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Clark v. Shari's Management Corp. Respondent's Brief Dckt. 40393

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DALLAS CLARK, Claimant/Appellant, vs. SHARI'S MANAGEMENT CORPORATION, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants/Respondents.	)	Supreme Court No. 40393-2012 **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS SHARI'S MANAGEMENT CORPORATION and LIBERTY NORTHWEST INSURANCE CORP.**

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APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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STATEMENT OF THE CASE

I. Nature of the Case

Claimant/Appellant, Dallas Clark ("Claimant"), is represented by Paul Curtis of Idaho Falls, Idaho. Respondents/Defendants, Shari's Management Corporation ("Defendant/Employer"), and Liberty Northwest Insurance Corporation ("Defendant/Surety"), are represented by Roger L. Brown of Boise, Idaho.

Industrial Commission Referee LaDawn Marsters ("Referee") issued Findings of Fact, Conclusions of Law and Recommendations dated March 7, 2012. *A.R., p. 22-42.* By Order dated March 13, 2012, the Commission proper unanimously approved, confirmed and adopted the Referee's findings of fact and conclusions of law ("Decision") as its own. *A.R., p. 43-44.* The Commission received Claimant's Request for Reconsideration and Rehearing filed April 2, 2012. *A.R., p. 45-80.* Defendants filed a Response to Claimant's Request for Reconsideration and Rehearing on April 16, 2012. *A.R., p. 81-85.* On April 26, 2012, Claimant filed her Reply to Defendants' Response. *A.R., p. 86-92.* An Order Denying Reconsideration and Rehearing ("Order"), was entered by the Industrial Commission on August 28, 2012. *A.R., p. 93-114.* Claimant filed her Notice of Appeal on October 4, 2012.

II. Course of Proceedings Below

Claimant filed a Worker's Compensation Complaint and an Amended Worker's Compensation Complaint on November 23, 2009, asserting entitlement to medical benefits, temporary total disability benefits, permanent partial impairment and/or disability benefits, retraining and attorney fees. *A.R., p. 1-8.* Defendants filed an Answer to Complaint on December 11, 2009, denying that the accident alleged by Claimant actually

occurred on or about the time claimed, and denying that the condition for which Claimant sought benefits was caused by an accident arising out of and in the course of Claimant's employment. *A.R., p. 9-10.* The Referee conducted a hearing June 1, 2011, in Idaho Falls, Idaho, on the following issues:

A. Whether Claimant sustained an injury from an accident arising out of and in the course of her employment;

B. Whether Claimant's condition was due in whole or in part to a pre-existing and/or subsequent injury or condition;

C. Whether and to what extent Claimant was entitled to medical care; and

D. Whether Claimant was entitled to attorney fees pursuant to Idaho Code Section 72-804.

A.R., p. 22-23. One post-hearing deposition was undertaken by Claimant. *A.R., p. 24.* Claimant then submitted her Opening Brief and Defendants filed their Brief in Response. Claimant chose to submit a reply, and thereafter the Referee took the matter under advisement. *A.R., p. 22.* Upon the record introduced at hearing, post-hearing deposition testimony, and briefing submitted by the parties, the Referee issued her Decision, dated March 7, 2012. *A.R., p. 22-42.* By Order dated March 13, 2012, the Commission proper unanimously approved, confirmed and adopted the Referee's Decision as its own. *A.R., p. 43-44.* Both the Referee and the Commission specifically found that, as a matter of fact, Claimant had failed to prove that her low back condition was caused by an accident arising out of and in the course of her employment. All other issues were rendered moot. *A.R., p. 41, 43-44.*

Claimant filed a Request for Reconsideration/ Rehearing ("Request") with the Commission. *A.R., p. 45-80.* Defendants objected to Claimant's Request on the grounds that Claimant complained of no legal error, nor did Claimant present new legal or factual information. Claimant's Request was based solely upon Claimant's factual disagreements with the Commission's findings, and as such, the Request was nothing more than an attempt to reweigh the evidence. *A.R., p. 84.* Following review of the record on reconsideration, the Commission confirmed that the substantial and competent evidence supported its conclusion that Claimant failed to prove the occurrence of an industrial accident. *A.R. 93-114.* This appeal followed.

