

CASE REVIEW

ANNUAL INDUSTRIAL COMMISSION SEMINAR

October 27, 2016

Presented By:

Bruce D. Skaug
Skaug Law
1226 E. Karcher Road
Nampa, Idaho 83687
Phone: (208) 466-0030
E-mail: bruce@skauglaw.com

and

Michael G. McPeck
Gardner Law Office
1410 W. Washington Street
Boise, Idaho 83702
Phone: (208) 387-0881, Ext. 15
E-mail: mmcpeek@gardnerlaw.net

IDAHO SUPREME COURT CASES AUGUST 2015 – AUGUST 2016

Fairchild v. Kentucky Fried Chicken, 2015 Opinion No. 90 (September 25, 2015)

5-0 decision. Eismann. J. Jones, Burdick, W. Jones and Horton Concur

Fairchild injured his right knee when he fell while working as a cook. The Commission conducted the hearing. It found the testimony of Dr. Sims, Fairchild's treating physician, the most persuasive on the issues of the nature and extent of injury and permanent impairment. It concluded that he sustained a right posterior cruciate ligament injury and had a permanent impairment rating of 3% whole person. It also accepted Dr. Sims' testimony that Fairchild had no restrictions. It also accepted as more persuasive the testimony of the Defendants' vocational expert that Fairchild had not sustained any permanent disability in excess of impairment. The Commission found that Fairchild "was not a credible witness base upon its observation of him during the hearing and the differences between his hearing testimony and his prior statements in depositions, interviews, and appointments with medical providers." Fairchild appealed the Commission's determination that he failed to prove a disability in excess of impairment. The Court affirmed the Commission's order.

On appeal, Fairchild's attorney argued that the Commission's findings regarding observational credibility were clearly erroneous because the Commission failed to cite any facts to support its finding. The Court held that a trier of fact is not required to set forth the specific observations of a witness's demeanor that the trier of fact took into consideration in judging the witness's credibility.

Regarding the Commission's findings concerning substantive credibility, the Court stated that the Commission is entitled to weigh inconsistencies in testimony and other evidence. It concluded that:

Fairchild's attorney challenged the Commission's findings regarding disability in excess of impairment. He essentially argued that, as a matter of law, if an employee has permanent impairment "then he must have physical limitations and restrictions." The Court held there is no such legal requirement. The Court reemphasized its holding in *Graybill v. Swift & Co.* 115 Idaho 293, 766 P.2d 763 (1988) that a disability rating is based upon permanent impairment and pertinent nonmedical factors, and that a disability rating need not be greater than the impairment rating when consideration of nonmedical factors indicates that the probable future ability to engage in gainful activity is accurately reflected by the impairment rating.

--MGM

Barbara Kelly v. Blue Ribbon Linen Supply, Inc., Id. S. Ct. (Nov. 2015)

Michael Kessinger of Goicoechea in Lewiston for appellant. (winner)

Wynn R. Mosman of Mosman Law/SIF for respondents.

Supreme Court reversed the IC decision that Ms. Kelly was not entitled to work comp benefits for injuries sustained in a head on motor vehicle collision that occurred when she was traveling home from an insurance directed IME.

The IC applied the 1963 case of Kiger v. Idaho Corp., 85 Idaho 424, 380 P.2d 208, deciding her injuries were not compensable because the injuries did not occur in the scope and course of her employment. The Supremes, guided by the able Claimant's attorney, found that the rule pronounced in Kiger did not apply to Kelly because Blue Ribbon's surety directed her to attend the IME. **Ms. Kelly won the appeal based on the special errand and traveling employee doctrines** where employees have been awarded benefits in the past. Thus, Ms. Kelly was in the course and scope of her employment.

--BDS

Chadwick v. Multi-State Electric, LLC, 2015 Opinion No. 109 (November 25, 2015)

5-0 decision. Eisman. Burdick, Horton and Pro Tem Kidwell Concur. Special Concurrence by J. Jones.

Pro Se Claimant sought compensation for two alleged accidents: one occurring on May 26, 2012, and the other on July 26, 2012. The case was heard by a referee, but the Commission did not adopt the referee's proposed findings and conclusions. The Commission issued its own decision. Regarding the first accident, the Commission found that Claimant failed to prove that the May 26, 2012 incident caused damage to the physical structure of the body, and the Claimant had failed to give the Employer timely notice of the alleged accident. Regarding the second accident, the Commission found that the Claimant had failed to prove the occurrence of the July 2012 incident, failed to give timely notice of the alleged accident, and failed to prove that the Employer was not prejudiced by the lack of timely notice. The Claimant appealed, and the Court affirmed the Commission.

The record was filled with inconsistent evidence from the Claimant in his medical records, recorded statement, and deposition regarding both incidents, so the Court had little trouble in finding substantial competent evidence to support the Commission's findings. The most interesting aspect of the Court's opinion concerns notice.

The Court held that notice requires notice of an injury and notice that the injury was caused by an accident arising out of an in the course of employment. Notice to the employer that the employee is experiencing pain, or that the employee has received treatment for that pain, is insufficient to meet the notice requirement, since injury is defined as "a personal injury caused by an accident arising out of an in the course of any employment covered by the workers' compensation law." "Injury" and "accident" are not synonymous, so notice must be of both and

injury and the cause of the injury. Additionally, an employer who knows, for instance, that an employee has back problems and is seeking medical care for those problem has no duty to initiate an investigation to determine whether those problems were caused by an accident arising out of and in the course of employment. The Court said “Claimant cites no authority for that assertion, and it is contrary to the requirements of Idaho law that the claimant must give the employer timely notice of the accident, I.C. § 72-701, and that such notice must include the time, place, nature, and cause of the injury, I.C. § 72-702.”

In his special concurrence, Chief Justice Jones discussed problems he has with cases in which the Commission rejects the finding of fact, conclusions of law, and recommendations of the referee and enters its own decision. He argued that, as a general matter, the Court should require the Commission to explain in its decision why it differed from the referee. Chief Justice Jones found two instances in the record of what he labeled “shoddy fact-finding” by the Commission. By “shoddy” he meant that the Commission was entering findings “based at least in part on observational credibility” –i.e., the demeanor of a witness on the stand—rather than based on “substantive credibility.” At the end of the day, however, Chief Justice Jones concluded that “[e]ven though the arrived there by slightly different routes, both the Commission and the Referee reached the same conclusion—that Chadwick’s complaint should be dismissed with prejudice. The two errant findings made by the Commission in this case were not critical to the outcome. The Court’s opinion does not rely upon the faulty fact-finding and, therefore, I concur in the decision.”

--MGM

Amanda Wilson v. Conagra Foods, et al., Id. S. Ct. (March 2016)

Justin Aylsworth of Goicoechea in Boise for appellant.
Scott Wigle/Old Republic Ins. Bowen & Bailey for respondent. (winner)

Supremes affirmed the Industrial Commission. Claimant alleged IC was out of line for not deciding she had not proven she suffered an industrial accident/injury. Complex back injury and pain history for Claimant. Supremes said IC was correct and awarded costs to Defendant.

--BDS

Green v. Roy Green, dba St. Joes Salvage Logging, 2016 Opinion No. 48 (April 26, 2016)

5-0 decision. Horton. J. Jones, Eismann, Burdick and W. Jones Concur

Green was a sawyer who was struck by a falling tree. The ISIF appealed from the Industrial Commission’s determination that Green was totally and permanently disabled and that his disability was due to the combined effects of a lumbar fusion and a cervical fusion related to the industrial accident and a pre-existing thoracic fusion. The Court affirmed the Commission. The ISIF appealed. The primary issue by the ISIF was whether the Commission erred in retaining jurisdiction to allow the presentation of additional evidence regarding the extent of permanent impairment attributable to the thoracic fusion. A secondary issue was whether the

Commission committed error regarding application of the “but for” test for determining ISSIF Liability. The Employer and Surety argued that the ISIF had filed an untimely appeal and was precluded from contesting liability.

