BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BOB D. CLARK, Claimant, v. AGRICULTURAL PRODUCTS CORP, Employer, and ONE BEACON INSURANCE COMPANY, successor to AMERICAN EMPLOYERS INSURANCE COMPANY, Surety, Defendants.	**IC 1974-094714** **ORDER ON RECONSIDERATION** **Filed January 24, 2020**

On or about November 25, 2019, the Commission entered its Findings of Fact, Conclusions of Law, and Order following hearing held August 1-2, 2018 in Pocatello. Claimant filed a timely Motion for Reconsideration pursuant to Idaho Code § 72-718. He raises two arguments in support of his Motion:

(1) While the Commission recognized that Claimant may now require "in-home skilled nursing care," to be provided by registered or licensed practical nurses, it erroneously concluded that Defendants were providing "24-hour skilled nursing services" to Claimant as of the date of hearing.

(2) Claimant is entitled to reimbursement in the amount of $857,279.14, representing "professional" expenditures made by Claimant from the in-home nonprofessional care and aid annuity between 1992 and 2011.

In response, Defendants contend that 24-hour skilled nursing care has never been provided to Claimant, and that Claimant has failed to adduce any proof, either in the case-in-chief or in the Motion for Reconsideration, which warrants finding that Claimant is entitled to 24/7 skilled nursing care. Next, Defendants argue that the care for which Claimant seeks reimbursement is "nonprofessional" care which was appropriately the responsibility of Claimant, at least up to the amount of the monthly in-home nonprofessional care and aid annuity. Finally, Defendants contend that the claim for reimbursement for professional care paid from the in-home nonprofessional care and aid annuity for the period 1992 through 2011 is barred by the applicable statute of limitation.

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.

I.

At Page 32 of the November 25, 2019 decision, the Commission stated:

> The Commission acknowledges that Claimant may require in-home skilled nursing care, to be provided by registered or licensed practical nurses. As of the date of hearing, it appears that this level of care may now be necessary. Care provided by such individuals is clearly "professional" within the meaning of the agreement since it requires advanced education/training.

(Findings of Fact, Conclusions of Law and Order at p.32). Later in the decision, the Commission offered an observation about the nature of the in-home care that had been provided by Defendants prior to the interruption of care which led to Claimant's August 12, 2019 request for emergency hearing. At Page 59 of the decision the Commission stated:

> Claimant argues that Defendants have not provided recommended care, specifically 24-hour skilled nursing services and adaptive home controls. The Commission believes Defendants had been providing 24-hour skilled nursing services until a recent interruption that was resolved following a request for emergency hearing.

Id. at 59. Claimant invites the Commission to order Defendants to pay for 24/7 skilled, or "professional" nursing care. Claimant argues that he has never enjoyed this level of care, notwithstanding that it has been ordered for him by several of his providers, including Dr. Rosenbluth and Life Care Planner Lance. All that Claimant obtained by virtue of the settlement

which averted the emergency hearing was Defendants' agreement to reinstate skilled nursing services of at least two visits per day. Claimant argues that he has never been provided with the 24/7 skilled nursing care which he requires, and as part of his Motion for Reconsideration, asks the Commission to address this alleged entitlement.

The Commission does not disagree that because of his profound injuries, Claimant requires care on a 24/7 basis, whether provided by paid caregivers or family members. Nor does the Commission quarrel with the proposition that Claimant may require regular (even daily) care or evaluation by providers we have defined as "professionals," i.e., LPNs, RNs, or MDs. It is evidently Claimant's contention, however, that Claimant requires such "professional" attendance continuously, i.e., on a 24/7 basis. If so, then the cost of such professional care would be the responsibility of Defendants. However, even if Claimant requires such 24/7 attendance by one or more medical professionals, Claimant would still not be entitled to require Defendants to pay for in-home nonprofessional care and aid rendered contemporaneous with professional care. For example, let it be assumed that Claimant's treating physician ordered 24/7 attendance by a registered nurse, as well as the attendance of one or two nurses aides to provide care for Claimant under the direction of the RN. As the Commission has construed the 1984 Agreement, Defendants would have responsibility for the payment of services rendered by the RN, while Claimant would first be required to pay for the services of the nurses aides, until the exhaustion of the monthly in-home nonprofessional care and aid annuity, at which point responsibility for the payment of such services would shift to Defendants. In other words, to simply say that Claimant requires 24/7 "professional" nursing care does not mean that Defendants are responsible for paying for all of the in-home care Claimant requires.