III. Statement of Facts

Claimant alleged that she sustained a low back injury as a result of an industrial accident on November 24, 2008. She first sought treatment for back and leg pain from a chiropractor on December 11, 2008. *D.E. M, p. 86.* Claimant was next seen on December 16, 2008, by Dr. Brower at Community Care Clinic complaining of "onset 11/27 pain down (L) leg. Went to chiropractor –now is worse x 3 wks," and " 1 ½ weeks ago L leg pain (most L thigh) **no trauma hx**." Claimant was diagnosed with sciatica. *D.E. C, p. 8 (emphasis added).* On December 19, 2008, Claimant presented again to Dr. Brower for re-check for sciatica. Claimant was noted to state the pain was worse in the left buttock. Dr. Brower referred Claimant to the Eastern Idaho Regional Medical Center Emergency Department for follow-up of leg and back pain where she was examined by Dr. Matthew Griggs. *Id., p. 7; D.E. D, p. 10.* Dr. Griggs noted that Claimant's chief complaint was moderate back pain in the left gluteus radiating to the left knee, with onset **several days ago**. *D.E. D, p. 10 (emphasis added).* Radiological studies of the lumbosacral spine

were ordered and found to be negative. *Id., p. 11.* Claimant was diagnosed with a lumbar strain, given medication, and discharged home with instructions to follow up in one week. Claimant next saw Dr. Jeff Thompson at Community Care Clinic on December 24, 2008, who referred her to Dr. Gary Walker. Id., *p. 9-11.* **There is no mention in the records that Claimant's pain began after a workplace accident.**

Claimant was seen by Dr. Walker on December 29, 2008. The chart note for this initial visit with Dr. Walker indicates the following:

> [Claimant's] history dates back to **early** November. She **did not recall any particular injury** but noted the onset of left lower extremity pain associated with work. **It became sharper over time** and has continued to worsen.

D.E. E, p. 19 (emphasis added). Dr. Walker ordered an MRI which showed a left paracentral disc extrusion at L5-S1 impacting the S1 nerve root. Claimant received epidural steroid injections from Dr. Walker on December 30, 2008, and January 29, 2009, from which she received good, albeit temporary, relief. Physical therapy was prescribed by Dr. Walker, however Claimant declined to attend. On March 9, 2009, Claimant presented to Dr. Walker reporting increasing pain. At this visit, Dr. Walker again urged Claimant to attend physical therapy. Claimant received an additional injection three days later on March 12, 2009. *Id., p. 20-24.*

Claimant attended a physical therapy session with therapist Stephanie Liddle on March 19, 2009. In the progress note from that visit Ms. Liddle recorded the following:

> [Claimant] has had a four month history of pain into her left leg. She states the pain **came on suddenly**, but **she is unaware of any specific injury to cause her pain.** She denies any background or previous history of low back pain and **contributes [sic] this episode to being a server/bartender for many, many years catching up to her and her not taking care of her body.**

D.E. G, p. 41(emphasis added).

Claimant followed up with Dr. Walker on April 7, 2009, at which time he recommended Claimant seek surgical consultation due to lack of resolution using non-operative treatment, noting:

> She is leaving town for a week but will **check her insurance** to see who is a participant. She will let me know back and we will get her set up for a surgical consultation when she returns in a week.

D.E. E, p. 24 (emphasis added). There is **no indication** in the medical records that Claimant, at this time, had made a worker's compensation claim with Employer, or intended to have her potential surgery covered by workers' compensation. *A.R., p. 96.*

Claimant consulted with neurosurgeon, Dr. Stephen Marano, on April 22, 2009. Consistent with previous chart notes written by Claimant's previous medical providers, Dr. Marano noted:

> Claimant **"cannot associate any injuries or trauma to the onset of her pain.** She said **that it just kind of started out of the blue. She thought maybe it was due to standing funny."**

D.E. I, p. 53 (emphasis added). Pursuant to her consultation with Dr. Marano, Claimant elected to proceed with surgical disc excision. *Id., p. 54.*

On April 24, 2009, a First Report of Injury ("FROI") was completed on Claimant's behalf by Zach Dummermuth, general manager for Employer. This document was signed by Claimant. The FROI states that on November 24, 2008, Claimant noticed an ache in her low back while she was **"standing"** and **"making salad."** In describing the specific sequence of events of how the injury occurred, the report states, **"standing there and back began hurting."** The report cites December 15, 2008, as the date Employer was notified of the alleged accident. *D.E. A, p. 1-2.*

