BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIO AYALA, Claimant, v. ROBERT J. MEYERS FARMS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2001-520958** **2009-029533** **2013-024075** **ORDER ON MOTION FOR RECONSIDERATION, MODIFICATION, AND CONSOLIDATION** **Filed 6/22/2018**

In its Findings of Fact, Conclusions of Law and Order dated April 9, 2018, the Commission determined, *inter alia*, that Claimant has proven disability of 40% of the whole person, inclusive of disability referable to the accidents of 2009, 2013, and Claimant's non-work related low back condition. Defendants failed to adduce evidence sufficient to allow the Commission to apportion disability pursuant to Idaho Code § 72-406 and, accordingly, Defendants were found responsible for the entirety of Claimant's 40% disability. In a separate Order issued contemporaneously herewith, the Commission has determined that Claimant's 40% disability is payable at 2013 rates.

On or about April 30, 2018, Claimant filed his Motions for Reconsideration, Modification, and Consolidation, supported by the April 30, 2018 Affidavit of Claimant. That affidavit reflects that Claimant earned $47,690 in income for 2016, but only $27,500 in 2017. Claimant also avers that while he was paid a monthly salary at the time of hearing, he is currently paid on an hourly basis, with his hourly wage being approximately the same as his two

subordinates. The affidavit further reflects that on or about June 7, 2017, Claimant suffered a work-related injury to his left knee for which he has received arthroscopic surgery by Dr. Johnson, the same physician who performed the right knee arthroplasty arising from the 2013 right knee injury. From Claimant's affidavit, it further appears that Dr. Johnson has recommended that Claimant requires left knee replacement. That surgery has not taken place and the affidavit suggests that Surety has declined to authorize this treatment. Exhibit C to Claimant's affidavit is a brief report from Dr. Johnson. It reflects that Claimant carries a diagnosis of degenerative joint disease and a torn meniscus. It further reflects Dr. Johnson's opinion that Claimant requires a left total knee replacement, suggesting that Dr. Johnson is of the view that Claimant is not yet at a point of medical stability. Somewhat paradoxically, he then suggests that if worker's compensation will not cover the recommended total knee replacement, Claimant may be considered to be at maximum medical improvement, with certain delineated impairment and permanent restrictions, restrictions which may be more onerous than those at issue in this proceeding.

In opposition to Claimant's motions, Defendants have offered the Affidavit of Morgan Meyers of Robert J. Meyers Farms, Inc. That affidavit reflects that in the 2017 calendar year, Claimant was paid his "normal wages." However, Claimant did not receive an annual bonus in 2017, and according to Mr. Meyers, this explains why his total compensation in 2017 was significantly less than his 2016 income. The affidavit further reflects that the decision not to offer a bonus in 2017 applied to all employees and that insofar as this decision applied to Claimant, it had nothing to do with Claimant's job performance. Mr. Meyers' affidavit implies that Claimant's compensation scheme, except for the payment of the 2017 bonus, was unchanged from prior years. This contradicts Claimant's affidavit which reflects that in 2017 Claimant went

from a monthly salary to an hourly wage. However, Claimant's affidavit does not reflect that this change in the method of compensation resulted in a pay reduction. Claimant argues that the approximate $20,000 reduction in income he suffered in 2017 cannot be explained solely by Employer's decision not to award a bonus for 2017, the implication being that some part of Claimant's decrease in compensation must be attributable to a decrease in his monthly income. However, Claimant, who should know, does not make this averment in his affidavit.

Morgan Meyers' affidavit does not explain why Meyers Farms employees, including Claimant, were not paid an annual bonus for 2017. Claimant's affidavit does not explain why he was switched from a monthly salary to an hourly wage in 2017. Nor does Claimant's affidavit explain why Claimant's income was reduced significantly in 2017; it may be that Claimant's income loss is related to new injuries he sustained in 2017. The affidavits are potentially in conflict depending on what is meant by Morgan Meyers' use of the term "normal wages" at ¶ 2 of this affidavit. However, both affidavits seem to support the proposition that Claimant's 2017 income is approximately $20,000 lower than his 2016 annual income.

In support of his motions, Claimant argues that the accident of June 7, 2017 and Claimant's demonstrated income reduction for 2017 constitute new evidence which warrants review of the Commission's April 9, 2018 Order pursuant to Idaho Code § 72-718 and/or Idaho Code § 72-719. As a fallback position, Claimant urges the Commission to consolidate the 2009 and 2013 claims with the new 2017 claim.

Claimant first takes issue with the Commission's decision to issue its own Findings of Fact, Conclusions of Law, and Order without the benefit of having observed Claimant at hearing. As we have explained, the Commission's election to write the April 9, 2018 decision was not lightly made. However, our obligation to manage our docket to issue timely decisions informed

our judgment. We are, of course, sensitive to the fact that not having observed Claimant at hearing, we are unable to make any finding as to Claimant's observational credibility. However, we are just as competent as the Referee who heard the matter to compare Claimant's testimony to other testimony and evidence of record to make substantive credibility determinations. For example, as explained in the April 9, 2018 decision, we found Claimant's testimony that he has experienced significant and unremitting low back pain ever since the October 6, 2009 accident to be incredible as compared to other testimony and evidence of record. This finding was important to the Commission's determination that Claimant's low back condition is not causally related to the subject accident.

