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Vawter v. United Parcel Service Respondent's Brief Dckt. 40660

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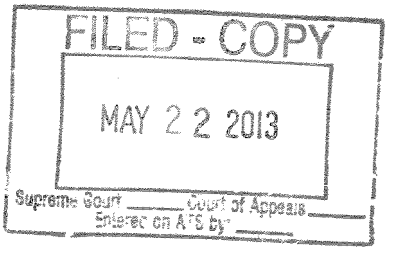
BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL VAWTER, Claimant / Respondent / Cross-Appellant, vs. UNITED PARCEL SERVICE, and LIBERTY INSURANCE CORPORATION, Defendants / Appellants / Cross-Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant / Respondent / Cross-Respondent.	Supreme Court No. 40660 **RESPONDENT'S BRIEF**



APPEAL FROM THE INDUSTRIAL COMMISSION, STATE OF IDAHO

Thomas Limbaugh, Chairman Presiding

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(A) THE NATURE OF THE CASE

The Claimant is a 26-year employee of UPS who suffered a large L4-5 disc herniation on his "Employer's premises" on 12.18.09 when he bent over to tie the laces on his work boots as required by his Employer's safety policies. Employer did not dispute that the Claimant suffered an "accident" and "injury" that occurred "in the course" of his employment. Employer denied this claim on the **exclusive legal ground** that the Claimant's 12.18.09 low back injury did **not "arise out of"** his employment.

The Referee who presided over the 9.28.10 1st bifurcated Hearing held that Claimant's injury occurred on his Employer's premises, properly applied the "premises presumption" and ruled that the Claimant's accident and injury "arose out of" his employment "as a matter of law" because Employer failed to rebut the premises presumption. When the Industrial Commission re-wrote the Referee's decision, it applied the wrong legal standard to the "premises presumption"

and concluded without citing any evidence in the record that Employer had come forward with sufficient evidence to rebut the presumption.

The Commission then accepted Employer's invitation to use this claim as a **test case** and reviewed 80 + years of "arose out of" employment case law in an effort to convince this Court that it should overrule its rejection of the **"greater risk"** doctrine in *Spivey v. Novartis Seed*, 137 Idaho 29, 43 P.3d 788 (2002). After analyzing all of the "greater risk" cases, the Commission correctly ruled that Claimant had met his burden of proving an accident and injury that "arose out of" his employment without even applying the premises presumption and awarded the Claimant medical benefits and total temporary disability benefits.

Employer refused to comply with the Commission's decision and refused to pay benefits Instead, Employer filed its 1st interlocutory appeal. This Court dismissed Employer's appeal based on *Jensen v. Pillsbury,* 121 Idaho 127, 823 P.2d 161 (1992). Employer then asked the Commission to stay enforcement of its Order. The Commission denied Employer's request for a stay. Employer attempted its 2nd interlocutory appeal. This Court dismissed it. After Employer's 2nd attempt to take an interlocutory appeal failed, Employer finally paid Claimant some of the benefits that he was entitled to receive under the Idaho Workers' Compensation Act in this compensable claim.

The Commission held its final bifurcated hearing over the extent of Claimant's disability on 5.17.12 and concluded that Claimant was totally and permanently disabled as an odd-lot worker. The Commission Ordered Employer to pay 100% of the Claimant's total and permanent

disability benefits. Employer filed its 3rd appeal and asked this Court to reverse both decisions from the Commission. The Claimant and ISIF cross-appealed.

Employer's decision to use this claim as a **test case** to convince this Court that it should overrule its rejection of the "greater risk" doctrine in *Spivey* has unreasonably deprived the Claimant and his family of the "sure and certain" relief that they were promised by the Idaho Workers' Compensation Act and replaced that relief with 4-5 years of vexatious litigation that has resulted in 2 bifurcated Hearings before the Industrial Commission and 3 Employer sponsored appeals to the Supreme Court.

(B) THE COURSE OF THE PROCEEDINGS

Employer filed its **Motion To Bifurcate** on 5.12.10 (R., Vol. I, pp. 11-14). Referee Michael Powers held the first bifurcated Hearing in this case on 9.28.10 and entered his proposed Findings of Fact, Conclusions of Law and Recommendation to the Commission on 4.20.11 (R., Vol. I, pp. 20-31). When the Commission re-wrote Referee Powers' proposed decision, the Commission found that "the subject accident occurred on Employer's premises" (R., Vol. I, p. 36, Ll. 15-16), but applied the wrong legal standard based on its misreading of *Kessler on Behalf of Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997) and I.R.E. 301 and erroneously concluded without citation to any evidence in the record that Employer had come forward with sufficient evidence to rebut the premises presumption (R., Vol. I, p. 38, Ll. 23-25).

After declaring the premises presumption rule from *Foust v. Birds Eye Division of General Foods Corp.*, 91 Idaho 418, 422 P.2d 616 (1967) "moot", the Commission reviewed 80 years of "arise out of" employment case law dating all the way back to a 1931 Oregon Supreme

Court case. After discussing the 3 categories of risk that might be applicable to different hypothetical "arise out of" employment scenarios, the Commission then cited this Court's holding in *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P. 3d 788 (2002) and ruled in Claimant's favor on the "arose out of" employment question:

> In summary, we find that the risk of injury at issue in the instant matter is likely not a neutral risk, but, instead, **a risk of injury that bears a causal connection to the work that Claimant was hired to perform.** ... To the extent that the longstanding rule explained in *Eriksen v. Nez Perce County*, *supra*, is to the contrary, **we perceive that rule is overruled by *Spivey***. Quite apart from the question of whether or not Claimant is entitled **to a presumption favoring the compensability** of this claim, **the evidence establishes that Claimant has satisfied his burden of proving the occurrence of an accident both arising out and in the course of employment"** (R., Vol. I, p. 49, L. 24 – p. 50, L. 7) (emphasis supplied).

The Commission awarded the Claimant TTD benefits during his period of recovery and 100% of the invoiced amount of the denied past medical benefit claims that had been adjudicated as Claimant's EX. 7 at the 9.28.10 Hearing, but denied Claimant's request for attorney's fees in this **close case** because the Commission felt that this Court's holding in *Spivey* is the subject of legitimate debate (R., Vol. I, p. 51, L. 21 – p. 52, L. 5) [1].

On 5.19.11 the Claimant filed his 2nd Request For Calendaring of the remaining disputed issues in this case (R., Vol. I, pp. 54-56). The Commission could not schedule the final hearing because Employer filed its **Notice of Appeal** to the Idaho Supreme Court on 6.20.11 (R., Vol., I, pp. 69-71). The Claimant filed a Motion For Involuntary Dismissal of Appeal and the Supreme Court granted the Claimant's Motion To Dismiss and entered its Order Dismissing Employer's Appeal on 7.27.11 (R., Vol. I, pp. 74-75).

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[1] The Claimant strongly disagrees with the Commission's suggestion that *Spivey* remains the subject of legitimate debate and argues that *stare decisis* requires all Employers and the Commission to properly apply this Court's holding in *Spivey*.

Employer then filed a **Motion For Clarification** of the Court's 7.27.11 Order Dismissing Appeal which this Court denied on 8.15.11 after directing Employer's attention to the Court's holding in *Jensen v. Pillsbury Co*, 121 Idaho 127, 823 P2d 161 (1992) (R., Vol. I, p. 76). Employer then filed a Notice of Intent to File a Workers' Compensation Complaint Against The Industrial Special Indemnity Fund on 8.18.11 (R. Vol. I, pp. 77-79) and a Complaint against the ISIF on 10.19.11 (R., Vol. II, pp. 190-191).

Employer **mocked** the Industrial Commission's legal authority in its 9.16.11 Memorandum Regarding Payment Obligations (R., Vol. I, p. 91-169) by pointing out that the Commission had **"no statutory authority to enforce its own awards"** (R., Vol. I, p. 94, Ll. 12-13) (emphasis supplied). The Claimant filed his Response to Defendants' Motion For Stay of 5.17.11 Order To Pay Compensation Benefits on 9.27.12 and asked the Commission to Order Employer to make prompt payment of all benefits due (R., Vol. II, pp. 170-187).

On 12.8.11, the Industrial Commission entered its Order Denying Stay and **ordered Employer to promptly pay** to the Claimant all medical and TTD benefits previously awarded to Claimant in the Commission's 5.17.11 decision plus statutory interest **within 14 days** from the date of the Commission's 12. 8.11 Order (R., Vol. II, pp. 204-214). The Commission reminded Employer that "[i]njured workers **should not be in the position of having to wait for compensation pending resolution of all the issues before both the Commission and the Court**, a process that can take **several years**" (R., Vol. II, p. 209, Ll. 2-4).

The Commission also admonished the Employer and its Surety that it expected "**Surety to comply with the orders of the Commission** until an appeal is perfected. In this regard, we note that Idaho Code § 72-304 grants to the Commission the authority to withdraw its approval

of any surety who unnecessarily delays payment of compensation" (R., Vol. II, P. 209, L. 23 – p. 210, L1).

Finally, the Commission reminded Employer that "[t]he **policy** of the workers' compensation law is to provide injured workers with **sure and certain relief**. Claimant is correct that an **important aspect of sure and certain relief is prompt payment of benefits**. Claimant's compensation payments **should not be delayed for months or years** because of a **voluntary request for bifurcation** made by Defendants. There is no manifest injustice or due process violation in ordering Defendants to **pay an award** granted by the bifurcated decision that **they themselves requested**" (R., Vol. II, p. 211, Ll. 4-9).

Although Employer had mocked the Industrial Commission's authority and refused to comply with its 5.17.11 Order, the Commission ruled in its 12.8.11 Order that the Claimant was not entitled to an award of attorney's fees for Employer's unreasonable delay in the payment of benefits because Employer had filed a Notice of Appeal to the Supreme Court and had asked the Commission to stay enforcement of its 5.17.11 Order (R., Vol. II, p. 212).

After Employer received the Commission's 12.8.11 Order compelling the prompt payment of benefits, Employer again refused to comply with the Commission's Order and filed a **Motion For Permissive Appeal** to the Idaho Supreme Court (R., Vol. II, pp. 215 – 217). The Commission granted Employer's Motion on 12.19.11 (R., Vol. II, pp. 237-239). However, on 1.30.12, the Idaho Supreme Court entered its **Order Denying Employer's Motion For Permissive Appeal** and Ordered that the remaining disputed issues in the case **"shall be litigated without further delay"** (R., Vol. II, pp. 247-248) (emphasis supplied).

After more than 2 years of unreasonable denials and contentious litigation, Employer finally complied with the Industrial Commission's 5.17.11 Order and 12.8.11 Order and made the **unconditional payment** of the past denied medical benefits that had been adjudicated at the 9.28.10 Hearing as CL. EX. 7 and the retroactive TTD benefits that had accrued from 12.28.09 – 12.6.10 (CL. 5.17.12 EX. 17, 017022; 017025).

After making that unconditional payment of past due benefits, Employer then engaged in a very disingenuous legal maneuver and raised the doctrine of *res judicata* to justify its continuing refusal to pay Claimant the following benefits:

1. 100% of the invoiced amount of all past denied medical benefit claims that were incurred by Claimant in connection with his 12.18.09 injury but not adjudicated as EX. 7 at the 9.28.10 Hearing (CL. 5.17.12 EX. 14 and EX. 15); and,

2. 100% of all past denied mileage, per diem and lodging benefits that were not adjudicated at the 9.28.10 Hearing (CL. 5.17.12 EX. 16).

The Commission's 3.7.12 Notice of Hearing set the remaining disputed issues in this case for Hearing on 5.17.12 (R., Vol. II, pp. 258-260). On 9.28.12, the Commission entered its final decision on the remaining disputed issues in this case and held that:

(1) The Claimant was totally and permanently disabled as an odd-lot worker;

(2) The Claimant was entitled to a 19% whole person PPI rating with 12% of that rating being assigned to the Claimant's 12.18.09 low back injury and 7% being apportioned back to the Claimant's 10.22.90 low back injury;

(3) The 7% whole person PPI rating that Dr. Frizzell issued on 3.10.11 and then applied retroactively 21-years back to the Claimant's 10.22.90 low back injury met all of the elements in the PFC against the ISIF, but the ISIF was not liable for any of the Claimant's total and permanent disability benefits because Employer is *estopped* from asserting any position on the issue of the Claimant's pre-existing PPI rating which is inconsistent with the 0% PPI rating that Employer obtained from its IME expert, Dr. Knoebel, on 4.2.91;

(4) Employer is liable for 100% of the Claimant's total and permanent disability benefits beginning when the Claimant achieved maximum medical improvement (MMI) in November of 2010;

(5) Based on this Court's holding in *Neel v. Western Construction,* 147 Idaho 146, 206 P.3d 852 (2009), Employer is liable for the payment of 100% of the invoiced amount of all of the Claimant's past denied medical benefits with proper credit for the amounts previously paid on or about 2.6.12 based on the medical bills that were adjudicated as CL. EX. 7 at the 9.28.10 Hearing;

(6) Employer could not use the doctrine of *res judicata* to avoid its *Neel* obligation to pay Claimant 100% of the invoiced amount of all past denied medical benefits that were incurred by Claimant in connection with his 12.18.09 industrial accident;

(7) Based on this Court's holding in *Neel*, Employer was liable for the payment of 100% of all past denied mileage, per diem and lodging expenses itemized in Claimant's 5.17.12 EX. 16; and

(8) Employer was liable for the payment of attorney's fees pursuant to Idaho Code §72-804 based on Employer's unreasonable refusal to pay the Claimant all undisputed worker's compensation benefits after the Idaho Supreme Court entered its 1.30.12 Order dismissing Employer's 2nd premature appeal (R., Vol. II, pp. 269-316).