Surety received the FROI on April 28, 2009. Pursuant to Surety's internal investigative procedure, claim manager, Bradley Armstrong conducted a telephone interview with Claimant on May 6, 2009. Mr. Armstrong asked Claimant to describe what happened on November 24, 2008:

> Mr. Armstrong: Now I have a date of injury of 11/24/2008. Was there a specific accident that happened that day or were you just kind of, was that when you started to feel the pain in your back?
>
> Claimant: Um, I was at work and my manager Michelle Miller [sic, Morgan] . . . and I were **standing there** [by] the salad bar [and] . . . I **noticed a pain and so I thought that it was because I was standing on it wrong, put all my weight on it wrong**, and so we were kind of joking around about my weight. [. . .] Then later on that evening . . . **I was bringing silverware out from the kitchen** and I went to put it up in the water station number two and [when] **I went to put that up there** it just like a sharp pain in the same area and I drop . . . dropped and **so I just laid it there set it down on the counter where I was . . . and just set my tables from there . . .** I didn't try to put the container up there **I set all my tables from there and then went to the tray that was just about empty I just set it upon the top . . .**

D.E. P, p. 207-208 (emphasis added). Claimant went on to explain what prompted her to seek medical treatment:

> Claimant: Michelle was my supervisor and **I went to bend over to get the scheduling book and I couldn't bend over because of the pain and that's when she told me I needed to go to the doctor.**
>
> Mr. Armstrong: And that was in the **first part of December**, is that correct?
>
> Claimant: Yes.
>
> Mr. Armstrong: **And you went over to Community Care your first time**?
>
> Claimant: Yes.

Id., p. 208 (emphasis added). During the interview **Claimant did not mention any witnesses other than Michelle Morgan.** After reviewing available medical records,

Mr. Armstrong sent Claimant a letter dated May 19, 2009, informing her that her claim was denied because there was no accident associated with the claim. *D.E. B, p. 5.* Notwithstanding the denial of her claim, Claimant proceeded with the surgical procedures recommended by Dr. Marano, including disc excision, decompressive foraminotomy, and annular repair at L5-S I. *D.E. J, p. 54.* Claimant has since experienced complications from that surgery and a recurrent disc herniation at L5-SI. *D.E. I, p. 57-63.*

On November 23, 2009, approximately six months after her claim was denied by the Surety, Claimant filed a workers' compensation complaint with the Industrial Commission. *A.R., p. 1-8.* Defendants answered the complaint and discovery ensued. By the time of her deposition on April 13, 2011, Claimant's account of her industrial accident had changed substantially. Asked by defense counsel how exactly the accident occurred, Claimant testified:

> **I had been doing the salad bar reach-ins**, which is down underneath our cabinets. And there was a pain, but I didn't think it was more than a pain of just bending and stretching.
>
> And then later on that night, probably around 1:30, 2:00 in the morning — it was when I was working graveyard — I was carrying a tray of silverware —a full tray of silverware out to put it into the water station.
>
> And as I was coming out of the water station to lift it above to where the shelf is, which is above the water spout —so it was just about a little higher than my shoulders — I just felt a sharp pain. **And I dropped the tray, and I fell.**
>
> **And Aaron, he came out.[1] The cook came out — running out and helped me up.** And he was like, "What's going on?" And I told him that something happened. "Something is wrong with my back." And he told me —**he helped me up to the booth** and told me just to sit still for a little bit and that he was going to try to call Michelle. And then he picked up the silverware for me **off the floor** and told me **just to stay there**.

[1] In Claimant's statement to Bradley Armstrong on May 6, 2009, Claimant identified Michelle Morgan as a witness. Claimant failed, however, to mention the cook, Aaron Swenson. *D.E. P, p. 207.*

Claimant's Deposition, p. 35-36 (emphasis added). Defense counsel then asked Claimant to describe the silverware incident in more detail:

> Defense Counsel: When you were carrying [the silverware tray] about how high was it . . . according to your body . . . ?
>
> Claimant: I was trying to carry it because **they told me – the doctor I went to at the Community Care,[2] he said to try to always keep my shoulders center with my knees, you know, not to try to bend outside of that area**. And so I tried – I always would carry – I would carry it towards my body.
>
> Defense Counsel: Now, you said that **you dropped the tray** and you **fell**; is that correct?
>
> Claimant: **Yes**. Well, actually, when I went to put it up there, it felt like somebody had taken**, like, an ice pick and hurt my back.** And so when I went to put it up there and it felt, like, **the stabbing, the silverware tray fell. And, of course, then the weight of it —it fell, like, towards me. So** I tried to, like, **stop that from falling, and then I fell.** And then I was trying to, like, stop that from coming, but it was **coming down on me.**
>
> Defense Counsel: So you literally **fell to the ground**?
>
> Claimant: **Yes.**

