3-24-2008

Davidson v. Riverland Excavating, Inc. Appellant's Brief Dckt. 34626

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHET DAVIDSON,

Appellant,

vs.

DOCKET NO. 34626 / 2000-1963

STATE INSURANCE FUND,

Respondent.

APPELLANTS' BRIEF

Appeal from the Idaho Industrial Commission.

Hearing Office Rinda Just presiding.

Michael J. Verbillis
Residing at Coeur d'Alene, ID for Appellants.

H. James Magnuson, Esq.
Residing at Coeur d'Alene, ID for Respondent.

Thomas W. Callery, Esq.
Residing at Lewiston, ID for Respondent.

TABLE OF AUTHORITIES

III.

STATEMENT OF THE CASE

i. This is a workers' compensation case filed on behalf of Chet Davidson on November 26, 2004. The industrial accident that gave rise to the filing of the within lawsuit occurred on December 30, 1999. Trial was held on November 1, 2006. Findings of Fact and Conclusions of Law and Recommendations were entered by the Commission on September 7, 2007.

ii. The Commission below ruled that Claimant had not met his burden of proving that he was totally and permanently disabled, did not prove that he was entitled to any disability, denied assessment of attorneys' fees, and refused to retain jurisdiction.

iii. Chet Davidson is a 55 year old high school graduate who grew up in eastern Montana and southern Wyoming. *Tr. p. 17.* Mr. Davidson graduated from high school in 1967. *Tr. p. 17.* Chet has pursued, in his adult life, a variety of construction jobs including carpentry, heavy equipment operation, long-haul trucking, and logging. *Tr. p. 19, Tr. p. 29, ll. 3-25.* Chet also spent a fair amount of time on the rodeo circuit in various events including team roping, bareback and bull riding, having competed successfully as late as 1996. *Tr. p. 20, l. 7 - p. 21, l. 25.* As indicated above, Chet even had a stint operating a business as a long-haul trucker for 3 or 4 years in the early '80s. This venture folded as a consequence of divorce. *Tr. p. 22-23.*

Chet's past medical history is marked by significant injuries, including at least 3 lower back injuries, the first occurring at age 20 and thereafter at approximately 2 year intervals when he finally received surgery in 1976 owing to an industrial accident that occurred while working construction. *Tr. p. 24-27.* He also suffered knee injuries, one of which occurred in Alaska in 1986 or 1987, which caused him to change his job from a "choker setter" to operating equipment. *Tr. p. 29.* More notably, Mr. Davidson suffered a significant accident in 1998, while working in The Dalles, Oregon. This was an industrial accident and was covered by the Washington Labor & Industries system. Chet ultimately underwent a diskectomy surgery for this 1998 injury by Dr. Ronald Vincent in 1990. This particular surgery was intended to be a diskectomy. *Tr. p. 31-34.* Chet had had some difficulty with

recuperation and returning to work following the sequelae of the 1998 injury. He was awarded a 25% whole man impairment rating from the Washington Department of L&I. *Defendant Employer's Exhibit 4, p. 956; Claimant's Exhibit 11, p. 2.*

After several years of attempted, albeit not successful vocational rehabilitation, Chet returned to work in 1991 and 1992 working in his customary trade as an equipment operator, although working under the table. *Tr. p. 35-36.* Chet also has had difficulty with alcoholism, ultimately taking the cure at the end of 2000. *Tr. p. 37.*

He commenced working for the Defendant employer in July of 1999 operating heavy equipment, including rollers and excavators. *Tr. p. 38.* Chet suffered a significant accident in November of 1999, which has later been accepted as December 30th in that that was the last day that Chet worked for Riverland. *Tr. p. 40, ll. 11-15.* The injury occurred when Chet was attempting to replace a hydraulic chair on a piece of heavy equipment. The chair apparently slipped out of his hands, struck him on the top of the head, and knocked him to the ground. *Tr. p. 39, l. 15 - p. 40, l. 14.* He was treated conservatively at the offices of North Idaho Immediate Care and ultimately was sent to a neurosurgeon, having first encountered Dr. McDonald, a board certified neurosurgeon in Coeur d'Alene in February of 2000. *Tr. p. 41, ll. 21-23.*

