BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN W. JORDAN, Claimant, v. HECLA MINING COMPANY, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2012-027819** **ORDER GRANTING RECONSIDERATION IN PART AND DENYING RECONSIDERATION IN PART** **Filed December 11, 2020**

On September 24, 2020, Defendants filed a timely motion for reconsideration with supporting brief. On September 4, 2020, the Commission entered its order ("Order") which approved, confirmed, and adopted the Referee's proposed findings of fact and conclusion of law ("Findings") as its own. Defendants argue that the Commission erred in three respects: (1) by awarding Claimant TTD benefits between November 9, 2012 – December 21, 2012 because Claimant did not request time loss benefits for this period and was working for Employer during said period; (2) by ignoring Defendant's argument that Claimant's termination constitutes a "refusal" to work pursuant to Idaho Code § 72-403; and (3) by finding that Defendant's vocational expert, Mr. William Jordan, did not disagree with Mr. Fred Cutler's conclusion that it would be futile for Claimant to work under the FCE restrictions supported by Dr. Dirks. *See* Defendant's Motion for Reconsideration, p. 2.

On October 7, 2020, Claimant filed a response to the motion for reconsideration. On October 16, 2020, Defendants filed a reply brief. The Commission now enters its order on the Motion for Reconsideration, granting said motion in part and denying in part.

DISCUSSION

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. On a motion for reconsideration, the moving party "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. *Davidson 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)).

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.

As stated earlier, Defendants allege the Commission erred in three respects. The Commission will address each argument in the order brought up in Defendant's Brief on Reconsideration.

I. TTD Benefits during the time period of November 9, 2012 – December 21, 2012

The Commission awarded TTD benefits from November 8, 2012 to February 23, 2014. Order ¶2; Findings ¶39. However, the record reflects that Claimant did work for Employer for approximately the first one-and-a-half months of this time period: from the time when Claimant was released to light-duty work on November 9, 2012 until he was terminated by Employer on December 21, 2012. Tr. 128-131; 202-207. Claimant acknowledges that between November 9, 2012 and December 21, 2012, Claimant did receive some wages, that he worked for Employer daily during that time period, and that he received a paycheck. Cl.'s Response, p. 4. Therefore, the Claimant would not be entitled to income benefits for days actually worked during this period of time unless partial temporary benefits income benefits are appropriate under Idaho Code § 72-408(2).

The Commission acknowledges that its Findings and Order should have clarified that the award of TTD benefits to Claimant during the time period of November 8, 2012 – February 23, 2014 is subject to any credit that Defendants are entitled to for wages paid during that period. Per Idaho Code § 72-408 and rules construing the same, Claimant may be entitled to TTD or TPD benefits, depending on the wages he received for the period in question. The Commission directs Defendants to provide wage information necessary to determine Claimant's entitlement to TTD, or TPD benefits from November 9, 2012 through December 21, 2012. Note that per IDAPA 17.01.01.305.11.e, TPD benefits are calculated using the injured worker's pay period. Should the parties be unable to come to agreement about the time loss benefits owed to Claimant for the period

in question they may apply to the Commission for resolution of this issue. The Motion for Reconsideration is granted on this specific issue.

II. Refusing Work Pursuant to Idaho Code § 72-403

Defendants claim that the Commission erred in holding that Claimant is entitled to benefits from December 22, 2012 through February 23, 2014 because the Commission failed to treat Defendants' argument that Claimant was fired for cause unrelated to the work injury, and thereby refused to work pursuant to Idaho Code § 72-403. The statute states the following:

> If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

Idaho Code § 72-403.

Defendants cite *McCartney v. Apollo College*, IC 2007-011715 (Idaho Ind. Comm. May 28, 2008) for the proposition that where an injured worker has been provided a job within his restrictions, but is later terminated for reasons unconnected with his physical ability to perform the job, the actions which prompted his termination are the equivalent of a "refusal" of suitable employment. In *McCartney*, the actions prompting termination related to charges of sexual harassment made against the injured worker by subordinates. We do not agree with Defendant's assertion that the holding in *McCartney* requires us to find that every firing of a claimant for cause unrelated to the injury necessarily constitutes a refusal to work at a job secured for him pursuant to Idaho Code § 72-403. Indeed, our decision in *Roberts v. Portapros, LLC.*, IC 2019-008048 (Idaho Ind. Comm. Oct. 11, 2019) makes it very clear that "Idaho Code § 72-403 does not specify that a worker *will* lose TTD benefits if fired for cause. However, depending on the facts of a

particular case, an employee who is fired for cause *may* lose his entitlement to TTD benefits." *Roberts*, at ¶18 (emphasis in original).