Claimant Deposition, p. 43, lines 1-10, 23-25, p. 44, lines 1-11 (emphasis added). Contradicting her statement to Surety,[3] **Claimant went on to indicate that she did not work for the rest of her shift, stating, " [Aaron] came out and took the food orders, and I put it into the computer. And then he brought the food out and served it for me**. *Id., p. 46, lines 12-18.*

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[2] Claimant was describing how she was carrying the tray **right before** the alleged accident. Yet she did not treat for a back condition, at Community Care or otherwise, until **after** the alleged accident and therefore could not yet have received her doctor's instructions on how to carry items, e.g., a tub of silverware, *Claimant Deposition p. 43, lines 4-10.*

[3] Claimant told Mr. Armstrong that " I just **set all of my tables from there** and then went to the tray that was just about empty I just set it up on the top." *D.E. P, p. 207-208 (emphasis added).*

When asked by defense counsel about reporting the incident Claimant testified:

> Defense Counsel: And when did you report the accident . . . ?
> Claimant: **That next day**, it wasn't – **I didn't work that day**; so **I came in** to talk to Michelle. She came in at 3:30.
>
> Defense Counsel: Of the following day, the 25th?
>
> Claimant: Yes, The following day, yes. **And I came in and talked to Michelle, and she told me to take the rest of the night off that night and to see how I started feeling.** And then it wasn't getting better; so when I went in the next morning, she told me to go to the Community Care . . . I went to the Community Care . . . **I couldn't work for two days because of it.**

Claimant's Deposition, p. 46, lines 19-25, p. 47, lines 1-9 (emphasis added). Claimant's next account of the alleged industrial accident occurred at hearing on June 1, 2011. Asked by her legal counsel to describe what happened, Claimant testified:

> I was cleaning the reach-ins, which are the refrigerators underneath the salad bar . . . As I was **standing up**, I felt–I felt a dull pain into my back as I straightened up.
>
> I went along with my duties through the night. And it was approximately-I want to say it was closer to 2:00 or 3:00 in the morning rather than 1:00 or 2:00. And I was carrying out a full silverware-tub full of silverware from the dish area, which is in the kitchen.
>
> And as I was coming into Water Station 1 or Station 2, I went to put the tub of silverware up on the ledge where the silverware goes. And as I was lifting the tub up, I felt a sharp pain in the lower part of my back that **went down my leg**. And it caused me to **drop the silverware, and it actually landed onto the water station itself. And then the weight of it had dropped it to the floor.**
>
> And I caught myself as I was, like, going forward. **I** used the ledge of the water station to hold myself, but I was still —I was almost to the bottom of it, to the end of the floor.
>
> And Aaron actually – he heard the crash and came out, and he asked me what was [sic] what happened . . . [H]e helped me to a booth. . . .[W]e tried to call a manager . . . Aaron was trying to call [Michelle] first. . . . And so I stayed in the booth. **Aaron picked up the silverware, set it there on the water station, and told me just to sit there until I was feeling better . . . And that's what I did.**

Tr. p. 48, lines 6-7, 13-25, p. 49, lines1-10, 13-16, p. 50, lines1-13 (emphasis added). Claimant testified that she worked "**at least the next five days**" because she had no other income. Claimant then **called in sick** and spoke to Michelle. According to Claimant it was during that phone call that Michelle told her to go to the doctor. Claimant stated she went to Community Care the next day.

Claimant's co-worker Aaron Swenson ("Aaron") testified at the hearing on behalf of Claimant. Aaron, a line cook, was the only other employee on duty when Claimant alleges her accident occurred. Aaron described the alleged incident as follows:

> I heard a big bang out in the lobby; so that's where I went. . . . [She] told me she slipped, if I remember... I don't know if she slipped or tripped or what, but I know **she fell** and hurt herself. . . . And I heard something, like, crash out there, and it was **Dallas with a bunch of plates, silverware, and stuff. And she was hurting and having a hard time getting up and stuff;** so I helped her get her stuff picked up. And I helped her get to a seat.

