

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID ONTHANK,

Claimant,

v.

REPUBLIC SERVICES,

Employer,

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,

Surety,
Defendants.

IC 2015-022115

**ORDER GRANTING CLAIMANT'S
MOTION FOR RECONSIDERATION
AND TO SET ASIDE ORDER
DISMISSING COMPLAINT
WITHOUT PREJUDICE**

FILED

DEC 18 2020

INDUSTRIAL COMMISSION

On November 18, 2020, the Commission dismissed the complaint without prejudice as a sanction for failure to comply with the Commission's order compelling discovery under the Industrial Commission's Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law, Effective March 23, 2020, ("JRP") Rule 16. The following day, November 19, 2020, Claimant filed a timely Motion asking the Commission to reconsider and set aside the order dismissing the complaint. A supporting affidavit accompanied the motion. On December 1, 2020, the Defendant filed a response objecting to Claimant's Motion.

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

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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.

I. Procedural Background

The procedural timeline of this case is as follows. On August 13, 2020, Defendants filed their motion to compel discovery. Claimant did not respond to the motion. On September 10, 2020, the Commission entered its order requiring Claimant to respond to Defendants' discovery requests, and to file a notice of compliance with the Commission no later than 15 days from the date of said order. Claimant failed to respond to Defendants' discovery requests, nor did Claimant file a notice of compliance. On October 16, 2020, Defendants filed a Motion to Dismiss Claimant's complaint without prejudice as a sanction for Claimant's failure to comply with the Commission's order. Claimant did not respond to Defendant's Motion to Dismiss. On November 18, 2020, the Commission ordered that the complaint be dismissed without prejudice.

The (1) August 13, 2020 Motion to Compel Discovery; (2) September 10, 2020 Order Compelling Discovery; (3) October 16, 2020 Motion to Dismiss; and the (4) November 18, 2020

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Order Dismissing Complaint Without Prejudice were all sent to the email address clinton@middletonlaw.com. On reconsideration, Claimant's counsel argues that these pleadings were not properly served. Furthermore, counsel asserts that the statute of limitations provided within Title 72, Idaho Code has lapsed in this matter, and that Claimant would be unfairly prejudiced from presenting his case on the merits should the Order not be set aside.

II. Service

On March 23, 2020, The Commission amended its rules to address necessary health and safety precautions during the COVID-19 pandemic. In furtherance of that goal, all documents and pleadings are to be served or filed by email whenever possible. JRP 4(A) states that "[s]ervice of documents by email to represented parties **shall be to the email address of the party's attorney on file with the Idaho State Bar.**" (emphasis added).

The Idaho State Bar Rule regarding Membership Information is as follows:

- (a) **Required Information.** All members of the Bar must provide the following membership information, which shall be considered public information:
- (1) Full name;
 - (2) Name of employer or firm, if applicable;
 - (3) Mailing address;
 - (4) Phone number;
 - (5) Email address for use by the Bar; and
 - (6) In addition to the above information, an Active or House Counsel Member shall also provide:
 - (A) An email address for electronic service of notices and orders from the courts in those counties and district courts where electronic filing has been approved by the Supreme Court. This email address may be the same as the email address identified in subsection (a)(5) above. If no separate email address for electronic service from the courts has been designated, the email address identified in subsection (a)(5) will be used for such service; ...

...

I.B.C.R. 303 (emphasis in original).

Claimant's counsel currently has two separate address listed on the Bar website¹: (1) the email address for use by the Bar under I.B.C.R. 303 (a)(5) (designated on the online Bar directory as the "Bar Email Address"), which is clinton@middletonidlaw.com, and (2) the email address for electronic service of notices and orders as described in I.B.C.R. 303 (a)(6)(A) (designated on the online Bar directory as the "Court eService Email"), which is lawoffice@middletonidlaw.com.² It was to Counsel's "Bar Email Address" that the four pleadings referenced above were served. In his Affidavit in Support of his Motion, counsel avers that his "Court eService Email", lawoffice@middletonidlaw.com, has been on file with the Bar as his designated address for all filings and service since 2019. Aff. of Clinton Miner at ¶2. Counsel set up that email address so that his support staff could have access to those emails and input the pleadings into his client files and calendar deadlines. *Id.* at ¶5. Counsel further states that he does not check his other email address (the "Bar Email Address"), clinton@middletonidlaw.com, for litigation or calendaring purposes. *Id.* at ¶4.³ Counsel claims that he recently discovered that some parties may have sent litigation and other important pleadings to the clinton@middletonidlaw.com address, and not to the "Court eService Email" address. Accordingly, on November 12, 2020, counsel's staff notified the Commission to send all documents to the "Court eService email" address - lawoffice@middletonidlaw.com. *Id.* at ¶6.

Claimant contends that, pursuant to JRP 4, he was not properly served with the pleadings referenced above because they were sent to clinton@middletonidlaw.com, and not to his "Court eService Email" address - lawoffice@middletonidlaw.com. Claimant argues that the phrase used in JRP 4 - "email address of the party's attorney on file with the Idaho State Bar" - refers

¹ isb.idaho.gov/licensing-mcle/attorney-roster-search/ (Accessed Dec. 9, 2020).

² The Membership Roster of the Idaho State Bar Desk Book Directory 2020-2021 lists counsel's email address as clinton@middletonidlaw.com.