The Court ruled that the ISIF’s appeal was timely. It had appealed from the Commission’s November 26, 2014 order determining the impairment attributable to the thoracic fusion and apportioning the total permanent disability pursuant to *Carey*. The Employer and Surety argued that in order to contest liability, the ISIF should have appeal from the Commission’s January 29, 2014 decision, which established the ISIF’s liability but retained jurisdiction to decide the extent of impairment attributable to the thoracic fusion and apportionment under *Carey*. The Court held that, by its nature, retention of jurisdiction infers that there is neither a final determination of the case nor a final permanent award to the employee. Consequently, there was no final decision determining the parties’ rights until the November 26, 2014 order, so the ISIF’s appeal was timely. In a footnote, the Court clarified that “a decision is not final, and thus not appealable, until all issues are resolved between all parties. Thus, in order to permit appeals of certain interlocutory decision of the Commission, we have adopted I.A.R. 11(d)(2), authoring expedited appeals from compensability determinations.” It made the clarification because it felt that the Commission was misconstruing a comment the Court had made in *Vawter* regarding the effect of interlocutory orders.

As to the ISIFs challenge to the Commission’s retention of jurisdiction, the Court stated that the Commission is entitled to retain jurisdiction to take additional evidence on an issue when the evidence establishes a right to compensation but not the amount, It ruled that there was substantial competent evidence to support the Commission’s finding that the Claimant had a prior impairment which had combined with the effects of the industrial accident to render Green a total permanent disability. Consequently, it concluded that the Commission did not abuse its discretion in retaining jurisdiction to determine the extent of impairment attributable to the thoracic fusion and to make the *Carey* apportionment. The ISIF argued that retention of jurisdiction was only available to aid claimants and could not be used by employers and sureties. The Court said it has never issued a decision limiting retention of jurisdiction to assist claimants. It noted that the second injury fund exists to encourage employers to hire handicapped workers and to relieve such employers from liability for all of a total permanent disability when the “an employee [is] rendered totally and permanently disabled because of a pre-existing handicap coupled with a subsequent industrial injury.” The Court stated that “[a]llowing employers and sureties the opportunity to present evidence at a supplemental hearing when there is an obvious pre-existing condition is consistent with these policies.”

Concerning application of the “but for” test, the Court held that it is not necessary for a physician to use that magic language in rendering an opinion regarding the effects of prior conditions and an industrial accident. The Court noted that the whole of the Commission’s decision on the issue “clearly employs the correct test.” The Court made the following comments regarding the nature of the “but for” test:

--MGM

Mayer v. TPC Holdings, Inc., Id. S. Ct. (May 2016)

Lea Kear/Liberty Mutual for appellant.

Michael Kessinger of Goicoechea Law in Lewiston for respondent. (winner)

The Idaho Supreme Court affirmed the IC Decision and Order ruling that, under Idaho Code 72-431, **income benefits for permanent partial disability, less than total, survive the death of the injured worker.**

Case arose from IC decision relating to the survivability of PPD benefits when a Claimant dies for reasons unrelated to the work accident. Surety paid out the PPI benefits following the death. Liberty saw otherwise.

The Supremes saw otherwise from Liberty holding the plain language of 72-431 clearly allows for survivability of PPD in excess of PPI, upon death of Claimant. **Court also held the disability of the deceased worker may be evaluated after the worker's death.**

--BDS

Gerdon v. Con Paulos, Inc., 2016 Opinion No. 59 (May 27, 2016)

3-2 Decision. Eismann. W. Jones and Horton Concur. J. Jones Dissents. ProTem Kidwell Concur.

Gerdon was in a work-related automobile accident. His injuries included an ankle fracture, herniated lumbar disk, and a complex regional pain syndrome. The case went to hearing on the issue of whether Gerdon was entitled, pursuant to Idaho Code §72-451, to psychological care for depression. There was no dispute Gerdon suffered from depression, nor any dispute that the accident was a cause of his depression. This issue before the Commission was whether the accident was the "predominant cause" of the depression. Each side presented expert testimony on the causation issue. The referee concluded that the defense expert was more credible than Gerdon's, and recommended that the Commission find that Gerdon had failed to carry his burden of proving that the accident was the predominant cause of his depression. The Commission adopted the referee's proposed findings of fact and conclusions of law, and entered an order in favor of the Defendants. Gerdon appealed. The Court affirmed the Commission.

Gerdon's expert was Dr. Marsh, a physiatrist who is board certified in physical medicine and rehabilitation and in pain medicine, and who was one of Gerdon's treating physicians. Dr. Marsh is neither a psychiatrist nor a psychologist. The Defendants' expert was Dr. Calhoun, a psychologist, who is the neuropsychologist director of the brain injury and stroke programs at Saint Alphonsus Regional Medical Center and who is also a consulting psychologist for the rehabilitation program at WorkSTAR. Gerdon had been referred to WorkSTAR, and as part of that program he was evaluated three times by Dr. Calhoun. Dr. Calhoun administered psychological testing on the first the third evaluations. Dr. Calhoun testified that 50% of Gerdon's depressions was contributed to by the pain disorder caused by the accident, and the other 50% was related to pre-existing personality traits of hostility, anger, resentment, and

dysthymia. He had also noted Gerdon suffered from non-accident stressors in his life, including his father abandoning him, his brother committing suicide, and his wife being chronically ill. Dr. Calhoun concluded that it was more probable than not that the industrial accident and injury was not the predominant factor, above all others combined, in causing his depression.

The referee determined that Dr. Calhoun's testimony was more credible than Dr. Marsh because Dr. Calhoun had done psychological testing on Gerdon, which Dr. Marsh had not, and had also evaluated Gerdon's personality style and prior psychological stressors. Additionally, the referee concluded that Dr. Marsh's testimony was entitled to little weight because Dr. Marsh had relied on an inaccurate understanding of the predominant cause standard. Dr. Marsh had assumed that the take-the-worker-as-you-find-them rule applied to psychological treatment. The referee, citing *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 757, 302 P. 3d 718, 725 (2013), noted that the predominant cause standard requires consideration of all other causes combined, including preexisting psychological conditions and other stressors.

The Court applied the substantial evidence standard of review and affirmed the Commission because it determined that all Gerdon's attorney was doing was asking the Court to reweigh the evidence and conclude that the industrial accident was the cause of Gerdon's depression. It also noted that Gerdon's attorney did not argue on appeal that the Commission erred in finding that Dr. Marsh did not use the predominant cause standard contained in Idaho Code §72-451(3). Nonetheless, the Court went on to comment regarding the latter issue, stating:

To find that it was clearly erroneous for the Commission to accept the expert opinion of Dr. Calhoun regarding causation, we would have to find that a reasonable mind could not have relied upon his opinion. [Citation omitted.] Even if we were to find that a reasonable mind could not have accepted Dr. Calhoun's opinion, which we do not, that would not have cured the defect in Dr. Marsh's opinion. His opinion would still be entitled to little weight and would be insufficient to meet Mr. Gerdon's burden of proof. The Commission's decision that Mr. Gerdon failed to meet his burden of proof is not clearly erroneous.

The Dissent focused on Dr. Calhoun's testimony of 50-50 causal relationship. It argued that by accepting Dr. Calhoun's testimony, the Commission essentially was concluding that there was a 51% requirement not contained in the statute in order to meet the predominant cause standard. The Dissent further argued that the Commission disregarded "the positive, uncontradicted testimony of Gerdon's family members and friends who testified as to his mental condition prior to the accident."

--MGM

INDUSTRIAL COMMISSION CASES AUGUST 2015 – AUGUST 2016

Maravilla v. J.R. Simplot Co., 2015 IIC 0046 (Aug. 11, 2015)

Declaratory ruling. The Commission held that abolition of joint and several liability required modification of the pre-abolition rule that any negligence on the part of an employer completely barred the employer's right of subrogation regarding its employee's recovery

against a negligent third party. The Commission adopted a new rule which restricts a negligent employer from recovering on its subrogated interest until the amount paid in workers' compensation benefits exceeds the amount the employer would have been liable for in the third-party case if the employer was a tortfeasor. The Commission stated it would apply this apportionment rule even in a case in which the employer was less negligent than the employee. The Commission also held that it has subject matter jurisdiction to determine and apportion negligence where no determination of negligence was made in the third-party litigation.

