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

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| KEVIN R. SMITH,<br><br>Claimant,<br><br>v.<br><br>STATE OF IDAHO, INDUSTRIAL SPECIAL INDMENITY FUND,<br><br>Defendant. | **IC 2007-002698**<br><br>**ORDER DENYING RECONSIDERATION**<br><br>**Filed 11/22/17** |

On July 27, 2017, Claimant timely filed a motion for reconsideration, asking the Commission to reverse its July 7, 2017 order. The Commission found that Claimant had not shown he is totally and permanently disabled due to the combination of his permanent physical impairments and non-medical factors. Claimant argues that the Referee inappropriately relied on excluded evidence and interpreted Claimant's FCE report.[1] Claimant argues that he is totally and permanently disabled, and that the Referee failed to evaluate Claimant's disability as of the date of hearing. Claimant requests that the Commission award total and permanent disability benefits, or retain jurisdiction over the matter.

On August 10, 2017, ISIF responded. ISIF argues that the Commission should have admitted exhibit 17, because the document was available to both parties before the hearing, and Claimant included this document in his discovery response. Further, even if exhibit 17 is not admitted, the Referee appropriately applied Idaho Rule of Evidence 703 which allows Mr. Jordan's reliance on the inadmissible documents if they are of a type typically relied upon by

[1] Claimant's counsel has challenged Referee Harper's impartiality, going so far as to suggest that he acted unethically and in derogation of the Idaho Code of Judicial Conduct. Having thoroughly considered the Referee's original proposed decision, we discern nothing in his analysis or tone to permit the inference that the Referee was arbitrary or capricious. On the contrary, Referee Harper made an evidentiary ruling with transparence and application of the applicable evidentiary rules. The Commission can discern nothing in the record or decision suggesting that Referee Harper comported himself otherwise.

experts in their field. Finally, ISIF contends that there is substantial evidence independent of exhibit 17 which supports the opinion that Claimant can return to the workforce despite his psychological issues. ISIF argues that the Commission appropriately treated the Claimant's FCE, and found that Claimant did not establish total and permanent disability under either the 100% method or the odd-lot method.

Claimant filed his reply on August 22, 2017. In his reply, Claimant suggests that the Referee violated judicial cannons of conduct in his treatment of exhibit 17, and has intentionally refused to carry out his judicial responsibilities with integrity, impartiality, and competence.

**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).

Claimant argues that the cases of Deon v. H&J, Inc., 157 Idaho 665, 668-69, 339 P.3d 550, 553-54, (2014) and Arizona v. California, 530 U.S. 392, 412-13 (2000)), establish that the Referee erred in applying I.R.E. 703 *sua sponte* to address Mr. Jordan's report's reliance on exhibit 17. Claimant also contends that he suffered irreversible harm because the Referee's entire recommendation is premised on exhibit 17, and that there is no evidence in the record that supports that Claimant was capable of performing any work that was regularly available in any labor market.

**Did the Referee Improperly Consider ISIF Exhibit 17?**

The Commission will first address Claimant's allegations that the Referee improperly raised I.R.E. 703 in his evidentiary ruling, and violated the established legal process and canons of judicial conduct. At the May 17, 2016 hearing, ISIF offered exhibits 1 through 17. ISIF

exhibit 16 is Mr. Jordan's report of May 12, 2016. That report contains several references to a psychological evaluation performed by Thaworn Rethana-Nakintara, M.D. That psychological report is dated April 22, 2012, although it is erroneously described by Mr. Jordan as being dated April 22, 2014. Claimant did not object to the admission of ISIF exhibit 16. (Transcript at p. 10). However, Claimant did object to the admission of ISIF exhibit 17, Dr. Rethana-Nakintara's April 22, 2012 report. The basis of Claimant's objection was that he had not seen the report before, and that its admission would constitute a prejudicial and unfair surprise to the prosecution of his case:

> (Claimant's Attorney): But I mean this is a potentially prejudicial document that is a surprise, as I sit here today, and it's after the Rule 10, and I think it's pretty clear.
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> . . . .
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> Well, the impact would have been that we would have objected because it wasn't provided as far as discovery; and the impact would have been that we probably would have requested a continuance for us to be able to run this person down. Who knows where this person is that authored a 2012 report? Who knows?
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> HT, p. 13, ln. 6-8, 18-24.