A more important point must be made about the terms used by providers to define the care Claimant requires. Just because a provider has in the past prescribed "skilled" or "professional" in-home care does not mean that the care prescribed by that provider is in fact "professional" care as the Commission has construed the term. For example, as discussed at pages 9-10, *infra*, Dr. Rosenbluth offered a number of definitions of "professional" care. However, these definitions are at odds with the Commission's construction of the 1984 Agreement. In order to hold Defendants responsible for payment of the "professional" care prescribed by a provider, it must appear that the provider is in fact referring to care of the type the Commission has defined as "professional."

Although the assertion is made that Claimant requires 24/7 "skilled" nursing care, the source of this recommendation is somewhat difficult to pinpoint in the record. The record reflects that in 2009, Kelly Lance, the Life Care Planner retained by Claimant, opined that Claimant requires aides to assist him in almost every aspect of daily living and licensed nurses to provide him with care on a daily basis. However, she did not specify a need for 24/7 nursing care (much less 24/7 care from an RN or LPN) unless Surety declined to provide for Claimant a self-turning mattress (see Joint Exhibit 9 at JE0853).

In 2012, Dr. Rosenbluth issued final discharge orders and patient instructions for Claimant at the time of his discharge from University Healthcare Rehabilitation Center. Dr. Rosenbluth's note of March 31, 2012 contains several instructions concerning the type and level of care Claimant would require on discharge. Dr. Rosenbluth discharged Claimant to his home, but with the following recommendations concerning home health services:

> 24-hour professional nursing care services. . . .daily RN oversight with two hour weekly visit for assessment of skin, respirations and medical changes. . . . . please provide patient 24 hour professional nursing care services – 16 hours of certified nursing assistance – 5 hours per day LPN for suction, cough assist, medication

> administration – please ensure follow-up scripts are completed for patient care needs.

Dr. Rosenbluth's discharge order strongly suggests that he does not equate "professional" care with the care delivered by an RN. If "professional" care is care delivered by an RN, there would be no need to address the need for daily RN oversight. Moreover, the order does not suggest that Claimant requires 24/7 attendance by an RN or LPN. Rather, the note suggests that while such attendance must occur daily, it need not be continuous.

Finally, in June of 2014 Ms. Lance revisited her 2009 Life Care Plan for Claimant. She noted that as of 2014 Claimant was being provided with 24-hour care by a licensed and bonded home care agency. From her report, it is unclear how frequently Claimant received the attendance of licensed nurses. However, Ms. Lance made it clear that Claimant would require 24/7 home care.

These records leave the Commission uncertain whether Claimant's current needs are met by the stipulation which averted the August 2019 emergency hearing. If, due to a change in circumstances or for some other reason, Claimant requires further or additional medical treatment of the type authorized by the 1984 Agreement, we rely on Claimant's treaters to make appropriate recommendations for such care. If this requires an increase in the type and frequency of professional nursing services rendered to Claimant at his residence, such as those which can only be rendered by a RN or LPN, then Defendants are obligated to provide such care. Further, we remind Defendants of their obligation pursuant to Idaho Code § 72-304 and Idaho Code § 72-305 to act proactively in assessing Claimant's in-home medical needs whether they be professional, (to be paid by Defendants) or nonprofessional, (to first be paid by Claimant). This may well require in-home assessment of Claimant's needs by an appropriately credentialed expert in such matters. The Commission does not condone the type of long distance assessments

and evaluations previously conducted at Defendants' instance by Dr. Friedman. Should the parties be unable to come to agreement about the nature and extent of the care to which Claimant is currently entitled under the 1984 Agreement, the parties are invited to apply to the Commission for further guidance. However, on the basis of the record before us the Commission is unable to comment further on what is anticipated by the dated and ambiguous orders discussed above concerning Claimant's need for 24/7 home care and the individual components of such care. Again, "nonprofessional" care, as we have defined it, must first be paid by Claimant, while professional care must be paid by Defendants.