Employer filed its Motion For Reconsideration of the Commission's 9.28.12 decision on 10.17.12 (R., Vol. II, pp. 338-349). Defendant ISIF opposed Employer's 10.17.12 Motion For Reconsideration on 10.30.12 (R., Vol. II, pp. 350-354). Claimant opposed Employer's 10.17.12 Motion For Reconsideration on 10.30.12 (R., Vol. III, pp. 355-376).

The Industrial Commission granted Employer's Motion For Reconsideration on 12.10.12 and made the following alterations to its 9.28.12 decision (as amended on 12.5.12):

(1) The doctrine of *collateral estoppel* could now be used to allow Employer to circumvent this Court's holding in *Neel* and give Employer an **unearned credit** for paying Claimant 100% of the invoiced amount of all past medical benefits, mileage, per diem and lodging expenses incurred by the Claimant from the date of his 12.18.19 industrial accident to the date of the 9.28.10 first bifurcated hearing even though Employer never actually paid those benefits; and,

(2) The Claimant's award of **attorney's fees should now be restricted** to Employer's unreasonable refusal to pay Claimant his undisputed 12% whole person PPI benefit award after the Supreme Court dismissed Employer's 2nd premature appeal on 1.30.12 (R., Vol. III, pp. 443-461).

On 12.19.12, the Claimant filed his Motion For Reconsideration of the Commission's 12.10.12 Order on Reconsideration and asked the Commission to reconsider its application of *collateral estoppel* because Employer failed to prove all of the elements in the prima facie case (R., Vol. III, pp. 462-497). The Commission summarily denied the motion without discussion even though the doctrine of *collateral estoppel* was not listed in the Commission's 3.7.12 Notice of Hearing; was not raised as an affirmative defense by Employer at the commencement of the 5.17.12 Hearing **when the parties agreed** Employer was relying exclusively on the doctrine of *res judicata*; not raised by the Claimant in his 7.27.12 post-hearing Brief; not raised by Employer in its 8.15.12 post-hearing Reply Brief and never even discussed by the Industrial Commission in its original 9.28.12 decision (R., Vol. III., pp. 504-506).

Employer then filed its **3rd appeal** to the Idaho Supreme Court on 1.18.13 (R., Vol. III, pp. 507-512). The Claimant filed his Notice of Cross-Appeal on 2.1.13 and asked the Court to decide other disputed issues that arose during the evolution of this case but had not been raised by Employer's 1.18.13 Notice of Appeal (R., Vol. III. pp. 516-525). Defendant ISIF filed its Notice of Cross Appeal on 2.4.13 (R., Vol. III, pp. 529-532) and asked the Court to address 3 issues relevant to the PFC against the ISIF.

(C) STATEMENT OF THE FACTS

Employer has conceded that the material facts in this case are not in dispute. (ER.

12.17.10 Br., p. 2, L. 9). Employer denied this claim based the **exclusive legal ground** that Claimant's 12.18.09 injury **did not "arise out of"** his employment with UPS. Since the material facts in this case are not in dispute and all of the issues presented on appeal are legal questions, the Claimant will not set forth a detailed statement of facts but will cite to the facts in the record when necessary to support the Claimant's legal arguments on the disputed issues [2].

(III) ISSUES PRESENTED ON APPEAL

1. Has Employer met its burden of proving that the Commission's 5.17.11 decision should be reversed based on the standards of Idaho Code §72-732?
2. Has Employer met its burden of proving that the Commission's 12.5.12 decision should be reversed based on the standards of Idaho Code §72-732?
3. Has Claimant met his burden of proving that the Commission's 12.10.12 Order On Reconsideration should be reversed based on the standards of Idaho Code §72-732?
4. Should the Court award the Claimant attorney's fees at every stage of this **"close case"** from date of injury on 12.18.09 to the date of final decision by the Supreme Court and on remand pursuant to Idaho Code §72-804, I.A.R. 35(a)(2) and I.A.R. 41?

(D) STANDARD OF REVIEW

This Court has defined the standards of review which govern appeals from the Industrial Commission decisions as follows:

> The Court may set aside an order or award by the Industrial Commission if: (1) the commission's findings of fact are not based on any substantial competent evidence; (2) the commission has acted without jurisdiction or in excess of its powers; (3) the findings of fact, order or award were procured by fraud; or (4) the findings of fact do not as a matter of law support the order or award. I.C. § 72-732; *Ewins v. Allied Sec.*, 138 Idaho 343, 345-346, 63 P.3d 469, 471-472 (2003). This Court exercises free review over the Commission's legal conclusions but does not disturb factual findings that are supported by substantial and competent evidence. *Ewins,* 138 Idaho at 346, 63 P.3d at 472. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* This Court views all facts and inferences "in the light most favorable to the party who prevailed before the Commission." *Taylor v. Soran Rest., Inc.,* 131 Idaho 525, 527, 950 P.2d 1254, 1256

[2] The background facts which support the Commission's findings of fact and conclusions of law on the "accident" and "injury" issues can be located at pp. 3-7 of CL. 11.19.10 Br.

(1998) (internal quotations and citation omitted). *Page v. McCain Foods, Inc.*, 145 Idaho 302, 305, 179 P.3d. 265, 268 (2008).

(E) ARGUMENT

1. THE COURT SHOULD **REVERSE** THE COMMISSION'S ERRONEOUS CONCLUSION THAT EMPLOYER PRESENTED SUFFICIENT EVIDENCE TO REBUT THE PREMISES PRESUMPTION AND RULE THAT CLAIMANT'S ACCIDENT AND INJURY AROSE OUT OF HIS EMPLOYMENT AS A MATTER OF LAW

The Industrial Commission found in this case that there was no question that the Claimant's 12.18.09 industrial accident and injury occurred on his Employer's premises:

> There is no question that Claimant's normal workplace (other than in his truck) was at Arnold's Aviation at the Cascade Airport in Cascade. We find that for purposes of this matter, the subject accident occurred on Employer's premises. (R., Vol. I, p. 36, Ll. 14-16).

Employer did not appeal this finding or the Commission's ruling that the premises presumption applied to this case. Referee Powers applied the correct legal standard from *Foust v. Birds Eye Div.*, 91 Idaho 418, 419, 422 P.2d 616, 617 (1967) for what the Employer must prove to rebut the premises presumption and correctly held that Employer failed to rebut the "premises presumption":

> Claimant is entitled to the presumption that his injury arose in the course of and out of his employment. Therefore, the burden shifts to Employer to rebut that presumption by proving Claimant's accident and injury did not arise out of his employment because it was an abnormal, unforeseeable activity that was foreign to his employment. *See, Foust Id.* (R., Vol. I, p. 24, L. 20-p.25, L. 4).

When the Industrial Commission re-wrote Referee Powers' proposed decision, it misread *Kessler* and I.R.E. 301 and lowered the *Foust* standard for what the Employer is required to prove in order to rebut the premises presumption:

> Therefore, in order to overcome the presumption that the accident is one arising out of and in the course of employment, Defendant must come forward with proof sufficient to permit reasonable minds to conclude that the accident is not one arising out of and in the course of employment. If the opposing party does come forward with such evidence, then the Commission must ascertain whether the facts are sufficient to demonstrate that the accident is one arising out of and in the course of employment without the benefit of the presumption. (R., Vol. I, p. 37, Ll. 17-22).

Even if the Court assumed *arguendo* that that the *Kessler* Court's reference to I.R.E. 301 negated this Court's holding in *Foust* and lowered the standard of proof for what is required to rebut the "premises presumption" (which the Claimant does not concede), by its express terms I.R.E. 301 only applies in those cases where the presumption rebuttal standard is **not otherwise provided for by Idaho appellate decisions**.

The *Foust* rule is directly on point and has always defined the proper standard of proof that is required for Employer to rebut the "premises presumption":

> A contrary presumption, that is, that the injury arises out of and in the course of employment, prevails where the injury occurs on the employer's premises, as in the instant case and *Nichols v. Godfrey, supra. (citations omitted).* In the case at bar there is nothing to indicate that respondent, while on her employer's premises, was engaged in any abnormal unforeseeable activity foreign to her employment, as was the situation in *In re Malmquist,* 78 Idaho 117, 300 P.2d 820 (1956); *Neale v. Weaver,* 60 Idaho 41, 88 P.2d 522 (1939); and *Walker v. Hyde,* 43 Idaho 625, 253 P. 1104 (1927). *Foust v. Birds Eye Div.*, 91 Idaho 418, 419, 422 P.2d 616, 617 (1967).

This Court has recently construed the premises presumption rule stated in *Kessler*, I.R.E. 301 and *Foust* as being perfectly consistent:

> When an injury occurs on an employer's premises, a presumption arises that the injury arose out of and in the course of employment. *Kessler,* 129 Idaho at 859, 934 P.2d at 32 (1997); *Foust v. Birds Eye Div.,* 91 Idaho 418, 419, 422 P.2d 616, 617 (1967). *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 333, 179 P.3d 288, 296 (2008).

A mere 6 months after the Commission refused to apply the *Foust* rule in this case, the Commission correctly held that *Foust* defines what the Employer must prove to rebut the premises presumption:

> An accident involving a worker occurring on the employer's premises is presumed to arise out of and in the course of employment. Foust v. Birds Eye Division of General Foods Corp., 91 Idaho 418, 422 P.2d 616 (1967). This presumption can be rebutted by proof that the employee, while on the employer's premises, was engaged in unforeseeable, abnormal activity foreign to his employment. *Mudge v. GNP of Idaho, Inc., and Tower Insurance Company of New York*, 2011 WL 6042994, I.C. No. 2010-025109, p. 7, L. 32 – p. 8, L. 1 (Filed: 11.14.11).

Even if this Court were to ignore the Commission's adoption of the *Foust* standard in *Mudge* and apply the lower standard that the Commission used in this case, this Court should still **reverse** the Commission's finding that Employer rebutted the presumption because no reasonable person could conclude, based on the evidence presented, that Employer came forward with proof sufficient to permit reasonable minds to conclude that the accident is not one arising out of and in the course of employment.

The Claimant gave **unrefuted** testimony at the 9.28.10 Hearing which explained how Employer's Safety Policies required him to tie the laces on his work boots (Tr. 1, p. 17, L. 22 – p. 23, L. 19). Michael McGuire is Employer's Health and Safety Manager for the Northwest District who, by his own estimate, is one of the top 20 people in the entire UPS organization of 430,000 employees who is qualified to discuss UPS's Safety Policies (McGuire 9.16.10 pre-hearing Dep., p. 6, Ll. 13-16; p. 32, Ll. 8-10).

Mr. McGuire gave **unrefuted** testimony during his 9.16.10 pre-hearing deposition that Employer's Safety Policies required the Claimant to tie the laces on his work boots in order to

minimize the risk of trip and fall injuries and prevent "loose or hanging" parts from getting caught in moving parts or machinery (McGuire 9.16.10 Dep., p. 24, L-9 – p. 52, L. 15; Dep. EX E, p. 4 and CL. 9.28.10 EX. 11, 011015-011016).

Preston Dax Wilkinson was the Claimant's Supervisor and Business Manager (Tr. 1, p. 84, Ll. 18-19). Mr. Wilkinson gave **unrefuted** testimony at the 9.28.10 Hearing confirming that he had read all of Mr. McGuire's 9.16.10 pre-hearing deposition transcript and **agreed 100%** with all of Mr. McGuire's testimony about Employer's Safety Policies (Tr. 1 , p. 85, Ll. 5-10).

The unrefuted sworn testimony from the Claimant, Mr. McGuire and Mr. Wilkinson provides overwhelming evidence that Claimant was performing an act required by his job and was not engaged in some abnormal, unforeseeable act that was foreign to his employment when he bent down to tie the laces on his work boots on his Employer's premises on 12.18.09. Based on this unrefuted evidence, no reasonable mind could reach the conclusion that Employer came forward with sufficient evidence to rebut the premises presumption.