Dr. McDonald, after ordering an MRI, determined that the patient was in need of a three level cervical fusion. *Claimant's Exhibit 1, pp. 105-106.* Apparently surgery was scheduled for Chet by Dr. McDonald to take place in last February early March of 2000. This surgery did not take place, as the authority for the same was denied by the State Insurance Fund. *Tr. p. 42.* Ultimately, a second surgical date was set for 6 weeks following the first aborted date, approval for which was also rejected by the State Insurance Fund. *Tr. p. 43.*

Meanwhile, Claimant had received correspondence from the State Insurance Fund dated 3/7/00 that stated that the State Insurance Fund had conducted a "thorough" review of his claim and determined that Mr. Davidson did not suffer an injury sustained in an accident arising out of the course of his employment. *Claimant's Exhibit 10, pp. 44.* Mr. Davidson retained the undersigned

on 3/14/00. *Claimant's Exhibit 10, pp. 41-43.* This Counsel promptly wrote to Dr. McDonald asking for further clarification as to the causal link between the industrial accident and the need for surgery. *Claimant's Exhibit 10, p. 40.* Dr. McDonald responded with clear and unequivocal language in correspondence to the undersigned dated 3/17/00. *Claimant's Exhibit 10, p. 35.* This information was submitted to the Surety by letter from the undersigned on 3/27/00, at which time the undersigned gave the Surety 1 week within which to approve the surgery and pay appropriate benefits. *Claimant's Exhibit 10, p. 34.* Hearing nothing within that time period, the Undersigned filed a Complaint against the State Insurance Fund on 4/13/00. *Claimant's Exhibit 10, p. 28-30.* Coincidentally, on that same date, the State Insurance Fund wrote, again, denying compensability for this claim. *Claimant's Exhibit 10, p. 31.*

As the record reflects, Chet Davidson did, in fact, receive income benefits after defense counsel was retained and after the Complaint was filed and served on or about 5/9/00. *Defendant's Exhibit 6.* Mr. Davidson ultimately received the surgery that was recommended by Dr. McDonald on August 22, 2001. *Claimant's Exhibit 1, p. 80.* This occurred after Mr. Davidson had been seen by physicians chosen by the Defendant who apparently felt that Mr. Davidson would not benefit from the surgery, a contention disputed by the attending physician. *Claimant's Exhibit 1, pp. 93-94.* It should be noted that at this point in time, Chet had been scheduled to see doctors in Spokane in June of 2000. These two doctors were a Dr. Barbara Jessen, a neurologist, who has never performed neurosurgery in her life, and Dr. Scott Linder an orthopedist, who, in fact, refused to examine Mr. Davidson. In fact, these two doctors wrote on more than one occasion concerning the wisdom of, medical necessity of, and indications for the surgery, having opined initially in June of 2000 and then thereafter in January of 2001. *Defendant's Employer Exhibit 7, pp. 01011-01047.*

It appears as though the amalgam of the opinions of Drs. Jessen and Linder was that not only was Mr. Davidson not in need of surgery but that he should be deemed fixed and stable. Again, after some discourse through the attending physician, the adjuster and the examining doctors, the decision was made to authorize surgery, some 16 months after the industrial accident. Thereafter, Chet faired

rather poorly and had to have a "re-do" of his thoracic cervical fusion in July of 2003. *Claimant's Exhibit 1, p. 50.* This, after once again State Insurance Fund chosen physicians felt that Chet was stable as opined by Drs. Jessen and Linder. *Defendant's Exhibit 7, pp. 01000-01007.* Notwithstanding the opinions of these insurance retained doctors, Chet did, in fact, have the second surgery as previously indicated. Regrettably, that surgery was also a failure and had to be repeated on 2/24/05. *Claimant's Exhibit 1, p. 20.* By this time the panel doctors (Dr. Jessen, again, and a new doctor, Dr. William R. Pace), felt that, indeed, the fusion "re-do" of 2003 was not effective.