II.

Next, Claimant asserts that between approximately January of 1992 and May of 2011 the monthly "in-home nonprofessional care and aid" annuity was exhausted by Claimant's use of those monies to pay for what he has described as "professional" care. Since it is the responsibility of Defendants to assume responsibility for all care that is other than "nonprofessional" (and for monthly in-home nonprofessional care and aid which exceeds the monthly annuity) Claimant argues that he is entitled, at the very least, to the return of $857,279.14, this sum representing the total monthly in-home nonprofessional care and aid annuity payments made to him between approximately January 1992 and May of 2011.

Central to Claimant's demand for reimbursement is his assertion that during the period 1992 through 2011 he was made to pay for "professional" care from the proceeds of the in-home nonprofessional care and aid annuity. On reconsideration Claimant makes the same argument he made before the Commission in the case-in-chief, i.e., that the care he paid for in the aforementioned period was care rendered by "professionals." Exhibit 67 contains payroll records for individuals hired by Claimant to provide in-home care. The caregivers are not identified, but

monthly wages and associated withholdings are. Exhibit 77 contains similar information that is more detailed for the period 2009 through 2014. In 2009 and 2010, Claimant was still accepting the monthly in-home nonprofessional care and aid annuity and applying that monthly annuity to expenses associated with Claimant's in-home care. In 2009 that included paying for the services of a number of aides, e.g., Camra Smith, Tyson Stevens, Suzanne Skinner, Shauna Spencer, Cassie Barton, Jessalyn Christensen, to name a few. No evidence has been submitted that any of these individuals provided other than "nonprofessional" care and aid to Claimant, as the Commission has defined that term.

We appreciate the argument that because of his unique circumstances, Claimant requires care tailored to his particular needs, and no one, not even a physician or a registered nurse, can provide that care without background on Claimant's specific needs. As Claimant has pointed out, during his 2012 hospital stay, "professional" caregivers were insufficiently knowledgeable about some of Claimant's special requirements, while the same issues would have posed no particular difficulty to the aides used by Claimant at his place of residence.

The response to this is whether or not a caregiver is a professional is not determined by whether such individual has acquired a specialized understanding of the needs of Claimant. Someone who is completely unschooled in medicine may nevertheless be trained to run Claimant's cough assist machine, suction device, or protect him from foods to which he is allergic. Assuming that a layperson may legally render such care, developing such a narrow and specific skill set does not transform a lay person from a "nonprofessional" into a professional, as we believe the term was intended by the parties in 1984.

The Commission has given all the guidance it feels is necessary on the construction to be given to the 1984 Agreement, and the parties' use of the term "in-home nonprofessional care and

aid." To reiterate, nonprofessional care is care not requiring advanced skill or training. Because of potential confusion concerning certified nursing assistants and nurse's aides, we specifically treated these services, concluding that such care is nonprofessional, even if given under the direction of a physician, RN, or LPN. Where further questions arise as to whether a particular type of care and aid is "nonprofessional" in character, guidance may be obtained by ascertaining whether the service in question could legally have been offered to the public in the 1984 marketplace by an individual without requisite state licensure. Of course, the agreement provides special treatment for physical therapy and speech therapy which Claimant might require, regardless of by whom such therapy is provided.

The record does not reveal that any of the care and aid paid by the nonprofessional care and aid annuity for the period January of 1992 through May, 2011 was for something other than what we have defined as nonprofessional care and aid. Therefore, these expenses were appropriately the responsibility of Claimant to pay from the nonprofessional care and aid annuity, up to the amount of the monthly annuity. Thereafter, the 1984 Agreement obligates Defendants to pay such expenses where those monthly expenses exceed the monthly annuity.