Here, the Commission found that the position offered to Claimant, was physically and mentally suitable. It also concluded that one of the requirements of Claimant's employment was to notify employer before leaving the premises. On December 21, 2012, Claimant's low back pain became more than he could manage without pain medication, which he kept at his home. Claimant testified he looked for a safety department officer to let Employer know he was in too much pain to continue working and he was going to leave to take his prescription pain medication. When he could find no one he simply left work, a violation of safety protocol. After taking his pain medication he went to sleep and did not wake up until evening. Claimant did not return the phone message left for him by employer.[1] When he returned to work as scheduled on December 26, his employment was terminated. The question before the Commission was whether, on these facts, Claimant could be said to have refused, unreasonably failed or neglected the mentally and physically suitable work which had been procured for him.

Defendants' assert that the Commission did not treat the argument that Claimant's act of leaving the workplace without first notifying the appropriate authority is the equivalent of a "refusal" to perform his suitable job. The Commission briefly treated this argument by concluding that Claimant did not refuse to perform any of his work tasks. *See* Findings at ¶30-31. Defendants argue that refusing to perform a work task is not the same as Claimant

[1] The Referee's finding that Claimant returned a telephone message left for him by Employer two days later (Findings, ¶32) is not supported by the record. Claimant testified that he received the phone message sometime over the weekend, however he did not explicitly testify that he returned the message, merely that he received it. *See* Tr. 135:9-137:3. The Employer's record of the disciplinary proceeding notes that Claimant did not return the phone message. Ex. 1 at 10. For the reasons discussed *infra*, the Commission determines that it is irrelevant whether or not Claimant returned the phone call from his Employer. Claimant was disciplined, and eventually terminated, because he left the work site without notifying anyone prior to leaving, not because he failed to return the phone message. Therefore, any error made by the Referee in making this unsupported finding is harmless.

refusing to perform his job, which in this case included abiding by Employer's safety protocols. Essentially, Defendants argue that Claimant's failure to do what he knew he was required to do before leaving the premises should be viewed as the equivalent of a "refusal" to comply with one of the requirements of his employment. However, this argument begins to fall apart when one considers the dictionary definition of "refuse": "to show or express unwillingness to do or comply with."[2] What is called for by the provisions of Idaho Code § 72-403 is evidence of a refusal to perform suitable work. With the plain definition of "refuse" in mind it is impossible for us to characterize Claimant's failure as a "refusal", when the evidence establishes that he attempted to find an appropriate authority to notify before leaving the premises, but could find no one. *McCartney*, *supra*., is distinguishable on its facts. As to Claimant's failure to return the message left on his phone the evening of December 21, the evidence does not establish that such failure was the basis of his termination; he was terminated because he failed to notify his employer before leaving the premises.

As we stated in the original opinion, whether Claimant should forego time loss benefits due to this termination is best evaluated by considering whether he unreasonably failed or neglected to perform the suitable job that had been procured for him. We find no reason to depart from the conclusions reached in that analysis.

III. Mr. Jordan's testimony

Defendants contend that the Commission erred in its finding that Mr. Jordan, the defense's vocational expert, agreed with Mr. Cutler, Claimant's vocational expert, that it would be futile for

[2] "Refuse" *Merriam-Webster.com* Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/refuse. Accessed 11 Dec. 2020.

Claimant to attempt to find work under the restrictions set forth in the Functional Capacity Evaluations ("FCE") that were supported by Dr. Dirks.

The Referee found that Mr. Jordan "acknowledged that under the FCE restrictions it was unlikely Claimant could find suitable employment" Findings, ¶107. The Referee also found that:

> [a]lthough Mr. Cutler's analysis left much to be desired in terms of professional analysis, his conclusion was rather elementary, Claimant would not find work in the Silver Valley with FCE-level restrictions. **Mr. Jordan did not disagree**.

Findings, ¶108 (emphasis added).

Defendants argue that these findings are incorrect and that the Commission has misunderstood Mr. Jordan's testimony. Specifically, Defendants assert that while the Commission found agreement between the opinions of Mr. Cutler and Mr. Jordan, that agreement is based on an assumption made by Mr. Jordan that should be rejected by the Commission. Defendants assert that the only reason Mr. Jordan holds the alternative opinion that it would be futile for Claimant to look for work is because he relied on a statement that he extracted from a May 24, 2019 response by Dr. Dirks to inquiries posed by Defense counsel in formulating his vocational opinions:

> 05/24/19: Bret Dirks, MD response to Attorney Muller: 1) Do you agree with Dr. Cox's recommendations for permanent work restriction; Yes with the restriction of 15 and 20#. 2) do you agree with Dr. Cox that there are limitations in using FCE as basis to assign permanent work restrictions: Yes, they are as the patient should have the final say as related to his symptoms.