As mentioned in the preceding paragraph, Chet Davidson had his third and final cervical fusion in February of 2005. He was deemed surgically stable by his doctor on October 31, 2005. *Claimant's Exhibit 1, p. 9.* An additional medical complication from the repeated trauma to Mr. Davidson's neck in the form of 3 surgeries is a condition known as Horner Syndrome, a vision impairment, which was clearly a consequence of the injury and ultimate surgical intervention by his attending physician. *Claimant's Exhibit 1, p. 6.*

Subjectively, Chet described in some detail the impact of these repeated surgeries and his perception of pain and his functional abilities. There is a lengthy discussion of his symptoms that appear commencing on page 48 of the Transcript through page 60. Among those symptoms and limitations are severe headaches, stabbing, burning pain in his neck that he described as a burning or like an icepick sticking into him. *Tr. p. 49, ll. 20-21.* He also describes paralysis in his left arm. *Tr. p. 50, ll. 5-9.* He further describes a lack of grip in his dominant hand and a sensation of pins and needles in his left hand. *Tr. p. 51, ll. 3-7.* Also among his symptoms a sensation if he moves his arm or shoulder just right, a flash and he goes black and then he sees stars. *Tr. p. 51, ll. 14-17.* Alternatively, if he turns his head just right, he also gets the same sensation, i.e. blackness and then stars. *Tr. p. 51, ll. 18-22.* He also experiences limitations in motion in his neck in terms of moving it left to right and up and down. *Tr. p. 52, ll. 1-9.* As it turns out, the ravages of time and inactivity, perhaps, have brought back some of his low back problems and knee problems that just are not getting much better. *Tr. p. 53, ll. 1-15.* He describes the intensity of pain in his neck at different

times of the day as varying from 3-4 in the morning progressing to 10 when he retires for the evening. This pain sensation, again, is punctuated by headaches, pins and needles, and he feels that at times he needs to lie down, get in a chair with his feet up or get into a dark room with the lights off. *Tr. p. 55, ll. 1-22.*

A description of his daily activities paints a picture of an extremely sedentary lifestyle. He is unable to do much in terms of chores around the house, to go shopping, he even describes he doesn't wear shirts with buttons on them because he does not have the dexterity to get his shirts buttoned. *Tr. p. 57, ll. 7-10.* He needs two hands to lift a gallon of milk. *Tr. p. 57, ll. 13-15.* Additionally, he has described apparent personality or temperament changes. By his own description, he has a short fuse, he doesn't like many people, and he doesn't like to be around people. *Tr. p. 58, ll. 11-14.* By his own description, he can think of nothing he has done in the past, employment wise, that he would be fit to attempt. *Tr. p. 60, ll. 15-17.* He has made efforts to cooperate with the Vocational Rehabilitation Division of the Idaho Industrial Commission and was told that there wasn't much for him. At one point in time, he thought that if he could just have enough money to have his own business, he might be able to work at his own pace. When that particular avenue did not appear to be viable from the standpoint of the Industrial Commission Rehabilitation Division, Mr. Davidson lost heart in any rehabilitation efforts. *Tr. p. 61, ll. 11-25.*

Dan Brownell from the Industrial Commission Rehabilitation Division stated that it wasn't very reasonable for Claimant to be looking for work. *Tr. p. 173, ll. 19-24.* Testimony was also provided in the form of Tom Moreland, a vocational rehabilitation expert, who opined that Mr. Davidson was unemployable in the regular competitive job market based upon the effects of his neck injury, it's subsequent impairment and disability. And, in essence basing his ultimate opinion that if Dr. McDonald, as a treating physician, is to be believed, then Mr. Davidson cannot find any work available on a continuous and sustained basis. *Tr. p. 124, l. 19 - p. 125, l. 12.*

This is due to the fact that Dr. McDonald has restricted Chet to sedentary employment that would need to be greatly accommodated by Chet being able to take frequent intermittent rest periods

of up to 30 minutes. These rest periods would occur at unpredictable times. *Claimant's Exhibit 1, p. 1.*

Defendant Employer presented evidence that Chet was capable of light work. For example, Dr. Vincent examined Claimant on behalf of the State Insurance Fund and felt that, not only, was Chet capable of light work, but the fact that he had had 3 fusion surgeries in the cervical region of his spine, two of which have failed, did not warrant any additional impairment. Likewise, the insurance retained vocational expert opined that Chet was capable of light work and that there were numerous light duty jobs available in the Coeur d'Alene community.