The Court should give Claimant the benefit of the premises presumption and rule as a matter of law that Claimant's accident and injury arose out of his employment.

> Where there is no dispute in the evidence and it is not reasonably susceptible of more than one inference, the question of whether an accident to a workman arose out of and in the course of employment **is a conclusion of law** rather than a finding of fact and may be reviewed by this court. *Colson v. Steele,* 73 Idaho 348, 351, 252 P.2d 1049, 1050 (1953). *Gage v. Express Personnel*, 135 Idaho 250, 253, 16 P.3d 926, 929 (2000) (emphasis supplied).

The Industrial Commission explained the legal effect of what would happen if the Employer came forward with sufficient evidence to rebut the premises presumption as follows:

> If the opposing party does come forward with such evidence, then the Commission must ascertain whether the facts are sufficient to demonstrate that the accident is one arising out of and in the course of employment without the benefit of the presumption (R., Vol. I, p. 37, Ll. 20-22).

The converse must likewise be true. In cases like this where the Employer has **failed to come forward with sufficient evidence** to rebut the presumption, then by its own logic the Commission is not required to go any further to ascertain whether the facts are sufficient to demonstrate that the accident is one arising out of and in the course of employment because the "arise out of" question has already been decided as a matter of law by proper application of the presumption. To hold otherwise and still require the Claimant to adduce evidence on the "arise out of" question after he has already received the benefit of the presumption, would nullify the effect of the presumption and make it absolutely meaningless.

The Commission's description of the legal effect of failing to rebut the presumption is consistent with this Court's holding in *Kessler* and I.R.E. 301 which explains the effect of failure to rebut the presumption as follows:

> If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved. (I.R.E. 301(a)).

The fact which **shall be deemed proved** by Employer's failure to rebut the premises presumption in this case is that the Claimant's injury "arose out of" his employment. Since Employer denied this entire claim on that **exclusive legal ground**, the Claimant is entitled to a ruling that his injury "arose out of his employment" **as a matter of law**. Based on the unique facts of this case, there is absolutely no need for this Court to accept Employer's invitation to analyze 80 + years of "greater risk" case law to resolve the "arose out of" employment question.

> 'By the great weight of authority, injuries sustained by an employee upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment. Annotation, 49 A.L.R. 426-436(6). ...
>
> In *Burchett v. Anaconda Copper Min. Co.*, supra, this court affirmed a determination that an employee who sustained an injury on the employer's premises as a result of a fall on a slippery walkway was entitled to compensation. Therein **it was held as a matter of law that the accident was one that arose out of and in the course of employment.** *Nichols v. Godfrey*, 90 Idaho 345, 350-351, 411 P.2d 763, 765-766 (1966) (emphasis supplied).

The Commission not only committed plain legal error by refusing to apply the *Foust* standard to determine whether Employer had rebutted the premises presumption, the Commission compounded that error by formulating legal conclusions that were not supported by any substantial and competent evidence in the record:

> Regardless, we think the question of the current status of the *Foust* presumption is mooted in this case in view of our **conclusion** that Defendant's have **come forward with evidence sufficient** to permit reasonable minds to conclude that the subject accident is not one arising out of and in the course of Claimant's employment. (R., Vol. I, p. 38, Ll. 20-23) (emphasis supplied).

Without citing any facts in the record to support its legal conclusion that Employer had come forward with sufficient evidence to rebut the presumption, the Commission just formulated another legal conclusion and then looped the first conclusion with the second conclusion:

> Employer has a reasonable expectation that Claimant will prepare himself such that when he arrives at the work site, he is ready to go to work. Such pre-work preparations such as eating and dressing are not ordinarily part of the work that a worker is paid to perform, and therefore, such activities are not in the "course" of employment. That Claimant chooses, for reasons of personal convenience, to perform one of preparatory activities at the work place, as opposed to his home, arguably does nothing to bring this activity into the "course" of Claimant's employment, Defendants [sic] [Defendants'] concession on the course question notwithstanding. (R., Vol. I, p. 38, L. 23- p. 39, L. 3).

The Commission did not cite any legal authority to support its conclusion that an Employer's "reasonable expectations" can rebut the premises presumption. Furthermore, the Commission's finding Employer had a "reasonable expectation" that Claimant would tie his work boot laces before he entered upon his Employer's premises is directly contradicted by Employer's testimony.

Mike McGuire gave **unrefuted** testimony in his pre-hearing deposition that **Employer never communicated its expectations** that its employee were required to tie their boot laces before entering upon the Employer's premises in a written policy, procedure, standard, rule or guideline (McGuire Dep., p. 49, Ll. 8-11; p. 50, Ll. 11-15; p. 55, L. 16 – p. 56, L. 1).

> To be objectively reasonable, "[t]he employer's expectations must be communicated to the employee unless they flow naturally from the employment relationship." *Pimley v. Best Values, Inc.,* 132 Idaho 432, 436, 974 P.2d 78, 82 (1999). *Sadid v. Idaho State University*, ___Idaho ___, 294 P.3d 1100, 1107 (2013).

The Commission also based its conclusion that Employer had met its *Foust* burden of rebutting the "premises presumption" by stating another erroneous legal conclusion that was directly contradicted by the Commission's own subsequent findings:

> Similarly, the risk of injury to which Claimant was evidently exposed is arguably a common risk, with no particular association to Claimant's employment. **We therefore conclude that Defendants have overcome the presumption**, leaving the Commission to consider whether the evidence supports a finding that Claimant has met his burden of proving the occurrence of an accident arising out of and in the course of employment. (R., Vol. I, p. 39, Ll. 3-7) (emphasis supplied).

The Commission did not cite any authority to support its conclusion that an Employer can overcome the premises presumption merely by arguing that the Claimant was exposed to a "common risk". Even if exposure to a "common risk" was sufficient to rebut the premises

presumption, the Commission found that Claimant's job exposed him to an **actual risk of injury directly associated with the performance of his job duties or reasonably incidental thereto** when he bent over to tie his work boot laces on 12.18.09 (R., Vol. I, p. 45, Ll. 20-23; p. 46, Ll. 6-12 and Ll. 16-20; p. 47, Ll. 10-12 and p. 49, Ll. 24-26).

The Court should reverse the Commission's erroneous conclusion of law that Employer successfully rebutted the premises presumption because that conclusion was based on the wrong legal standard in direct violation of this Court's holding in *Foust* [3] and based on erroneous legal conclusions and factual findings that were directly contradicted by the Commission's own findings. Even if this Court determines that proper application of the premises presumption does not entitle the Claimant to a ruling that his accident and injury "arose out of" his employment as a matter of law, the Court should still affirm the Industrial Commission's 5.17.11 decision because Employer has failed to satisfy the appellate standards set forth in Idaho Code §72-732.

2. THE COURT SHOULD **AFFIRM** THE INDUSTRIAL COMMISSION'S 5.17.11 AROSE OUT OF EMPLOYMENT RULING BECAUSE EMPLOYER FAILED TO PROVE THAT THE COMMISSION'S FINDINGS OF FACT WERE NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE AS REQUIRED BY IDAHO CODE 72-732(1)

Idaho code §72-732(1) requires Employer to prove that the Commission's findings of fact were not supported by substantial competent evidence in order to **set aside** the Commission's 5.17.11 decision. Employer has only challenged 1 finding of fact; i.e., that "the Industrial Commission erred by asserting UPS did not dispute an accident or injury as defined in Idaho Code §72-102(18) had occurred" (ER. 4.24.13 App. Br, p. 17, Ll. 8-9). The record proves exactly the opposite and confirms that Employer failed to meet its burden of proof under Idaho Code §72-

[3] The Commission adopted the *Foust* rule in *Mudge* just 6 months later.

732(1).

Employer denied this claim on 1.8.10 based on the **exclusive legal ground** that Claimant's 12.18.09 "injury" did not "arise out of" his employment with UPS (CL. 9.28.10 EX. 8, 008001, EX. 9, 009006). Employer did not dispute that the Claimant suffered an accident and injury that occurred during the course of his employment. Based on the express language of Employer's original 1.8.10 denial and its 2.26.10 secondary denial, **the Industrial Commission had substantial and competent evidence** to conclude that Employer did not dispute that Claimant suffered an accident and injury in the course of his employment. The Court should not disturb those findings on appeal.

The Industrial Commission described the term "accident" as "a term of art" in its 5.17.11 decision:

> The term "accident" is a term of art under the Idaho Workers' Compensation law, and is defined at I.C. § 72-102(18)(b) as follows: "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. Here, **it is clear that the mishap described by Claimant is one that would qualify as an "accident"** under the statutory scheme. See *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 666 P.2d 629 (1983); *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002); *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005). **Moreover, there is no dispute that Claimant's injuries are causally related to the accident.** (R., Vol. I, p. 39, Ll. 9-18) (emphasis supplied).

Employer used the words "accident" and "injury" in the heading of argument 2 on page 12 of its 12.17.10 brief, **but that was as far as Employer's analysis of those terms of art went.** Employer did not argue that the Claimant was not involved in an "unexpected, undesigned, and unlooked for mishap, or untoward event" when he bent over to tie the laces on his work boots

and felt a "pop" in his low back. Employer did not argue that Claimant's accident was not connected with the industry in which it occurred. Employer did not argue that Claimant failed to reasonably locate the time and place where his "accident" occurred. Employer did not argue that the Claimant's 12.18.09 accident did not "cause" his low back "injury. Employer conceded the "in the course of employment" issue.

Based on the express language of its 2 written denials and Employer's failure to dispute that Claimant suffered an "accident" and "injury" in its 12.17.10 Brief, **the Commission clearly had substantial and competent evidence** to support its finding that Employer has never disputed that Claimant suffered an accident and injury in the course of his employment. Even if Employer had disputed that Claimant suffered an accident and injury in the course of his employment, the Industrial Commission had substantial and competent evidence to support its conclusion that Claimant suffered an accident and injury in the course of his employment on 12.18.09 when he bent over to tie the laces on his work boots and felt a "pop" in his low back [4].

Since Employer failed to prove that the Commission's findings of fact were not supported by substantial and competent evidence, there is no basis for this Court to set aside the Commission's findings pursuant to Idaho Code §72-732(1).

3. THE COURT SHOULD **AFFIRM** THE COMMISSION'S 5.17.11 "AROSE OUT OF" EMPLOYMENT RULING BECAUSE EMPLOYER FAILED TO PROVE THAT THE COMMISSION'S FINDINGS OF FACT DID NOT AS A MATTER OF LAW SUPPORT ITS RULING AS REQUIRED BY IDAHO CODE §72-732(4)

Idaho Code §72-732(4) requires Employer to prove on appeal that the Commission's findings of fact do not as a matter of law support the Commission's 5.17.11 Order. However,

[4] *See* background facts set forth at pp. 3-7 of CL. 11.19.10 Br.

from page 16 to page 33 of its 4.24.13 appellate brief, Employer **failed to identify a single finding of fact** which did not as a matter of law support the Commission's 5.17.11 "arose out of" ruling.

> The Industrial Commission's use of the positional risk doctrine **given its findings** was in error, and its 2011 Decision warrants reversal. (ER. 4.24.13 App. Br., p. 33, Ll. 7-8).

What findings? Employer did not identify a single finding of fact which did not as a matter of law support the Commission's 5.17.11 ruling on the "arose out of" employment question. Therefore, this Court cannot conduct effective appellate review. Even if Employer had identified specific findings of fact which did not support the Commission's ruling, Employer's argument would still fail to meet the standards of Idaho Code §72-732(4) because it is very clear that all of the Commission's findings supported its ruling that Claimant's injury arose out of his employment:

> Here, the risk of injury in question is connected to the employment because it was encountered by Claimant as result of the Claimant's performance of a task that was either part of his work, or reasonably incidental thereto. To conclude, as we do, that the risk of bending over to tie one's shoe preparatory to beginning the workday is a work-connected risk, is entirely consistent with the proposition that an accident does not arise out of employment unless there is proof of a causal connection between the conditions under which the work must be performed and the resulting injury. Claimant had demonstrated, and no rational person would disagree, that anyone whose job includes the requirement of carrying boxes all day, frequently in a way that obscures his view of the ground immediately in front of him, would do well to keep his shoes tied. It strains credulity to suggest that the action Claimant took preparatory to the start of his shift did not confer a benefit upon Employer by reducing the chances that Claimant would suffer a trip and fall. It strains credulity to suggest that the risk of injury associated with the tying of the shoelaces was not therefore one which followed as a natural incident of the work. Claimant needed to have his shoes tied to perform his work, and the injury that he suffered as a result of performing this task is assuredly connected to his employment. This is not a case where the evidence establishes an absence of a work connection, or where the

evidence is such that it cannot be ascertained whether Claimant's injury was occasioned as a result of a risk personal to him versus an employment connected risk. (R., Vol. I, p. 45, L. 20- p. 45, L. 12).