Ex. 8 at 784.

According to Defendants, Dr. Dirks's answer to the second question means that he would allow Claimant to define his own restrictions based on Claimant's subjective sense of what he can and cannot do. If Claimant is allowed to define his own restrictions, then it would be futile for him to look for work in view of the severity of his subjective complaints. Defendants assert that in concluding that it would be futile for Claimant to look for work, Mr. Jordan incorporated Dr.

Dirks's direction to allow Claimant's stated symptoms to define what he can and cannot do. However, Defendants argue, it was erroneous for Mr. Jordan to do so because Claimant should not be allowed to define his restrictions based on his perception of his pain, and what he is capable of doing. Otherwise, an injured worker would be allowed to establish disability based on untestable assertions that he is as disabled as he claims to be. Therefore, Mr. Jordan's opinion is tainted, and it cannot be utilized to prop up the opinion of Mr. Cutler. According to Defendants, where he bases his opinion on the FCE alone, Mr. Jordan concludes that Claimant is employable in his labor market, and that this opinion, which is contrary to Mr. Cutler's, should be adopted as the most persuasive. We disagree with Defendants' arguments for the following reasons.

First, the record does not contain a copy of Dr. Dirks's May 24, 2019 response to questions posed by Defendants. *See* Def. Motion for Reconsideration at 10 n. 1. Dr. Dirks was not examined about these responses. Reference to this document appears only in the report of Mr. Jordan. Ex. 8 at 784. However, Mr. Jordan was entitled to rely on matters not in evidence in forming his opinion. The response to the second question is curiously worded, making it difficult to understand exactly what Dr. Dirks was trying to convey. He may be saying that the FCE results should not be relied upon to define restrictions, and that the injured workers own sense of what he can and cannot do is a better measure of actual restrictions. However, his answer is couched in the general, and does not suggest that he holds that opinion in this case. Moreover, in other parts of the record Dr. Dirks, though generally skeptical of FCEs, opined that in this case, the FCE results are a good measure of Claimant's restrictions. Ex. RR at 1947. Therefore, we are unable to say that the May 24, 2019 response considered by Mr. Jordan actually establishes that Dr. Dirks holds the medical opinion that in setting restrictions, the FCE results should be abandoned in favor of allowing Claimant to self-define his restrictions.

Second, let it be assumed for the sake of argument that in forming his medical opinion on Claimant's restrictions Dr. Dirks deemed it appropriate to consider both the FCE results and Claimant's subjective sense of what he can and cannot do. Defendants argue that it is improper to allow a claimant to define his own disability by saying what he can and cannot do. Defendants cite to *Hopwood v. Kimberly Seeds Int'l*, IC No. 2005-505872, 2014 WL 587935 (Idaho Ind. Comm. Jan 15, 2014) to support this argument. Defendants reliance on this authority is misplaced. *Hopwood* does not prohibit the Commission, or a treating physician, from considering a claimant's subjective limitations, among other evidence, when determining disability. The Commission declined to adopt the claimant's self-imposed restrictions regarding sitting, standing, and walking in *Hopwood*, because no physician had imposed such permanent restrictions, nor had a physician related the restrictions to the subject accident. *Hopwood* is distinguishable from this case. Here, the treating physician, Dr. Dirks, has lent his support and agreement with the FCE restrictions. He has not allowed Claimant to craft his own restrictions. Furthermore, the Commission did not rely solely on Claimant's subjective complaints in determining disability. The Commission agrees that due to the subjective and untestable nature of such complaints, there is reason to be cautious about relying on the same. However, to say that neither Claimant's treating physician nor the Commission may consider Claimant's subjective complaints, along with other evidence, in evaluating disability, is an overstatement. Even Defendants' vocational expert entertained an alternative opinion on Claimant's disability based on his subjective complaints. Ex. 8 at 804.

Finally, as set forth in the original decision, Mr. Jordan appears to have acknowledged that even if the FCE results alone are used to define the Claimant's restrictions, Claimant is likely totally and permanently disabled. This was developed primarily on cross-examination by

Claimant's counsel. Counsel inquired of Mr. Jordan regarding statements in his Employability Report (Ex. 8 at 798) as follows:

> Q. Okay. The next sentence "The [Claimant's] perceived level of function as well as the subjective performance outlined on the FCE recommendations were not discussed with the employers." Correct?
>
> A. Correct.
>
> Q. You chose not to tell them about that information. Correct?
>
> A. That's correct.
>
> Q. Continuing on, colon "this is secondary to the severity of the limitations identified" – meaning severity of limitations identified in the FCE?
>
> A. Yes.
>
> Q. "and" – continuing on – "the likelihood that he would not be" – excuse me – "and the likelihood that he would not be capable of maintaining employment under those opinions." Correct?
>
> A. That's correct.
>
> Q. So it was your opinion that [Claimant], based upon the functional capacity evaluation findings, would not be capable of maintaining employment. Correct?
>
> A. Yes. He does say "light work" in the FCE, but he puts a lot of other statements –
>
> MR. KELSO: I'm going to object as nonresponsive.
>
> Q. (BY MR. KELSO) The question was, I think, clear that that was referring to the FCE, the limitations identified. Correct?
>
> A. Correct.
>
> Q. "And the likelihood that he would not be capable of maintaining employment under those opinions," meaning the FCE recommendations. Correct? Yes or no.
>
> A. Yes and no.
>
> Q. I'm sorry?