From the foregoing evidence, the Referee concluded that Chet Davidson had not met his burden of establishing that he was totally and permanently disabled, nor had he presented sufficient evidence to justify a finding that he had suffered disability beyond the level of impairment; this in spite of three successive surgical surgeries, two of which were abject failures. The Referee further opined that Mr. Davidson had not met his burden of establishing that the State Insurance Fund had acted unreasonably by denying access to medical care for 16 months and income benefits for approximately 3 months.

IV.

ISSUES PRESENTED ON APPEAL

1. Whether the Commission erred in failure to consider pain as a component of impairment.

2. Whether the Commission erred by not employing a two tiered assessment of disability.

3. Whether or not the Commission abused its discretion by not retaining jurisdiction.

4. Whether the Commission erred by not awarding attorneys' fees to Claimant.

V.

ARGUMENT

A. The Commission failed to properly assess impairment.

At the outset, the Claimant would certainly acknowledge that the determination of physical impairment is a question of fact for the Commission. This Court will not scrutinize the weight and credibility of evidence relied upon by the Commission and will not disturb any findings regarding the weight and credibility unless they are clearly erroneous. *Hutton vs. Manpower, Inc.*, 143 Idaho 573, 149 P.3d. 848 (2006). Of course, the Court exercises free review over legal questions. *Id.*

In this case, with respect to the impairment aspect of the claim, it is the contention of the Claimant that the Commission was legally deficient in its assessment of impairment. This is not a case where Claimant is saying that there are conflicting impairment ratings and the Commission chose one over the other. Rather, this is a case where the failure of the Commission to consider aspects that are includable in the assessment of impairment was fatally deficient.

Permanent impairment is a word of art within workers' compensation parlance. Statutorily, it is defined as:

> . . . any anatomic or functional abnormality or loss after maximum medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation . . . *Idaho Code §72-422.*

The evaluation of permanent impairment is a:

> . . . medical appraisal of the nature and extent of the injury or disease as it affects an injured employees' personal efficiency in the activity of daily living, such as self care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. *Idaho Code §72-424.*

It is for the Commission, after considering the medical evidence, to enter its assessment of impairment. No medical opinion is binding upon the Commission, but medical evidence may be instructive in assisting the Commission in assessing impairment. Of course, the assessment of disability is how that specific impairment suffered by the injured workers translates into his ability

to earn a competitive wage. But the beginning analysis on the journey to assess disability must begin with a meaningful examination of the impairment question.

Urry vs. Walker is the pivotal decision on this question. In the Walker case, the Court held that pain as it relates to functional loss is a medical factor to be considered in determining impairment. The failure by an examining physician to consider pain where it manifests itself in functional loss is legally insufficient. A decision bottomed upon such opinion in assessing a penurious impairment rating should be reversed. *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 769 P2d. 1122 (1989).

As the Court indicated in Urry v. Walker:

> A doctor should take complaints of pain into account when reaching an opinion regarding impairment.

115 Idaho 750, 756, 769 P.2d 1122 (1989).

> [2] We recognize, of course, that a finding on the question of impairment must be upheld when supported by substantial evidence. I.C.§72-732(1). In this case, however, the impairment question was entirely derivative of the pain issue. The Commission made no finding as to whether the hip pain actually existed, whether the pain (if it did exist) was attributable to the 1984 injury) had produced any additional "functional . . . loss" within the meaning of I.C. §72-422. Without a finding on at least one of these points, it is difficult to understand how the Commission could have determined that Urry's impairment with an allegedly painful hip after 1984 was the same as his impairment with an asymptomatic hip after 1979.

155 Idaho 750, 754 P2d. 1122 (1989).

> . . . Rather, the Commission appeared to treat the evidence as relevant to disability – an issue which the Commission then declined to reach because it had found no increased impairment. Thus, the structure and language of the Commission's decision strongly suggest that pain was treated not as a medical factor in determining impairment but rather as a "nonmedical factor" to be considered in determining a disability rating if, and only if, an additional impairment were otherwise found to exist.
>
> [4] Such an approach to the pain issue would be erroneous as a matter of law. Pain can produce "functional . . . loss" under I.C. §72-422. Because it relates to function loss, pain is a medical factor to be considered in determining impairment itself. When a physician is satisfied that pain is genuine, it can be used – like pathology or loss of structural integrity – to measure the extent of an impaired function.

