VACATING DISMISSAL** was served by regular United States Mail upon each of the following:

RANDALL SCHMITZ  
1226 E. KARCHER ROAD  
NAMPA, ID 83687

WILLIAM FLETCHER  
877 MAIN STREET, SUITE 1000  
PO BOX 1617  
BOISE, ID 83701

SNR

\_\_\_\_\_/s/\_\_\_\_\_