However, true this may be, the fact of the matter is that Claimant suffered this particular injury as the result of his attempts to accommodate the requirements of his job. Because the Claimant was necessarily required to tie his shoelaces before starting work, his job clearly created an actual risk which ultimately resulted in Claimant's injury. (R., Vol. I, p. 46, Ll. 16-20).

Even though we have found that Claimant's employment did, indeed, subject him to an actual risk of injury due to workplace demands which required of him that his shoelaces be tied, the "arising" test explained in *Eriksen v. Nez Perce County, supra*, may still present an obstacle to the claim. (R., Vol. I, p. 47, Ll. 10-13).

Therefore, after *Spivey*, it seems clear that where the risk of injury is one to which claimant is equally exposed both in, and without, his employment, the resulting injury is one which will be deemed to arise out of employment. This rule embraces coverage for both neutral and equal risks. However, it is clear that before benefits are payable, it must be demonstrated that claimant actually was exposed to the risk in question in the course of his employment, and that exposure to that risk led to the injury.

In summary, we find that the risk of injury at issue in the instant matter is likely not a neutral risk, but, instead, a risk of injury that bears a causal connection to the work that Claimant was hired to perform. However, like a true "neutral" risk, it is a risk of injury to which Claimant was equally exposed apart from his employment. *Spivey v. Novartis Seed, Inc.*, supra, makes it clear that injuries resulting from both types of risks so characterized should be deemed to arise out of employment. To the extent that the longstanding rule explained in *Eriksen v. Nez Perce County, supra*, is to the contrary, we perceive that rule is overruled by *Spivey*. Quite apart from the question of whether or not Claimant is entitled to a presumption favoring the compensability of this claim, the evidence establishes that Claimant has satisfied his burden of proving the occurrence of an accident both arising out and in the course of employment (R., Vol. I, p. 49, Ll. 18 – p. 50, L. 7).

Since all of the Commission's findings fact supported its ruling on the "arose out of employment' issue as a matter of law, Employer failed to meet its burden of proof under Idaho

Code §72-732(4) and there is no basis for this Court to set aside the Commission's 5.17.11 Order.

4. WHEN THE COMMISSION'S FINDINGS OF FACT ARE PROPERLY APPLIED TO THIS COURT'S MODERN HOLDINGS WHICH REQUIRE A LIBERAL INTERPRETATION OF THE TERMS "ACCIDENT" AND "INJURY", THERE IS NO DOUBT THAT THE COMMISSION'S FINDINGS OF FACT SUPPORT THE COMMISSION'S RULING ON THE "AROSE OUT OF" EMPLOYMENT QUESTION AS A MATTER OF LAW.

Employer has accused this Court of misreading the plain language of Idaho Code §72-102(18) and legislating from the bench in *Spivey* in order to expand the scope of the terms "accident" and "injury" beyond what the legislature intended (ER 4.24.13 App. Br., p. 19, Ll. 19-21; p. 26, Ll. 15-18; p. 28, L. 20 – p. 29, L. 17). The irony of Employer's argument must be pointed out. Although Employer uses euphemistic language to conceal its true objective in this case, what the Employer is really asking this Court to do is judicially re-write the plain definition of the terms accident and injury set forth in Idaho Code §72-102(18) to include **a new element in the prima facie case** of the accident / injury theory which would require the Claimant to prove that he was **exposed to a "greater risk"** while performing an **actual job duty** that was **peculiar to and characteristic of the job duty itself and not a common risk that he would be equally exposed to outside of work** in order to have a compensable accident / injury claim that "arose out of" his employment (ER. 12.17.10 post-hearing brief, p. 13, Ll. 13-15; p. 20, Ll. 7-8).

The Court should decline Employer's invitation to survey 39 cases dating back 82 years and Professor Larson's treatise when this Court can reject Employer's "greater risk" argument by simply applying this Court's modern holdings which have consistently **applied a broad and liberal interpretation** to the terms "accident" and "injury" to the facts of this case.

This Court began its modern trend of rejecting Employer's attempts to give an **overly narrow and hyper-technical** interpretation to the terms accident and injury in *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

> We cannot agree **with the Commission or Simplot's overly narrow and overly technical construction** in view of the circumstances presented in the instant case ...
>
> It is enough to note that claimant here, as indicated by the medical evidence, suffered his injury at a particular time, at a particular place, while engaged in his normal and ordinary work for his employer. **The fact that Wynn's spine may have been weak and predisposed him to a ruptured disc does not prevent an award since our compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he finds him....**
>
> As this Court has repeatedly stated, "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." *Whipple v. Brundage,* 80 Idaho 193, 327 P.2d 383 (1958); *Lewis v. Dept. of Law Enforcement,* 79 Idaho 40, 311 P.2d 976 (1957). ...
>
> We **reverse** the decision of the Industrial Commission and remand the cause to the Commission for the entry of an appropriate award to claimant. Costs to appellant. *Wynn, supra*, 105 Idaho 104 -105, 666 P. 2d 631-632 (emphasis supplied).

In *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000), this Court clearly **rejected** Employer's argument that the Claimant must prove that he was exposed to a **"greater risk"** while performing an **actual job duty**:

> We **hold that the Commission committed clear error** when it concluded that Gage's smoking was a **wholly personal activity** not in furtherance of any interest of her employer. An injury is considered to arise out of employment when a causal connection exists between the circumstances under which the work must be performed and the injury of which the claimant complains. *Kessler*, supra at 859, 934 P.2d at 32....
>
> This Court has repeatedly recognized that in determining whether an accident arises out of and in the course of employment, each case must be

> decided upon its own attendant facts and circumstances under a liberal construction of the Worker's Compensation Act. Beebe v. Horton, 77 Idaho 388, 390, 293 P.2d 661, 662 (1956). We hold that the Commission erred in concluding that Gage's injury did not arise out of and in the course of her employment. Accordingly, we reverse the Commission's decision denying worker's compensation benefits. *Id.* 135 Idaho 254, 16 P.3d 930 (emphasis supplied).

In *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005), the Court affirmed its holding in *Gage* that the Claimant does not need to be exposed to a **"greater risk"** of injury while performing an **actual job duty** to prove a compensable accident / injury claim:

> The Commission's reliance on *Perez* is misplaced and *Spivey* provides a more analogous analysis. The Commission erred in concluding that Page did not experience an "accident" when she rose from the chair.
>
> Because this case will be remanded to the Commission, we note two additional concerns regarding the injury at issue here. The testimony of two physicians establishes that while the meniscus tear could have happened at any time, based on the "grabbing," pain and locking of the knee, the probability is that it happened at the time Page rose from the chair. Case law holds that doubts about an injury arising out of and in the course of employment are resolved in favor of the claimant. *Dinius,* 133 Idaho at 574, 990 P.2d at 740. *Id.* 141 Idaho 347-348, 109 P.3d 1089-1090.

The *Page* Court found that that the facts presented were closely analogous to *Spivey* even though the Claimant in *Page* was clearly **not performing an actual job duty** when she suffered her accident and injury while rising from a chair in the break-room. The Court made it very clear that **all doubts** over whether an accident / injury **arose out of** employment **must be resolved in favor of the Claimant.** Just like the Claimants in *Wynn*, *Gage, Spivey* and *Page I*, the Claimant in this case can point to the specific act of bending over to tie his work boot laces

on his Employer's premises at 6:30 AM on 12.18.09 when he felt a "pop" in his low back followed by severe pain as the source of his "accident" and low back "injury" [5].

Employer argued to the Commission that this Court's analysis in *Page* was flawed and had no precedential value because the Court failed to discuss whether the Claimant's injury was connected with her employment or arose out of her employment (ER. 12.17.10 Br., p. 15, Ll. 18-15). Employer is really arguing that this Court should narrow the definitions of "accident" and "injury" to require the Claimant to prove that he was exposed to a **greater risk** while performing an **actual job duty** in order for his injury to be connected with his employment and arise out of his employment. A plain reading of the clear language of the statute refutes Employer's argument:

> An analysis of whether the accident requirement has been met must begin with a review of the relevant statutory language. Idaho Code section 72-102(17)(b) defines accident as "an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury." An injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." I.C. § 72-102(17)(a). 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 any employment." *Dinius v. Loving Care and More, Inc.,* 133 Idaho 572, 574, 990 P.2d 738, 740 (1999) (citations omitted); *Seamans v. Maaco Auto Painting,* 128 Idaho 747, 918 P.2d 1192 (1996). "The words 'out of' have been held to refer to the origin and cause of the accident and the words 'in the course of' refer to the time, place, and the circumstances under which the accident occurred." *Dinius,* 133 Idaho at 574, 990 P.2d at 740 (citation omitted). If there is doubt surrounding whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the employee. *Id.* (citations omitted). ...

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[5] *See* background facts set forth at pp. 3-7 of Claimant's 11.19.10 Opening Brief.

> An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought. *Wynn v. J.R. Simplot Co.,* 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). *Spivey v. Novartis Seed, Inc.,* 137 Idaho 29, 33, 43 P.3d 788, 792 (2002). *Ibid.* 141 Idaho 347, 109 P.3d 1089.

The *Page* Court did not require the Claimant to prove that she was performing an **actual job duty** that exposed her to a **"greater risk"** when she suffered her accident and injury. This has never been the law in Idaho:

> Plaintiff did not have to be actually engaged in the performance of the particular tasks of her employment at the time of the accident to have it arise out of and in the course of her employment. *Nichols v. Godfrey*, 90 Idaho 345, 349, 411 P.2d 763, 765 (1966).

The *Page I* Court relied heavily on the closely analogous facts of *Spivey v. Novartis Seed*, 137 Idaho 29, 43 P.3d 788 (2002) when it reversed the Commission's denial of benefits. The *Spivey* Court's rejection of the **"greater risk"** doctrine is the reason why Employer brought this **test case** before the Court on appeal (ER. 4.24.13 Br., p. 21, Ll. 7-8; p. 33, Ll. 7-8).

> The Commission determined that the record supported the decision and **declined the defendants' 'invitation to introduce risk analysis from the occupational disease legal theory** into the accident and injury legal theory.' *Id.* 137 Idaho 32, 43 P.3d 791 (emphasis supplied)....
>
> Appellants additionally urge that **the Commission erred in its refusal to utilize a greater risk analysis** in this case when determining whether the respondent was entitled to benefits. ... Because her job did not place her at **greater risk** for injury than her daily routine, appellants contend that there is not substantial and competent evidence to support the Commission's findings.
>
> **The Commission's refusal to utilize a greater risk analysis in reaching its holding was proper. The statutory language is clear on its face as to what is required of a claimant seeking compensation for an injury sustained during an accident that arose out of and in the course of employment.** *Id.* 137 Idaho 34, 43 P.3d 793. ...

> In this case, the appellants suggest a return to the rationale of *Wells* by requiring Spivey **to prove that her job duties placed her at a greater risk for injury** than that encountered by the general public performing the same physical motions. However, **a greater risk analysis is no longer required of a claimant** in light of *Mayo* and *Kessler*. ...
>
> The respondent, Spivey, **met her burden** by establishing that she sustained an **injury that resulted from an accident that arose out of** and in the course of her employment. **A greater risk analysis is not required within the context of accident/injury cases to determine a compensable injury**. *Ibid*, 137 Idaho 35, 43 P.3d 794 (emphasis supplied).

This Court clearly held in *Spivey* that the "greater risk" doctrine cannot be applied to accident / injury claims and that holding is not the subject of legitimate debate by reasonable minds. Idaho Employers have had 11 years to come to the realization that this Court has no intention of overruling *Spivey*.

Since *Spivey* was decided in 2002, this Court has cited its holding in *Spivey* with approval in at least 8 different cases including, *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004); *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005); *Clark v. Truss*, 142 Idaho 404, 128 P. 3d 941 (2006); *Hutton v. Manpower, Inc.*, 143 Idaho 573, 149 P.3d 848 (2006); *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008); *Fife v. Home Depot, Inc.*, 151 Idaho 509, 260 P.3d 1180 (2011); *Henry v. Department of Correction*, Docket No. 39039 (Filed: 1.23.13) and *Mazzone v. Texas Roadhouse, Inc.*, Docket No. 39337 (Filed: 4.26.13).

Based on the proper application of this Court's holdings in *Wynn, Gage, Spivey, Page I and Stevens-McAtee,* the Claimant respectfully requests that this Court decline Employer's invitation to survey 80 years of "risk analysis" cases in order to judicially re-write the plain

language of Idaho Code §72-102(18) and inject a **"greater risk" "while performing an actual job duty"** element into the prima facie case for proving a compensable accident / injury claim.