In response, Counsel for ISIF explained that it did not order the report; it had obtained the report from either Claimant, or Employer/Surety, in the course of discovery. However, Mr. Callery was unable to definitively state at hearing from which party he had received the report. Counsel for Claimant did not deny the possibility that he had provided the report to ISIF in the course of discovery, but also proposed that the document could have been provided to ISIF by Employer/Surety, in which case it would be entirely new to Claimant as of the date of hearing. In short, as of the date of hearing, nobody could satisfactorily explain who had supplied the document to ISIF, and whether Claimant's counsel had had the opportunity to examine it prior to hearing. This ambiguous state of affairs led the Referee to exclude the document, against the possibility that the document had not been exchanged in discovery, and that Claimant's counsel

had not had the opportunity (regardless of whether he actually looked at the document or not) to review the same within 10 days prior to the date of hearing. (Hearing Transcript 10/11-14/22). The Referee's comments at hearing make it clear that he would have been inclined to admit the document had it been Claimant who provided it to ISIF in the course of discovery. In its August 10, 2017 response to Claimant's Motion for Reconsideration, the ISIF affirmatively stated that subsequent investigation has revealed to the ISIF that exhibit 17 was in fact provided to the ISIF by Claimant in the course of pre-hearing discovery. In his reply brief, Claimant rehashed what transpired at hearing, but did not denigrate the ISIF's assertion that the document actually originated in a discovery response provided by Claimant. (*See,* Claimant's reply brief on his motion for reconsideration at 6-8).

Based on Claimant's failure to specifically challenge ISIF's statement concerning the source of the document, it seems quite possible that the document did in fact originate in a discovery response made by Claimant. If so, then Referee Harper's comments at hearing suggest that he would have admitted the document in evidence. Based on this state of affairs, we believe that it would not be inappropriate to admit the proffered exhibit.

Regardless, the fight over the admissibility of ISIF exhibit 17 seems much ado about very little since the contents of the report are referenced in exhibit 16, a document to which Claimant made no objection. For this reason, as well as Referee Harper's reliance on IRE 703, we do not believe that it was erroneous of him to consider Mr. Jordan's reliance on Dr. Rethana Nakintara's report, to the extent that Mr. Jordan actually did rely on that report in formulating his opinions. We recognize that Claimant's counsel did object to those portions of Mr. Jordan's report referencing the psychological evaluation, but this objection comes a little to

late in the game, well after the document has already been admitted into evidence without objection.

Even were we to conclude that Mr. Jordan's evaluation is flawed by his reference to Dr. Rethana-Nakintara's report, it does not appear that his consideration of that report fatally undermines any of the opinions he has rendered in connection with this case. At his deposition, Mr. Jordan explained that there was independent corroboration from other psychologists/psychiatrists, notably Dr. Klein and Dr. Parkman, to the effect that the best thing for Claimant, from a psychological standpoint, would be to get back to work. (Jordan Deposition 45/15-46/14…53/16-54/2). Notwithstanding that his report does reference, and does appear to rely on, the excluded evaluation, Mr. Jordan reached the same conclusion in the absence of that report. Therefore, we conclude that if erroneous, Referee Harper's reliance on IRE 703 to support Mr. Jordan's consideration of an excluded document was harmless error; Mr. Jordan's testimony is that he would have reached the same conclusion without reference to that document.

Next, Claimant challenges Referee Harper's reliance on, and interpretation of, the March 3, 2014 FCE, ordered by Claimant, and performed by Dr. Manesh. First, it is a bit of a puzzle why Claimant would challenge the Referee's reliance on this report, inasmuch as it is the only medical evidence which arguably articulates permanent limitations/restrictions for Claimant following the pronouncement of medical stability, and the rating of Claimant by Dr. Welch on December 12, 2007. Our review of the record fails to reveal any other limitations/restrictions given by any medical provider following Claimant's accepted date of medical stability. If the FCE report cannot be relied upon, at least in part, then it would seem an important component of Claimant's claim for total and permanent disability is lacking, i.e., some proof that limitations

from Claimant's pre-existing conditions combined with his limitations from the subject accident to cause total and permanent disability.

We have reviewed the report, as did Referee Harper, and note, as well, the various puzzling inconsistencies in the report. We are cognizant of the limitations placed on the Commission by Mazzone v. Texas Roadhouse, Inc., 154 Idaho 750, 302 P.3d 718 (2013), but do not believe that the Referee stepped over that line by deciding to rely on the actual measurements taken by Dr. Manesh to inform his judgment of Claimant's accident-produced limitations/restrictions. We agree with the Referee that the objection raised by Claimant to Dr. Manesh's observation that the strength measurements follow a bell-shaped curve is entirely misplaced. To summarize, we believe that the Referee did the best he could with an unfamiliar and somewhat contradictory report. We decline to reconsider his judgment in this regard.

There is another issue that is worth bringing up at this juncture, and which would mandate a similar outcome in this case even had it been determined by the Referee that Claimant is totally and permanently disabled. Of course, a finding that Claimant is totally and permanently disabled satisfies only one element of the case against the ISIF. In addition, Claimant must prove that he suffered certain pre-existing physical impairments which were manifest, which constituted a subjective hindrance to his employability, and which combined with the effects of the work accident to cause total and permanent disability. See, Idaho Code § 72-332. Referee Harper alluded to this issue at page 31 of the Findings of Fact, Conclusions of Law and Recommendation:

> Since Claimant has not shown he is totally and permanently disabled as a result of permanent physical impairments combined with permanent non-medical factors, the remaining noticed issues are moot.

