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Davidson v. Riverland Excavating, Inc. Respondent's Brief 1 Dckt. 34626

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

CHET DAVIDSON,

Claimant-Appellant,

v.

RIVERLAND EXCAVATING, INC.,
Employer,

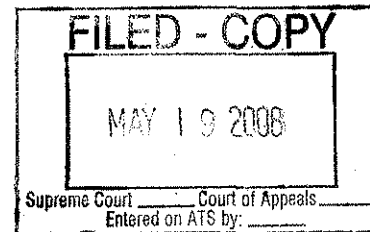
Defendant,

and

STATE INSURANCE FUND, Surety,
and STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendants-Respondents.

SUPREME COURT NO. 34626



RESPONDENTS' BRIEF

Appeal from
the Idaho Industrial Commission of the State of Idaho

Chairman James F. Kile Presiding

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I.

STATEMENT OF THE CASE

NATURE OF THE CASE:

Defendants/Respondents Riverland Excavating, Inc., Employer, and State Insurance Fund, Surety (collectively hereinafter referred to as "Riverland" or "SIF"), agree with paragraphs i and ii of Claimant/Appellant's Chet Davidson ("Claimant") Statement of the Case except that the Commission did not specifically refuse to retain jurisdiction as retention of jurisdiction was never raised as an issue by Claimant nor heard by the Industrial Commission ("Commission") below. The remainder of Claimant's Statement of the Case (iii) is Claimant's statement of facts, which were disputed in part in the proceeding below.

COURSE OF PROCEEDINGS:

Claimant on April 27, 2006, requested the Commission calendar for hearing the issues of: (1) whether Claimant is totally and permanent disabled; (2) apportionment; (3) impairment and disability; and (4) attorney's fees. R., p. 34. The matter was heard on November 1, 2006, by the Commission Referee Rinda Just ("Referee") in Coeur d'Alene, Idaho. On August 17, 2007, the Referee submitted her Findings of Fact, Conclusions of Law and Recommendation to the Commission. R., p. 75.

On September 7, 2007, the Commission entered an Order approving and adopting the Referee's proposed findings of fact, and conclusions of law and ordered that:

1. Claimant is entitled to whole person impairment of 19% for his injuries arising from the 1999 accident. The Surety has already paid Claimant impairment benefits totaling 20% of whole person;
2. Claimant has not sustained any disability in excess of his 19% impairment as a result of the 1999 accident;
3. Claimant failed to prove he is totally and permanently disabled; and
4. Claimant is not entitled to attorney's fees pursuant to Idaho Code §72-804. R., pp. 76-77.

STATEMENT OF FACTS:

The Commission made the following findings of fact:

1. At the time of hearing, Claimant was 55 years of age. Twice divorced, with one child, he resided in Post Falls, Idaho, with his partner, Paula Smith.
2. Claimant graduated from high school in 1967 in Wyoming. He has no other formal training.
3. Claimant's spotty work history is limited to the professional rodeo circuit and heavy construction. Until about 1983, his income reflects both construction work and rodeo prize money. Social Security records¹ show that Claimant's earnings were minimal from 1967 through 1978. During that twelve-year period, he earned just \$34,660, less than \$3,000 per year.

From 1979 through 1982 Claimant operated his own trucking company. Claimant testified that the trucking business "was working pretty good until the divorce hit me in the face." Tr., p. 23. Social Security records for the period show that Claimant's earnings were \$12,296, with no earnings reported in 1980 or 1982. In 1983, Claimant went to Alaska, where he worked off and on in heavy construction for about five years. Claimant testified that he worked for Whitestone Logging in 1984, 1985 and 1986 in Alaska. His earnings from 1983 through 1987 were only \$11,237 with no income reported for 1984, 1985 and 1986. In 1987, Claimant worked for South Coast Construction building a road into a mine site in Alaska. Social security earnings for 1987 were \$9,724.

4. In 1988, Claimant left Alaska and went to work for Northwest Monorooft on a construction project on the dam in The Dalles, Oregon. Claimant sustained a cervical injury in July 1988, spawning a workers' compensation claim in Washington state that was initially denied and was not finally resolved until 1997. Claimant had no reported income for the years 1989 through 1995. In 1996, he reported income of \$500, and Claimant reported no income in 1997. In 1998, social security reported income of \$1,222. Claimant testified that once his Washington workers' compensation claim was resolved, he was either working for himself or working under the table for his friend, James Nirk.

¹ Claimant's social security earnings records are the only reliable indication of Claimant's work history. Claimant's statements as to his employment prior to going to work for Employer are inconsistent with the social security records, and Claimant's assertions that he worked "under the table" are disputed and cannot be verified.