³ Obviously, Claimant's counsel checks his "Bar Email Address" for other purposes. He notes that he saw the November 18, 2020 Order Dismissing Complaint Without Prejudice that was sent to that email address and filed this instant motion the very next day. Aff. of Clinton Miner at ¶8.

specifically to the “Court eService Email.” Aff. of Clinton Miner at ¶3. In response, Defendant contends that service was proper under JRP 4 because the Bar lists both email addresses for Claimant’s counsel. Thus, Defendant claims, whether the pleadings were sent to clinton@middletonidlaw.com or lawoffice@middletonidlaw.com, service was proper under JRP 4 because the pleadings were sent to an email address that was indeed “on file with the Idaho State Bar.” Def. Response pp. 2-3. Defendant further argues that the eService email designation is designed for use by the court, and thus does not apply to the Commission, which does not utilize the iCourt system. *Id.* at p. 3. Therefore, Defendant argues, Claimant’s contention that the language in JRP 4 refers exclusively to the “Court eService Email” is unfounded.

Defendant’s arguments are duly noted. However, the provisions of the Idaho Workers’ Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). This principle also applies to the construction, interpretation, and analysis of the JRP Rules. The consequences to a claimant of dismissing a complaint, even if the dismissal is without prejudice, on a case where the statute of limitations has lapsed are very harsh indeed. Claimant would be barred from pursuing his case and obtaining statutory benefits he may be entitled to.

First, the Commission acknowledges that, under the present language of JRP 4(a), it is not clear whether service should be made to the “Bar Email Address” or to the “Court eService Email” or both. Either of these addresses could be construed as an email address “on file with the Idaho State Bar.” However, Claimant’s counsel’s explanation that he uses one email address (the “Court eService Email”) for all filings, litigation, and calendaring (and that his support staff has access to) pursuant to I.B.C.R. 303(a)(6)(A) and uses a separate email address (the “Bar Email Address”) not for litigation purposes, but for “use by the Bar” pursuant to I.B.C.R. 303(a)(5), is reasonable. The Commission foresees several scenarios why an attorney would want to have these email

addresses be separate and distinct.⁴ Additionally, I.B.C.R. 303 does not require that the email addresses be the same. Furthermore, the Commission also foresees the scenario where an attorney would not expect pleadings and filings to be sent to an email address that, while on file as the “Bar Email Address”, was not the iCourt email address that he uses for pleadings and filings in his other cases; as apparently was the case here.

The Commission notes that once Claimant’s counsel realized that pleadings for this case were being sent to the clinton@middletonidlaw.com address, and not his usual email address for filings, he promptly made the Commission aware of the desired email address for service of pleadings. He also promptly filed this instant Motion, the day after the Order Dismissing the Complaint was filed. Certainly, Claimant’s counsel should have been more diligent in handling this case, but under the circumstances, and due to the unclear language of our Rule regarding the use of a particular address “on file with the Idaho State Bar,” we find Claimant’s neglect in responding to Motions and Orders Compelling Discovery to be excusable. Accordingly, the Commission is inclined to grant the Claimant’s Motion and set aside the Order Dismissing the Complaint entered in this case.

Bolstering the Commission’s decision to set aside the Order is Claimant’s assertion that the statute of limitations has lapsed in this matter. In such circumstances, the Commission liberally grants reconsideration. *See Amezquita v. King*, IC 2018-000004 (Idaho Ind. Comm. March 4, 2019) (granting a timely motion for reconsideration when, due to a misunderstanding, claimant’s counsel failed to respond to a Notice of Intent to Dismiss. In a footnote, the Commission noted that the limitation provisions of Idaho Code § 72-706 would likely prohibit the claimant from refiling the complaint); *see also Robertson v. Vernon Steel, Inc.*, IC 2018-001726 (Idaho Ind. Comm. October

⁴ Indeed, Defendant’s counsel, Jamie Lane Riley, also has two separate email addresses listed on the Bar website; one for the “Bar Email Address” (jaimelaneriley@gmail.com) and one for the “Court eService Email” (jriley@hawleytroxell.com). isb.idaho.gov/licensing-mcle/attorney-roster-search/ (Accessed Dec. 9, 2020).

11, 2019) (granting a timely motion for reconsideration when claimant's apparent failure to respond to the Notice of Intent to Dismiss was likely due to a mail error, was an isolated incident, and claimant promptly acted to mitigate the consequences of such); *Whitney v. Sysco Corp.*, IC 2017-003966 (Idaho Ind. Comm. July 5, 2018) (granting a timely motion for reconsideration when, due to claimant's counsel's oversight, a response to a Notice of Intent to Dismiss was not filed and counsel promptly acted to mitigate the consequences of such); *Padilla v. Prestige Fence & Landscape Co.*, IC 2012-031446 (Idaho Ind. Comm. December 10, 2018) (granting a timely motion for reconsideration when claimant's counsel, through inadvertence or mistake, did not follow established office procedure and was unaware of the Notice of Intent to Dismiss and failed to file a response).

ORDER

Based on the foregoing reasons, Claimant's Motion for Reconsideration is GRANTED. The November 18, 2020 Order Dismissing Complaint Without Prejudice is set aside. **IT IS SO ORDERED.**

DATED this 17th day of December, 2020.

INDUSTRIAL COMMISSION


Thomas P. Baskin, Chairman


Aaron White, Commissioner


Thomas E. Limbaugh, Commissioner



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ATTEST:

Kameron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2020, a true and correct copy of the foregoing **ORDER GRANTING CLAIMANT'S MOTION FOR RECONSIDERATION AND TO SET ASIDE ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE** was served by regular United States mail and email upon each of the following:

CLINTON E MINER
412 S KINGS AVE, STE 106
MIDDLETON ID 83644
lawoffice@middletonidlaw.com

MARK C PETERSON
PO BOX 1617
BOISE ID 83701-1617
mpeterson@hawleytroxell.com

A handwritten signature in blue ink, appearing to read 'Kameron Slay', is written over a horizontal line.