--MGM

Maria Melendez v. Conagra/Lamb Weston, IC 2008-023987/IC 2009-032750 (Aug. 2015)

BERRY MAY HAVE HIS CAKE AND EAT IT TOO. (Overpayment of Attorney Fees and Benefits)

L. Clyel Berry for Claimant (winner)
Eric Bailey for Defendants

In 2011, Melendez won a total perm decision from the Industrial Commission and was awarded attorney fees. Claimant's attorney, Mr. Berry, and the Defendants agreed by stipulation the attorney fee award would be an additional 30% of the monthly benefit to Claimant.

Payments of benefits and the attorney fees went on for several years until the IC did a random audit and informed the parties overpayments of benefits and fees were occurring each month. Defendants tried to get some refund from Mr. Berry for the attorney fee overpayment, which they allege was about \$9,000.00.

The parties agreed that there was no way to recoup the overpayment of benefits to the Claimant under IC 72-316.

IC 72-316 Voluntary payments of income benefits. – Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of the law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability *such deduction shall be made by shortening the period during which income benefits must be paid and not by reducing the amount of weekly payments.*

So, if there is an overpayment, the surety can recoup the overpayment, unless it is a total perm case, because they CANNOT shorten the period of income benefits or reduce weekly payment amounts.

Since there is no way to shorten the income benefit period on a total perm, the Commission decided Defendants could not recoup the overpayment of attorney fees. The fees are treated as a benefit to the worker.

The Defendants were also spanked a bit for unilaterally reducing the benefits to recoup their overpayment, WITHOUT Industrial Commission approval. IC concluded that prior approval of the Commission is required before action can be taken a surety to curtail payments of benefits under IC 72-316.

--BDS

Woodward v. Northwest Paramedic Assoc., 2015 IIC 00037 (Aug. 21, 2015)

The Commission adopted Referee Harper's recommended findings of fact and conclusions of law. The claimant suffered from Complex Regional Pain Syndrome as a result of her accident. The issue in the case was whether ketamine infusion therapy followed by intensive physical therapy was reasonable under Idaho Code § 72-432(1).

The referee specifically noted that the claimant's treating physician acknowledged that the treatment would be less-than-ideal, that an ideal treatment was available but the claimant refused to participate in the ideal treatment, and that it was solely because of the claimant's refusal to participate in the ideal treatment that her treating physician recommend the less-than-ideal treatment. The "ideal" treatment would have been the infusion therapy followed by a functional restoration program such as LifeFit. Because she would not participate in any program such as LifeFit, her attending physician recommend and undefined "intensive physical therapy" program as an adjunct to the ketamine infusion. The Defendants presented evidence that prior ketamine treatment had not improved the claimant's condition because it had not been followed by a functional restoration program. Without such a program, the Defendants argued that ketamine therapy simply would be a short-term pain reducing regime, and not reasonable since the Defendants already were providing a pain relief program. The Referee resolved the conflicting evidence as follows:

101. The weight of the evidence supports Dr. Greenwald's opinion that Claimant is *best served* by enrolling in a LifeFit functional restoration-type program immediately after a ketamine infusion session; an opinion shared by Dr. Severson. However, that does not mean that any other physical therapy regime is necessarily unreasonable.

102. Under the unique facts presented herein, Dr. Severson's recommendation of ketamine infusion followed by a therapy program ultimately designed by the doctor, (undoubtedly with input from Claimant), is reasonable treatment under Idaho Code § 72-432(1). The Referee finds Dr. Severson's reasoning persuasive that enrolling Claimant in a program she will willingly tolerate is better than putting her into one she utterly rejects. However, it is important to realize that whatever course of treatment is chosen post-infusion, it is, by all medical accounts in the record, Claimant's one last treatment opportunity. No doctor has suggested any further treatment beyond the one contemplated, and at least four doctors have opined at one point or another that Claimant has reached her maximum medical improvement. While Dr. Greenwald testified quite convincingly that Claimant's chance of success with this program is scant, given the emotional and

psychological components involved, and Claimant's medical history to date, in this particular case with this particular Claimant, a scant chance of success is better than no chance, and is reasonable treatment when the totality of the evidence is examined.

Comment: There is no indication in the case that Idaho Code § 72-435 was raised as an issue. That statute provides that "if an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the commission may order the compensation of such employee to be suspended or reduced." Apart from that, the decision places considerable weight on the claimant's subjective reasons for rejecting participation in a functional restoration program as an adjunct therapy. There is an issue whether an objective standard should be used for assessing a claimant's rejection of a tendered treatment. Such a standard appears to have been used by the Industrial Accident Board (the predecessor to the Industrial Commission) and the Idaho Supreme Court in determining, for purposes of the predecessor statute to Idaho Code §72-434, the reasonableness of an employee's refusal to submit to a diagnostic procedure. See *Proffitt v. DeAtely-Overman, Inc.*, 86 Idaho 207, 384 P.2d 473 (1963). However, there is an argument that a subjective standard is appropriate where the issue isn't the reasonableness of an employee's refusal or the reasonableness of an employee's practices, but the issue of whether the treatment recommended by the employee's attending physician is reasonable. In the latter situation, the physician presumably must take into account his patient's subjective psychological response to treatment in determining what would be "reasonable" treatment under the circumstances.

--MGM

Anthony Hite v. Timberline Drilling/American Mining Ins. Co., IC 2011-025903 (Sept. 2015)

The spleen bone is not connected to the shoulder bone.

Michael Verbillis for Claimant
Scott Wigle for Defendants (Winner)

Issue: Whether Claimant's injury and resultant pathology to his spleen is causally linked to his industrial injury wherein he injured his right shoulder.

While recovering from an accepted industrial injury shoulder surgery, Claimant fell on an icy sidewalk at his home. He landed on his left side and claims to have injured his spleen. He also asserts he further damaged his spleen while getting down from a PT table.

Defendant says Claimant's fall was a superseding intervening event and they are not responsible for the spleen injury costs.

IC found no evidence that the shoulder surgery affected the way Claimant walked so as to have caused him to slip and fall on the ice or hurt himself on a PT table. Claimant failed to prove a causal link from his shoulder injury to his spleen injury.

--BDS

Juarez v. Cintas Corp., 2015 IIC 0043 (Sep. 23, 2015)

A majority of the Commission adopted Referee Harper's recommended findings of fact and conclusions of law. Commissioner Baskin issued a concurring opinion. This was an "odd lot" case in which the Referee determined the claimant was totally and permanently disabled. The Referee also found that the employer and surety were not entitled to apportionment under *Carey*.

Referee Harper found that the claimant met the odd-lot standard because she had looked for work but was unsuccessful and that a further work search would have been futile. Commissioner Baskin in his concurrence did not find any problem in the ultimate determination that the claimant was totally and permanently disabled. His concern was over the method used to reach that result.

There were two industrial accidents. The first accident was in 2009 and injured the left shoulder. The second accident was in 2012 and injured the right shoulder.

Commissioner Baskin felt that since there were two accidents and one of the issues noticed for hearing was whether the claimant was entitled to permanent partial disability in excess of permanent impairment, he felt that after determining the extent of disability from all causes, an analysis should have been made to determine the extent of disability attributable to 2009 accident and the incremental disability, if any, attributable to the 2012 accident. He concluded, however, that the claimant "made a *prima facie* showing of total and permanent disability under the odd-lot doctrine for the effects of the 2009 injury, standing alone." Consequently, he concluded that that the "combined with" requirement for ISIF liability could not be met.

--MGM

Robert Mead v. Swift Transportation and Ace American Ins., IC 2008-027385 (Sept. 2015)

Starr Kelso for Claimant
Emma Wilson for Defendants

Surety should have filed Notice of Claim Status – SOL Tolloed as result of failure to file.

Claimant rightly received benefits in 2008 claim. Years later, Claimant requested additional benefits in 2014, after the five year statute of limitations. At hearing, the parties agreed the surety failed to file any Notice of Claim Status during the life of the claim.

The Industrial Commission found the surety's actions were "willful" as the surety was aware of the legal requirements of IC 72-806. Bad intent is not required to make a determination of willful conduct. Pursuant to IC 72-604, because the Notice of Claim Status was not filed, the SOL is tolled.