Claimant also testified at hearing to his subjective pain and functional loss stemming from his various injuries/conditions. The Commission considered this testimony in evaluating Claimant's disability. However, it is urged by Claimant that had we had the ability to observe Claimant at hearing, e.g., had we watched him walk to and from the witness stand, grimace with certain movements, or squirm in his seat, we might have been more inclined to give greater weight to his recitation of his functional limitations.

Identifying Claimant's residual functional capacity was one of the principle issues with which the Commission struggled in connection with evaluating Claimant's disability. Based on the opinions of a number of Claimant's treaters, Defendants argued that Claimant has no limitations/restrictions referable to the 2009 and 2013 injuries. In further support of this assertion, they pointed out that Claimant has continued to work for this time-of-injury employer in his time-of-injury position since the 2009 accident.

Claimant relied on the September 25, 2015 FCE in support of his assertion that the 2009 and 2013 accidents, along with Claimant's low back condition, have significantly degraded his

functional capacity. We rejected Defendants' argument that Claimant is not limited by the residual effects of the subject accidents. While the FCE findings are not unchallenged by other evidence of record (see Findings of Fact, ¶¶ 98-105), the Commission determined that the FCE is the least objectionable measure of Claimant's functional abilities and relied on it to evaluate Claimant's disability. Therefore, the Commission did exactly as Claimant asked. If Claimant's presentation at hearing was demonstrative of his discomfort and loss of functional ability, it seems that this additional information only reiterates the evidence the Commission accepted concerning Claimant's functional ability, and is therefore cumulative. Medical evidence is preferred as a guide to evaluating limitations/restrictions.

Next, Claimant takes issue with the Commission's treatment of Claimant's age, 65, as of the date of hearing. Claimant argues that the Commission's decision subverts conventional wisdom about the impact of age on disability. We disagree. Idaho Code § 72-430 specifies that among the non-medical factors to be considered by the Commission in evaluating disability is Claimant's age. The statute does not direct us to award higher disability to older workers, although that is frequently the result. As directed by statute, the Commission did take Claimant's age into account and found, under the peculiar facts of this case, that Claimant's status as an older worker, coupled with the likelihood of continued employment with his time-of-injury employer, supported lower disability than would be the case for a similarly situated 20-year-old. We find no reason to revise our treatment of Claimant's age. *Woody v. Seneca Foods*, I.C. 2010-012114 (2013) is inapposite. That case involved an older injured worker who was unemployed at the time of hearing and without prospects.

Next, Claimant charges that it was improper for the Commission to attach the significance it did to Claimant's current employment and annual income in evaluating his

disability. Claimant argues that the Commission's consideration of Claimant's current employment "punishes" Claimant for continuing to work following the 2009 accident:

> It is respectfully submitted that the Commission's rationale as specifically set-forth within its decision punishes Mr. Ayala for continuing to work following his October 6, 2009, and August 28, 2013, industrial accidents. Had Mr. Ayala terminated his employment after either of those events, he most likely would have been awarded the entirety of his permanent disability related to and resultant of injuries suffered therein, without reduction.

Clt's Memorandum, p. 9-10. Therefore, the argument goes, Claimant's post-accident employment denies him disability that he would otherwise have been entitled to, had he not gone back to work.[1] We reject this cynical argument as entirely inconsistent with the purpose of our worker's compensation system. In this case, Claimant suffered two work-related accidents. Income and medical benefits were paid to Claimant, all for the purpose of supporting his recovery and return to gainful employment. This he did, and in his case, the system did what it is supposed to do. Claimant has hardly been punished. We can think of no justification for ignoring Claimant's current ability to work at his time-of-injury job, since return to gainful activity is the aim of worker's compensation.

The main argument offered by Claimant in support of his Idaho Code § 72-718 and Idaho Code § 72-719 motions is his assertion that events occurring subsequent to the October 26, 2016 hearing have invalidated one of the significant assumptions made by the Commission in arriving at the determination that Claimant has 40% disability referable to the pre-existing back condition and the 2009 and 2013 accidents. As the underlying decision reflects, it was, indeed, significant to the Commission's decision that Claimant has performed his time-of-injury job, albeit with some modification, since the 2009 accident, excepting those times when he has been in a period of recovery following his various surgeries. Claimant was so employed at the time of hearing,

[1] By dint of similar reasoning, any person who is employed is unfairly deprived of the unemployment insurance benefits he would get were he laid off.

and since 2009, he has enjoyed steady annual increases in compensation, such that by 2016 his annual income slightly exceeded $47,000. It was also significant to the Commission that Claimant's prospects for ongoing employment seemed reasonably secure; Morgan Meyers testified that Claimant was important, if not critical, to Employer's business. Based on past history, the Commission also entertained the possibility that Claimant's annual income would increase, and that he would eventually retire from this job. Claimant argues that the Commission's assumption that Claimant's employment would continue at the same or greater wage was central to the Commission's decision on disability. However, the fact that Claimant is currently employed is far from the sole factor upon which the Commission relied in evaluating Claimant's disability. Had it been the sole factor, we might have adopted Defendant's argument on disability: Claimant's continuing employment, coupled with a significant increase in annual income since 2009, and the prospect for continued future employment, augers in favor of a conclusion that Claimant has suffered no disability over and above impairment. However, we did not adopt this argument, recognizing that we must reconcile Claimant's seeming prospects for continued employment with the fact that he has suffered a significant disability should he ever lose his job. (See Findings of Fact, Conclusions of Law and Order at ¶¶ 113-115).

