

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

VENTURA ESCUTIA,

Claimant,

v.

OBENDORF HOPS, INC.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL  
SPECIAL INDEMNITY FUND,

Defendants.

**IC 2012-011436**

**ORDER DENYING  
RECONSIDERATION**

**Filed March 18, 2020**

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On January 14, 2020, pursuant to Idaho Industrial Judicial Rules of Practice and Procedure Rule 3(G) and Idaho Code §72-718, Defendant, State of Idaho, Industrial Special Indemnity Fund (ISIF), filed a Motion to Reconsider the Industrial Commission’s (“Commission”) January 9, 2020, Order Retaining Case on Active Calendar (“Order”) in the above-captioned matter. On January 16, 2020, Defendants Employer and Surety filed Notice of Concurrence in ISIF’s Motion to Reconsider. In the January 16, 2020 Order, Referee John C. Hummel found good cause for retaining the case on Claimants behalf. On reconsideration, ISIF argues that Claimant failed to show cause because an explanation for the lack of action was not offered.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated, provided that within twenty days from the date of filing the decision, any

party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must “present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented.” *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party’s favor.

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

As noted by ISIF, this claim arises from an accident of April 27, 2012. The case has been subject to previous notices of intent to recommend dismissal pursuant to JRP 12, in addition to the notice filed December 10, 2019. Moreover, the case has been set for hearing on four separate occasions, only to have the hearings vacated for various reasons, most recently at the instance of Claimant by Order of the Commission dated May 28, 2019. In an Order dated May 31, 2019, the Commission gave the following direction to the parties concerning calendaring of the case for a future hearing:

In light of current circumstances, this claim is not yet ready for hearing. The parties are directed to confer among themselves regarding hearing readiness. Hearing will be set upon receipt of a request for calendaring. . . .

(Order Setting Date Certain for Discovery Responses and Procedure for Hearing Reset).

On June 11, 2019, counsel for Claimant provided supplemental discovery responses to Defendants. By letter dated June 14, 2019, counsel for ISIF requested that Claimant provide certain medical records from providers identified in those responses. There the matter evidently sat until the Commission filed its December 10, 2019, Notice of Intent to Recommend Dismissal. Both

Employer/Surety and ISIF requested that the Commission dismiss the matter without prejudice, arguing that no action had been taken on the case since June 14, 2019. Employer/Surety also argued that dismissal was warranted since Claimant had never responded to Employer/Surety's November 8, 2016 settlement offer.<sup>1</sup> For his part, Claimant offered no recitation of actions taken in the six months prior to the Commission's December 10, 2019 notice in support of his request that jurisdiction be retained. Claimant only suggested that no prejudice would be visited upon Defendants and the ISIF if jurisdiction was retained, while considerable prejudice would be visited upon him if the Commission should choose to dismiss the case without prejudice.<sup>2</sup>

By Order dated January 9, 2020, the Commission retained jurisdiction over the matter stating:

Having considered Claimant's reasons why the case should be retained and finding good cause therefore, the Industrial Commission of the State of Idaho hereby orders that the above-entitled matter will be retained by the Commission.

Defendants and ISIF argue that the referee's decision is unsupported by any facts of record since, other than the alleged prejudicial impact of dismissal, no reason was offered why the case should be retained. Implicit in this argument is an assertion that a showing of the adverse consequences of dismissal is not the equivalent of a showing that there has either been action of some type taken on the case in the six months prior to the notice, or that there is some good reason to excuse lack of action on the case. Claimant has failed to respond to the Motion for Reconsideration within the time specified by JRP 3(G).

JRP12(B) provides:

DISMISSALS. B. Non-Prosecution.

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<sup>1</sup> From the fact that the case was set for hearing on three occasions subsequent to the date of the settlement offer, it is probably safe to assume that Claimant rejected the proposal.