--BDS

Rodriquez v. Consolidate Farms, LLC, 2015 IIC 0044 (Sep. 24, 2015)

2-1 Decision. Limbaugh Dissent

This was an odd lot case in which the majority determined the claimant was totally and permanently disabled. The majority declined to accept Referee Powers' recommend findings and conclusions, indicating that while it reached the same result he did, there were "certain aspects of Referee Powers' recommendation require further elaboration and discussion." It added that "most of Referee Powers' proposed recommendation has been preserved."

The claimant lived in Boise at the time of hearing. At the time of the accident, however, the Claimant lived in Bonners Ferry and worked on the employer's hop farm. The Commission determined that pursuant to the Supreme Court's decisions in *Davaz v. Priest River Glass Co.*, 125 Idaho 33, 870- P.2d 2192 (1994) and *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 40-, 565 P. 2d 1360 (1977), it had the discretion to consider the claimant's geographical labor market both in the area where he was living at the time of the accident and where he was living at the time of hearing. The reason was because the claimant had moved from a more favorable labor market at the time of the accident to a less favorable labor market.

The Commission found that the claimant was an odd-lot worker on the basis that a further work search would be futile. It also found the employer did not rebut the claimant's *prima facie* odd-lot case. It isn't clear the reasoning used by Referee Powers in arriving at his conclusions regarding total permanent disability. The Commission felt, however, that this conclusion was one that "is necessary to elaborate on[.]" The elaboration appears to have related to how to handle evidence regarding the job offer the employer made to the claimant.

The claimant had worked for the employer for 21 years and was considered a "core" employee. Following his recovery from the accident, the employer offered him a supervisory job. The claimant didn't take it and moved to Boise.

The Commission noted that:

Referee Powers found that this was a bona fide offer of employment, and that Employer was sincere in its stated willingness to accommodate Claimant's physical limitations in order to make use of his vast knowledge of the hop farming operation. Per Employer, Claimant's job would be largely supervisory, and he would have subordinates available to whom he would assign the physical tasks that he had previously performed. As developed above, in proving that some kind of suitable work is regularly and continuously available to Claimant, it is necessary that Defendants introduce evidence that there is an actual job within a reasonable distance from a Claimant's home which he is able to perform or for which he can be trained. The Commission concludes that the job described by Mr. Atkins in his testimony is an "actual job". As developed above, we further

conclude that since both the Bonners Ferry and Boise labor markets must be considered in evaluating Claimant's disability, this actual job must be treated as a job which lies within a reasonable distance from Claimant's home, notwithstanding that Claimant currently resides in the Treasure Valley.

The Commission then proceeded to reject any evidentiary reliance on the employer's job offer. First, the Commission stated:

However, it is impossible to know whether the modified job, as described by Mr. Atkins, is one that Claimant has retained the physical capacity to perform. Therefore, it is unclear whether the actual job is "suitable." As problematic, is the requirement that the suitable work be "regularly and continuously available" to Claimant.

Second, it focused on testimony that the demand for hops fluctuates with market conditions, then stated that:

Mr. Atkins testified that it is the current expansion which supports Employer's ability to treat the job to which they propose to return Claimant as mainly a supervisory job, a job in which the physical components of the work which Claimant once performed can be performed by his subordinates. (*See* CDA Tr., 68/3-71/3). However, it does not seem unreasonable to suppose that the same factors which drove the decrease in production in 2010 might arise again in the future, leaving Employer without the luxury of treating Claimant's position as largely supervisory in nature. On this evidence, we cannot conclude that Defendants have met their burden of proving that suitable work is "regularly and continuously available" to Claimant, notwithstanding that Employer's current offer of employment is legitimate and sincere. The Commission concludes that Defendants have failed to rebut Claimant's *prima facie* showing of odd-lot status.

In his dissent, Commissioner Limbaugh faulted the Commission on how it handled the employer's job offer to the claimant.

Commissioner Limbaugh noted at the time the job offer was extended, the claimant was still living on the employer's premises in housing provided by the employer which the claimant had lived in for twenty years. The employer also assured the claimant that the employer would make whatever modifications to their equipment and to his job duties necessary for him to return to work. The claimant did not attempt to return to work with the employer. He declined the job offer in writing through his attorney, applied for and began receiving Social Security disability benefits and moved to Boise to be closer to his daughter.

Commissioner Limbaugh also challenged the majority's statement that it was "unclear whether the actual job is suitable" because it might not be regularly and continuously available. He noted:

However, Employer made it more than clear that Claimant was more than just an unskilled laborer. According to Employer, Claimant was “the guy” when it came to hops irrigation and was a skilled, knowledgeable, and valued employee and that they would make whatever accommodations that would be necessary to get him back to work. *Id.* Additionally, while it is true that Claimant is more limited now than he was before his injury, this does not mean he is incapable of working. Dr. Krafft indicated that while Claimant clearly has some limitations, with modifications, he is fully capable of returning to work and that he should work with ICRD regarding work alternatives. (Exhibit 14, pp. 482-483, 490)

Concerning fluctuation in hops production, Commissioner Limbaugh commented that the employer,

made it clear that Claimant was one of their “core employees” and that if they needed to lay off workers, Claimant would be one of the last to go. Additionally, Employer is not just a small Idaho hops farm. Employer is actually a subsidiary of a subsidiary of Anheuser-Bush. (CDA Tr. 53) The likely-hood that production would drop off enough that Employer’s entire group of core employees would lose their jobs seems extremely low.

Commissioner Limbaugh ultimately concluded:

Since Claimant made no attempt, we are left to discuss whether it would have been futile for him to attempt. Given the evidence in the record, it clearly would not have been futile for him to attempt to find a job. Employer testified that Claimant could still have his job and that they would make whatever modifications he needed. Additionally, taking into consideration Claimant’s skill and experience in dealing with hops farming and with irrigation of crops in particular, Claimant is clearly more than just an “unskilled laborer” with no transferable skills. Dr. Barros-Bailey testified that although returning to Employer would have been Claimant’s easiest way to find employment, she does not think it would be futile for Claimant to look for work in the Boise area and that there are jobs available that he could perform with his restrictions if he took the time to look. (Barros-Bailey dep. 19-20) Although Claimant’s industrial injury has significantly reduced his labor market access, the record does not support the proposition that Claimant’s efforts to find suitable employment would be futile.

--MGM

Davis v. Hammack Management, Inc., 2015 IIC 0047 (Oct. 6, 2015)

This was a petition for declaratory ruling in which the Commission entered a unanimous decision against the claimant-petitioner.

The claimant entered into a lump sum settlement agreement with the employer and surety and the ISIF. The Commission approved the agreement. The claimant did not seek

reconsideration of the agreement following its approval, nor did he appeal from approval of the agreement. The parties in the approved agreement stipulated that the claimant was a total permanent disability, apportioned the disability between the employer and ISIF, provided the period of time during which the employer would pay benefits, and provided that ISIF would become liable for full total permanent benefits following the weeks of the employers liability, but that during the period of the employer's liability the ISIF would pay the difference between the total permanent disability rate and the permanent partial rate. The agreement also provided that the employer was entitled to credit against its 250 weeks of liability the PPD benefits it previously paid for the claimant's 27% impairment rating. It was the latter provision of the agreement that the claimant challenged in his declaratory judgment petition.

The claimant argued that the employer should not be entitled to credit PPI in view of the Supreme Court's decision in *Corgatelli v. Steel West, Inc.* 157 Idaho 287, 335 P.3d 1150 (2014), which was decided not long after the Commission approved the lump sum agreement on June 26, 2014. The Commission determined that the lump sum agreement was a final decision which was not subject to collateral attack. The Commission did comment, however, that it might, because of *Corgatelli*, to reach a different result if it came to the same findings regarding total disability and apportionment under *Carey* by way of an adjudication.

Davis v. Hammack Management, Inc., 2015 IIC 0-049 (Nov. 25, 2015)(reconsideration denied)

The Commission denied the petitioner's motion for reconsideration.