Pursuant to Idaho Code § 72-425, disability is a measure of Claimant's "present and probable future" ability to engage in gainful activity. Our finding that Claimant's current employment is likely to continue is assuredly important to our decision, but our award of a 40% disability necessarily reflects our recognition that continuation of Claimant's employment is not assured. The Commission cannot predict the future, yet the statute requires us to consider the impact of the 2009 and 2013 accidents on Claimant's probable future ability to engage in gainful activity. Our synthesis of Claimant's disability recognizes that the future holds uncertainties

which we cannot know, including the circumstances of Claimant's future employment. The 40% disability figure we arrived at recognizes Claimant's significant loss of access to the labor market, and the fact that he has successfully continued to work for Employer. Nothing in our decision signals that a different result would obtain should Claimant lose his current job. While the 40% rating is based on our perception that Claimant will continue in his time-of-injury employment, it also reflects our acknowledgement that he may not. Otherwise, we might have awarded Claimant no disability above impairment. That one of the possibilities we necessarily entertained has now come to pass does not persuade us to revisit our gestalt of Claimant's disability since that possibility is merged into the Commission's evaluation.

Further, the affidavits provided by the parties leave us unable to understand why Claimant's income declined so precipitously in 2017. Claimant specifically denies any increase in disability or limitation referable to the 2009 and 2013 accidents. (See Claimant's Reply at pp. 7 and 8). He does, however, argue that the June 7, 2017 accident is responsible for a significant increase in Claimant's limitations/restrictions and may make it impossible for Claimant to continue in his employment. It is argued that this likelihood adds further support to Claimant's argument that the Commission erred when it based its evaluation of Claimant's disability on the likelihood that Claimant's employment would continue. This argument seems nonsensical. If Claimant suffers income loss or loses his job because of a new injury associated with an accident of June 7, 2017, this loss is part-and-parcel of a claim for disability referable to the new accident, not the 2009 and 2013 claims. While Claimant might lose his job because of additional limitations related to the June 7, 2017 accident, this does not prove that the Commission made an invalid assumption concerning the likelihood for Claimant's continued employment. All it

proves (or may prove) is that Claimant has an actionable claim for disability arising from a new accident/injury.

Having addressed the broad arguments made by Claimant in support of his motions, we turn now to the specific arguments made by Claimant in connection with his motions made pursuant to Idaho Code § 72-718, Idaho Code § 72-719, and for consolidation.

Motion for Reconsideration Under Idaho Code § 72-718

Claimant has filed a timely Motion for Reconsideration pursuant to Idaho Code § 72-718. That section provides:

> A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

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. *Davison 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 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.

In this case, Claimant argues that facts arising subsequent to the date of hearing undercut the assumptions supporting the Commission's decision and constitute new evidence of which the Commission must consider on reconsideration. Defendants argue that in evaluating the Motion for Reconsideration, the Commission is limited to consideration of evidence of record, not new evidence. Consistent with this position, Defendants filed a Motion to Strike the Affidavit of Claimant, but against the chance that the Commission will entertain Claimant's affidavit, Defendants filed the Affidavit of Morgan Meyers, which also makes factual averments not in the current record. The statute is silent on the question of whether the Commission may consider new evidence, i.e., evidence that was not before the Commission in connection with the earlier proceeding, in evaluating a motion for reconsideration. However, as Claimant has observed, the Idaho Supreme Court does appear to have addressed this issue. In *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005), claimant asserted that her avascular necrosis of the hip was attributable to a fall at work. Relying on the testimony of Dr. Rudd, the Commission determined that this condition was not causally related to claimant's accident. Claimant filed a motion for reconsideration pursuant to Idaho Code § 72-718, which was denied by the Commission. On appeal, the Court noted that although medical evidence was in conflict, Dr. Rudd's testimony constituted substantial and competent evidence supporting the Commission's decision. Claimant also argued that the Commission erred in denying her motion for reconsideration. The Court noted that Idaho Code § 72-718 authorizes the party to request reconsideration, but does not require the Commission to grant such request. The Court then stated:

> It 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. Although Curtis presented a very detailed brief in support of her motion she did not produce new law or evidence to necessitate a rehearing or reconsideration.

Id. at 388, 925. As noted by Claimant, this language suggests that to properly support a motion for reconsideration the moving party must present to the Commission new facts or legal argument rather than ask the Commission to think some more about the facts and argument upon which the Commission originally relied in reaching its decision. Indeed, review of the Commission's Order denying reconsideration in *Curtis* reflects that Claimant did not rely on any new facts to support her motion for reconsideration. (See Order Denying Reconsideration at 2004-IIC0735.1) (2004).