Tr. p. 24, lines 11-16, p. 26, lines 1-10 (emphasis added). Aaron testified that he was in the kitchen and therefore he did not see Claimant's alleged fall. *Id., p. 35, lines1-8.* When asked by defense counsel if he reported the incident to management, Aaron testified:

> Defense Counsel: Did you report the accident to any management employee of Shari's?
>
> Aaron: Well, everybody knew about it. I think **they knew about it before I did.**[4]

Tr. p. 36, lines 16-20. The Commission found Aaron was not a credible witness,

The case was taken under advisement by the Commission on March 6, 2012, and after thoroughly considering the testimonial and documentary evidence in the record, as well as the briefs of the parties, the Commission held that Claimant failed to prove the

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[4]Aaron was the only employee other than Claimant on duty at the time of the alleged accident. Accordingly, **if** Claimant's alleged incident actually occurred as described by Aaron and Claimant, Aaron **must have known about it before anyone else, including management, BECAUSE HE CLAIMED HE WAS THERE WHEN IT HAPPENED.**

occurrence of an industrial accident. Claimant's remaining issue were deemed moot. *A.R., p. 22-44.*

Claimant timely filed Claimant's Request for Reconsideration/Rehearing arguing that the Commission's decision against Claimant is not based upon substantial and competent evidence because the Referee overlooked or misinterpreted key evidence, improperly excluded other evidence and made "obvious and clear" factual errors. Claimant requested reconsideration and/or rehearing of the case so that additional witnesses could testify. *A.R., p. 45-62.*

Defendants objected to Claimant's Motion for Reconsideration on April 16, 2012, arguing that the decision is supported by substantial and competent evidence and that Claimant's motion effectively requests that the Commission reweigh evidence and arguments simply because the case was not resolved in Claimant's favor. *A.R., p. 81-85.* Claimant filed a reply to Defendants' objection on April 26, 2012. *A.R., p. 86-92.*

In a 22-page order denying Claimant's request, the Commission methodically, and in minute detail, addressed the complaints raised by Claimant in support of her motion for reconsideration. *A.R., p. 93-114.*

IV. Issues on Appeal

A. Whether, upon the record in its entirety, there is substantial and competent evidence to support the Commission's factual determination that Claimant failed to prove the occurrence of an industrial accident

B. Whether Defendants' request under I. C. §12-121 and I. A. R. 41 for an award of attorney fees and costs on appeal should be granted

C. Whether Claimant's request for an award of attorney fees on appeal under I.C. §72-313 [*sic*] should be denied

ARGUMENT

I. RELEVANT LAW

Relying upon the former Idaho Code §72-17(a) (now, §72-18 (a)), this Court has established clear requirements for a Claimant seeking benefits under Idaho's Worker's Compensation Law. In *Dinius v. Loving Care and More, Inc.,* 133 Idaho 572, 574 900 P.2d 738, 740 (1999), the Court stated:

> The applicable standard for determining whether an employee is entitled to compensation under the Worker's Compensation Act requires that the injury must have been caused by an accident "arising out of and in the course of employment."

Dinius v. Loving Care and More, Inc., 133 Idaho 572, 574, 990 P.2d 738, 740 (1999) (quoting I.C. §72-102 (18)(a)). ***Claimant carries the burden of proving both that she was injured and that "the injury was the result of an accident arising out of and in the course of employment."*** *Seamans v. Maaco Auto Painting and Body Works,* 128 Idaho 747, 751, P.2d 1192, 1196 (1996)(*emphasis added*) (citing *Neufield v. Browning Farris Indus.,* 109 Idaho 899, 902, 712 P.2d 600, 603 (1985)).

II. STANDARD OF REVIEW

The Commission's decision below turns solely upon an issue previously identified by this Court as a question of fact: Whether Claimant proved the occurrence of an industrial accident. The standard of review long applied by this Court in an appeal such as this is concisely set forth in *Kessler ex rel. Kessler v. Payette County,* 129 Idaho 855, 858, 934 P.2d 28, 31 (1997):

> It is particularly important to note that ***whether an injury arose out of and in the course of employment is a question of fact to be decided by the Commission.*** *Reinstein v. McGregor Land and Livestock Co.,* 126 Idaho 156, 879 P.2d 1089 (1994). Although this Court may review the Commission's factual findings, this Court must limit its review to determining