The claimant argued that the lump sum should be treated as a compensation agreement under Idaho Code §72-711 rather than a lump under Idaho Code §72-404. The agreement essentially treated the argument as a distinction without a difference. The Commission stated that:

even if it be assumed that the settlement agreement is best characterized as an Idaho Code § 72-711 compensation agreement, the agreement would not receive different treatment under the provisions of Idaho Code § 72-318 than it would if it is more appropriately characterized as an Idaho Code § 72-404 agreement. The agreement does not waive Petitioner's rights to compensation under the Act. Rather, by the subject agreement, Defendants and Petitioner merely agreed to resolve the specific claim for benefits at issue in this case. *See Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005). Further, we find that if the agreement is best characterized as an Idaho Code § 72-711 agreement, it still passes muster under *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009), vis-à-vis the ISIF.

Also, it again declined to apply *Corgatelli* retroactively.

--MGM

Matthew Davidson v. Idaho Elks Rehab/Liberty NW Ins., IC 2011-022463 (Dec. 2015)

We don't believe you.

Clinton Minor/Bryan Storer for Claimant
Joseph Wager for Defendants (Winner)

Issue: Whether Claimant's pre-existing spine condition was aggravated by her industrial accident.

Retiring Referee said yes, award additional medical benefits. Second Referee said no benefits. Industrial Commissioners also said no benefits, but by a different path.

Commissioners found the record to show Claimant lacked substantive credibility.

--BDS

Erickson v. State of Idaho, Industrial Special Indemnity Fund, 2016 IIC 0002 (Jan. 19, 2016)

Unanimous decision adopting Referee Donohue's recommended findings and conclusions. This was a case in which the claimant settled with the employer and surety and proceeded solely against the ISIF. Referee Donohue concluded that the claimant failed to establish that he was totally and permanently disabled.

The primary significance of the decision relates to conclusions the Referee reached concerning the claimant's credibility and the implications for the credibility of the claimant's vocational expert because of his reliance on the claimant's subjective reports. The Referee found that:

123. Particularly, Mr. Crum and Mr. Porter in their post-hearing depositions well explained the objective medical bases upon which they relied to evaluate work restrictions and labor market access. By contrast, Mr. Montague, upon review of records, did not do a transferable skills set analysis because he believed Claimant "would be unable to find gainful activity." Essentially, he facilely opined that because Claimant is a chronic pain patient, he can't work; it would be futile to seek work. The opinions of Mr. Crum and Mr. Porter, based upon analysis of physician-imposed restrictions and Claimant's local labor market, are entitled to greater weight.

--MGM

Williams v. Knitting Factory Entertainment, 2016 IIC 004 (Feb. 1, 2016)

This is an interesting case involving analysis of the special errand and dual purpose doctrines. Referee Powers issued a recommended decision finding for the claimant. The Commission, however, declined to adopt his recommended findings and conclusions and issued

its own determination. The Commission unanimously concluded that the claimant failed to prove that she suffered an accident and injury arising out of and in the course of her employment.

The claimant was injured when struck by an automobile in the crosswalk at Myrtle and 9th while on the way to her car from the defendant employer to have her personal cell phone repaired. Referee Powers had found that the claimant's personal cell phone provided some benefit to the employer and that the journey to repair it was at least partly related to her employment. Therefore, he concluded that the trip was a special errand undertaken to advance the employer's interest, so he recommended that the injury be found compensable. The Commission, however, disagreed with how Referee Powers treated the issue, and declined to adopt his recommended decision.

The Commission noted that it had adopted in *Trapp v. Sagle Volunteer Fire Department*, 1991 IIC 0011 (January 15, 1991), a five factor test for analyzing special errand cases: (1) did the activity inure to the substantial benefit of the employer? (2) was the activity engaged in with the permission or at the discretion of the employer? (3) did the employer knowingly furnish the instrumentalities by which the activity was to be carried out? (4) could the employee reasonably expect compensation or reimbursement for the activity engaged in? and (5) was the activity primarily for the personal enjoyment of the employee? The Commission in *Trapp* further noted that the foregoing factors must be viewed in light of "reasonableness." The Commission in *Williams* noted that "[t]he facts of the present case require us to determine whether a sufficient causal connection exists between Claimant's desire to report her personal cell phone and her employment such that Employer should be liable for the injuries Claims sustained while performing the errand." The Commission then went on to analyze the evidence under each of the five factors.

In the course of discussing the fifth factor, the Commission also referenced the "dual purpose" doctrine. And it essentially summarized the effect of an overall weighing of the five-factor test. Concerning this factor, the Commission began by stating that:

46. The fifth *Trapp* factor is whether the activity was primarily for the personal enjoyment of the employee. As developed above, Claimant has testified that she left the KFE facility on the morning of March 20, 2014, to repair her phone because she wanted to keep in contact with her children and because she expected to need her phone for work purposes after hours. As explained above, we conclude that the primary reason for Claimant's decision to repair her phone sooner rather than later was to advance her personal interest in re-establishing her means of staying in touch with her children. The evidence supports the conclusion that Claimant's purpose in initiating the trip on the morning of March 20, 2014, was primarily personal.

The Commission went on to note, however, that it recognized that an errand can serve a business and a personal purpose. (This is a statement of the dual purpose doctrine.) It also recognized Idaho Supreme Court authority in which the Court explained how to distinguish the two components of the dual purpose doctrine. The Court had explained that if the work created the necessity of the travel, then the employee is in the course of employment, though the

employee is serving at the same time some personal purpose. However, the Court further explained, that if “the work had had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.” The Court also indicated that the service of the employer did not need to be a paramount cause of the trip. The Commission in *Williams* then reasoned:

As we have found, Claimant’s use of her personal cell phone was of some benefit to employer. Therefore, it might well be argued that the Claimant’s employment was, at least, a concurrent cause of the errand in question. However, focusing on the timing of the errand, i.e. the fact that it took place in the morning, as opposed to the afternoon, and Claimant’s stated reason for leaving when she did, leaves us unpersuaded that Claimant would have cancelled the trip upon failure of the business purpose. Rather, the evidence persuades us that absent a business connection, Claimant would still have requested permission to leave the premises on the morning of March 20, 2014, for the purpose of obtaining repair of her phone.

47. As to reasonableness, Claimant argues that the errand was reasonably incidental to her work duties because she used her cell phone for work. We agree that there is evidence demonstrating some usage of her personal cell phone for work activities, but the Commission is not persuaded that Claimant’s work-related cell phone usage makes her trip a reasonable work-related activity. Smart phones are now ubiquitous in the workplace, and employers and employees routinely contact each other using such devices. Like Claimant, many employees forego a landline and rely exclusively on cell phones. No evidence suggests that Claimant’s personal cell phone had to be urgently repaired on the morning of March 20, 2014 to conduct any job responsibilities or that the trip came at Employer’s request or directive. While it is understandable that Claimant wished to maintain contact with her dependent children, her sporadic use of a personal cell phone for work purposes does not transform any activity connected to the care and maintenance of the personal cell phone into a work-related event. Claimant has not met her burden of demonstrating that her off-premises accident occurred while engaged in a special errand in the service of her employer.

--MGM

Backes v. Dependable Fabrication, Inc., 2016 IIC 0005, (February 5, 2016)

Following hearing, the claimant entered into a lump sum settlement with the employer and surety, but ultimately failed to execute the settlement documents. The employer and surety moved to enforce the settlement, but the Commission denied the motion. Referee Taylor then proceeded to prepare recommended findings and conclusions. He concluded that the claimant had impairment of 1% whole person for a left wrist injury, but that he failed to prove he had sustained permanent disability in excess of impairment. The Commission agreed with his

ultimate determination, but disagreed with his treatment and analysis of the FCE, so it entered its own findings and conclusions regarding that issue,

Concerning the FCE, the Commission found:

28. In summary, we disagree with the Referee that the FCE administered by Mr. Norling and accepted by Dr. Dunteman provides the most objective and reliable assessment of Claimant's functionality. Important and apparently contradictory statements were not explained in a way that would allow us to conclude that the FCE credibly establishes that Claimant has medium duty limitations/restrictions as a consequence of his left wrist injury.

Instead, the Commission found that the testimony Dr. Stevens and Dr. Bert reflected "a more persuasive indicator of Claimant's functional ability." Neither physician had imposed any work restrictions.