Employer has failed to meet its burden of proving under Idaho Code §72-732(4) that the Commission's findings of fact do not as a matter of law support its ruling that the Claimant's injury "arose out of his employment". The Court does not even need to perform a "greater risk" analysis in order to affirm the Commission's ruling.

5. EMPLOYER HAD AN OBLIGATION TO PROMPTLY COMPLY WITH THE INDUSTRIAL COMMISSION'S 5.17.11 ORDER AND 12.8.11 ORDER AND PAY ALL BENEFITS ORDERED

When the legislature adopted the Idaho Workers' Compensation Act, it granted **exclusive jurisdiction** to the Industrial Commission to resolve all disputes arising under the Act. (*See Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 906, 980 P.2d 566, 570 (1999) (*Van Tine II*)). The legislature has protected the Commission's exclusive jurisdiction by instructing the Courts that they do not have the jurisdiction to interfere with the Commission in the performance of its duties:

> 72-733. Limited jurisdiction of courts. Except as herein provided, no court of this state shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any order or award of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its duties.

If the Courts of this state cannot interfere with the Commission in the performance it its duties, then the Employer cannot be allowed to act with impunity and refuse to comply with Commission's Orders especially when it filed a Motion to Bifurcate and requested entry of the 5.17.11 Order. Employer not only refused to comply with the Order that it requested, Employer

mocked the Commission's exclusive jurisdiction by pointing out that the Commission had **"no statutory authority to enforce its own awards"** (R., Vol. I, p. 94, Ll. 12-13) (emphasis supplied).

Employer's refusal to comply with the Commission's Orders left the Claimant without an effective legal remedy since this Court had already determined in its 7.27.11 Order Dismissing Appeal (R., Vol. I, p. 74-75) and 8.15.11 Order Denying Motion For Clarification (R., Vol. I, p. 76) that the Commission's 5.17.11 Order was not a final and appealable Order. The Claimant could not file the 5.17.11 Order with the District Court and seek enforcement against Employer's assets pursuant to Idaho Code §72-735. The Claimant asks this Court for an Order which requires Employer to comply with all of the Industrial Commission's Orders and describes the consequences of non-compliance.

6. THIS COURT SHOULD **REVERSE** THE INDUSTRIAL COMMISSION'S 12.5.12 ORDER APPORTIONING 7% OF THE CLAIMANT'S 19% PPI RATING BACK TO THE CLAIMANT'S 10.22.90 LOW BACK INJURY BECAUSE THAT RATING WAS BASED ON DR. FRIZZELL'S 3.10.11 PPI / APPORTIONMENT OPINION WHICH LACKED A PROPER FOUNDATION OF SUBSTANTIAL AND COMPETENT EVIDENCE?

The Industrial Commission concluded that the Claimant should receive a 7% whole person PPI rating for his 10.22.90 low back injury based on Dr. Frizzell's 3.10.11 apportionment of PPI medical opinion (R., Vol. III, p. 421, Ll. 15-18). This Court should **reverse** the Commission's decision to assign 7% of the Claimant's 19% whole person PPI rating 21-years back to the Claimant's 10.22.90 low back injury because Dr. Frizzell's 7% whole person PPI rating was not based on a proper foundation of substantial and competent evidence under the AMA GUIDES and Idaho Code §72-424 as demonstrated by the following summary:

a. Dr. Frizzell originally opined in his 12.6.10 PPI report that 0% of the Claimant's 20% PPI rating should be apportioned to the Claimant's 10.22.90 injury because "he was released to full duty without any permanent physical impairment or restrictions" (CL. 5.17.12 EX. 1, 001089);

b. Dr. Frizzell based 100% of his 12.6.10 20% PPI rating and 100% of his 3.10.11 19% whole person PPI rating on 5 PPI rating factors from the 5th Edition of the AMA GUIDES which were all due exclusively to the Claimant's 12.18.09 industrial injury (CL. 5.17.12 EX. 1, 001089). The first 2 PPI rating factors were based exclusively on the 2 back surgeries that the Claimant had to undergo as the direct result of his 12.18.09 industrial accident and totaled 14%. The final 3 PPI factors were all based on Claimant's Range of Motion (ROM) deficits which were not due to Claimant's 10.22.90 low back injury but due to his 12.18.09 injury (CL. 5.17.12. EX. 1, 001109) (Frizzell Dep. p. 24, Ll. 2-8).

c. Dr. Frizzell did not properly follow the apportionment methodology of the AMA GUIDES. Even though Dr. Frizzell stated in his 6.27.11 letter that all 3-steps in the apportionment methodology had been met (Cl. 5.17.12 EX 1, 001109), when he was asked to explain that bald conclusion during his 6.4.12 post-hearing deposition, Dr. Frizzell responded with "No, I can't confirm that" (Frizzell Depo. p. 22, L. 7 – p. 23, L4). The Industrial Commission has historically rejected apportionment of PPI opinions based on the 5th Edition of the AMA GUIDES in cases where the rating physician failed to specifically follow the 3-step apportionment protocol set forth on page 11 of the 5th Edition (As Claimant points out, the AMA Guides are instructive regarding apportionment....Dr. Phillips failed to address the "protocol" established by the Guides and, hence, his apportionment analysis lacks credence. (*See Moncada v. Gonzalez*, 2007 WL 1904252, I.C. No. 2004-010943, ¶ ¶12-13 on pp. 7-8, (Filed: 4.24.07).

d. Dr. Frizzell admitted during his 6.4.12 post-hearing deposition that the 7% PPI rating that he assigned to the Claimant's 10.22.90 low back injury did not meet the PPI criteria of Idaho Code §72-424 because there was no proof in this case that the Claimant's 10.22.90 low back injury had an adverse impact on the Claimant's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members (Frizzell Depo. p. 28, L. 17 – p. 30, L. 18).

e. Dr. Frizzell did not assign the Claimant a 7% rating for his 10.22.90 low back injury until 21 years later on 3.10.11 and this Court has held that the proper time to conduct a PPI evaluation is when the Claimant achieves maximum medical improvement (MMI) (Our holding in *Stoddard* was not meant to contradict or overrule *Davaz,* but to emphasize, contrary to the surety's argument, that no disability determination could

be made prior to the determination of permanent impairment, which cannot be evaluated until maximum medical improvement has been reached. *See* I.C. §§ 72-422, 424. *Brown v. Home Depot*, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012).

f. Dr. Frizzell admitted during his 6.4.10 post-hearing deposition that the 5th Edition of the AMA GUIDES was not in effect when the Claimant achieved MMI from his 10.22.90 low back injury and admitted that he did not know if the Claimant would have qualified for a PPI rating based on the edition of the AMA GUIDES that was in effect when the Claimant achieved MMI from his 10.22.90 injury (Frizzell Depo., p. 21, Ll. 5 – p. 22, L. 6).

g. Since UPS's own Independent Medical Evaluator (IME) physician, Richard Knoebel, M.D., evaluated the Claimant when he achieved MMI from his 10.22.90 injury on 4.2.91, Dr. Knoebel's 0% PPI rating was more reliable than the 7% PPI rating that Dr. Frizzell issued 21 years later on 3.10.11. (CL. 5.17.12 EX. 1, 001019 and 001024).

Since the Commission based its 7% PPI rating on Dr. Frizzell's 3.10.11 opinion which was not based on a proper foundation of substantial and competent evidence, the Court should **reverse** the Commission's finding that a 7% PPI rating should have been assigned to the Claimant's 10.22.90 low back injury.

7. THIS COURT SHOULD **REVERSE** THE INDUSTRIAL COMMISSION'S 12.5.10 FINDING THAT THE 7% PPI RATING THAT DR. FRIZZELL ISSUED WAS A "SUBJECTIVE HINDRANCE" TO EMPLOYMENT PRIOR TO THE CLAIMANT'S 12.18.09 ACCIDENT / INJURY

The Commission based its finding that the Claimant's other preexisting impairments were not subjective hindrances to employment on the **significant factor** that no physician had issued the Claimant any permanent physical restrictions for those impairments prior to the Claimant's 12.18.09 injury (R., Vol. III, p. 423, Ll. 7-13). The same logic applies to Claimant's 10.22.90 low back injury.

The physicians who treated the Claimant for his 10.22.00 low back injury did not issue him **any permanent physical restrictions** (CL. 9.28.10 EX. 3, 003009-003039) and Employer's

IME evaluator, Dr. Knoebel, concluded when the Claimant reached MMI from his 10.22.90 low back injury on 4.2.91 that the **Claimant did not have any permanent physical impairment or restrictions** from his 10.22.90 low back injury and released the Claimant to return to full duty unrestricted work (003019-003020 and 003024).

The Industrial Commission has held that a Claimant cannot prove disability above impairment if the Claimant does not have any permanent physical restrictions that adversely impact his functional capacity:

> Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated. *Wright v. Hagadone Photography*, 2019 WL 3011038, I.C. No. 2004-507331, ¶ 51 (Filed: 7.16.10).

Since the Claimant was released to perform full duty work without any restrictions after his 10.22.90 low back injury and succeeded in the performance of very heavy work for UPS for approximately 19 years until his 12.18.09 injury, the Commission did not have any substantial and competent evidence in the record to support its conclusion the Claimant's 10.22.90 low back injury was a subjective hindrance.

Although the absence of restrictions was a **significant factor** which supported the Commission's finding that the Claimant's other pre-existing impairments were not subjective hindrances, the Commission ignored this **significant factor** and chose to rely instead on hypothetical restrictions that Dr. Frizzell issued 21-years after the Claimant's 10.22.90 low back injury:

> With respect to the 1990 low back injury, in addition to determining that Claimant is entitled to a 7% PPI rating for that injury, Dr. Frizzell felt it appropriate that following that injury Claimant should have observed certain limitations/restrictions in order to protect his back from further injury. He proposed that Claimant should avoid maximum lifting of over 75 pounds. The sensibility of this recommendation is well borne out by Claimant's subsequent history. Although Claimant returned to unrestricted work following the 1990 low back injury, he did not stay symptom free (R., Vol. III, p. 423, Ll. 14-20).

This Court should reverse the Commission's reliance on Dr. Frizzell's restrictions because those restrictions were not based on a proper foundation of substantial and competent evidence as demonstrated by the following summary:

a. Prior to issuing his hypothetical 9.19.11 restrictions, Dr. Frizzell had already issued 3 prior opinions stating unequivocally that 100% of the Claimant's restrictions were **due exclusively** to his 12.18.09 industrial accident and Claimant did not have any restrictions related to his 10.22.90 low back injury (CL. 5.17.12 EX. 1, 001090; 001102 and 001108-001109);

b. Dr. Frizzell could not explain during his post-hearing deposition what facts, legal analysis or methodology in the 36-page legal decision that he received from Employer's counsel caused him to change his 3 prior opinions and issue hypothetical restrictions for the Claimant's 10.22.90 injury (CL. 5.17.12 EX. 1, 001114-001116). Dr. Frizzell could not even confirm that he read the decision (Frizzell 6.4.12 Depo., p. 31, L. 4 – p. 32, L. 11).

c. Dr. Frizzell's 9.19.11 hypothetical restrictions were directly contradicted by the Claimant's unrefuted hearing testimony which established that his 10.22.90 low back injury did not interfere with his ability to perform the essential functions of job for UPS; that all of his attending physicians who treated him for his preexisting injuries had released him to return to full duty unrestricted work; that he never asked UPS to make any job modifications based on his preexisting impairments and UPS never imposed any job modifications because of his preexisting impairments (Tr. 2, p. 35, L. 14 – p. 52, L. 10) (Tr. 2, p. 157, L. 14 – p. 160, l. 13).

d. Dr. Frizzell's 9.19.11 hypothetical restrictions were directly contradicted by Claimant's Supervisor's Hearing testimony which confirmed that UPS company policy requires every injured worker to undergo an Independent Medical Evaluation (IME) before they are allowed to return to work (ISIF EX. K, p. 25, L. 23 – p. 26, L. 20) and that if the injured worker cannot perform all of the essential functions of the job without accommodation, they are not allowed to return to work because UPS is never willing to

modify the essential functions of a job to accommodate any injured employee's physical disability (ISIF EX. K, p. 37, L. 23- p. 38, L. 5). Mr. Wilkinson confirmed that none of the Claimant's prior physical injuries / impairments adversely impacted his ability to perform the essential duties of his Package Driver job (ISIF EX. K, p. 38, L.25 – p. 39, L. 14).

e. The Commission has expressed concern in other cases about hypothetical restrictions that are applied retroactively as if they had always been in place (The Referee finds the panel's approach, and Mr. Jordan's reliance upon it, flawed in that it formulates work restrictions that did not previously exist, applies them retroactively, then analyzes Claimant's condition as though the restrictions had always been in place). *Sommer v. ISIF*, 2008 WL 3090703, I.C. No. 2001-012652 (Filed 7.7.08).