> whether the Commission correctly denied benefits after it applied the law to the relevant facts. *Morgan v. Columbia Helicopters, Inc.,* 118 Idaho 347, 796 P.2d 1020 (1990). ***This Court may not set aside findings of fact that are supported by substantial competent, although conflicting, evidence*** (*See* I.C. 72-732(1); *Gradwohl v. J.R. Simplot Co.,* 96 Idaho 655, 534 P.2d 775 (1975)), but may disturb the Commission's findings if they are clearly erroneous. *Koester v. State Ins. Fund,* 124 Idaho 205, 208, 858 P.2d 744, 747 (1993). ***This Court additionally may not scrutinize the weight and credibility of the evidence relied upon by the Commission but must construe the evidence in the light most favorable to the party who prevailed before the Commission.*** *Darner v. Southeast Idaho In-Home Servs.,* 122 Idaho 897, 841 P.2d 427 (1992).

Kessler, 129 Idaho at 858, 934 P.2d at 31 (*emphasis added*). "[The Court] does not try the matter anew." *Wichterman v. J.H. Kelly, Inc.,* 144 Idaho 138, 158 P.3d 301, 303 (2007) (citing *Hart v. Kaman Bearing & Supply,* 130 Idaho, 296, 299, 939 P.2d 1375, 1378 (1997)).

On appeal from a decision of the Idaho Industrial Commission, the Supreme Court grants great deference to the Commission's Findings of Facts and Conclusions of Law. This Court exercises free review over questions of law, but not over questions of fact. As restated in *Sundquist v. Precision Steel & Gypsum, Inc.,* 141 Idaho 450, 111 P.3d 135 (2005):

> When reviewing a decision of the Industrial Commission, this Court exercises free review over questions of law. *Uhl v. Ballard Medical Products, Inc.,* 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003) . . . ***The factual findings of the Industrial Commission will be upheld provided they are supported by substantial and competent evidence.*** *Uhl,* 138 Idaho at 657, 67 P.3d at 1269. "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* The conclusions reached by the Industrial Commission regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. *Hughen v. Highland Estates,* 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002). We will not re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented.

Id., (emphasis added). "[Substantial and competent evidence] is more than a scintilla of proof, but less than a preponderance." *Stolle v. Bennett*, 144 Idaho 44, 48, P.3d 545, 549 (2007) (*Internal quotations and citations omitted*). The Commission is the ultimate judge of credibility of witnesses. *Duncan v. Navajo Trucking,* 134 Idaho 202, 204; 998 P.2d 1115, 1117 (2000). It is a function of the Commission and not of this Court to determine the credibility of witnesses, the weight to be assigned testimony, and the reasonable inferences to be drawn from the record as a whole. *ASARCO, Inc., v. Industrial Special Indemnity Fund,* 127 Idaho 928, 931, 908 P.2d 1235, 1238 (1996).

III. CONSTRUING THE EVIDENCE OF RECORD IN A LIGHT MOST FAVORABLE TO RESPONDENTS, THE COMMISSION'S FACTUAL DETERMINATION BELOW THAT CLAIMANT DID NOT MEET HER BURDEN OF PROVING THE OCCURRENCE OF AN ACCIDENT RESULTING IN INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL AND CREDIBLE EVIDENCE

Claimant/Appellant incorrectly characterizes the holding of the Referee and the Commission in this case as a mistake of law. *Claimant's Opening Brief, p. 26.* Yet, Claimant disingenuously contends that the Commission's decision below was not based on substantial and competent evidence because the Referee overlooked or misinterpreted evidence, improperly excluded other evidence , and made "obvious and clear" factual errors. *A.R. p. 93.*

Factual errors Claimant specifically complained of include the Referee's findings: 1) that Claimant herself completed the FROI; 2) that the Surety did not pay some of Claimant's related expenses; 3) that Employer was not aware of Claimant's injury and accident until late April 2009; and 4) that Claimant's accident was not recorded in the Employer's daily log book. *A. R. p. 57.*

The Commission agreed with Claimant that there were some errors in the findings of fact. First, the FROI was not completed by Claimant, but was actually completed by manager, Mr. Dummermuth, and signed by Claimant. The Commission stated this was harmless error, because the basis for the decision against Claimant was that she failed to prove that an industrial accident occurred, which would not change simply because someone other than Claimant completed the FROI. *A.R., p. 100-101.*