--MGM

Smith v. Henry Steven Smith, dba Quality Appliance Service, 2016 IIC 0007 (February 18, 2016)

This is one of those rare cases where the claimant is also the employer—i.e., the claimant was a self-employed appliance repair technician who had elected coverage. He injured his right hip when he fell on ice, and he also sustained a right wrist injury, which developed into carpal tunnel syndrome. He had a number of preexisting conditions, including degenerative lumbar disc disease, right wrist arthritis, arthritic knees, and left-shoulder arthritis. Besides the claimant-is-also-employer angle, another interesting aspect of the case was the size of Referee Harper's overall permanent partial disability rating and the extent of apportionment of the rating.

Referee Harper found that the claimant had lost access to 80% of the labor market and had suffered a loss of earning potential of 60%. He then concluded that he had an overall permanent partial disability of 70% whole person, "exclusive of impairment." He concluded that the claimant's preexisting conditions and the restrictions attributable to those had a greater impact on disability than the restrictions attributable to the industrial accident. He apportioned the overall disability rating 12%, exclusive of PPI, to the industrial accident and "58 percent to his non-industrial pre-existing conditions."

--MGM

Gormley v. South State Trailer Supply, 2016 IIC 0009 (March 4, 2016)

The claimant alleged he was totally and permanently disabled. Besides the issue of extent of disability, the case also involved an issue regarding ISIF liability. The Commission declined to accept Referee Taylor's recommended decisions, since it disagreed with the treatment he had given to the claimants preexisting low-back impairment, the evaluation of his

disability, and the apportionment of his disability between the preexisting condition and the accident.

The claimant injured his right knee in an industrial accident in 2010 and had several surgeries on the knee. Prior to the industrial accident, he had two low back surgeries and fusions, the first in 2006 and the second in 2008. His prior back problems did not arise from a workers' compensation accident, so his back was never rated for permanent impairment. The claimant asked the Commission to utilize the AMA Guides to Permanent Impairment and rate the claimant's low back condition. The Commission declined to do so.

The Commission drew a distinction between determining a rating for purposes of ISIF apportionment under *Carey* and apportioning permanent partial disability under Idaho Code §72-406. In view of the Supreme Court's decision *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013), the Commission determined that it was not empowered to assess impairment by utilizing the AMA Guides, so it declined to rate the claimant's prior lumbar impairment.

The rating issued for purposes of *Carey* ended up moot, however, since the Commission found that the claimant was not totally and permanently disabled but only permanently and partially disabled. But the Commission did proceed to apportion permanent partial disability between the industrial accident and the prior low back condition without a determination of the degree of permanent impairment attributable to the latter.

The Commission found that the claimant's overall permanent disability due to his low back and kneed conditions was 55% of the whole person. It apportioned 9% to the prior low back condition. The Commission noted that for purposes of apportionment under Idaho Code §72-406, the extent and degree of impairment need not be quantified. All that is needed is evidence that the employee suffered from a prior impairment of some type. The Commission then stated: "We need only draw on our experience in many similar cases to conclude that Claimant's multilevel degenerative disease of the lumbar spine with concomitant four-level fusion procedure and residual symptomatology/limitations leave him qualified for a permanent physical impairment rating of some type."

What the Commission then did was turn to the issue of permanent partial disability. It considered evidence regarding the claimant's medical treatment prior to the 2010 accident, his job performance prior to the 2010 accident, and testimony from the employer's vocational expert. It then arrived at an overall permanent partial disability rating of 55% whole person, of which it assigned 9% to the preexisting low back condition

--MGM

Salinas v. Bridge View Estates, 2016 IIC 0010 (March 4, 2016)

Referee Harper determined that the claimant failed to prove her current low back condition was caused by her industrial accident; failure to prove her right to reimbursement for medical care for her low back after she reached MMI; failure to prove she was entitled to

permanent impairment; and failed to prove she was entitled to permanent partial disability benefits. Nonetheless, Referee Harper found that the claimant was entitled to an award of attorney fees because of the surety's discontinuance of medical benefits.

The surety initially provided medical care to the claimant, including an MRI and a referral to physical therapy. It then decided to conduct additional investigation of the claim, and it obtained a medical release from the claimant. While it was gathering the claimant's medical records, the surety discontinued medical treatment. The Referee accepted the claimant's testimony that she tried several times to contact the adjuster, but the surety never contacted her in response, either orally or in writing. The Referee then made the following findings:

70. Surety owed a duty to Claimant to communicate promptly and keep her informed of the status of her claim in circumstances such as presented herein. Surety also had the obligation to investigate her claim promptly and efficiently. In a case such as this one, where Claimant is actively treating for a symptomatic accepted condition and not at MMI, Surety's responsibility included addressing any coverage concerns as promptly as was reasonable and communicating its findings to Claimant without delay.

71. Surety's actions in leaving Claimant in the dark as to whether or not she had continuing medical coverage at a time when she should have been receiving medical care, and in fact had appointments scheduled, was not reasonable. In effect, Surety discontinued compensation justly due and owing to Claimant without a reasonable ground, not *per se* by temporarily suspending her medical coverage, but by unreasonably delaying its decision on continuing coverage on an accepted claim and/or refusing to communicate with Claimant on her coverage status despite her repeated attempts to speak with the adjuster.

72. Surety's actions led to the uncertainty that helped fuel this litigation. By discontinuing care before a physician declared Claimant at MMI, Surety left the door open for Claimant to more forcefully argue that she never did achieve medical stability after the industrial accident. It is nearly axiomatic that the greater the uncertainty, *i.e.* unresolved issues, the greater the chance for contested litigation. After all, cases with a certain outcome rarely end up going to hearing.

73. In the present case, had Claimant been allowed to treat to MMI, her argument that she never reached MMI would be less of an open question. While there is no guarantee that Claimant would not contest her treater's opinion regarding medical stability, without that opinion Claimant had only an after-the-fact IME doctor's opinion to overcome. While she did not overcome that opinion, Surety's conduct invited this litigation by unreasonably leaving Claimant in a legal and medical limbo.

74. The fact that Claimant did not prevail on her causation claim does not prove Surety acted reasonably. Idaho Code § 72-804 does not speak in terms of a prevailing party. To obtain attorney fees under the statute, Claimant need only

prove one of the three (3) prohibited behaviors. For an award of attorney fees in this case, Claimant must, and did, prove (1) an industrial injury, (2) causally-related treatment (prior to November 2011) for such injury, and (3) Surety discontinuing such causally-related treatment without reasonable grounds. Claimant has satisfied her obligation for an award of attorney fees in pursuing this litigation.

Salinas v. Bride View Estates, 2016 IIC 0020 (April 28, 2016)(reconsideration denied.)

The defendants primarily argued on reconsideration that attorney fees cannot be awarded under Idaho Code §72-804 if a claimant is not awarded compensation. The Commission rejected that argument. It noted that the claimant was actively treating for the industrial injury, which was an accepted claim, when the surety declined payment for additional treatment without a medical reason, and then did not provide the claimant with clear information regarding her claim status. At the time benefits were terminated, the claimant had not been declared MMI. These actions, stated the Commission, “denied Claimant benefits justly due during the pendency of her workers’ compensation claim. It further noted that the “a persuasive medical opinion that declared Claimant stable” was not procured until several years after the termination of benefits. Under these circumstances, the Commission stated that “Defendant cannot excuse their actions by Claimant’s subsequent recovery.”

--MGM

Youren v. Treasure, 2016 IIC 0011 (March 11, 2016)

This is an uninsured employer case which involved an independent contractor v. employee issue.

Youren was a “galloper” at Les Bois Park. He sustained a leg fracture while galloping a horse for Treasure at the racetrack. The referee concluded that the Youren was an employee, finding that:

65. In the present case, the evidence supporting both parties’ positions is closely balanced. Treasure’s payment without withholding taxes clearly suggests Claimant was an independent contractor. Treasure did not provide any major equipment suggestive of direct employment. The parties’ ability to terminate the relationship at any time is consistent with both direct employment and day to day contract labor. Most persuasive is the direct evidence establishing that Treasure required Claimant to gallop his horses first, regularly specified the time to begin galloping, and expected Claimant to perform additional duties beyond that of a galloper. Considered collectively, the four factors which evaluate the right to control and distinguish an employee from an independent contractor indicate that Claimant was a direct employee of Treasure. From the credible evidence presented in this case, the Referee finds that Claimant was an employee of Treasure at the time of his accident on July 17, 2013.