The Court should **reverse** the Industrial Commission's conclusion that the Claimant's 10.22.90 low back impairment was a subjective hindrance to employment because that conclusion was based on Dr. Frizzell's opinion that was not supported by a proper foundation and directly contradicted by the reality of Claimant's ability to perform heavy physical labor for 19 years prior to his 12.18.09 injury.

8. THIS COURT SHOULD **REVERSE** THE INDUSTRIAL COMMISSION'S FINDING THAT THE CLAIMANT'S 3.10.11 7% IMPAIRMENT "COMBINED WITH" THE CLAIMANT'S 12.18.09 ACCIDENT / INJURY TO CAUSE THE CLAIMANT TO BECOME TOTALLY AND PERMANENTLY DISABLED

The Commission relied on the following factors to support its erroneous conclusion that the Claimant's 10.22.90 low back injury "combined with" his 12.18.09 industrial injury to cause total and permanent disability:

a. The 7% PPI Rating and Restrictions That Dr. Frizzell issued in 2011 (R., Vol. III, p. 425, Ll. 8-11).

The 7% rating and the restrictions that Dr. Frizzell issued in 2011 were not based on a proper foundation and were contradicted by the Claimant's and Employer's unrefuted testimony

and the reality of the Claimant's ability to perform unrestricted physical labor for 19 years until his 12.18.09 injury.

b. Claimant was not symptom free in the years immediately preceding the 12.18.09 accident (R., Vol. III, p. 425, L. 14-15).

The record in this case **does not contain any medical causation opinion from any doctor** which established that Claimant's episodic "sore back" over a 26-year career with UPS was due specifically to his 10.22.90 L4-5 disc injury. **The Commission formulated its own medical causation opinion** when it concluded that Claimant's episodic low back pain over the years was caused specifically by his 10.22.90 L4-5 low back injury. This Court held in *Mazzone v. Texas Roadhouse, Inc.*, Docket No. 39337 (Filed: 4.26.13) that it is **improper for the Commission to formulate its own medical opinions** where medical evidence is lacking in the record.

c. Claimant attempted to find ways to do his job which eased the demands on his back (R., Vol. III, p. 425, L. 15-16).

The Commission based its finding that Claimant self-modified his job to accommodate his "sore back" on: (1) a box marked "no" in a 3.15.06 Supervisor's Ride Along Report (Employer 5.17.12 EX. 15, p.120); (2) a box marked "no" in a 7.20.09 report (Employer's 5.17.12 EX. 15, p. 127); and (3) a hand written hearsay statement at the bottom of a 7.29.08 report accusing Claimant of "[e]excessive backing due to protectiveness of sore back" (Employer's 5.17.12 EX. 15, p. 124).

A reasonable mind would not accept 3 references to excessive backing in a 26 year Package Car driving career to support the conclusion that the Claimant had to self-modify his job

because of his 10.22.90 low back injury - especially given the fact that the Claimant's Supervisor, Dax Wilkinson, admitted during his 5.8.12 pre-hearing deposition that he sees a tendency in all UPS Package Car Drivers to back their vehicles as close to the delivery point as possible so they don't have to carry the packages as far (Wilkinson, 5.8.12 Depo., p. 44, Ll. 19-22).

Employer did not present any medical causation evidence to the Commission which established that the **"sore back"** referred to in the 7.29.08 ride-along-report **was caused by the Claimant's 10.22.90 L4-5 back injury.** The Claimant's "sore back" could have been caused by any number of soft tissue problems ranging from the top of his thoracic spine at T-1 to the bottom of his lumbar spine at L5-S1. Since no doctor established a causal relationship between the "sore back" hearsay statement in the 7.29.08 report and Claimant's 10.22.90 low back injury, **the Commission had to manufacture its own medical causation opinion** in order to conclude that residuals from the Claimant's 10.22.90 low back injury are what caused him to self-modify his job through "excessive backing." The Court should reverse the Commission's "combined with" finding because it was based on the Commission's own medical causation opinions in direct violation of this Court's holding in *Mazzone v. Texas Roadhouse, Inc.*, Docket No. 39337 (Filed: 4.26.13).

d. The mechanics of the Claimant's 12.18.09 bending over to tie the laces on his work boots injury were such a "trivial exercise" that they could not have caused Claimant's 12.18.09 disc herniation absent "Claimant's significant preexisting condition at L4-5
(R., Vol. III, p. 425, L. 16-22).

Employer did not dispute medical causation in this case. The only medical causation opinions in this case came from the Claimant's attending physicians. Dr. Harris and Dr. Frizzell

never opined that bending over to tie the laces on work boots was a **"trivial exercise"** that could not cause the Claimant's 12.18.09 L4-5 disc herniation **"absent Claimant's significant preexisting condition at L4-5"** as found by the Commission (R., Vol. III, p. 425, Ll. 16-22). **The Commission manufactured that medical causation opinion on its own** without any medical opinion from any medical expert in this case to support that conclusion.

Dr. Harris opined that the act of Claimant bending over to tie the laces on his work boots caused the Claimant's 12.18.09 "acute injury" (CL. 9.28.10 EX. 2, 002003). Dr. Frizzell confirmed that bending over at the waist can increase the intradiskal disc pressure and cause a lumbar disk to rupture and that he has seen that happen many times throughout his career. Dr. Frizzell **stated unequivocally** that it was the act of bending over to tie his work boot laces that caused the Claimant's large L4-5 disk herniation on 12.18.09 (CL. 9.28.10. EX. 3, 003040-003041; 003042; 003054; 003059; 003062).

The Court should **reverse** the Commission's **medical causation opinion** that the act of bending over at the waist was a **"trivial exercise"** that could not cause the Claimant's L4-5 disc herniation **"absent Claimant's significant preexisting condition at L4-5"** because the Commission based that finding on **its own medical causation opinion** which was clearly improper under *Mazzone.*

e. Claimant's preexisting condition at L4-5 clearly "set the stage" for Claimant's 12.18.09 accident and in that sense "combined with" Claimant's 12.18.09 accident to cause total and permanent disability
(R., Vol. III, p. 425, L. 25 – p. 426, L. 2).

None of the doctors in this case opined that Claimant's 10.22.90 L4-5 disc injury **"set the stage"** for his 12.18.09 L4-5 disc herniation injury which could not have occurred but for

Claimant's 10.22.90 injury. Dr. Frizzell admitted during his 6.4.12 deposition that Claimant's 10.22.90 disc injury could have **spontaneously healed** prior to his 12.18.09 injury and that it would be **pure speculation** to assume that his 10.22.90 L4-5 disc protrusion was present prior to his 12.18.09 injury (Frizzell, 6.4.12 Dep., p. 34, L. 9 – p. 36, L. 13). Dr. Frizzell established a clear causal relationship between the Claimant's 12.18.09 accident and his large L4-5 herniated disc (CL. 9.28.10. EX. 3, 003040-003041; 003042; 003054; 003059; 003062).

The Commission based its entire "combined with" conclusion on **medical causation opinions that were improperly formulated by the Commission itself** and directly contradicted by the unrefuted medical causation opinions of the Claimant's attending physicians. Based on this Court's holding in *Mazzone*, the Claimant respectfully requests that the Court **reverse** the Commission's conclusion that the Claimant's 10.22.90 impairment "combined with" his 12.18.09 injury to cause total and permanent disability.

9. THE COURT SHOULD **AFFIRM** THE COMMISSION'S 12.5.12 RULING THAT QUASI-ESTOPPEL PREVENTS EMPLOYER FROM SHIFTING LIABILITY TO THE ISIF

Employer argues that it was error for the Commission to apply the doctrine of *quasi-estoppel* because that legal doctrine is an affirmative defense that had to be affirmatively pled by ISIF and listed in the Industrial Commission's 3.7.12 Notice of Hearing. The Commission properly rejected Employer's lack of notice arguments because apportionment of PPI under Idaho Code §72-406 or Idaho Code §72-332 was always a central disputed issue and Claimant gave Employer notice that *quasi-estoppel* should be used by the Commission to apportion 100% of the Claimant's PPI rating to his 12.18.09 injury:

> The point of synopsizing the positions of the parties is to illustrate that the fight over whether the opinion of Dr. Frizzell should prevail over the opinion of Dr. Knoebel is a **dispute of central importance to the outcome of this matter**. One need only review the deposition of Dr. Frizzell, or the many letters between Dr. Frizzell and counsel for Claimant and Employer to understand that the parties grasp the importance of obtaining a favorable opinion on the issue of apportionment (R., Vol. III, p. 446, L.18-23) (emphasis supplied).
>
> One of the noticed issues is whether, and to what extent, Claimant is entitled to PPI benefits, and it was **in connection with his pursuit of PPI benefits** that Claimant articulated his position that Employer should not be allowed to have it both ways. Viewed **in the context of Claimant's burden of proof, his reliance on the doctrine of quasi-estoppel seems to be less an affirmative defense, and more an argument made in support of proving his prima facie case** (R., Vol. III, p. 448, Ll. 1-9) (emphasis supplied).

After being placed on notice of quasi-estoppel, Employer chose to completely ignore that doctrine in its post-hearing brief:

> "Moreover, although both Claimant and the ISIF argued in their post-hearing briefs that Employer should not be allowed to take a different position in this action concerning Claimant's preexisting impairment than it did in connection with the 1990 accident, **Employer's post-hearing brief devotes not one sentence to treatment of the doctrine of quasi-estoppel** or to the ISIF's challenge to Employer's inconsistent position. From the Employer's **failure to protest**, the Commission concluded that Employer gave its **implied consent** to the Commission's consideration of these arguments. To the extent necessary, the Commission will treat these arguments as though they were raised in the issues noticed for hearing (*See* IRCP 15(b); *Murphy v. Browning Freight*, 1986 IIC 0664 (1986)) (R., Vol. III, p. 448, L. 10-18) (emphasis supplied).

The Commission cited all of the documents that Employer filed with the Industrial Commission which supported the Commission's finding that Employer had taken a previous position on the PPI issue (R., Vol., III, p. 449, L. 8 – p. 451, L. 10) and rejected Employer's argument that formal litigation is required for Employer to have taken a "position". This Court should affirm the Commission's use of quasi-estoppel to prevent Employer from apportioning

7% of the Claimant's 19% PPI rating 21 years back to his 10.22.90 injury because the Commission's findings of fact were supported by substantial and competent evidence and the unique facts of this case supported application of the *quasi-estoppel* doctrine as a matter of law.

10. THIS COURT SHOULD **REVERSE** THE INDUSTRIAL COMMISSION'S 12.10.12 USE OF COLLATERAL ESTOPPEL TO PREVENT CLAIMANT FROM RECOVERING 100% OF ALL PAST DENIED MEDICAL BENEFITS FROM EMPLOYER

This Court's holding in *Neel v. Western Construction,* 147 Idaho 146, 149, 206 P.3d 852, 855 (2009) placed an obligation on Employer to pay 100% of the invoiced amount of ALL past denied medical benefits incurred by Claimant from date of injury on 12.18.09 to date when the Industrial Commission deemed this claim compensable on 5.17.11. After the Supreme Court dismissed Employer's 2nd interlocutory appeal on 1.30.12, Employer finally complied with *Neel* and paid Claimant 100% of the invoiced amount of the medical benefit claims that had been adjudicated at the 9.28.10 Hearing as Claimant's EX. 7 on or about 2.6.12.

