BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

EUGENE STROEBEL, Claimant, v. AUTOMOTIVE MARKETING CONSULTANT, Employer, and XL SPECIALTY INSURANCE COMPANY, Surety, Defendants.	**IC 2017-050855** **ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION** FILED DEC 01 2023 INDUSTRIAL COMMISSION

The above-entitled matter went to hearing before Referee Douglas A. Donohue in Boise on November 17, 2022. Claimant appeared *pro se*. Chad Walker represented Employer and Surety. The Commission adopted the Referee's recommended Findings of Fact and Conclusions of Law in an order filed August 11, 2023 (the "Decision"). On October 12, 2023, Claimant made a motion for reconsideration pursuant to Idaho Code (I.C.) § 72-718.[1] On October 20, 2023, Defendants filed a response arguing that the motion is untimely. The Commission has reviewed the parties' pleadings and issues this order denying Claimant's Motion for Reconsideration.

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,

[1] Although Claimant did not expressly title his letter of October 12, 2023 as a "Motion for Reconsideration", Claimant requests that the Commission reconsider the case in light of the alleged errors raised in his letter. Thus, Claimant's letter of October 12, 2023 is deemed a Motion for Reconsideration under I.C. § 72-218.

any party may move for reconsideration. I.C. § 72-718. However, "[i]t is axiomatic that a [party] must present to the Commission new reasons factually and legally to support a hearing on [a] 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 I.C. § 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)). 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).

Timeliness

I.C. § 72-718 provides:

> **72-718. Finality of commission's decision.** – 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.

As stated earlier, the Commission filed its Decision on August 11, 2023. Thus, for a motion for reconsideration to have been timely, it must have been made on or before twenty (20) days from the date of filing the Decision – i.e. August 31, 2023.

Claimant mailed his motion for reconsideration to the Commission. Per *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986), a motion for reconsideration served by mail is made when it is placed in the mail. Claimant dated his motion on October 12, 2023. The envelope containing Claimant's motion for reconsideration was postmarked October 12, 2023. Thus, Claimant's motion for reconsideration was made and deemed filed on October 12, 2023. Claimant's motion was made six weeks beyond the expiration of the statutory deadline. Thus, Claimant's motion for reconsideration is untimely.

In his motion, Claimant states that he had been "out of town with work and have not had time to sit down and thoroughly go through the final decision regarding my case in a timely manner …." Mot. for Reconsideration p. 1. The Commission acknowledges that Claimant may have been busy, however, Claimant does not allege a defect in service of the August 11, 2023 Decision and furthermore, the statutory deadline is mandatory. Claimant's departure from his home does not excuse the untimely motion for reconsideration.

The Commission's Decision of August 11, 2023 became final and conclusive as to all matters adjudicated when no request for reconsideration was timely made. At this point, Claimant may only reopen the case or set aside the Decision upon sufficient proof of fraud.

Fraud

I.C. § 72-718 provides that, when no timely motion for reconsideration is made, a decision of the Commission is final and conclusive as to all matters adjudicated "in the absence of fraud." Thus, upon a sufficient showing of fraud that would affect the finality of the Commission's decision, a final order of the Commission may be reopened or set aside even if the twenty-day deadline to move for reconsideration has lapsed. *See Harmon v. Lute's Const. Co., Inc.*, 112 Idaho 291, 293, 732 P.2d 260, 262 (1986) (holding that "once a lump sum compensation agreement is approved by the Commission, that agreement becomes an award and is final and may not be reopened or set aside absent allegations and proof of fraud"); *see also Morris v. Hap Taylor & Sons, Inc.*, 154 Idaho 633, 301 P.3d 639 (2013) (the claimant's allegation that his former attorney fraudulently induced the claimant to sign a lump sum settlement was not the type of fraud that affected the finality of the Commission's order approving the settlement).