A. It's a yes and no for me on that one.

Q. What other opinions are you referring to?

A. Well, Dr. Dirks indicates, in response to Mindy Muller's letter on 5/24/19, that he agreed with Dr. Cox's restrictions but indicates 15-to-20 pound lifting. And then he says the patient should have the final say –

Q. Well, excuse me. As of – well, go ahead. I'm sorry. I didn't mean to interrupt. Go ahead.

A. The final say related to his symptoms. And so the patient says he can't do anything. So if you accept that, then there is no reason to do a labor market survey because there's nothing that we can use to assist the Claimant in going back to work there. The restrictions are too severe.

Q. Well, you didn't tell the employer of the functional capacity evaluation limitations, did you?

A. No, I did not.

Q. And you chose not to, why?

A. It's not a permanent restriction.

Q. And how do you know that?

A. Because only doctors can give permanent restrictions. Now, if Dr. Dirks says, I agree with the functional capacity evaluation and – let's see – and it's 15 to 20 pounds, and then you tack onto that the Claimant's symptoms – he said the patient should have final say related to his symptoms as to what he can do – then it takes him out.

Q. So is your testimony that Dr. Dirks did or didn't agree with the limitations identified in the function capacity evaluation?

A. My understanding is he agreed.

Q. So the doctor did provide those same restrictions. Correct?

A. That's the way I read it, yes.

Jordan Depo. 74:12 – 77:7. Later, Counsel again asked why Mr. Jordan did not inform prospective employers about Dr. Dirks's and the FCE restrictions.

Q. You didn't tell anybody about the limitations of the treating physician, four-time surgeries, or the functional capacity evaluation. Correct?

A. Based on what they said, it would be futile for him to work.

Q. So you didn't tell any employer about that?

A. No, I did not. It wouldn't serve any purpose.

Jordan Depo. 88:6-12.

Reviewing Mr. Jordan's deposition testimony in full, the Commission cannot conclude that the Referee misinterpreted or took his testimony regarding Claimant's employability under the FCE restrictions out of context. Mr. Jordan appears to acknowledge that based on the FCE results alone, it would be futile for Claimant to look for work. Although Mr. Jordan did opine in his report that there were a few jobs that Claimant could perform under the FCE restrictions, he readily admits that he did not even ask prospective employers about those restrictions. In further support of the Commission's determination of Claimant's disability it should be remembered that in searching for jobs in the Silver Valley, Mr. Jordan advised potential employers only of Dr. Cox's restrictions. It is unknown whether those employers would entertain employment of Claimant assuming the restrictions authored by Dr. Dirks. Further, in calculating Claimant's labor market, Mr. Jordan included not only areas within a fifty-mile radius of Claimant's home, but the entirety of five northern Idaho counties[3], potentially inflating the number of jobs in Claimant's post injury labor market. Finally, in considering the weight to be given to Mr. Jordan's testimony it must be remembered that Referee Harper attended Mr. Jordan's post hearing deposition and was able, unlike the Commission, to make his own assessment of Mr. Jordan's credibility by observing his reactions to questions.

[3] *See* Jordan Depo. 51-54; 100-101; 113.

On balance, we do not believe that Mr. Jordan's reliance, if any there be, on the somewhat cryptic May 24, 2019 response by Dr. Dirks, causes us to revisit the Commission's conclusion on disability.

The Referee's reasoning for adopting the FCE restrictions supported by Dr. Dirks over the restrictions imposed by Dr. Cox are sound and thoroughly analyzed. Defendants have not presented a persuasive argument denigrating this reasoning. Defendants have not persuaded the Commission to reverse the Referee's findings.

ORDER

Based on the foregoing reasons, the Commission **ORDERS** the following: Defendants request for reconsideration is GRANTED in part and DENIED in part as outlined above. **IT IS SO ORDERED.**

DATED this 11th day of December 2020.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2020, a true and correct copy of the foregoing **ORDER GRANTING RECONSIDERATION IN PART AND DENYING RECONSIDERATION IN PART** was served by email upon each of the following:

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