The Commission next agreed with Claimant that Surety did pay some medical expenses associated with Claimant's claim. Again, the Commission found this to be harmless error, explaining that, notwithstanding Claimant's apparent misunderstanding of Idaho's worker's compensation law, payment of benefits by a Surety does not equate to acceptance of liability for a claim. *A.R. p. 101; see also, Idaho Code §72-201.*

Claimant next argued that the FROI contained an inaccurate description of Claimant's accident, and that it was that inaccurate information that led the Commission to the conclusion that Claimant was not credible. Unfortunately for Claimant, however, and as clearly articulated by the Commission, the record is replete with many additional reasons for the Commission to conclude that Claimant lacked credibility. The Commission first discussed Claimant's own contradictory statements, (previously set forth above) of how she first came to require treatment for her low back, as evidenced in the early medical records, Claimant's statement to Surety on May 6, 2009, her deposition on April 13, 2011, and her hearing testimony on June 1, 2011. Claimant's later statements were inconsistent with those recorded in her early medical records with respect to the details surrounding her symptom onset. Claimant's later statements were also inconsistent with each other on

critical points including pain onset and the circumstances under which Claimant says her supervisor told her to see a doctor. *A.R. p. 101-104.*

Claimant argued that her many inconsistencies and contradictions involve only minor details, and that her various accounts of the alleged accident were substantially similar, citing this Court's holding in *Stevens-McAtee v. Potlatch*, 145 Idaho 325, 179 P. 3d 288 (2008) in support of her argument. Claimant believes her later testimony, like the claimant's testimony in *McAtee*, simply provides more details than her earlier statements. However, the McAtee Court found claimant's later testimony, although **more detailed** than his prior accounts, **was not inconsistent with those earlier accounts**. *Id.* While in the present case Claimant's later testimony certainly provides more details than her earlier accounts of the accident, in contrast with *McAtee*, Claimant's later testimony was also **inconsistent** with, and **contradictory** of, her earlier versions. *A.R. 101-104.* Not only did Claimant fail to mention a work-place accident to her medical providers, she is reported to have affirmatively stated she had **no history of trauma or accident**, that her low back pain began "**out of the blue**" while she was "**standing funny**" and she thought it was from **waitressing for many years and not taking care of her body**. *D.E. C p. 8; D.E. E p. 19; D.E. I p. 53; D.E. G p. 41* . (*Emphasis added.*)

The Commission clearly articulated three reasons for finding that the information contained in Claimant's medical records was more credible than Claimant's later statements and testimony:

> First, the medical records from December 2008 to April 2009 are more contemporaneous to the onset of Claimant's back pain than statements and testimony delivered after April 2009. Second, statements made during litigation, or even during the course of making a workers' compensation claim, are inherently self-serving; this does not make them *per se* untrue, but it does make them more suspect than statements made

> for the sole purpose of receiving appropriate medical care. Indeed, the Idaho Rules of Evidence recognize that statements made for the purposes of medical care have a "circumstantial [guarantee] of trustworthiness'; that is why they are an exception to the rule that hearsay is inadmissible. Third, **Claimant's later accounts of her accident, both in her statement to Surety and in her testimony, are so contradictory as to be unreliable. Claimant's descriptions of the accident are not just progressively more detailed, as in *McAtee* above; Claimant's descriptions actively conflict with each other.**

A.R. p. 106 (emphasis added). The Commission then clarified its process for determining witness credibility:

> We understand that memory is an imperfect device, and that the details of an accident resulting in an injury can be forgotten or misremembered as time passes. We understand, too, that even credible witnesses have a desire to present themselves in the best possible light, and may subconsciously massage certain details without a malicious intent to deceive, **Thus, when determining whether a witness is credible, we do not look for perfect consistency. Rather, we look for substantial consistency supported by the other evidence in the record.**

Id. p. 107 (emphasis added). The Commission, in explaining why Claimant lacked credibility, stated:

> Here, Claimant's accounts are not substantially consistent. Either she fell, or she did not fall; either she fell to the floor, or she was able to catch herself; either she dropped the tray, or she set it down; either she set tables after the accident, or she rested in a booth for the remainder of her shift; either the silverware tray actually "came down on" Claimant, or it fell without impacting her – **these are not minor details, easily misremembered; these are material facts about how the accident occurred**. A heavy silverware tray "coming down on" a fallen person could easily cause injury, perhaps even serious injury, depending on how heavy it was and what part of the body was impacted, and **it defies belief that if this actually happened, Claimant would have neglected to mention it to Surety**.