--MGM

Tuma v. State of Idaho, Industrial Special Indemnity Fund, 2016 IIC 0013 (March 23, 2016)

This was a total permanent disability case. The employer and surety settled during the pendency of the litigation. The case continued against the ISIF. The Commission disagreed with Referee Taylor's application of the *Carey* apportionment rule, so it issued its own decision.

The Commission found that the claimant was totally and permanently disabled from the combined effects of her preexisting low back impairment and the impairment from the industrial accident. The Commission did not explain how Referee Taylor had apportioned benefits and in what manner it disagreed with his apportionment. The Commission simply calculated the apportionment based on the impairment ratings, and noted that, absent the settlement, the employer and surety would have been liable for 369.55 weeks of benefits. It then found that:

39. Apportionment pursuant to Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate as follows: For the 369.55 week period subsequent to December 18, 2014, ISIF is responsible to pay to Claimant the difference between the applicable permanent partial disability rate and the applicable total and permanent disability rate. Thereafter, ISIF is wholly responsible for the payment of total and permanent disability benefits at the applicable statutory rate. See, Carey v. Clearwater County Road Department, Amended Award following remand, 1984 IIC 0431.

One important aspect of the case is that the Commission determined that the total permanent disability commenced as of the date of medical stability. It explained that determination in a footnote, stating:

Brown v. The Home Depot, 152 Idaho 605, 272 P.3d 577 (2012), establishes that in most cases, the facts and circumstances extant as of the date of hearing are the facts that should be considered by the Commission in assessing disability. However, Brown provides no specific guidance on the question of whether the date of hearing is also the date on which responsibility for payment of a disability award commences. Here, there is no evidence that Claimant's disability was any different between the date of medical stability and the date of the disability determination, i.e. the date of hearing. Therefore, it is appropriate to find Claimant totally and permanently disabled retroactive to the date of medical stability. To hold otherwise would be to deny Claimant any indemnity benefits between December 18, 2014 and August 4, 2015.

--MGM

Lopez v. Vanbeek Herd Partnership, 2016 IIC 0017 (April 14, 2016)

The case involved the proper methodology for rating partial binaural hearing loss. The Commission determined that the proper method was to analogize an unscheduled partial binaural

hearing impairment to the statutory schedule for total loss of binaural hearing. Consequently, the overall percentage of partial binaural hearing sustained is multiplied by 175 weeks.

--MGM

Chapek v. Earth Energy, Inc., 2016 IIC 0018 (April 14, 2016)

This was a declaratory ruling case. The issue was whether the petitioner's ex-wife was entitled to a portion of his lump sum settlement pursuant to their divorce decree.

The divorce decree was entered subsequent to the industrial accident. The decree awarded to each party 50% of all settlement funds from the petitioner's industrial accident. The proposed lump sum settlement was for \$250,000.

The Commission held that the petitioner's assignment of 50% of his settlement to his ex-wife was invalid pursuant to Idaho Code §72-802, which prohibits the assignment of benefits. It further held that his ex-wife, as a judgment creditor, was prohibited by the same statute from claiming a portion of the lump sum proceeds.

--MGM

Hammon v. Century AG, Inc., 2016 IIC 0021 (April 29, 2016)

Referee Taylor issued recommended findings and conclusions, which the Commission declined to adopt because it concluded that the referee "inappropriately speculated as to the type of injury Claimant suffered, i.e., "likely meniscal tearing", without medical evidence."

The Commission concluded that the medical evidence established that the claimant had injured his left knee in the accident, but that the extent of his injury could not be determined without an MRI. Consequently, it determined that the claimant was entitled to further medical care, including, but not limited to, an MRI.

--MGM

Kim Gray v. Idaho Special Indemnity Fund, IC 2011-002751 (May 2016)

Robert Beck for Claimant
Paul Rippel for ISIF (Winner)

Too much reliance on subjective complaints by vocational expert. Battle of vocational experts. Granat v. Crum and Crum found more persuasive.

Issue: Carey formula apportionment and whether Claimant totally and permanently disabled.

Commission found that though not appropriate to ignore subjective complaints or an FCE. However, there needs to be additional evidence to support such. Claimant expert relied too much on subjective complaints and made up his own restrictions based on such. Claimant found not to be totally and permanently disabled.

--BDS

Andrews v. State of Idaho, Industrial Special Indemnity Fund, 2016 IIC 0024 (May 10, 2016)

The claimant settled with the employer and surety prior to hearing and the case proceeded solely against the ISIF. Referee Powers issued a recommended decision, which the Commission accepted. He found that the claimant was totally and permanently disabled from the effects of his industrial accident under the odd-lot doctrine, and also found that the claimant had failed to prove liability on the part of the ISIF.

Concerning the issue of ISIF liability, the Referee found that the claimant had failed to establish that his preexisting were a subjective hindrance to employment. The Referee then determined that the claimant could not meet the “but for” test associated with the “combined with” element for ISIF liability. Here he relied on testimony elicited from the claimant’s own vocational expert, who testified that the restrictions for the claimant’s 2009 industrial accident alone would render him totally and permanently disabled.

--MGM

Anderson v. Gamma Phi Beta Sorority, 20-16 IIC 0026 (June 7, 2016)

Referee Taylor issued a recommended decision which the Commission chose not to adopt. It state that “[a]lthough the Commission agrees with the Referee’s proposed outcome, the Commission gives slight different treatment to the issue of whether Claimant suffered a compensable accident and injury.” The Commission concluded that the claimant proved she sustained a compensable accident and injury, but it did not explain the nature of its “slight different treatment” of the accident and injury issue to that given by Referee Taylor.

The important part of the decision is that it involved application to the facts of the Supreme Court’s decision in *Wynn v. J.R. Simplot Co.*, 105 Idaho 102,663 P. 2d 629 (1983). That was a case in which a heavy equipment operator developed the immediate onset of the symptoms of a herniated disc while doing his normal work without the occurrence of anything out of the ordinary. The Court concluded that Wynn had established an accident and injury, noting that an accident occurs in doing what the worker habitually does if the strain of normal work was sufficient to overcome the resistance of the workers’ body, resulting in damage to the physical structure of the body.

Ms. Anderson worked as the house director for a sorority. On April 27, 2014 she experienced the onset of right shoulder, neck, and upper back pain in the course of lifting gallons

of pizza sauce to make 60- hand-mad pizzas and lifting pizzas in and out of the oven. She subsequently was diagnosed with a cervical disc herniation.

In making its determination regarding compensability, the Commission accepted the credibility assessment made by the Referee, The Commission then found the occurrence of an accident:

26. Even without falling or tripping, pulling gallon cans from pantry shelves and lifting pans containing six pizzas apiece is sufficient to constitute an untoward event or mishap if injury is caused thereby. "If the claimant be engaged in his ordinary usual work and the strain of such labor becomes sufficient to overcome the resistance of the claimant's body and causes an injury, the injury is compensable." Wynn v. J.R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

27. Finally, Claimant has related the onset of her symptoms to a date certain, April 27, 2014, during the afternoon hours. Her discomfort was first noted while taking gallon cans off shelves, and progressed as she put pizza pans into and took them out of the oven. On these facts Claimant has satisfied her burden of reasonably locating the accident as to time when and place where it occurred. Henry v. Department of Corrections, 2011 IIC 0045.

28. On the basis of the foregoing, we conclude that Claimant has met her burden of proving the occurrence of an accident on April 27, 2014.

On the injury issue, the Commission rejected the testimony of the defendants' medical expert, an orthopedist. Since 1987, 95% of his practice had consisted of IMEs. He had testified that claimant's herniated disc was due to her degenerative cervical condition and the force of sleeping. He had also testified that her work activities had not produced sufficient force to herniate her cervical discs. Instead, the Commission relied on the testimony of three of the claimant's attending physicians, including a neurosurgeon and an orthopedic surgeon. The Commission found that:

46. The opinions of Dr. Niska, Dr. Dirks, and Dr. McNulty that Claimant's April 27, 2014 accident caused her cervical disc herniations are consistent with the evidence, including Claimant's credible testimony of her onset of symptoms upon lifting gallon cans of pizza sauce, olives, and pineapples and increasing symptoms lifting pans of pizzas in and out of the oven, and are persuasive.