155 Idaho 750, 754 P2d. 1122 (1989).

Finally, the Commission made it clear that doctor's examining patients in Idaho should take complaints of pain in reaching an opinion regarding impairment, "doctors should take complains of pain into account when reaching an opinion regarding impairment." *Urry v. Walker & Fox Masonry Contractors 155 Idaho 750, 756, 769 P2d. 1122.*

The fatal flaw in the assessment of impairment in this case by the Referee and sanctioned by the Commission is the failure to, by the ultimate fact finder, consider pain as a component of the impairment assessment. That Chet Davidson endures daily excruciating pain has not been challenged by any physician whether attending or insurance retained. As the physician who performed three surgical operations on Chet stated "it would appear to me that, without question, Mr. Davidson has to be considered to have suffered additional impairment from the time of that C5-6 interior discectomy in 1991. As you point out, he has had three additional surgeries, and now has three levels which are fused in his neck. In comparison to that initial surgery of C5-6 without fusion in 1991, all reasonable analysis would lead me to conclude that he has suffered additional impairment in intervening years and that his current opinion it is not all merely pre-existing." *Claimant Exhibit* 1, pg. 1A.

On the specific issue of pain, again the attending physician: "I do not disagree that Mr. Davidson has a severe chronic pain disorder related to the multiple cervical procedures, with a poor outcome and continued pain." *Claimant's Exhibit* 1, pg. 4.

Even the insurance retained doctor acknowledged that the patient complains of excruciating pain. Consider for a moment two brief passages from the deposition of Dr. Vincent:

Q. You are not calling him a malingerer, are you?
A. No.
Q. That's a different technical term, right?
A. Yes.
Q. A malingerer is someone that's faking it, right?
A. Yes.
Q. This guy isn't faking his pain?
A. No.
Q. He has real pain. There's an organic basis for it. And I think where the rubber meets the road is how much of his pain would one expect from the surgical insults versus how much presents where the rubber meets the road?

A. Yes.
Q. And again, in terms of this, how many liters of pain does he have?
A. I don't think you can discuss it in terms of liters.
Q. Precisely. You can't measure the amount of pain that this person is describing, can you? There's no way to measure it?
A. Well, we have some criteria. We ask people what their levels of pain are.
Q. Severe, marked, moderate, that sort of thing?
A. No, zero to ten, and they have a scale that does give us some idea. Obviously, that's somewhat subjective. At least there's some mark to compare with.

Deposition of Ronald Vincent, M.D., pg. 65, ln. 17 - pg. 66, ln. 22.

Q. Okay. You didn't utilize pain as a component of your current assessment of his rating, did you?
A. It can't be considered.

Deposition of Ronald Vincent, M.D., pg. 72, lns. 7-10.

Obviously, in this particular case, the Referee chose to accept the rating given by Dr. Vincent rather than exercise it's own judgment in awarding impairment. That the Referee is ordinarily free to do so is acknowledged by the Undersigned, as medical evidence can be accepted or rejected and the ultimate fact finder regarding impairment is obliged to make that finding. *Urry v. Walker, supra.* However, when that Referee relies upon a physician practicing out of state, who displayed absolutely no familiarity with Idaho Workers' Compensation Law and furthermore specifically acknowledged that he has not used pain in his evaluation, then that opinion should not be accepted for any weight.

That the Commission could find a person who had a previously adjudicated 25% whole man impairment owing to a cervical operation can only have 15% impairment fifteen years later following three additional surgeries that included a fusion with documented restricted motion is unfathomable and constitutes manifest injustice.

As the Court knows, reports from a physician that was attending the Claimant should be given at least as great, if not greater weight, than reports from a physician who saw the Claimant only in preparation for trial. *McGee vs. J.D. Lumber*, 135 Idaho 328, 334, 17 P.3d. 272 (2000).