In order for a claimant to succeed on grounds of fraud he must "prove the following elements by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury." *Harmon*, 112 Idaho at 293, 732 P.2d at 262. Whether fraud has been proven by "clear and convincing evidence is for the determination of the trier of fact [and] [o]n appeal that determination will not be reversed where supported by competent, substantial, though conflicting

evidence." *Id.* at 294, 263 (quoting *Faw v. Greenwood*, 101 Idaho 387, 389, 613 P.2d 1338, 1340 (1980)).

In its Decision, the Commission concluded that:

> (1) Claimant temporarily exacerbated a pre-existing condition in his cervical spine area, and injured his right knee in a compensable accident around the end of July 2017;
>
> (2) Claimant has reached medical stability regarding both conditions and is entitled to permanent disability rated at 1% whole person, inclusive of 1% PPI, accounting for apportionment; and
>
> (3) Claimant is entitled to medical benefits for his right knee. Claimant is entitled to benefits for chiropractic care from August 2017 through December 2017 inclusive for treatment of the temporary aggravation of his neck and for 10 visits occurring immediately after. Claimant failed to establish entitlement to additional medical care and temporary disability benefits.

Decision p. 18. At hearing, Claimant argued that he suffers from several additional conditions beyond those found compensable in the Decision (including pain in his left hip and low back) that are all related to his July 2017 work accident.

In his motion for reconsideration, Claimant states that his IME with Dr. Friedman was the "most bogus and bizarre doctor's exam I have ever had." Mot. for Reconsideration p. 1. Furthermore, Claimant alleges that Dr. Friedman and Dr. Heiner made statements in their respective reports that are not true. Namely, Claimant avers that Dr. Friedman's statement that all other treatment (apart from the treatment found compensable in the Decision) was "caused by preexisting arthritis and not the accident is a bold face [sic] lie." *Id.*

Claimant's bare allegations in his motion do not sufficiently prove that Dr. Friedman's opinion regarding causation is fraudulent. Rather, Dr. Friedman arrived at a medical opinion regarding causation after conducting a physical examination of Claimant. Dr. Friedman further explained the basis for his opinions on causation at his post-hearing deposition.

It is well established that a claimant bears the burden to prove causation, through medical testimony, to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Claimant proffered the medical records of his chiropractor, Dr. Klena, in support of his claim for compensation. In response, Defendants proffered the IME of Dr. Friedman, inter alia, to support their argument that the work accident was not responsible for all the conditions Claimant complained of at hearing. For the reasons thoroughly explained in the Decision, the Commission afforded more weight to Dr. Friedman's opinion over Dr. Klena's opinion. Decision pp. 12-14 (¶44-53). Accordingly, the Commission concluded that Claimant had only proved that a temporary exacerbation of a pre-existing condition in his cervical spine area and an injury to his right knee were compensable. As a fact-finder, the Commission is tasked to balance the conflicting opinions of medical professionals to ascertain whether a claimant has proven causation. That process was followed here. Claimant has failed to show by clear and convincing evidence that the opinions of Dr. Friedman and Dr. Heiner are fraudulent to justify reopening or to set aside the final order of the Commission. The Commission's conclusions were based on competent and substantial evidence.

In his motion for reconsideration, Claimant also avers that Dr. Klena's opinion was disregarded because the Commission does not consider chiropractors to be "legitimate doctors." Mot. for Reconsideration p. 1. Claimant's argument is without merit. Dr. Klena's causation opinions were afforded little weight not because he is a chiropractor, but rather, because his opinions on causation represent little more than his acceptance of Claimant's assertion that certain symptoms are related to the subject accident. *See* Decision pp. 13-14 (¶50). Again, Claimant has failed to show that a party has committed fraud to justify reopening or to set aside the final order of the Commission.