--MGM

Smith v. Ox Industrial, LLC, (June 27, 2016)

The Commission declined to adopt Referee Donohue's recommended findings and conclusions "in order to give different treatment to the issue of attorney's fees and to address

whether Claimant's conduct is sufficient to warrant forfeiture of benefits pursuant to Idaho Code §720-801."

The Commission concluded that the claimant had sustained a compensable accident which caused a permanent loss of hearing in the left ear. He also sustained vertigo and loss of balance problems. An OTR/L had evaluated claimant's home and recommended certain home improvements for safety reasons. That surety provided some of the improvement recommended by the expert, but not others. The Commission concluded that the surety's failure to provide the safety improvements was unreasonable, and awarded attorney fees.

The Commission also found that the claimant willfully made false statements to treating and evaluating physicians, and in the course of his deposition. The Commission found he had done so for the purpose of obtaining workers' compensation benefits. The Commission concluded, however, that it did not have statutory authority to order a forfeiture of benefits or require the repayment of benefits paid to date without there having been a criminal conviction. Consequently, it retained jurisdiction "for possible further action pending criminal prosecution of the Claimant pursuant to Idaho Code § 72-801 or Idaho Code § 41-293."

--MGM

Joseph George v. Sears and Indemnity Ins., IC 2014-008780 (July 2016)

Richard Whitehead for Claimant (Winner)
Eric Bailey for Defendants

Windfall allowed for Claimant on Denied Medical bills.

Issue: Medical Care benefits (Neel)

Defendants accepted the back injury claim until a back surgery was recommended. Then, the defense claimed ongoing back issues were unrelated and pre-existing.

Thirty year old Joe had his back surgery and incurred \$72,478 in surety denied medical bills. He had Blue Cross health insurance which paid \$35,000 of the bills and Joe paid \$3,000 out of pocket. Claimant came before the Industrial Commission demanding payment of the full \$72,438.

The Commission found the medical care causally related to the industrial accident and ordered Defendants to pay the full 72k to Claimant. The IC cited *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P3d 852 (2009). "when a surety initially denies an industrial accident claim which is later determined to be compensable, it is precluded from reviewing medical bills for reasonableness under the workers' compensation regulations from the time such bills are initially incurred until the claim is deemed compensable,"

Commission also cited *Niebuhr v. AAPEX Construction* and *Kibler v. The Fausett Group, Inc.*, IC 2012-016396, 2016 WL 3385275. "**Under the Neel Doctrine . . . when Defendants**

fail or refuse to pay for compensable medical charges, leaving Claimant to incur such debt, Defendants must pay or reimburse such charges at the full invoiced amount.”

(Claimant attorney, be sure you confirm the medical providers and health insurance companies are pursuing their bills and subrogations when presenting your case).

(Defense attorney or adjuster, be sure you have solid ground for your medical denials or the claim may cost you full invoice on every billing).

“The Neel court did what it did in order to avert greater mischief that might result if, in scenarios like the one before us, surety is allowed to satisfy its obligation to pay the medical bills incurred during the period of denial simply by satisfying the subrogation claim.” *George*.

--BDS

Christy Hackworth v. Super 8 and Employer's Compensation Insurance, IC 2012-016233 (July 2016)

Dennis Peterson for Claimant

Alan Gardner for Defendants

Good discussion of determining PPD determined by labor market analysis, not the averaging method of Deon. As to when appropriate.

Claimant's vocational expert opined 44% loss of labor market access. No loss to her wage earning capacity. Opined 33% PPD inclusive of the 8% PPI.

Defendant vocational expert opined 12.5% but could not support how he came to that number.

Decision was for Claimant in amount of 22% PPD inclusive of 8% WPI. However, value of reading the decision is understanding how IC views Deon case and averaging method for PPD. bds

Lubow v. Gentle Touch Health Care, Inc., (July 14, 2016)

Referee Powers issued a recommended decision which the Commission adopted. He found the claimant failed to prove she was totally and permanently disabled and failed to prove that she had permanent partial disability in excess of permanent impairment of 7% whole person.

The claimant worked as a CNA. She injured her middle low back on May 25, 2011 while transferring an in-home-care patient from her bed to a wheel chair. She was found to have compression fractures at L1 and L2. Dr. Gussner, her treating physiatrist, found her MMI as of April 16, 2012 when an MRI showed the compression fractures had healed. He rated her at 7% whole person, and assigned her restrictions of maximum lifting of 50 pounds occasionally, 25 pounds frequently, and occasional bending/twisted/stopping. The claimant had diabetic neuropathy prior to the industrial accident, but informed her ICRD consultant that her diabetes

was controlled with diet and had no impact on her work. On July 9, 2013, the claimant suffered an unrelated myocardial infarction that resulted in open heart surgery. She was also diagnosed with COPD. She quit looking for work after her heart surgery and applied for Social Security disability.

The Referee found that although *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012), holds that that date of the hearing generally should be the date upon which disability should be determined, nothing in the decision prevents assessing disability at another appropriate time. He concluded that the “myriad debilitating nonindustrial medical problems” that the claimant experienced post MMI and pre hearing “in all likelihood, rendered her totally and permanently disabled under any labor market whether at the time of MMI or at the time of hearing. Therefore, in this case, it makes more sense to assess Claimant’s disability, if any, as of the date of MMI.” [Emphasis in the original.]

The claimant, the employer/surety, and the ISIF each hired a vocational consultant. There was considerable conflicting testimony among the experts. Both the employer/surety expert and the ISIF expert testified that the claimant has no permanent disability in excess of impairment due to the effects of the industrial accident. Both felt that any disability she had was the result of the effects of her myocardial infarction, heart surgery, and COPD. The Referee did not find the claimant’s expert’s testimony regarding disability to be credible. The Referee found the following problems with the claimant’s vocational expert’s opinion concerning disability: too much reliance on her sporadic homelessness after she was MMI; ignoring Dr. Gussner’s permanent restrictions; and relying exclusively on an FCE that was not ordered by any physician, but was arranged by claimant’s counsel, and the results of which were not agreed with by Dr. Gussner, a physician rather than a physical therapist.

--MGM

Funke v. Atkison Logging Company, Inc., (July 20, 2016)

The Commission declined to adopt the recommended findings and conclusions of Referee Donohue. It felt that different treatment was warranted for the issues relating to intervening cause and attorney fees.

Claimant suffered a compensable accident on June 14, 1991 which resulted in total permanent disability. He had sustained a burst fracture of L1, a right below-knee amputation, paraplegia, and a neurogenic bowel and bladder without sensation below the waist. The issue in the case was whether a fracture of the right femur on November 18, 2009, and a fracture left femur on December 1, 2014, both of which occurred while claimant was deer hunting, were compensable consequences of his June 14, 1991 accident and injuries, or were the result of subsequent intervening causes. Claimant sought payment of medical expenses in the amount of \$95,732.93.

The Commission found for the claimant regarding the 2009 fracture, but found for the defendants regarding the 2014 fracture. In doing so, the Commission essentially limited the superseding intervening cause doctrine to only those subsequent injuries resulting from negligent

or intentional conduct on the part of the claimant. That explains the following conclusions reached by the Commission concerning each claim:

3. Prior to the November 18, 2009, Claimant was unaware that trivial twisting events could result in serious injuries to the bones of a paraplegic with long-standing osteoporosis. Therefore, it was not unreasonable for Claimant to engage in solo hunting activities in Idaho's back country even though he knew he could reasonably be expected to have to dismount and mount his ATV without assistance, and in less than perfect conditions. Surety is responsible for the payment of all past and future medical expenses associated with the 2009 right femur fracture at 100% of the invoiced amount of such bills *per Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009)

4. With respect to the December 1, 2014 incident, Claimant knew or should have known that he was at considerable risk for bodily injury in the event he was required to mount or dismount his ATV by himself in uncertain conditions. Claimant's negligence in this regard breaks the chain of causation. Surety is not responsible for any medical expenses incurred by Claimant in the past or required by him in the future, for the care of the 2014 left femur fracture.

Regarding attorney fees, the Commission declined to award them for the 2009 accident because "reasonable minds might differ on whether Claimant acted reasonable in engaging in these activities in 2009.

--MGM