After making that **unconditional payment** of Claimant's 9.28.10 EX. 7 medical benefit claims, Employer disingenuously raised the doctrine of *res judicata* to justify its refusal pay 100% of all past denied medical benefit claims that were not adjudicated at the 9.28.10 Hearing as part of CL. EX. 7 (CL. 5.17.12 EX. 17). Employer barely devoted 1-page to its *res judicata* argument in its 8.15.12 brief and **did not even mention** *collateral estoppel.*

The Commission followed this Court's holding in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 288, 207 P.3d 1008, 1019 (2009) and rejected Employer's *res judicata* arguments to avoid its obligations under *Neel:*

Here, every medical bill that was submitted by Claimant to Surety for payment

> represents a distinct claim for a benefit payable under the workers' compensation laws. Every bill that was submitted could have been the subject of any number of defenses to payment raised by Employer/Surety. Employer/Surety could have argued that one or more of the bills were incurred outside the chain of referral Employer/Surety could have argued that the care was not required by Claimant's physician. Employer/Surety could have argued to the Commission that it should have found the care represented by a particular bill to be unreasonable. The point is that every bill for medical services represents a discrete claim for workers' compensation benefits. Accordingly, since it is clear that the bills totaling $24,627.80 are new bills, Claimant's entitlement to that which was not adjudicated at the prior hearing, the doctrine of res judicata does not bar Claimant's litigation of those bills at this time, notwithstanding that most of those bills are for services rendered prior to the date of the September 28, 2010 hearing. Aside from the res judicata defense, no other defenses to these bills have been raised by Employer/Surety. Accordingly, and per *Neel v. Western Construction, Inc.,* 147 Idaho 146, 206 P.3d 852 (2009), Claimant is entitled to 100% of the invoiced amount of the bills set forth at Claimant's 5.17.12Exhibit 14 (R., Vol. III, p. 431, Ll. 3-18).
>
> Finally, Claimant has claimed entitlement to the sum of $1,684.71, representing travel expenses incurred in connection with the medical care, $264.75 representing per diem expenses associated with medical care, and $200.01 representing lodging expenses incurred in connection with medical treatment. (*See* C. 5.17.12 Ex. 16). Some of these expenses were incurred prior to the September 28, 2010 hearing, and some were incurred subsequent thereto. Claimant contends, and Employer/Surety does not dispute, that these expenses are otherwise compensable as medical and related expenses under Idaho Code § 72-432. However, Employer/Surety asserts that those expenses incurred prior to the September 28, 2010 hearing are barred by the doctrine of res judicata. As with the claim for additional medical bills, the claims for travel, lodging, and per diem expenses were not adjudicated at the time of the initial hearing. Therefore, these claims are not barred by the doctrine of res judicata, and since they are not otherwise contested by Employer/Surety, Claimant is entitled to be reimbursed for these expenses as well (R., Vol. III, p. 432, Ll. 3-15).

Employer filed a Motion To Reconsider on 10.17.12 and converted its pre-hearing *res judicata* argument into a 2-page *collateral estoppel* argument at pp. 6-8 of its brief. This Court should **reverse** the Commission's use of *collateral estoppel* because Employer did not meet its burden of proving each of the following elements in the prima facie case:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in

> the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Rodriguez,* 136 Idaho at 92, 29 P.3d at 403. This Court finds that collateral estoppel does not bar Royal's claim seeking apportionment of liability to ISIF for Stoddard's total and permanent disability because the issues are not identical in the two cases. *Stoddard v. Hagadone Corp.,* 147 Idaho 186, 191, 207 P.3d 162, 167 (2009).

The Claimant filed a Motion For Reconsideration on 12.19.12 and asked the Industrial Commission to reconsider its decision to apply *collateral estoppel* to the facts of this case (R., Vol. III, pp. 465-494), but the Commission summarily denied that motion on 1.2.13 without discussion (R., Vol. III, pp. 504-505). The Court should **reverse** the Industrial Commission's 12.10.12 decision to apply *collateral estoppel* and 1.2.13 denial of Claimant's Motion For Reconsideration for the following reasons:

1. The Commission only listed res judicata and did not list collateral estoppel as a disputed issue in its 3.17.12 Notice of Hearing as required by Idaho Code §72-713 (R., Vol. II, p. 259, Ll. 6-11).

2. The Commission and the parties discussed all of the disputed issues at the commencement of the 5.17.12 Hearing and **Employer explicitly agreed** that *res judicata* was the only affirmative defense being raised by Employer. There was no mention of *collateral estoppel* (Tr. 2, p. 4, L. 16-p. 5, L.24).

3. Based on the Notice of Hearing and agreement of the parties at the Hearing, the Claimant only addressed the doctrine of *res judicata* and did not even mention *collateral estoppel* at pages 25-27 of his 7.27.12 of his post-hearing brief.

4. Employer barely discussed *res judicata* and did not even mention *collateral estoppel* in its at pp. 24-25 of its 8.15.12 post-hearing brief.

5. The Industrial Commission rejected Employer's *res judicata* argument and Ordered Employer to pay Claimant 100% of the invoiced amount of all past denied medical benefits that Claimant had incurred in connection with his 12.18.09 low back injury with proper credit for the payment of the past denied medical benefit claims that had previously been adjudicated at the 9.28.12 Hearing as Claimant's EX. 7 (R., Vol. III,

p. 429, L. 19 – p. 432, L. 15). The Industrial Commission did not even mention the doctrine of *collateral estoppel* in its 9.28.12 decision / 12.5.12 amended decision.

6. Based on that pre-hearing record, the Industrial Commission did not have substantial and competent evidence to support its "belief that by raising the doctrine of res judicata, Employer raised the issue of collateral estoppel as well" (R., Vol. III, p. 453, Ll., 19-22).

7. The Claimant did not have a full and fair opportunity to litigate all past denied medical benefits at the 9.28.10 Hearing (R., Vol. III, p. 473, L. 1 – p. 480, L. 23).

8. The past denied medical benefit matters / issues litigated at the 9.28.10 Hearing were not identical to the past denied medical benefit matters / issues litigated at the 5.17.12 Hearing (R. Vol. III, p. 480, L. 24 – p. 490, L. 7). If the matter / issue was not actually adjudicated at the prior hearing, *collateral estoppel* does not apply. *Wernecke, supra,* 147 Idaho 277, 288, 207 P.3d 1008, 1019 (2009).

9. This Court ruled in its 7.27.11 Order Dismissing Appeal (R., Vol. I, pp. 74-75) and 8.15.11 Order Denying Employer's Motion For Clarification (R., Vol. I, p. 76) that the Commission's 5.17.11 Order was not a final and appealable Order to which the doctrine of *collateral estoppel* could properly be applied. And,

10. The Industrial Commission has held that in cases that involve multiple hearings between the same parties, the doctrine of *collateral estoppel* does not apply. (Collateral estoppel is inapplicable in cases like this one where the litigation, albeit including several different hearings, is nevertheless all part of the same case. *Berisha v. The Grove Hotel and Insurance Company of the West*, 2012 WL 2118142, I.C. 2002-003038 (Filed: 5.30.12) (*See* ¶13 on p. 13)).

For all of the foregoing reasons and those set forth in Claimant's 12.19.12 Motion For Reconsideration, the Claimant asks this Court to reverse the Industrial Commission's 12.10.12 erroneous decision to apply the doctrine of *collateral estoppel* to allow Employer to avoid this Court's holding in *Neel.*

11. THIS COURT SHOULD **REVERSE** THE INDUSTRIAL COMMISSION'S ERRONEOUS REFUSAL TO EXERCISE ITS JURISDICTION UNDER IDAHO CODE §72-719 TO CORRECT THE MANIFEST INJUSTICE OF GIVING EMPLOYER AN UNEARNED CREDIT FOR THE PAYMENT OF PAST DENIED MEDICAL BILLS THAT THEY NEVER ACTUALLY PAID

When Employer raised *res judicata* as a disingenuous device to avoid its obligations under *Neel*, the Claimant filed his 2.13.12 request to include the Idaho Code §72-719 "manifest injustice" issue as a disputed issue to be heard and decided at the 5.17.12 Hearing and explained the manifest injustice that would occur if Employer was allowed escape its obligations under Idaho Code §72-432 and *Neel* by receiving an unearned credit for paying **$27,451.27** in past denied benefits that Employer never actually paid (R., Vol. II, p. 254-257) (*See* CL. 5.17.12 EX. 14, 15 and 16).

The Commission did not address the I.C. §72-719 "manifest injustice" issue in its 12.5.12 amended decision or its 12.10.12 Order on Reconsideration. After receiving the Industrial Commission's 12.10.12 Order On Reconsideration which applied the doctrine of *collateral estoppel* for the first time, the Claimant filed a Motion For Reconsideration on 12.19.12 and again asked the Commission to exercise its authority under I.C. §72-719 to prevent the manifest injustice that would occur if Employer was given an unearned credit for paying the past denied benefits listed in Claimant's 5.17.12 EX. 14, 15 and 16. (R., Vol. III, p. 479 L. 18 – p. 480, L.19).

The Commission could have easily exercised its authority under Idaho Code §72-719 to correct manifest injustice by making a simple change to the language of its 5.17.11 Order:

> Employer is ordered to pay 100% of the invoiced amount of all past denied medical benefits incurred by Claimant from the date of his 12.18.09 industrial injury until the date when the Commission deemed this claim compensable with proper credit for any payment made by Employer for past denied medical benefit claims that were adjudicated at the 9.28.10 Hearing as Claimant's Exhibit No 7.

In *Page v. McCain Foods, Inc.*, 145 Idaho 302, 306, 179 P. 3d 265, 269 (2008) (*Page II*) this Court **reversed** the Industrial Commission's refusal to correct a manifest injustice when the Commission based its date of medical stability finding on a medical opinion which lacked a proper foundation. If basing a stability finding on a medical opinion that lacked proper foundation is a proper basis for appellate review to correct manifest injustice, the Court should reverse the Commission's refusal to correct the manifest injustice that will occur if Employer is rewarded for denying this claim and receives a unearned credit for the payment of all past medical benefits listed in CL. 5.17.12 EX. 14, 15 and 16 **($27,451.27)** when Employer never actually paid those benefits.

The Commission's ruling not only violates this Court's holding in *Neel*, it is antithetical to the policies of sure and certain relief and the attainment of justice which underlie the Workers' Compensation Act:

> "Since the inception of Idaho's Workers' Compensation Act, Industrial Commission proceedings have been informal and designed for simplicity; the primary purpose of these proceedings being the attainment of justice in each individual case." Hagler v. Micron Technology, Inc., 118 Idaho 596, 599, 798 P.2d 55, 58 (1990). Industrial Commission proceedings should be simple, accommodating to claimants, and above all seek justice. Id. "[T]he Commission has historically been imbued with certain powers that specifically enable it to simplify proceedings and enhance the likelihood of equitable and just results." Id.
>
> When a claimant has failed or overlooked submitting evidence to establish the amount of compensation to which he is entitled, and there is no question but that he is entitled to compensation, then it is the duty of the Board to call attention to such failure and see to it that whatever evidence is available to establish such fact is presented, and then make the necessary findings of fact. Watkins v. Cavanagh, 61 Idaho 720, 722, 107 P.2d 155, 157 (1940) (quoting Feuling v. Farmers' Co-operative Ditch Co., 54 Idaho 326, 334, 31 P.2d 683, 686 (1934). *Hartman v. Double L Mfg.* 141 Idaho 456, 458, 111 P.3d 141, 143 (2005).

The Court should **reverse** the Commission's refusal to exercise its authority under Idaho Code §72-719 and correct this manifest injustice.

12. THE COURT SHOULD **REVERSE** THE INDUSTRIAL COMMISSION'S DECISION IN THIS **"CLOSE CASE"** TO ONLY AWARD ATTORNEY'S FEES BASED ON EMPLOYER'S UNREASONABLE REFUSAL TO PAY CLAIMANT HIS UNDISPUTED PPI BENEFITS AND AWARD ATTORNEY'S FEES AT EVERY STAGE OF THIS CLAIM

Employer denied this claim without any reasonable factual or legal reason. When asked to explain its denial, Employer refused to offer any facts that would explain why the premises presumption did not apply and refused to explain why it would not follow this Court's holding in *Stevens - McAtee v. Potlatch Corp.,* 145 Idaho 325, 179 P.3d 288 (2008) and resolve all doubts over whether the Claimant's injury arose out of employment in the Claimant's favor (CL. 5.17.12 EX. 9, 009006).

The Industrial Commission held that this was **"a close case"**, but refused to award Claimant attorney's fees on the following 4 grounds:

1. Shoe tying is a common occurrence;
2. Idaho does not have any bright line in the case law regarding when an accident arises out of employment;
3. Idaho does not have any boot lace tying cases; and,
4. The scope and reach of this Court's holding in *Spivey* is the subject of legitimate debate (R., Vol. I, p. 51, Ll. 21 –p. 52, L. 3).

The 1st ground is a non sequitur. Whether shoe tying is a common occurrence is irrelevant to the attorney's fee question. Operation of a motor vehicle at work is a common occurrence. That does not mean that whenever a Claimant suffers injury in a motor vehicle collision his injury did not arise out of employment. Climbing a ladder on a construction site is a common occurrence. That does that mean that whenever a Claimant suffers injury in a fall from a ladder

that his injury did not arise out of employment. The Commission's logic does not justify a denial of Claimant's request for attorney's fees.

The 2nd ground is based on a misunderstandings of this Court's holdings. Idaho does have a **bright line** of cases which define when an injury "arises out of" employment. If the injury happens on the Employer's premises, it is **presumed** to arise out of employment (*See Kessler* and *Foust*). If there is **any doubt** about whether the injury arose out of employment, that **doubt must be resolved in the Claimant's favor** (*See Dinius, Spivey, Page I* and *Stevens-McAtee*). Where a causal connection exists between the circumstances under which the work must be performed and the injury of which the claimant complains, the injury arose out of employment (*See Wynn, Gage, Spivey, Page I and Stevens-McAtee*).