Thus, we have a situation where the treating physician has documented pain and an organic basis for the same. We have an insurance retained physician who agrees that the Claimant has pain and there appears to be an organic basis for the same (in other words, he's not faking it and he's not

a malinger). We have no apparent rating that appears to incorporate the existence of pain. Finally, the Commission apparently refuses or neglects to utilize pain. This is clear error.

B. The Commission failed to make a meaningful assessment of disability.

The error committed by the Referee in failing to consider pain as a medical factor with respect to impairment was compounded in the analysis of disability.

In this case, the Commission approved the Referee's decision which found that Claimant had failed to present any meaningful evidence that he was entitled to disability. What is lacking in the analysis of the Referee is a consideration of the factors set forth in *Idaho Code §72-430(1).* That section of the Code states as follows:

> (1) Matters to be considered. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement. *Idaho Code §72-430(1).*

In *Page vs. McCain Foods, Inc.*, docket no. 33158, this Court set forth a two tiered approach mandated when making an apportionment of an injured worker's disability. First, the Commission should evaluate the Claimant's permanent disability in light of **all** of his physical impairments resulting from the industrial accident and **any pre-existing conditions** existing at the time of the evaluation. And, secondly, they must determine the amount of permanent disability attributable to the industrial accident. *Id.*

The problem in this case is that no apportionment was made, nor was there any mention in the disability portion of the findings as to the significant pre-existing impairment. Chet Davidson had surgical intervention following his 1988 accident. He had various and sundry ratings over time

and was last adjudicated at 25% whole man impairment on the basis of his 1988 accident. Following his 1999 injury, he had three successive surgeries to his neck, two of which were abject failures. Functionally, according to the attending physician, he had excruciating pain that rendered him capable of only sedentary to light work. While there admittedly is some difference of opinion between the attending physician and the retained expert, the importance is that there has been no meaningful analysis of Mr. Davidson's total disability from all sources and allocating how much the prior disability affected the extent of his current disability versus the current injury. This two stage analysis was never performed by the Commission because it first failed to address the pre-existing impairment.

One thing should be clear, Claimant is not asking this Court to refind the facts.

Rather, Claimant is asking the Supreme Court to remand this case so that the Commission can set forth a meaningful analysis of the totality of Chet Davidson's disability from **all** sources and then allocate pursuant to the two tiered mandate as articulated in *Page vs. McCain*. That was not done in this case. Justice demands that it be done.

That the Referee traveled a wayward path in her reasoning, is evident by several passages. Equally palpable is the Referee's unfamiliarity with her charge with respect to findings regarding credibility. Consider the following passages:

> Claimant's several fleeting contacts with ICRD staff were undertaken **only to provide an appearance that he was interested in returning to work.**

R.p67 (emphasis added).

Such a statement implies a finding that the Claimant lacked credibility. Obviously, the interpretation of the Claimant's motives in approaching the Industrial Commission Rehabilitation staff can only be interposed with respect to a value judgment with respect to said motive. As such, it is implicit that the Referee found the Claimant to be disingenuous and lacking credibility. This left-handed finding of credibility is specifically forbidden by the teachings of this Court. *Stevens-McAtee vs. Potlach Corp.*, Supreme Court docket 33342 (2/11/08). In McAtee, the court held that

a Commission finding regarding Claimant's testimony to be not credible must be supported by substantial and competent evidence. Such a finding regarding credibility has been bifurcated by this Court into findings regarding the two categories of "observational credibility" and "substantive credibility."

The Court reiterated its standard from an earlier case:

> Observational credibility "goes to the demeanor of the Appellant on the witness stand." And it "requires that the Commission had to be present for the hearing" in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. The Commission's findings regarding substantive credibility will only be disturbed if they are not supported by substantial competent evidence. *Id. p.6.*

In the McAtee case, the Court noted that the Referee did not make any conclusions as to Mr. McAtee's demeanor on the stand. Therefore, according to this Court, his observational credibility was not in question. As the Court noted, the hearing officer (and ultimately the Commission) found that the Claimant's testimony in the McAtee case was not credible because his story had "differed substantially" from the prior accounts. Thus, this Court found that the Referee made a determination as to the credibility of the Claimant not supported by substantial and competent evidence.