Finally, Claimant urges the Commission to accept the testimony of Dr. Rosenbluth in support of the proposition that certified nursing assistants, nurse's aides, and the like, constitute professional caregivers for whom Defendants should be responsible. First, our obligation is to determine the intention of the parties in executing the 1984 agreement. It is as unclear to the Commission why Dr. Rosenbluth's opinion on what constitutes "nonprofessional" and "professional" care should be given credence, as it is why we should accept Dr. Friedman's musings on this legal question. Second, Dr. Rosenbluth's testimony is not as supportive as

Claimant would have the Commission believe. At page 45 of his March 27, 2015 deposition, there is the following exchange between Claimant's counsel and Dr. Rosenbluth:

> Q: [By Mr. Bergman] In your profession, do you guys - - do you doctors, in your profession, use the term "professional care" versus "nonprofessional care"?
>
> A: Yes
>
> Q: And generally speaking, what is nonprofessional care versus professional care according to your understanding?
>
> A: Well, for the most part, nonprofessional - - there's some gray area, but nonprofessional is generally people that aren't getting paid. So oftentimes it's family, friends, caregivers. And the professional services we have in - - that come in, nurses, aids, therapists, respiratory folks, are I would consider, professional.

Rosenbluth Depo., 45:15-46:3. Therefore, a "nonprofessional" is one who does not get paid for his or her services. Dr. Rosenbluth was forced to refine this judgment on cross examination when he was reminded that some people who are assuredly "nonprofessionals" nevertheless expect to be paid for their services, such as someone who provides lawn care. (Rosenbluth Depo., 145:8-146:19). Dr. Rosenbluth then acknowledged that it might be more appropriate to determine whether someone is a "professional" by ascertaining whether the individual must be licensed by statute in order to provide the service in question. (Rosenbluth Depo., 146:20-147:4). Finally, Dr. Rosenbluth testified that he would consider a "CNA" to be a professional because "some degree" of training is required to become a CNA. (Rosenbluth Depo., 148:10-149:4). Therefore, Dr. Rosenbluth has offered a number of definitions of what it means to be a "professional." As with Dr. Friedman, no foundation for his qualifications to give a definition for the term "nonprofessional" as used in the 1984 agreement was offered.

At pages 4-6 of his brief in support of motion for reconsideration, Claimant itemizes the various services, medications, and medical devices he requires per the 2009 and 2014 Life Care Plans found at JE-09 and JE-49. Assuming, for the sake of discussion, that the enumerated

items/services are causally related to the subject accident, it is clear that a number of services fall into the nonprofessional category such as meal preparation, housekeeping, lawn maintenance, etc. Other services clearly fall into the professional category, such as twice weekly RN evaluations and LPN care. Other of the services probably qualify as physical therapy, and therefore, as professional. Some of the services may be nonprofessional depending on whether the services may be legally offered to a patient by someone who does not have one type of licensure or another. The point is that just because a life care plan exists which identifies certain care as needed is not the same thing as saying that all the care is professional in nature.

In his Motion for Reconsideration Claimant has, again, invited the Commission to consider the definition of the term "nonprofessional" as used in the 1984 agreement. However, Claimant has adduced neither new facts nor arguments that persuade the Commission to modify its finding on this central dispute. Again, we are constrained to give effect to the intentions of the parties at the time the agreement was drafted in 1984. As we noted, the possibility exists that a service deemed "nonprofessional" in 1984 might now be subject to training and/or licensure such that its provision would now be deemed professional. The parties had an opportunity to make provision for how such a shift in classification should be treated, but they chose not to. Services which were "nonprofessional" in 1984 are "nonprofessional" still.

In response to the motion for reconsideration, Defendants have additionally argued that the Claim for reimbursement made by Claimant is barred by the applicable statute of limitations. This is not among the issues noticed for hearing and the Commission will not entertain it at this juncture.

ORDER

Based on the foregoing, Claimant's Motion for Reconsideration is DENIED. IT IS SO ORDERED.

DATED this ___24th___ day of ___January___, 2020.

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 the _____24th_____ day of _____January_____, 2020, a true and correct copy of the **ORDER ON RECONSIDERATION** was served by regular United States Mail and fax upon each of the following:

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