The Commission had to **overlook** the premises presumption, the rule that all doubts about whether in injury arose out of employment must be resolved in the Claimant's favor and the overwhelming evidence in this case that established a causal connection between the requirements of the Claimant's job and the circumstances under which that job had to be performed and his low back injury in order to rule against the Claimant on the attorney's fee issue.

The 3rd ground relied on by the Commission to deny fees was that Idaho does not have any boot tying cases. This is a non sequitur. Idaho Code §72-804 does not require the Claimant to prove that the Idaho Supreme Court has decided an "arise out of employment" case with the exact same mechanism of injury or fact pattern in order for a Claimant to qualify for an award of attorney's fees. The focus of the Commission's inquiry under Idaho Code §72-804 should be on

the nature of the Employer's unreasonable conduct, not on the injured worker's mechanism of injury which will obviously change in every case due to the vicissitudes of life.

The 4th ground relied on to deny an award of attorney's fees is that this Court's holding in *Spivey* is still the subject of legitimate debate. The Claimant strongly disagrees with this statement. Since *Spivey* was decided in 2002, this Court has cited the *Spivey* holding with approval in at least 8 different cases including, *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004); *Page v. McCain Foods, Inc.,* 141 Idaho 342, 109 P.3d 1084 (2005); *Clark v. Truss*, 142 Idaho 404, 128 P. 3d 941 (2006); *Hutton v. Manpower, Inc.*, 143 Idaho 573, 149 P.3d 848 (2006); *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008); *Fife v. Home Depot, Inc.*, 151 Idaho 509, 260 P.3d 1180 (2011); *Henry v. Department of Correction*, Docket No. 39039 (Filed: 1.23.13) and *Mazzone v. Texas Roadhouse, Inc.*, Docket No. 39337 (Filed: 4.26.13).

Whether Employer likes it or not, the *Spivey* Court's rejection of the "greater risk" doctrine is the law of this state and Employer and the Industrial Commission have a duty to properly apply this Court's holding in *Spivey* to the facts of each case:

> Reyes invites us to overrule *Nelson.* We decline to do so. The **rule of stare decisis dictates that we follow [controlling precedent],** unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice. Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990). *Reyes v. Kit Mfg. Co.,* 131 Idaho 239, 240, 953 P.2d 989, 990 (1998) emphasis supplied).

The Commission did not find that Employer proved that *Spivey* was manifestly wrong, unjust, unwise or needed to be overruled in order to vindicate plain, obvious principles of law and remedy continued injustice. Employer and the Commission both had a duty to comply with

this court's holdings in *Foust, Kessler, Wynn, Gage, Spivey, Page I, Page II and Stevens-McAtee* and then properly apply those holdings to the facts of this case and accept this claim as compensable.

Just because Employer chose this claim as a **test case** to convince the Court that it should overrule its rejection of the "greater risk" doctrine in *Spivey*, that does not mean that the holding in *Spivey* is the subject of legitimate debate. When the Industrial Commission accepted Employer's invitation to review 80 years of "greater risk" case law and then euphemistically labeled Employer's defiance of this Court's holdings as the subject of legitimate debate, the Commission's undermined the bedrock principle of stare decisis. Employers should not be allowed to willfully defy this Court's holdings and then whitewash their unreasonable conduct by calling it the subject of reasonable debate.

Since the overwhelming weight of the evidence in the record proves that Employer's denial was not based on reasonable factual or legal grounds, the Court should reverse the Commission's 5.17.11 denial and award the Claimant attorney's fees on all benefits awarded in its 5.17.11 compensability decision from date of injury on 12.18.09 to date of decision on 5.17.11 based on the percentages set forth in the Legal Services Contingency Fee Employment Agreement between Claimant and Claimant's Counsel dated 1.19.10 (R., Vol. II, pp. 327-330).

When Employer refused to comply with the Commission's 5.17.11 Order and then mocked the Commission's authority by pointing out that the Commission had **"no statutory authority to enforce its own awards"** (R., Vol. I, p. 94, LI. 12-13) (emphasis supplied), Employer's unreasonable conduct forced the Claimant into another round of litigation and

briefing which ultimately resulted in the Commission's 12.8.11 Order Denying Stay. The Claimant should not be forced through Employer's unreasonable conduct to re-litigate Employer's obligation to pay benefits when Employer's liability for those benefits has already been established.

The 1st ground the Commission gave for denying attorney's fees in its 12.8.11 Order was that Employer filed a Notice of Appeal with the Supreme Court (R., Vol. II, p. 212, Ll. 10-11). Employer's decision to file a frivolous interlocutory appeal from the Commission's non-final Order which clearly did not resolve all of the disputed issues in the case did not give Employer a reasonable basis to refuse to comply with Orders from the Industrial Commission. This Court should reverse the Commission's refusal to award the Claimant fees on this ground because the Commission's finding did not as a matter of law support its denial of fees under Idaho Code §72-804.

The Commission also denied the Claimant's request for fees because after the Supreme Court dismissed Employer's 1st interlocutory appeal (which signaled the Court's intent to not stay the proceedings before the Commission), the Employer just returned to the Commission and asked the Commission to stay the enforcement of its own award (R., Vol. II, p. 212, Ll. 11-13). Employer's decision to go back to the Commission and ask it to stay the enforcement of its own Order after the Supreme Court had just refused Employer's request for a stay by dismissing its interlocutory appeal, hardly supports the Industrial Commission's finding that the Employer did not engage in unreasonable conduct. Employer's actions support the opposite finding that Employer engaged in unreasonable conduct by asking the Commission for a stay when the

Supreme Court had just denied Employer's request for a stay by dismissing Employer's appeal. Since the Commission's finding did not support its denial of attorney's fees as a matter of law, this Court should reverse the Commission's denial of attorney's fees in its 12.8.11 Order.

In its 12.5.10 Order, the Commission ordered Employer to pay attorney's fees on all benefits that it unreasonably refused to pay after this Court dismissed Employer's Motion For Permissive Appeal on 1.30.12 including, past denied medical benefits listed in CL.5.17.12 EX. 14 and 15, past denied mileage, per diem and lodging expenses listed in CL. 5.17.12 EX. 16 and the undisputed 12% PPI rating that Dr. Frizzell issued on or about 3.10.11 (R., Vol. II, p. 315, Ll. 20-23) (*See* Claimant's demand for payment of these benefits in CL. 5.17.12 EX. 17).

When the Commission entered its 12.10.12 Order on Reconsideration, it erroneously applied the doctrine of *collateral estoppel* to give Employer an unearned credit for the payment of past denied medical benefits that Employer had never actually paid and limited the Claimant's award of attorney's fees to Employer's unreasonable refusal to pay the undisputed 12% PPI based on the undisputed 12% PPI rating that Dr. Frizzell had issued on 3.10.11 (R., Vol. III, p. 460, Ll. 1-5).

This Court should reverse the Commission's erroneous misapplication of *collateral estoppel* and Order Employer to pay attorney's fees in accordance with the percentages set forth in Claimant's Legal Services Contingency Fee Employment Agreement (R., Vol. II, pp. 327-330) based on all benefits that Employer unreasonably refused to pay including, but not limited to:

1. The past denied medical benefit claims listed in CL. 5.17.12 EX. 14 of $24,627.80;
2. The past denied medical benefit claims listed in CL. 5.17.12 EX. 15 of $674.00;

3. The past denied mileage, per diem and lodging expenses listed in CL. 5.17.12. EX. 16 of **$ 2,149.47**; and,
4. The undisputed 12% PPI rating that Dr. Frizzell issued on 3.10.11 of **$20,988.00**.

The Claimant repeatedly asked Employer to pay all worker's compensation benefits that Claimant was entitled to receive in this compensable claim under the Idaho Workers' Compensation Act. Employer responded to Claimant's multiple requests for the payment of benefits and made it clear that **Employer had absolutely no intention of making payment of any benefits to Claimant until after the Idaho Supreme Court entered its final decision** on appeal which affirmed the Industrial Commission's 5.17.11 compensability decision (CL. 5.17.12 EX. 17, Bates No. 017010; 017021-017022). The Commission explained by that defense was unreasonable in its 12.8.11 decision and its 12.5.12 decision:

> As noted above, the Commission's final order on the issue of compensability brings with it an obligation to pay to Claimant those workers' compensation benefits to which he would normally be entitled as a result of having suffered a compensable accident/injury" (R., Vol. III, p. 435, Ll. 7-10).
>
> What Employer/Surety has failed to understand, however, is that the Commission's finding that the subject accident is compensable carries with it an obligation on the part of Employer/Surety to pay to Claimant those workers' [sic][worker's] compensation benefits to which he is entitled as a result of the accident. We find nothing in the correspondence going back and forth between Claimant's counsel and Defense Counsel which suggests that Employer/Surety at any time disputed the claims for additional benefits to which Claimant believed he was entitled. The only basis for denial was the aforementioned belief that Employer/Surety had no obligation under the May 17, 2011 order to pay anything except those benefits which were specifically addressed in that order.
>
> As explained in more detail in our December 8, 2011 order denying Employer's motion for stay, it is the expectation of the Industrial Commission that its final order on compensability binds the parties to act accordingly during the pendency of this bifurcated matter. It is no defense to Claimant's manifold requests to simply say that Claimant's entitlement to the benefits at issue will be decided in connection with the May 17, 2012 hearing. Absent a good faith dispute over Claimant's entitlement to a

particular benefit, Employer/Surety had an obligation to timely pay the same once this claim had been found to be compensable under the workers' compensation laws of this state. (*See* Idaho Code § 72-304) (R., Vol. III, p. 438, Ll. 2-18).

Since Employer has "neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law" in direct violation of Idaho Code §72-804, this Court should award Claimant attorney's fees at every stage of the litigation from date of injury on 12.18.09 to final decision on appeal and on remand to the Commission (*See Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008)).

CONCLUSION

The Claimant respectfully requests that this Court enter the following Orders on appeal:

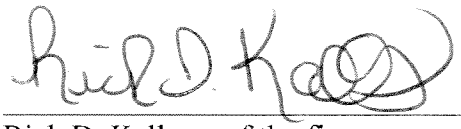
1. An Order **affirming** the Commission's 5.17.11 "arose out of" employment ruling and award of past denied medical benefits and retroactive total temporary disability benefits;
2. An Order **reversing** the Commission's 5.17.11 decision that Employer came forward with sufficient evidence to rebut the premises presumption;
3. An Order ruling that Claimant was entitled to a favorable ruling on the arose out employment issue **as a matter of law** based on the proper application of the premises presumption to the unique facts of this case because Employer only denied this claim on the exclusive legal grounds that Claimant's accident and injury did not arise out of employment;
4. An Order **reversing** the Commission's 5.17.11 decision to not award the Claimant attorney's fees;
5. An Order instructing Employer that it had a duty to comply with the Industrial Commission's Orders even if they were not final and appealable Orders and explaining the consequences of its failure to do so;
6. An Order **reversing** the Commission's 12.8.11 decision to not award the Claimant attorney's fees;
7. An Order **affirming** the Claimant's 19% whole person PPI rating;
8. An Order **reversing** the Commission's 12.5.12 decision to apportion 7% of the Claimant's 19% PPI rating to the Claimant's 10.22.90 injury;
9. An Order **reversing** the Commission's 12.5.12 decision that Claimant's 10.22.90 7% impairment was a subjective hindrance to employment prior to his 12.18.09 injury;
10. An Order **reversing** the Commission's 12.5.12 decision that Claimant's 10.22.90 7% impairment combined with Claimant's 12.18.09 injury to cause total and permanent

disability;

11. An Order **affirming** the Industrial Commission's 12.5.12 decision that quasi-estoppel prevents Employer from shifting any liability for Claimant's total and permanent disability to the ISIF;
12. An Order **affirming** the Industrial Commission's 12.5.12 decision to award the Claimant attorney's fees;
13. An Order **reversing** the Industrial Commission's 12.10.12 decision to use *collateral estoppel* to give Employer an unearned credit for the payment of past denied benefits that Employer never actually paid;
14. An Order **reversing** the Commission's 12.10.12 decision to use *collateral estoppel* to limit its award of attorney's fees to Employer's unreasonable refusal to pay Claimant his undisputed 12% PPI award; and
15. An Order **awarding** Claimant attorney's fees based on the percentages set forth in his Legal Services Contingency Fee Employment Agreement at every stage of this litigation from date of injury to date of final decision on appeal and on remand.

Respectfully submitted this 22nd day of May, 2013.

Ellsworth, Kallas, & DeFranco, PLLC



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of May, 2013, I mailed 2 copies of the foregoing Respondent's Brief, postage prepaid, to the following:

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