<sup>2</sup> Per Claimant, dismissal of this case without prejudice is the equivalent of a dismissal with prejudice, presumably because any future complaint for indemnity benefits would be time-barred.

The Commission may dismiss a complaint without prejudice if no action has been taken on the case for a period of 6 months. Prior to dismissal, the Commission shall give written notice to the parties of the Commission's intent to dismiss the complaint. Any party may, within 21 days of the date of service of the Commission's notice, show cause in writing why the Commission should not dismiss the complaint.

It is first notable that the rule does not require dismissal of a complaint if no action has been taken within a period of six months; the rule merely authorizes the Commission to take such action at its discretion. Therefore, the Commission may appropriately decline to dismiss a complaint for lack of prosecution even if, the evidence fails to demonstrate that any action has been taken on the case for a period of six months.

Second, JRP 12(B) does not specify that to avert dismissal it is Claimant's obligation to demonstrate that he took some action on the case during the six months preceding the notice of intent to recommend dismissal. The rule merely specifies that if "no action" has been taken on the case for a period of six months, the Commission may dismiss the complaint. Arguably, this means action by any party, particularly when read in light of the right of any party to come forth with reasons why the complaint should not be dismissed. Here, Claimant's second supplemental discovery responses were served on June 11, 2019, more than six months prior to the December 10, 2019 Notice of Intent to Recommend Dismissal. However, this filing prompted Defendants to take further action within the six months prior to the filing of the Notice of Intent to Recommend Dismissal. Therefore, a narrow reading of the rule suggests that the filing of the Notice of Intent to Recommend Dismissal was premature because action had been taken on the case within six months prior to the filing of the Notice.

Finally, the Commission notes that the filing of the Notice of Intent to Recommend Dismissal on December 10, 2019 is potentially inconsistent with the referee's Order of May 31, 2019, quoted above. That Order reflects that the Commission tasked the parties to confer about the

readiness of the case for hearing and cautioned that no hearing would be set until a request for calendaring was received. Neither the pleadings generated in connection with the Notice of Intent to Recommend Dismissal, nor those generated in connection with the motion for reconsideration reflect that the parties have conferred about setting the case for hearing, as directed by the Commission. Although not discussed by the referee as a reason to retain the case, we believe that the Notice of Intent to Recommend Dismissal may have been inconsistent with the direction given to the parties via the May 31, 2019 Order.

We agree with Defendants and the ISIF that expressing alarm at the consequences of dismissal is not the same as coming forth with information sufficient to persuade the Commission to retain the case. However, it is impossible not to be cognizant of the impact of a dismissal without prejudice on this case. If it is true that such a dismissal would leave Claimant unable to refile a complaint for indemnity benefits due to the running of the period of limitation set forth at I.C. §72-706, then it is hard to argue that the dismissal without prejudice is the equivalent of a dismissal with prejudice, and such dismissals are expressly disfavored. See JRP 12(A). The Commission disfavors such dismissals because one of the aims of the statutory scheme is to provide sure and certain relief for workplace injuries. To that end, the workers' compensation laws of this state are construed in favor of a finding of compensation. We are troubled, of course, by Claimant's apparent disinterest in the prosecution of this claim, as we are by his failure to respond to the motion for reconsideration. However, we do not believe that the shortcomings of Claimant's attorney in this regard should be visited upon Claimant.

Based on the foregoing, we decline to reconsider the referee's order retaining the case. However, we direct that this matter be calendared for hearing as soon as may be practicable.

Further, absent settlement or extraordinary circumstances, no motion to vacate that hearing will be entertained. ISIF's Motion for Reconsideration is therefore DENIED.

IT IS SO ORDERED.

DATED this \_\_\_\_ 18th \_\_\_\_ day of March, 2020.

INDUSTRIAL COMMISSION

Participated but not available for signature \_\_\_\_\_  
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 the   18th   day of March, 2020, 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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\_\_\_\_\_/s/\_\_\_\_\_  
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