Claimant alleges that a report of a Medicare Annual Wellness Visit of August 3, 2017 that was entered into the record (Defendants' Exhibit ("DE") 1:64-78) contains many inaccuracies. Namely, while the report reflects that Claimant had not had any falls in the past year, Claimant avers that he had fallen a few days prior, at the time of the July 2017 work accident. Furthermore, the report does not reflect any abrasion on Claimant's head, even though Claimant avers that at the August 3, 2017 visit he still had a "scab, noticeable swelling and a bruise on my for [sic] head for a week, not to mention a serious headache, also the neck, back, hip and gluteal injuries." Mot. for Reconsideration, p. 1. Also, the report reflects that Claimant has handrails in his home and that Claimant exercised twenty minutes for 3 or more days a week. DE 1:65. Claimant asserts that, in contrast, he has never had handrails in his home and that he has not exercised that regularly since his college days.

This Medicare Annual Wellness Visit was conducted by Claimant's provider, Jay H. Hansen, M.D., not by a physician at the behest of Employer or Surety. The answers regarding falls, handrails, exercise regimen, etc. appear to have been answers that Claimant reported to the provider. Dr. Hansen was not deposed to explain his notes of the August 3, 2017 visit or to explain whether he observed the scab, noticeable swelling, and the pain that Claimant alleges he was suffering from at the time of the visit.

Regardless, in proving fraud to set aside a final order, it is not enough for Claimant to show that a medical record admitted into evidence is simply inaccurate, he must show by clear and convincing evidence that it was fraudulent under the elements outlined in *Harmon, supra*. For example, Claimant alleges that the report is inaccurate because it reflects that he had not fallen in the past year. He does not allege that he informed Dr. Hansen during the exam that he had fallen in the past year, and then that Dr. Hansen allegedly falsified the report to reflect that he had not

fallen. Furthermore, Claimant has failed to show how these alleged inaccuracies materially affected the Decision. The presence or lack of handrails in Claimant's home and Claimant's exercise regimen were not relevant to the issues discussed and determined in the Decision. Whether Claimant had fallen shortly before August 3, 2017, and whether he demonstrated symptoms of the work accident at the August 3, 2017 visit, had some relevance to the issues before the Commission. However, the report of the August 3, 2017 visit was not central to our conclusion that Claimant had suffered a work accident and injury in July 2017. Indeed, notwithstanding Dr. Hansen's records, the Commission, due to other medical testimony admitted into the record, ultimately concluded that the July 2017 work accident as described by Claimant did indeed happen and that Claimant proved that the July 2017 work accident caused a temporary exacerbation of a pre-existing condition in his cervical spine area and an injury to his right knee. In other words, the Commission still found that the July 2017 work accident happened despite the omission of the incident in the report of the August 3, 2017 visit. For the foregoing reasons, Claimant has failed to prove by clear and convincing evidence that the report of the August 3, 2017 Medicare Annual Wellness Visit, even if it contained inaccuracies, was fraudulent to justify reopening or to set aside the final order of the Commission.

Finally, Claimant accuses Defendants' lawyer of offering him a $1500 "bribe" to "go away." Mot. for Reconsideration p. 2. Idaho Code § 72-404 provides that parties "may compromise and settle claims by way of agreements for lump sum payments, future payments, accrued income benefits, future income benefits, medical cost reimbursements, and other benefits payable under Idaho's worker's compensation laws." It appears that what Claimant characterizes a "bribe" was simply an offer to compromise and settle the claims pursuant to I.C. § 72-404, an offer that Claimant refused to accept, which was within his rights to do. Again, Claimant has failed to prove

by clear and convincing evidence that Defendants' counsel, in offering this settlement, engaged in fraudulent activity to justify reopening or to set aside the final order of the Commission.

ORDER

In conclusion, Claimant's Motion for Reconsideration is untimely and must be denied. The Commission's Decision of August 11, 2023 became final and conclusive as to all matters adjudicated when no request for reconsideration was timely made. Claimant has failed to prove fraud to reopen or set aside the August 11, 2023 Decision.

Based on the foregoing, Claimant's motion for reconsideration is DENIED. **IT IS SO ORDERED.** Pursuant to I.C. § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 1st day of December, 2023.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December 2023, a true and correct copy of the foregoing **ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION** was served by regular United States Mail and Electronic Mail upon each of the following:

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