5. In July 1999, Claimant went to work for Employer as a heavy equipment operator and mechanic helper. In November of that year, Claimant was replacing a chair in a Case loader, when the chair slipped and hit him on the head, resulting in a cervical injury.

6. Claimant sustained a lumbar injury as the result of a motor vehicle accident in the early 1970s. Claimant ultimately underwent a fusion somewhere in the vicinity of L3, L4 and L5. After recovering, Claimant returned to work and to the rodeo circuit. Approximately two years later a bucking horse fell on top of Claimant, re-injuring his lumbar spine and necessitating a second lumbar surgery. Then, in about 1976, while punching in a mine road, Claimant was thrown off his scraper and injured his low back once again. Although work-related, the injury was not filed as a workers' compensation claim because it fell under the jurisdiction of the mine workers' union. Claimant returned to work operating heavy equipment following his recovery from his third low back surgery. Asked if the series of low back surgeries slowed him down, Claimant stated, "[r]un them just as hard and fast as they go." Tr., p. 27.

7. Claimant sustained an injury to his left knee in the mid-1970s when a bull he was preparing to ride acted up in the chute, banging Claimant's knee against the metal chute. Claimant's kneecap was torn off and he splintered a bone in his left leg. Claimant sustained an injury to his right knee as a result of a logging accident in Alaska in the mid-1980s when he was helping a friend set choke chain. Following surgery on his right knee, Claimant returned to operating heavy equipment.

8. Claimant testified that he abused alcohol in the 1980s and 1990s:

Q. [by Verbillis] did you -- during the 80s and 90s, did you have a problem with alcohol?

A. I drank an ocean full of it.

Q. When did you take the cure?

A. I've been sober for five and a half years.

Q. During the time when you were cowboying and working construction, would you characterize that you were an alcoholic?

A. No, I just liked to drink.

Q. Okay. Denial is one of the signs, partner.

Tr., pp. 36-37.

9. Claimant has also had multiple right shoulder separations without medical intervention, and has had his cheekbones, jaw and nose broken. Claimant also related that he had sustained fractures of his wrist, foot, and shin, all as a result of his years on the rodeo circuit.

10. Claimant filed a claim for an injury to his neck and upper back that he alleged occurred in 1988 while working on The Dalles Dam for Northwest Monoroof. The claim was initially denied based on statements provided by co-workers that Claimant injured himself while fishing in the Columbia River. Eventually the surety accepted the claim, although the employer contended to the bitter end that Claimant's injury was not work-related. As a result of the July 1988 injury, Claimant underwent an anterior cervical discectomy at C5-6 in March 1990.

Dr. Vincent, a Spokane neurosurgeon, performed the surgery. Dr. Vincent testified in his deposition that it was his standard practice to perform discectomies only in most such cases

because in the vast majority of patients a discectomy will progress to a natural fusion of the discs over a period of twelve to eighteen months. In fact, Claimant did have a natural fusion at that level.

11. Claimant had on-going pain complaints following the 1990 surgery, and contended that he could not return to work. Claimant's workers' compensation file from Washington is just shy of 1000 pages (*See*, Defendants' Ex. 4). Included in the file are numerous medical records documenting Claimant's continued complaints without objective medical findings to support them. Claimant was offered a great deal of rehabilitative treatment, both medically and vocationally. He was diagnosed with chronic pain syndrome and referred to a pain clinic, but he was uncooperative and left the program after only a few days. He was offered vocational assistance but consistently insisted that he was unemployable and just wanted a settlement.

12. Claimant's Washington workers' compensation case was ultimately closed in 1993. He received a whole person impairment rating of 10% for his cervical injury and 25% whole person impairment for mental impairment.²

² As part of the closing medical evaluation, Claimant was seen by Arthur A. Murray, M.D., a psychiatrist. Dr. Murray diagnosed major depression, single episode without psychosis, and somatoform pain disorder related to the 1988 injury. He also gave Claimant a diagnosis of personality disorder not otherwise specified. Dr. Murray suggested that Claimant receive treatment for the depression, noting that "[e]ffective treatment may well lead to restoration of productive work on a more or less continuous basis." Defendants' Ex. 4, p. 785. Claimant rejected such treatment.

13. Claimant attempted to reopen the Washington workers' compensation proceeding in 1994 asserting that bilateral thoracic outlet syndrome, bilateral adhesive capsulitis and bilateral brachial plexus lesions were a worsening of his cervical condition. The matter was ultimately settled, and the Board of Industrial Insurance Appeal, State of Washington, issued an order on August 8, 1997, finding that Claimant was capable of obtaining and performing gainful employment from May 3, 1995, through August 1996, and that Claimant's cervical spine injury was fixed and stable as of August 5, 1996. Claimant was awarded additional impairment for his cervical spine so that his cervical impairment totaled 25% whole person.