The evidence that Claimant would have us consider is not evidence that could reasonably have been adduced at hearing. The facts that Claimant would have us consider are new facts which came into existence following the hearing, and therefore could not and were not considered by the Commission. In other recent cases we have considered such evidence in connection with a motion for reconsideration. (See *Strope v. Kootenai Medical Ctr, Inc.*, 2016 IIC0046.1). In *Strope*, one of claimant's arguments at hearing was that claimant was entitled to a new MRI which it was thought might reveal that she was entitled to further medical treatment. The Commission ruled in defendants' favor, finding that claimant had not proven her entitlement to such a study. Following the Commission's decision, claimant obtained the study at her own expense, and urged the Commission to reconsider its decision, arguing that the study did reveal that she suffered from a work-related condition requiring additional care. The Commission found this argument persuasive and granted claimant's motion for reconsideration upon the basis of new evidence. Accordingly, we agree that it is not inappropriate for the Commission to

consider the affidavits of Claimant and Mr. Meyers in connection with Claimant's Motion for Reconsideration and we deny Defendants' Motion to Strike Claimant's Affidavit.

However, as explained above, we do not find Claimant's arguments, in particular, his arguments involving events occurring subsequent to the date of hearing, to be persuasive. We continue to be satisfied with our analysis of Claimant's disability based on the evidence that was before us. Our deliberations on the issue of disability included consideration of a number of "what-ifs," including the fact that Claimant might not remain in his time-of-injury job to the date of his eventual retirement. Therefore, we deny Claimant's Motion for Reconsideration under Idaho Code § 72-718.

Motion to Correct a Manifest Injustice under Idaho Code § 72-719

Idaho Code § 72-719(3) provides:

> The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice.

While the plain language of the statute specifies that it comes on the Commission's own motion, this fact does not preclude the Commission from exercising its powers when notice of a purported manifest injustice is brought to its attention by a party. *Banzhaf v. Carnation Co.*, 104 Idaho 700, 662 P.2d 1144 (1983). As grounds for reopening and review of an order of the Commission the term "manifest injustice," must be given broad construction to advance the humane purposes of the Act. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982). As to the meaning of the term, the *Sines* Court stated:

> "Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. Webster's Third New International Dictionary, 1967. "Injustice" has been defined to mean: absence of justice; violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong. Webster's Third New International Dictionary, 1967.

In *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), the Commission determined that Claimant reached a point of medical stability from the effects of a knee injury on November 26, 2001. This decision was based on a note from Claimant's physician. Claimant was scheduled to see her physician on November 26, 2001, but was a no-show for the appointment. The physician concluded that claimant must have been getting along well and pronounced her medically stable. This was the only evidence the Commission relied upon to define Claimant's date of medical stability.

Subsequent to the issuance of the Commission's decision, claimant filed a motion pursuant to Idaho Code § 72-719(3), urging the Commission to reopen the case to correct a manifest injustice. Claimant supported her motion with a letter written by Dr. Peterson stating that he had not examined claimant on November 26, 2001, but that he had since examined her and determined that she was not medically stable and was in need of further care. The Commission denied the motion to reopen the case, ruling that Dr. Peterson's letter presented an insufficient factual basis upon which to reopen and review the case. On appeal, the Supreme Court noted that the only evidence upon which the Commission relied in defining claimant's date of medical stability was Dr. Peterson's November 26, 2001 chart note. The Court further noted that the unrebutted evidence established that Dr. Peterson did not actually examine claimant on that date. Dr. Peterson's subsequent letter entirely undermined his earlier statement and established that claimant was not medically stable and was in need of further care. Therefore, the only evidence upon which the Commission relied in establishing claimant's date of medical stability was demonstrated to be invalid. Clearly, the Court reasoned, this is an adequate factual basis upon which to reopen the case to revisit the finding of medical stability. To do otherwise would be unjust.

In this case, Claimant appears to state three bases for reopening of the case in order to correct a manifest injustice. First, as above noted, the Commission considered Claimant's testimony concerning his subjective limitations and discomfort. It is argued by Claimant that had the Commission actually observed Claimant at hearing, we might have been more inclined to give greater weight to his recitation of his residual functional abilities. However, as explained above, we have accepted the FCE findings, which Claimant urged us to adopt, as the best analysis of Claimant's residual functional capacity. Whatever additional insights might have been obtained by watching the Claimant as he sat or walked about the hearing room are largely reiterative and cumulative. We decline to entertain Claimant's invitation to reopen the case for further review on this basis.

Next, Claimant appears to suggest that because he suffered a new June 7, 2017 accident/injury which implicates further and more onerous restrictions on his ability to engage in gainful activity, the Commission's decision must be reopened to allow consideration of these new facts in assessing Claimant's disability. We reject this, too, as a reason to reopen the April 9, 2018 decision to correct a manifest injustice. Simply, the June 7, 2017 accident/injury, if it did occur, is not part of this proceeding. It is separately actionable and, as explained below, we decline to consolidate it with the 2009 and 2013 claims.

Finally, Claimant argues that to avoid a manifest injustice the record must be reopened to allow consideration of Claimant's changed circumstances, i.e., his 2017 earnings, which reflects a significant decrease, as compared to his 2016 earnings. Setting aside the possibility that this decrease is attributable to a separately actionable 2017 accident/injury, we conclude that it is not unjust to decline to consider this change in circumstance in evaluating Claimant's disability. As explained above, our evaluation of disability is a synthesis of Claimant's significant loss of

access to the labor market and the fact of his continued employment. Bill Jordan speculated that if Claimant ever lost his job, his disability would be in the range of 47%. Claimant has not lost his job, yet the Commission nevertheless made an award of 40% disability to balance Claimant's labor market access loss against the fact of his continuing employment. Simply, our analysis contemplates the possibility that Claimant's circumstances might change in the future. That they did does not undermine our analysis. This case is not like *Page*. Claimant's current job and his 2016 income were far from the sole factors we relied on in making our determination of Claimant's disability.