The significance of the Referee's finding regarding Mr. Davidson's motives in contacting the Rehabilitation Division of the Idaho Industrial Commission was that he was trying to create the illusion that he was seeking employment or rather vocational services. Again, this implies a judgment as to his credibility at trial, where evidence offered by Claimant that he was interested in vocational service was offered. Without the benefit of the Referee's thoughts on observational credibility, we are left to wonder as to which facts and evidence the hearing officer felt important.

Elsewhere in the record there are numerous conclusions that appear to be equally biased and not fact based. For example, in finding 37, *R.p.59*, the hearing officer recited a June 14, 2006 letter to Dr. McDonald with a check-off for Dr. McDonald to sign regarding limitations. At finding 59, commencing on *R.p.68* and continuing to *R.p.69*, the Referee was critical of Mr. Moreland, Claimant's vocational expert, by writing a summary of his interpretation of the medical data and

asking the doctor to sign off regarding limitations and specific obstacles that would affect a person is day to day life. The Referee stated:

> Finally, though the type of letter that Mr. Moreland sent Dr. McDonald does constitute a medical records of sorts, and is admissible, said documents are seldom persuasive as compared with detailed medical records compiled by the physician and dictated in his or her own words.

R.p.69.

The thrust of that criticism suggests naivete by the Referee at best and does violence to the spirit of the Worker's Compensation Act at worst. Does the Referee really think a neurosurgeon has nothing better to do than write forensic letters? Vocational experts routinely obtain medical information in this manner. In either event, perhaps it is this waywardness that has lead the Referee astray and contributed to the erroneous analysis of these cases and the Commission's ultimate failure to follow the teachings of *Horton vs. Garrett Freightlines, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989), as reiterated in *Page vs. McCain Foods, Inc.,* supra.

C. The Commission abused it's discretion by not retaining jurisdiction.

Every witness that has testified in this case, both expert and lay, has acknowledged that the condition in Chet Davidson's neck is progressive and will get worse rather than better. The Commission is bound to retain jurisdiction so that Claimant can seek to modify his award due to a change in conditions pursuant to Idaho Code §72-719. *Horton vs. Gerrett Freight Lines, Inc.*, 106 Idaho 895, 684 P.2d. 297 (1984). Neither impairment or disability is permanent until the point at which no further deterioration or change can be expected. *Reynolds vs. Browning Ferris Industries,* 113 Idaho 965, 751 P.2d. 113 (1988).

As the Court has held in a situation where the Claimant's impairment is progressive and therefore cannot adequately be determined for purposes of establishing a permanent disability rating, it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the Claimant's condition is nonprogressive. *Graybill vs. Swift & Co.,* 115 Idaho 293, 565 P.2d 763.

Claimant is well aware of the fact that this record indicates that he was deemed surgically stable by his treating physician and stable by a consultant, Dr. Vincent. However, under the unique circumstances of this case where he had had several periods of time in the previous two to three years following his industrial accident, he was deemed stable only to find out that he was not, in fact, stable. Under these circumstances, the Undersigned strongly feels that it was an abuse of discretion for the Commission to simply close the case without retaining jurisdiction. It is likely to assume, based upon all the available evidence that the then current status of stability will be revisited owing to the progressive nature of his deficient.

Chet Davidson has had multiple injuries and surgeries in his life. That he is going to have some additional impairment and disability in the future, consistent with the opinions of every physician who opined on this subject and, indeed, the adjuster with years of experience, is beyond debate.

D. The Commission erred by not awarding attorneys' fees to Claimant.

The Referee states that the Surety handled this initial claim in a timely manner by issuing its first determination approximately 60 days after the filing of the claim. What is left unstated and certainly not analyzed by Referee is just what precisely was going on at the State Insurance Fund while this claim was being considered.

The claim was presented on January 20, 2000. The State Insurance Fund denied coverage approximately 67 days later on March 7, 2000. Again in April of 2000, the State Insurance Fund sends a letter indicating that he (Claimant) did not give a complete list of prior medical **treaters**. At this point it is worth repeating the dialog between the undersigned and the State Insurance Fund adjuster on this point:

Q. And you say this – not you. This is Lisa now. "The State Insurance Fund is standing on their March 7th denial." And they say that he did return their requested medical release and attached a list. "However, the list appears to be incomplete." Tell me with respect to consideration of Mr. Davidson's neck – contemplated neck surgery, what was incomplete about what he had told you about his prior medical care?
A. I can't say.
Q. It was complete as to his neck, wasn't it?