14. In November 1999, Claimant was assisting the mechanic on a repair of the hydraulic system on a Case loader. The mechanic was called away, and Claimant was left to complete the reassembly of the cab of the loader. The weather was inclement, and Claimant wanted to get the seat back into the cab and out of the weather. As he lifted the seat overhead to put it in the cab, the seat slipped from his hands and hit his head, bending his neck and knocking him to the ground. Claimant finished work that day and continued to work until December 30, when Employer shut down for the winter. Claimant reported the injury several days later and was referred to the immediate care center in Post Falls. Claimant was seen at the clinic two or three times but received no real medical work-up. Eventually, he was referred to physical therapy, but the therapist would not see him because he had not had any imaging. The physical therapist referred Claimant to Jeffrey D. McDonald, M.D., who saw Claimant on February 4, 2000.

15. Dr. McDonald ordered x-rays and an MRI. Based on the results of the imaging and his examination of Claimant, Dr. McDonald diagnosed a left sided disc herniation at C6-7, neural foraminal narrowing at C5-6, and a severe kyphosis at C5-6. Dr. McDonald recommended a three-level anterior cervical discectomy and fusion at C4-5 and C6-7 with internal fixation. Surgery was scheduled, but Claimant's claim was denied and the surgery was cancelled.

16. Surety reversed its denial of the claim in March 2000 and forwarded Claimant's medical records to John W. Swartley, M.D., Surety's in-house physician. Dr. Swartley initially recommended that Surety authorize the surgery, but several months later changed his opinion and recommended that Claimant's case be sent for a panel review. Barbara G. Jessen, M.D., a neurologist, and Scott V. Linder, M.D., an orthopedic surgeon, conducted an independent medical evaluation (IME) of Claimant on June 29, 2000. Their reports are dated the same day.

17. Dr. Jessens report includes a comprehensive review of Claimant's prior medical records, particularly those records pertaining to his lengthy and contentious Washington workers' compensation claim. Based on her examination, patient history, and review of the medical records, Dr. Jessen opined that it was difficult to ascertain what injury Claimant sustained as a result of his November 1999 accident. Claimant did exhibit loss of left biceps and brachioradialis reflexes, but diagnostic studies did not show significant nerve root impingement. Dr. Jessen stated that Claimant's condition was only partly due to the 1999 accident, as Claimant had a preexisting discectomy at C5-6 in addition to significant preexisting degenerative changes. With regard to his preexisting conditions, Dr. Jessen noted:

[Claimant] is a very angry man, and review of the records reveals he had significant pain behavior with apparent symptom magnification following his previous claim. He did not discuss the amount of care he had after his surgery and implied to me that he got an excellent outcome immediately and was asymptomatic subsequently. His history is inconsistent with what is in the medical records.

Defendants' Ex. 7, p. 1038. Dr. Jessen went on to state:

It is questionable whether further curative measures are available. As a neurologist, I am concerned about a three-level fusion, additionally in a man who is a 3-pack a day smoker. It is unlikely he will sustain the type of benefit that he appears to believe he will by further surgery on his spine of whatever degree, but particularly a three-level fusion is problematic in people with the best surgical indications.

Id., at pp. 1038-1039. Dr. Jessen did recommend that Claimant have some further studies, including an EMG, nerve conduction studies, and a CT myelogram to identify whether Claimant had *objective* findings of a *treatable* condition.

18. Dr. Linder was unable to examine Claimant because the doctor required that any recording of the actual examination be by video. Dr. Linder's review was limited to a review of Claimant's medical records. Based on that review, Dr. Linder expressed reservations about the proposed surgery in light of Claimant's smoking habit, the uncertainty of the cause of Claimant's complaints, and the limited success rate (40% to 60%) for three-level fusions. Dr. Linder opined that a three-level fusion would be justified "only with the clearest of indications." *Id.*, at p. 1043. Dr. Linder agreed that additional diagnostic studies should be done.

19. Nerve conduction studies were performed on Claimant on August 7, and were entirely normal. Drs. Linder and Jessen opined in an August 11 letter:

We would thus feel that the odds of surgery successfully alleviating the patient's complaints are extremely tenuous for reasons which include, A) a lack of neurologic findings on physical examination or on electrical studies, B) the presence of well documented significant pain behavior and symptom magnification historically, C) inconsistency between the patient's statements and medical records, D) his three pack per day smoking habit, E) the rather marginal success of three-level cervical fusions under even ideal circumstances.