Based on the foregoing, we deny Claimant's Idaho Code § 72-719(3) motion.

Motion for Modification Pursuant to Change in Condition

Claimant's motion for modification made pursuant to Idaho Code § 72-719(1)(a) was made contemporaneous with his motion for reconsideration. Idaho Code § 72-718 specifies that the Commission's decision of April 9, 2018 is final and conclusive as to matters adjudicated therein unless a timely motion for reconsideration is filed, as it was in this case. Idaho Code § 72-719(1) authorizes the reopening of a "final and conclusive" award in certain circumstances. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988). At the time Claimant filed his Idaho Code § 72-719 motion, the April 9, 2018 decision was not final and conclusive, owing to Claimant's contemporaneous motion for reconsideration pursuant to Idaho Code § 72-718. However, having denied Claimant's Motion for Reconsideration and Motion to Correct a Manifest Injustice, the April 9, 2017 decision of the Commission is now final and conclusive as anticipated by Idaho Code § 72-718. Therefore, we accept Claimant's invitation to consider whether the case should be reopened to address a change in condition. Idaho Code § 72-719(1) provides:

> **72-719. Modification of awards and agreements – Grounds – Time within which made**. – (1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:
> (a) Change in the nature or extent of the employee's injury or disablement; and
> (b) Fraud.

Therefore, a case may be reopened to review an award on the grounds of a change in the nature of the employee's injury or disablement. Claimant concedes that there has been no change in the extent or degree or Claimant's impairment since date of hearing:

> Claimant's Idaho Code § 72-719 motions are not premised upon any argument that claimant's impairment has increased since the date of hearing herein, related to the 2009 and/or 2013 injuries. . . . .

(Claimant's Reply to Defendants' Opposition to Claimant's Post-Decision Motions at p.7)

Rather, Claimant argues that his condition has changed because of a change in the circumstances of his employment, and that Idaho Code § 72-719 provides that such a change warrants reopening of the case because it may reflect a change in Claimant's "disablement":

> Rather, counsel notes that Idaho Code § 72-719(1)(a) sets forth as alternative grounds, either a change in the nature or extent of employee's injury, meaning impairment, or, in the disjunctive, disablement. . . .

(Claimant's Reply to Defendants' Opposition to Claimant's Post-Decisions Motions at p.7)

Therefore, the argument is that because the ground for reopening for change in condition are stated in the disjunctive, a petition for change in condition may be justified where there is either a change in the nature and extent of Claimant's impairment, or a change in the nature and extent of his disability, owing to some non-medical circumstance, in this case, Claimant's significant 2017 decrease in earnings. For the reasons set forth below, we conclude that Claimant must demonstrate a change in the nature and extent of his physical injury in order to successfully

pursue a petition for change in condition under Idaho Code § 72-719(1)(a), and that such a petition cannot be pursued upon a showing of some change in a non-medical factor, alone.

Essentially, Claimant's argument is that because a petition for change in condition may be pursued when there has been a change in Claimant's "disablement," the statute clearly anticipates that such a petition may be pursued where there has been a change in one of the non-medical factors relied on by the Commission to assess "disability." Necessarily, this argument pre-supposes that "disablement" as used in the statute is the equivalent of "disability" as defined and evaluated at Idaho Code § 72-423, § 72-425, and § 72-430. Had the legislature intended that a petition for change in condition could be supported by a showing of a change in one of the non-medical factors central to the determination of "disability," it could have unambiguously signaled this intent by using that term in Idaho Code § 72-719(1)(a). Instead, the legislature chose to use another term: "disablement." Disablement is a concept central to the compensability of occupational disease claims. Idaho Code § 72-102(22)(c) defines disablement as follows:

> "Disablement," except in the case of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease; and "disability" means the state of being so incapacitated.

A claim for occupational disease arises when a worker is incapacitated, i.e. disabled, from performing his work in the last occupation in which he was injuriously exposed to the hazards of his disease. See Idaho Code § 72-437. "Disablement," in this sense, represents a physical inability to work at the time of injury job, caused by the hazards of that job. It does not have anything to do with the nonmedical factors enumerated at Idaho Code § 72-430. The nonmedical factors implicated in evaluating "disability" are <u>not</u> at issue when assessing whether "disablement" has occurred, i.e. whether a claimant is <u>physically</u> incapable of performing the

time of injury job. The legislature's choice of "disablement" versus "disability" in Idaho Code § 72-719(1)(a) lends no support to Claimant's argument that a change in one of the non-medical factors relevant to the original evaluation of claimant's disability warrants reopening of the claim for a change in condition. It seems just as likely that the disjunctive language of the statute simply reflects the fact that petitions for change in condition can be brought in both accident/injury and occupational disease claims, but only where there has been a change in the nature of the physical condition of the injured worker.