A. It listed Dr. Vincent. There was no mention on it of the Washington L&I claim, or Sacred Heart Medical Center.
Q. That's probably where Dr. Vincent did the surgery?
A. Correct. So –
Q. Why is the fact that there was an L&I claim? What does that add up to anything?
A. It's just, I have to go by what I read in this letter here because I was not privy to this claim up and to May.
Q. I know that, and I already mentioned that to you. I realize you didn't write this letter, but we still have to talk about it; okay?
Would you say to me in retrospect that letter appears to be a little **disingenuous**?
A. **Yes.**

Deposition of Jeanne Kelsch, pg. 46, ln. 17 - pg. 47, ln. 19 (emphasis added).

The reason that the letter referred to in the previous passage was disingenuous was that the only meaningful pre-existing medical history that Chet Davidson suffered from was the cervical surgery performed by Dr. Vincent, whose name was freely and fully disclosed.

In March 2003, when the Undersigned became involved, an opinion letter was solicited from Dr. McDonald (the surgeon that ultimately performed surgery on Mr. Davidson's neck) addressing the causation question. *Claimant's Exhibit 10,* p. 35. Request was made in correspondence to the State Insurance Fund for reconsideration. What followed was the precise letter that was referred to in the previous passage, to wit, a letter dated April 13, 2003, indicating that the State Insurance Fund was standing on their original March 7, 2000 denial. *Claimant's Exhibit 10*, pg. 31.

The attachment to the letter where it was suggested that Mr. Davidson hadn't been fully compliant describing doctors he had seen was not only disingenuous, it was a lie.

Nonetheless, the State Insurance Fund continued in their denial of compensation until after a Complaint was filed by an attorney and after a defense lawyer became involved. A brief review of the exhibits attached to the deposition of Jeanne Kelsch will tell a very clear and unequivocal story. The State Insurance Fund drug it's heals on this claim because the insured was questioning what had happened. It was not the confusion of the date of the accident or manner in which it had occurred, it was simply intransigence on the part of the State Insurance Fund. This intransigence was acknowledged in the deposition of Jeanne Kelsch.

Q. Do you think maybe in retrospect that certain decisions were made that were unreasonable?
A. I think certain decisions are **questionable.**

Deposition of Jeanne Kelsch, pg. 71, ln. 24, p. 72, ln. 2 (emphasis added).

The Referee pointed out correctly that once an attorney was involved decisions made by the adjuster of the State Insurance Fund seemed to be more timely and responsible. That analysis begs the question. The Workers' Compensation Act was enacted to provide sure and swift relief to injured workers in this State. Counsel should not be necessary at the initial stages of a workers' compensation claim. It is simply a matter of determining, did an accident happen on the job; was it a part of the body that could have gotten hurt in the accident?, is there supporting medical information that gives a reasonable likelihood that there is a connection between the symptoms complained of, the accidental event and the medical care?

That an injured worker has to get a lawyer to set these matters straight and conjole, argue and ultimately litigate to enforce payment is precisely why the fee shifting statute is on the books. *Idaho Code §72-804.*

CONCLUSION

In conclusion, it is respectfully submitted that the Referee, and ultimately the full Commission, committed serious error by not considering pain in assessing impairment on an injured worker who had endured three cervical fusions in connection with his industrial accident, two of which were abject failures. It is further urged that the Commission compounded that error by not analyzing the totality of Mr. Davidson's disability in making a proper apportionment as to what aspect of his disability pre-existed his 1999 injury. The Commission also erred in not retaining jurisdiction and such error constitutes manifest injustice. Finally, the Commission erred by not awarding attorneys' fees.

This case should be remanded for further proceedings.

Respectfully submitted this 20 day of March, 2008.

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CERTIFICATE OF SERVICE

I certify that on the 20 day of March, 2008, a true and correct copy of the foregoing was sent via U.S. mail to:

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