Id (emphasis added). The Commission, like the Referee, found it suspicious that Claimant's description of a lifting accident, by the time of her deposition:

> . . . grew to include an elaborate recitation of how **she dropped the silverware tray as she fell to the ground, creating a clamor that brought**

> **Aaron from the kitchen.** She had not previously divulged this dramatic fact, not to her many treating medical providers, and not in response to direct questioning by Defendants about how she incurred her back pain. Instead, she told Surety in May 2009 **that she set the tray down**.

A.R. p. 108 (emphasis added)(citing A. R. p. 39). Noting that Claimant was not merely providing more detail as contemplated by the holding in McAtee, the Commission found it to be a "**direct contradiction, calling into question the veracity of Claimant's testimony as a whole**" thus leading the Commission to its irrefutable conclusion:

> The substantial evidence in the record does not support a conclusion that Claimant's accident occurred as described at deposition or hearing. It does not support a conclusion that Claimant's accident occurred as described in her initial interview with Surety. **In fact, the substantial evidence in the record does not support a conclusion that Claimant's accident occurred at all.**

Id., (emphasis added).

IV. DEFENDANT/RESPONDENTS' REQUEST UNDER I. C. §12-121 and I. A. R. 41 FOR AWARD OF ATTORNEY FEES AND COSTS ON APPEAL SHOULD BE GRANTED

Claimant/Appellant has characterized the issue before this Court as one of law. *Appellant's Opening Brief, p. 26.* However, the issue here is actually one of fact, that is, whether there was substantial, competent evidence to support the Commission's finding. As previously articulated by this Court:

> Attorney fees and costs are properly awarded when an appeal asks this Court to do nothing more than reweigh the evidence submitted to the Commission.

Duncan v. Navajo Trucking, 134 Idaho 202, 204; 998 P.2d 1115, 1117 (2000) (citing *Baker v. Louisiana Pacific Corporation*, 123 Idaho 799, 803, 853 P.2d 544, 547 (1993).

When determining whether to award reasonable attorney fees to the prevailing party on appeal, the Court is guided by the following general principles:

> Since the statutory power [to award attorney fees] is discretionary, attorney fees will not be awarded as a matter of right. Nor will attorney fees be awarded where the losing party brought the appeal in good faith ***and*** where a ***genuine*** issue of law was presented . . . [An award of attorney fees may be granted under I. C. §12-121 and I. A. R. 41 on appeal to the prevailing party] when this court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation.

Minich v. Gem State Developers, Inc., 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979)(emphasis added).

V. CLAIMANT/APPELLANT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL UNDER I. C. §72-313 [*sic*] OR OTHERWISE

Regardless of the outcome of the issue on appeal, Respondents should not be ordered to pay attorney fees. Respondents clearly have reasonable grounds to ask the Court to affirm the Industrial Commission's ruling that Claimant failed to meet her burden of proving the occurrence of an industrial accident. I.C. 72-804 fees are only payable when the Commission, or any Court hearing a workers compensation proceeding, determines that the employer or surety contested the claim for compensation "without reasonable grounds."

CONCLUSION

Claimant has not argued that the Commission misapplied the law in this case, but, rather, simply seeks a determination from this Court substituting Claimant's view of key facts for those found by the Commission below. Thus, Claimant 's allegation that the Commission failed to ground its decision upon substantial and competent evidence is little more than a thinly veiled attempt to have this Court re-try the underlying case and re-weigh evidence, hoping that the Court will agree with Claimant's version of the facts rather than the findings and conclusions appropriately reached by the Commission below.

As previously set forth, Defendants respectfully pray this Court apply the standard of review announced in *Kessler*, 129 Idaho at 858, 934 P.2d at 31, and affirm the Commission's decision in this matter. Further, Defendants request this Court award reasonable attorney fees and costs on appeal to Defendants/Respondents, pursuant to I.C. §12-121 and I. A. R. 41, as well as the guidelines set forth in *Minich*, 99 Idaho at 918, 591 P.2d at 1085.

Respectfully submitted this 11th day of February, 2013.

LAW OFFICES OF HARMON & DAY

By: Roger L. Brown
Roger L. Brown
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2013, I caused a copy of the foregoing **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS** to be served by first class mail, postage prepaid, upon the following:

Paul T. Curtis
Curtis & Porter, PA
598 N. Capitol
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