Case law also supports the conclusion that it is only for changes in the extent and degree of an injured worker's physical condition that a petition for change in condition may be pursued. In *Magee v. Thompson Creek Mining Co.*, 152 Idaho 196, 268 P.3d 464 (2011), claimant suffered a work-related injury to his low back in 2002. His injuries resulted in permanent complaints of chronic pain. In a 2004 decision, the Commission found that Claimant had suffered permanent impairment and disability as a consequence of the accident. Claimant later filed a Petition for Change in Condition, arguing that the Commission's decision should be modified because of a change in Claimant's condition. A second hearing was held and the Commission ruled that Claimant had failed to prove that a change in his condition had occurred since the original hearing. Further, the Commission ruled that Claimant had failed to prove that it would be manifestly unjust for the Commission to continue to abide by its original decision. The evidence established that at the time of the original 2000 injury, Claimant resided in Cascade, Montana, a town with a population of about 2000 people. As of the date of hearing on the Petition for Change in Condition, Claimant resided in Radersburg, Montana, a town with a population of around 150 people. In connection with the Petition for Change in Condition Claimant acknowledged that his physical condition was about the same as it had been at the time

of the original hearing. However, there was also evidence that Claimant had been diagnosed with a major depressive disorder since the original hearing, which had been attributed to the May 2000 industrial injury. Further, since the original hearing, Claimant had undergone the implantation of a dorsal column stimulator in an effort to diminish Claimant's chronic pain. This evidently offered Claimant some relief. At hearing on the Petition for Change of Condition, Claimant also put on the testimony of a vocational rehabilitation specialist who opined that Claimant was totally and permanently disabled, but it was also noted that this opinion was delivered in the context of his very small labor market in Radersburg, Montana. The vocational expert acknowledged that a larger labor market might provide better employment opportunities for Claimant.

The Commission denied the Petition for Change of Condition, concluding that Claimant had failed to adduce evidence showing that a change in condition had occurred. The Commission also denied Claimant's Motion to Correct a Manifest Injustice. Claimant appealed, arguing that the Commission erred in determining that Claimant had failed to establish a change in condition.

Concerning Idaho Code § 72-719(1), the Court acknowledged the disjunctive nature of Idaho Code § 72-719(1)(a), yet concluded that in order to pursue a Petition for Change of Condition under this section, Claimant must nevertheless demonstrate a change in the nature or extent of his impairment:

> Magee asserts that he sustained a change in condition pursuant to Idaho Code section 72-719(a). The statute allows the Commission to modify an award if there is a "[c]hange in the nature or extent of the employee's injury or disablement." I.C. § 72-719(1)(a). When a claimant applies for modification of an award due to a change in condition under I.C. § 72-719(a), the claimant bears the burden of showing a change in condition. *Matthews v. Dep't of Corr.*, 121 Idaho 680, 681, 827 P.2d 693, 694 (1992) (citing *Boshers v. Payne*, 58 Idaho 109, 70 P.2d 391 (1937)). The claimant is "required to make a showing before the Commission that

> he had an increased level of impairment, and to establish with reasonable medical probability the existence of a causal relationship between the change in condition and the initial accident and injury." *Matthews*, 121 Idaho at 681–82, 827 P.2d 694–95 (internal citations omitted).

Id. Arguably, Magee did experience a significant change in the non-medical factors considered by the Commission in reaching its original decision on disability. By the time of the Petition for Rehearing, Claimant had moved from a town of 2000 to a town of 150, a move which, according to Claimant's vocational expert, dramatically increased his disability. Yet the Court did not consider this fact in evaluating the Petition for Change of Condition pursuant to the provisions of Idaho Code § 72-719(1)(a), concluding that since Claimant had failed to adduce evidence of a change in the nature or extent of his impairment, there the inquiry stops.

Cited with approval by the *Magee* Court is the case of *Matthews v. Dept. of Corrections*, 121 Idaho 680, 827 P.2d 693 (1992). Matthews suffered a low back injury in 1985. He underwent surgery and was eventually given a 20% impairment rating. Thereafter, claimant and surety executed a compensation agreement pursuant to the terms of which the claim for disability was resolved by the payment of $15,895, the amount of his impairment rating. Some months later, claimant alleged a change in his condition and requested that the Commission increase his disability award. He also filed an Idaho Code § 72-719(3) motion to correct a manifest injustice. His argument was based on his assertion that his low back injury made it impossible for him to re-enter the Army National Guard, and that this resulted in significant additional loss of wages and future retirement benefits.

In connection with the petition for change of condition under Idaho Code § 72-719(1)(a) the Court stated that to support such a petition, the claimant must prove an increase in the extent or degree of impairment:

> As the Commission noted, when a claimant applies for a modification of an award under I.C. Section 72-719, he or she bears the burden of showing a change in condition. *Boshors v. Payne*, 58 Idaho 109, 70 P.2d 391 (1937). Matthews was required to make a showing before the Commission that he had an increased level of impairment, *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989), and to establish with reasonable medical probability the existence of a causal relationship between the change in condition and the initial accident and injury. *Carter v. Garrett Freightlines*, 105 Idaho 59, 665 P.2d 1069 (1983).

As in *Magee*, the Court had before it, facts which arguably supported a change in the level of claimant's disability; new facts before the Commission suggested that claimant's 1985 injury was more limiting than initially found owing to its effect on claimant's designs upon re-entering the National Guard. Even so, the Idaho Code § 72-719(1)(a) issue was resolved by the Court's affirmation of the Commission's conclusion that claimant had failed to adduce evidence of a change in the nature or extent of his physical injury. See also *Ivie v. Daw Forest Products*, 1998 IIC 1253 (1998).

