

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL SHARP,

Claimant,

v.

THOMAS BROTHERS PLUMBING,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Surety,

Defendants.

IC 2015-033733

**ORDER DENYING
RECONSIDERATION**

FILED DECEMBER 10, 2020

This matter went to hearing on March 11, 2019. The commission entered its Findings of Fact, Conclusions of Law, and Order on or about the 8th day of September 2020 (the “Decision”). On September 28, 2020, Claimant filed a timely a motion for reconsideration, asking the Commission to re-hear or reconsider the issue of permanent disability. On October 9, 2020, Defendants filed a response, and on October 19, 2020 Claimant filed a reply.

Post-hearing, Claimant underwent a gastric bypass surgery on February 24, 2020, leading to over 120 pounds in weight loss. However, even though Claimant now weighs less than he did prior to the industrial accident he purports to suffer ongoing back pain. Claimant asserts this post-hearing weight loss “constitutes new evidence not available at the time of the hearing that proves that Dr. Cox's October 28, 2016 report can no longer be relied upon as a basis to determine Claimant's restrictions.” *See* Cl.’s Memorandum in Support, p.2 Defendants argue this information

fails to “provide new reasons factually or legally to support his request for a rehearing or reconsideration of the Industrial Commission's decision.” *See* Def.’s Response, p. 5.

DISCUSSION

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.

“Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *Curtis v. M.H. King Co.*, 142 Idaho 383, 385, 128 P.3d 920, 922

(2005) (citing *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003)). The burden on a workers' compensation claimant is to establish by the weight of the evidence that his injury was the result of a compensable accident or occupational disease to "a reasonable degree of medical probability." Furthermore, "a worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all facts essential to recovery." *Evans v. O'Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993).

In the Decision, the Commission found Claimant was 21% permanently disabled inclusive of a 14% permanent impairment, and that Claimant was not totally and permanently disabled pursuant to the odd-lot doctrine. *See* Decision p. 41. In coming to these conclusions, the Commission adopted the restriction of Dr. Cox given at the time Claimant reached MMI, instead of the restrictions at the time of hearing. *See* Decision p. 39. As discussed in the Decision, the Commission based this on the fact that the time of hearing restrictions accounted for 120 pounds of post-accident weight gain that was not attributed to the industrial accident. *Id.*

Claimant now asserts that following gastric bypass surgery, he now weighs less than he did at the time of the industrial accident yet continues to suffer unremittingly from the same pain he has experienced since the low back surgery performed by Dr. Ganz. In its decision the Commission found that Claimant's dramatic weight gain following the accident was the real explanation for his intractable pain and need for restrictions. Further, the Commission found there was no persuasive evidence relating Claimant's post-surgery weight gain to the accident. Therefore, while Claimant had significant disability as of the date of hearing, that disability was largely due to non-work-related obesity, a condition subsequent to the work accident for which defendants should not be held responsible. Claimant now argues that the Commission's analysis is based on a premise that has been disproven; Claimant's weight gain cannot be the cause of his unrelenting low back pain,

since he still suffers from the same pain after having lost the weight. Therefore, the argument goes, the real reason for Claimant's pain is, and always has been, an underlying injury to the lumbar spine which causes pain and dysfunction independent of Claimant's weight. *See* Cl.'s Memorandum in Support, p. 2. Per Claimant, the basis for the Commission's reliance on Dr. Cox is no longer reasonable. *Id.* Claimant asserts that the new weight loss and continued pain is new evidence that was not available at trial. Claimant further presents that the true reason for the pain and subsequent restrictions was "severe scar tissue at the L5-S1 level generated post-surgery that impinges his nerves and is unaffected by weight loss." *Id.* However, in reaching its decision, the Commission considered Dr. Magnuson's opinion that even if Claimant loses weight in the future, such future weight loss might prove ineffective in reducing Claimant's symptoms because the damage caused by Claimant's failure to initially heed his physician's recommendations is irreversible. As stated in the Decision:

Claimant emphasizes Dr. Magnuson's and Nurse Love's assertions that weight loss now may not improve his back pain because of permanent nerve damage. These assertions are tacit acknowledgements that weight loss earlier would have reduced his back pain and avoided nerve damage. It is tragic that Claimant, having ignored his surgeon's express warning and the recommendation of virtually every medical provider that has examined him since his accident, may now suffer permanent nerve damage due to his 120-pound post-accident weight gain. However, Claimant has not proven that Defendants are responsible for his post-accident weight gain or its sequela. Claimant's 120-pound post-accident weight gain constitutes a subsequent intervening condition not caused by his industrial accident and for which Defendants are not responsible.

Decision p. 33. Therefore, the fact that Claimant remains symptomatic following his post-February 2020 weight loss is not inconsistent with the proposition that his post-accident weight gain is nevertheless the cause of his recalcitrant symptoms. Further, a claim that the pain is attributable to post-surgery scar tissue vs. post-surgery weight gain was evidence available at the time of hearing, and this explanation was in fact entertained by Dr. Huynh. Therefore, Claimant's

assertions concerning the significance of his continuing complaints post bariatric surgery, along with his affidavits and additional medical records are not persuasive. The Commission declines to consider these new facts in connection with the original decision, or order rehearing.

Thus, although the Commission has considerable leeway to grant Claimant a re-hearing or re-consideration of the case under Idaho Code § 72-718, the Commission is not inclined to revisit previously considered evidence or argument or invite the parties the opportunity to offer additional evidence which could have been timely adduced at hearing.

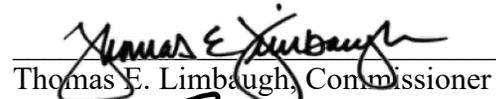
Based on the foregoing, Claimant's request for reconsideration and rehearing is DENIED.

DATED this 10th day of December, 2020.

INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman



Thomas E. Limbaugh, Commissioner



Aaron White, Commissioner

ATTEST:


Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 2020, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail and email upon each of the following:

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