In his decision of April 27, 2009, Referee Taylor concluded that Claimant's genuine psychological condition, though partially caused by the subject accident, was not predominately

caused by the subject accident as required by statute. (See, Idaho Code § 72-451). Therefore, though Claimant's psychological condition is real and relevant to his disability, it is not a compensable component of his claim against Employer/Surety. Ronald Klein, Ph.D., upon whom Referee Taylor principally relied in support of the decision denying compensability of Claimant's psychological condition, concluded that Claimant's Axis I diagnosis is adjustment disorder with anxious and depressed features and his Axis II diagnosis is mixed personality disorder with emotionally dependant and narcissistic features. (See, Ronald Klein, M.D. report at ISIF exhibit 4). Dr. Klein purposed, and Referee Taylor concluded, that while these conditions were worsened by the subject accident, they were not predominately caused by the subject accident.

Evaluation of ISIF responsibility requires the aforementioned four-step evaluation of Claimant's pre-existing conditions. Special rules obtain for conditions that are progressive in nature, i.e. those which worsen following the subject accident. This issue was addressed in some detail in the recent Commission decision Ritchie v. ISIF, 2016 IIC 0038 (2016). Relying on Colpaert v. Larsons, Inc., 115 Idaho 852, 771 P.2d 46 (1989), the Commission discussed how progressive pre-existing conditions must be evaluated when assessing ISIF liability:

> From *Colpaert*, it is clear that in determining whether the elements of ISIF liability are satisfied, a pre-existing condition must be assessed as of the date immediately preceding the work injury. A snapshot of Claimant's pre-existing condition must be taken as of that date, and from that snapshot Claimant's impairment must be determined, as well as whether Claimant's condition was manifest and constituted a subjective hindrance to Claimant. Finally, it must be determined whether Claimant's pre-existing condition, as it existed immediately before the work accident, combines with the effects of the work accident to cause total and permanent disability. *Colpaert* lends no support to the proposition that in evaluating ISIF liability for a pre-existing but progressive condition, that condition should be assessed as of the date of hearing, i.e. at a time when Claimant's condition is much worse.

> In order to determine whether a pre-existing condition constituted a subjective hindrance as of a point in time immediately preceding a work accident, one must assess, as the Commission did in *Colpaert*, the nature of the limitations/restrictions extant as of that date. It follows that in determining whether the pre-existing condition combines with the effects of the work accident to cause total and permanent disability, that assessment, too, must be performed in view of the limitations/restrictions arising from the pre-existing impairment as of a point in time immediately preceding the work accident, not the limitations/restrictions relating to the condition as it may have progressed as of the date of a subsequent hearing. To do otherwise would be to hold the ISIF responsible for something other than a "pre-existing" condition. In what sense can an impairment and related limitations be said to pre-date the work accident when some portion of the impairment and limitations arose after the work accident? The only solution that comports with the statutory design upon holding the ISIF responsible only for pre-existing impairments is to measure all elements of ISIF liability as of a point in time immediately preceding the work accident. *Colpaert* makes it clear that the ISIF cannot be held for the progression of impairment or limitations/restrictions which arise subsequent to the date of injury.

Claimant suffered from a psychological condition prior to the subject accident. However, we know that this condition was not altogether debilitating because Claimant was able to hold down full-time employment, notwithstanding its existence. Per *Ritchie*, ISIF cannot be held responsible for that condition as it progressed subsequent to the subject accident. Nor is the worsening of that condition the responsibility of Employer/Surety pursuant to Idaho Code § 72-451. Claimant's pre-existing conditions for purposes of ISIF liability include his bilateral calcaneal fractures and his psychological condition, as those conditions existed immediately prior to January 15, 2007. The next question is whether those pre-existing conditions combined with the work accident to cause total and permanent disability. Based on the evidence discussed above, in particular the evidence most favorable to Claimant concerning his left upper extremity limitations/restrictions, we are unable to conclude that Claimant has met his burden of proving that his pre-existing conditions combined with the effects of the subject accident to cause total and permanent disability. In other words, Claimant cannot demonstrate that but for his pre-

existing conditions he would not have been rendered totally and permanently disabled by the effects of the subject accident.

For these reasons, as well, we decline to revisit our original order approving the Referee's proposed Findings of Fact, Conclusions of Law and Order.

Based on the foregoing, **IT IS HEREBY ORDERED** that Claimant's request for reconsideration is **DENIED. IT IS SO ORDERED.**

DATED this _22nd_ day of ___November___2017.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

____/s/_____
R.D. Maynard, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on this __22nd__ day of ___November___2017, 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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