The Court's construction of Idaho Code § 72-719(1)(a) makes perfect sense. Otherwise, any time someone lost a job, got a job, got his GED, flunked out of school, got a raise, refused to cross a picket line, moved to another labor market, lost access to daycare, got older, etc., the Commission might be faced with a petition to change a previous disability award because somebody's circumstances had changed. In other words, anytime claimant's earnings increased or decreased for reasons unconnected with the extent and degree of the work-related injury, the Commission could be faced with a petition to reopen the case. This is clearly not what is intended, particularly in view of the charge of Idaho Code § 72-423 which obligates the Commission to evaluate Claimant's present and probable future ability to engage in gainful activity as of the date of hearing. This necessarily requires the Commission to consider how Claimant's future disability may be impacted by things that may or may not happen. We are

obligated to make this judgment once, and it would place an undue burden on the administration of the worker's compensation system to continually revise disability assessments based on Claimant's changing circumstances.

Since Claimant concedes that his Idaho Code § 72-719(1)(a) motion is not premised on any change in the nature or extent of his physical injuries related to the 2009 and 2013 accidents, we deny his Petition for Change in Condition under that section.

Motion for Consolidation

In the alternative, Claimant urges the Commission to withdraw the April 9, 2018 decision, consolidate the 2009, 2013, and 2017 complaints for hearing, and rehear the case so that Defendants may be held responsible for the entirety of the disability referable to Claimant's employment, and so that Defendants will be prevented from shifting responsibility for some portion of Claimant's disability to the Industrial Special Indemnity Fund. We decline to do this for several reasons.

First, it is unclear to us why consolidation will assure that Employer/Surety will pay what it should, but that a refusal to consolidate will not. Employer's liability for the 2009 and 2013 accidents has been decided by the Commission. If Claimant believes that he is entitled to further benefits by reason of the 2017 accident, he may pursue his claim. Consolidation or no, Employer will be held responsible for the payment of worker's compensation benefits owed as a consequence of the subject accidents.

In a case of total and permanent disability, the ISIF may be held responsible for that portion of an injured worker's total and permanent disability caused by impairments which predate the last accident. Sometimes these pre-existing impairments are work related, sometimes they are not. The distinction is unimportant in evaluating the ISIF's liability.

Finally, there is the matter of timing. Claimant's third accident allegedly occurred on or about June 7, 2017. It appears that Claimant's left knee condition following that accident was of sufficient seriousness to require surgical treatment, although we have no way of knowing whether the accident is responsible for that need for treatment. Had Claimant been sufficiently concerned that the June 7, 2017 accident changed the lay of the land, he had ample time within which to alert the Commission to his concerns, and to request action of some type prior to the issuance of the April 9, 2018 decision. Instead, the parties and the Commission devoted considerable effort to hearing and deciding the claims as presented. That Claimant may not have expected the decision to go the way it did is no defense to sitting on his hands.

We DENY the Motion to Consolidate.

CONCLUSIONS OF LAW AND ORDER

Having reviewed the affidavits and arguments of the parties on Claimant's motions, we hereby enter the following Order.

1. Claimant's Motion for Reconsideration is denied.

2. Claimant's Motion to Correct a Manifest Injustice Pursuant to Idaho Code § 72-719(3) is denied.

3. Claimant's Motion for Change in Condition Pursuant to the Provisions of Idaho Code § 72-719(1)(a) is denied.

IT IS SO ORDERED.

DATED this ___22nd____ day of ____June_____, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __22nd___day of _____June_____, 2018, a true and correct copy of the foregoing **ORDER ON MOTION FOR RECONSIDERATION, MODIFICATION, AND CONSOLIDATION** was served by regular United States Mail upon each of the following:

L. CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303

PAUL J. AUGUSTINE
PO BOX 1521
BOISE ID 83701

esl _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARIO AYALA, Claimant, v. ROBERT J. MEYERS FARMS, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2001-520958** **2009-029533** **2013-024075** **ORDER ON MOTION FOR RECONSIDERATION** **Filed 6/22/2018**

On April 9, 2018, the Commission entered its Findings of Fact, Conclusions of Law, and Order addressing, *inter alia*, the issue of the extent and degree of Claimant's disability and whether that disability should be apportioned between the Claimant's work-related injuries and his pre-existing low back condition. The Commission determined that Claimant's disability from all causes combined is 40%, inclusive of impairment. On the question of whether Claimant's disability should be apportioned between the work-related injuries and Claimant's pre-existing low back condition pursuant to the provisions of Idaho Code § 72-406, the Commission ruled that the evidence was insufficient to support apportionment pursuant to that section and charged Defendants with responsibility to pay the entirety of Claimant's 40% disability.

Defendant's Motion for Clarification is prompted by the fact that Claimant's work-related injuries derive from separate accidents of October 6, 2009 and August 28, 2013. Pursuant to Idaho Code § 72-428 and Idaho Code § 72-429, disability less-than-total is payable at 55% of the average weekly state wage for the year of injury. Defendants seek the

Commission's guidance as to how the 40% disability for which Defendants are held responsible should be paid. They contend that since Claimant's disability is the product of Claimant's pre-existing low back condition, the 2009 accident, and the 2013 accident, that some part of Claimant's disability should be paid at 2009 rates and some portion should be paid at 2013 rates. Defendants propose that disability over and above impairment be prorated between the 2009 and 2013 accidents in the same ratio that the 2009 and 2013 accidents contribute to Claimant's permanent physical impairment.

In response, Claimant contends that the mechanistic approach to apportionment advanced by Defendants is disfavored, and that apportionment of responsibility for Claimant's 40% disability must be based on an evaluation and assessment of the impact of each accident on Claimant's ability to engage in gainful activity as anticipated by the provisions of Idaho Code § 72-425 and Idaho Code § 72-430.

We believe it appropriate to treat Defendant's Motion for "Clarification" as a motion for reconsideration pursuant to 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 that within 20 days from the date of the filing of the decision, any party may move for reconsideration. Idaho Code § 72-718. However, "it 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. Davison 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)).

In the underlying decision, the Commission found that Claimant has suffered disability of 40%, inclusive of impairment referable to the 2009 and 2013 accidents. The Commission found that Defendants failed to come forward with such evidence as would support a ruling that some portion of Claimant's disability should be apportioned to his pre-existing low back condition pursuant to the provisions of Idaho Code § 72-406(1). That determination is not challenged. However, the Commission's Order assigning responsibility for the payment of the 40% disability is complicated by the fact that two industrial accidents are implicated in contributing to that disability, leaving Defendants unable to understand whether the award should be paid at 2009 or 2013 rates. They urge the Commission to prorate the disability award between the 2009 and 2013 accidents in the same ratio that each accident contributed to Claimant's permanent physical impairment. In other words, they suggest that the apportionment problem be solved by application of the *Carey* formula, the rule applied in total and permanent disability cases to apportion total and permanent disability between the Industrial Special Indemnity Fund and Employer. (See *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 118 686 P.2d 54 (1984)). However, the Court has made it clear that the *Carey* formula has no application in apportioning responsibility in less than total cases under the provisions of Idaho Code § 72-406(1). (See *Reiher v. American Fine Foods*, 126 Idaho 58, 878 P.2d 757 (1994); *Henderson v. McCain Foods, Inc*., 142 Idaho 559, 130 P.3d 1097 (2006)). Rather, in apportioning less-than-

total disability under Idaho Code § 72-406(1), the Commission is presumed, by its experience, to be able to judge the causative factors in a particular case, and should be allowed a degree of latitude in making an apportionment under Idaho Code § 72-406. (See *Brooks v. Standard Fire Ins., Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990)). Still, any decision on apportionment must be supported by substantial and competent evidence. Consideration of the factors outlined in Idaho Code § 72-425 and Idaho Code § 72-430 is the most appropriate way to determine whether, under Idaho Code § 72-406, Claimant's disability is increased or prolonged by virtue of a pre-existing condition. As we noted in the underlying decision, once Claimant has made a *prima facie* showing of Claimant's disability from all causes, the burden of coming forward with evidence that Defendants should not bear responsibility for that disability shifts to Defendants. Defendants did not adduce proof adequate to persuade the Commission that Claimant's 40% disability should be apportioned between the subject accidents and Claimant's pre-existing low back condition.

With respect to whether or how the 40% disability should be apportioned between the 2009 and 2013 accidents, it is worth noting that Claimant was found to be medically stable from the 2009 injuries prior to the 2013 accident. Vis-à-vis the 2013 accident, the impairments relating to the 2009 accident are certainly pre-existing, and there seems to be no reason why the rules relating to apportionment between a work accident and a non-work related pre-existing condition should not also apply to apportion responsibility between two work-related accidents separated by a period of years, but consolidated for the purposes of hearing.

As was the case with Claimant's low back condition, upon a *prima facie* showing that Claimant had suffered disability of 40%, inclusive of impairment, the burden of coming forward with evidence that disability should be shared as between the 2009 and 2013 accidents falls to

Defendants. Review of the record reveals no evidence that would allow the Commission to do anything but guess how the 2009 and 2013 accidents individually contribute to Claimant's 40% disability except to say that each accident is responsible for certain disability payable as impairment, as set forth in Paragraph 87 of the April 9, 2018 decision. As noted in *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008), where a claim for disability less-than-total is before the Commission, so is the issue of whether Employer bears full responsibility for Claimant's disability. Accordingly, apportionment of disability as between the 2009 and 2013 accidents is an issue before the Commission. Unfortunately, there is neither medical nor vocational evidence before the Commission, and no argument made to the Commission in briefing or the underlying matter, that would support apportionment of disability between the 2009 and 2013 accidents. Defendants' having failed to establish that some part of Claimant's disability should be paid at the lower 2009 rate, the Commission concludes that the balance of Claimant's 40% disability over and above the impairments referable to the 2009 and 2013 accidents must be paid at the higher 2013 rate.

Based on the foregoing, the Commission orders that the impairments identified at Paragraph 87 of the April 9, 2018 decision shall be paid at the appropriate percentage of the average weekly state wage based on the year of injury. The balance of Claimant's 40% impairment shall be paid at 2013 rates.

IT IS SO ORDERED.

DATED this ___22nd___ day of _____June_____, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

____/s/_____
Thomas P. Baskin, Commissioner

____/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___22nd___day of ____June_____, 2018, a true and correct copy of the foregoing **ORDER ON MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

L. CLYEL BERRY
PO BOX 302
TWIN FALLS ID 83303

PAUL J. AUGUSTINE
PO BOX 1521
BOISE ID 83701

esl _____/s/_____