Jeanne Kelsch Depo., Exhibit 2, p. 24. Drs. Linder and Jessen concluded that Claimant was medically stable and placed him in DRE Category 2 of the AMA *Guides to the Evaluation of Permanent Impairment*, Fourth Ed., (AMA *Guides*, 4th Ed.) and rated him at 5% whole person impairment based upon the permanent aggravation of his preexisting degenerative cervical condition.

20. Surety forwarded both the June 29 IME report and the panels August 11 letter to Dr. McDonald in mid-August. Dr. McDonald responded to the panel report in November. He expressed concern or disagreement with portions of the IME report. Drs. Jessen and Linder each responded to Dr. McDonald's concerns in January. Dr. Linder noted that the concerns he and Dr. Jessen expressed were not absolute contraindications to proceeding with the surgery, but did "represent legitimate and sincere concerns over the decision to proceed . . ." Defendants' Ex. 7, p. 1015. Dr. Jessen took Dr. McDonald's concerns and Dr. Linder's response as an opportunity to review the entire file. She stated that the review "reinforces my initial opinion rather than changing it." *Id.*, at p. 1013.

21. In March 2001, Surety reversed its position and authorized the three-level fusion recommended by Dr. McDonald. Surety's change of position regarding surgery was not based on medical factors.

22. Claimant returned to Dr. McDonald on April 30, 2001. Additional imaging was obtained and Claimant was scheduled for surgery. Claimant was incarcerated at the time of the surgery, and it was rescheduled for August 15, 2001.

23. Post-fusion, Claimant continued to complain of neck pain and loss of range of motion. On February 15, 2002 (five months after surgery), Dr. McDonald made the following chart entry:

At this point [Claimant] is not of the opinion that he will be able to return to work at this time. I have asked him to continue all effort at returning to work, however, and for the next month we will pursue a physical therapy program for his neck to meet these ends. I will see [Claimant] in follow-up after that course of physical therapy. At that time I anticipate recommending an independent medical evaluation, and a return to work at a minimum at light-duty assignment.

Defendants' Ex. 2, p. 74. By late April 2002, Claimant was not improved despite several months of physical therapy.

He remains convinced that he is unable to return to work, even at a light-duty assignment. He continues to have symptoms consisting primarily of low posterior cervical pain, radiating to the interscapular region.

Id., at p. 66. Dr. McDonald went on to note that Claimant's CT scan showed no evidence of neural element compression and the central canal as well as the neural foramina were widely patent at each level. Dr. McDonald asked Claimant to continue physical therapy, and suggested

he might try trigger point injections for his persistent low posterior cervical pain. Dr. McDonald also recommended that Claimant undergo a functional capacities evaluation and an IME. Claimant was to return in three months for x-rays to determine if he had a solid fusion at C6-7.

24. On June 8, Dr. Jessen and Charles J. Larson, M.D., an orthopedic surgeon, conducted an IME of Claimant. At the time of the IME, Claimant was markedly symptomatic, reporting pain at the base of his neck and radiating into his left arm and the second, third, and fourth digits of his left hand. Claimant stated that the pain he experienced was "exactly the same today as it was before he went in for surgery." Defendants' Ex. 7, p. 1003. Based on their review of the medical records, Claimant's history, and their examinations, Drs. Jessen and Larson opined that Claimant was medically stable, and that additional medical care would not be reasonably expected to provide significant relief of Claimant's residual symptoms. They determined that Claimant's condition was due wholly to the 1999 industrial injury, despite the presence of preexisting and concurrent degenerative conditions. They rated Claimant as DRE Category 3 of the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Ed. (*AMA Guides*, 5th Ed.) with 15% whole person impairment. Drs. Jessen and Larson opined that Claimant did have permanent restrictions because of his injury, but that he was capable of light to medium work with a lifting restriction of not more than 25 to 30 pounds on a regular basis.

25. Dr. McDonald received a copy of the IME report, and in August advised Surety that there was still no evidence that Claimant had a complete fusion at C6-7. He recommended that Claimant continue to receive physical therapy, anti-inflammatory medication and muscle

relaxants until a solid fusion could be confirmed. Drs. Jessen and Larson disagreed with Dr. McDonald's recommendation for additional physical therapy, noting that Dr. McDonald had not actually examined Claimant, and their examination showed no palpable spasm or hypertonicity that could be helped with physical therapy. They agreed that use of OTC anti-inflammatories was appropriate. On September 7, Dr. McDonald wrote Surety advising that Claimant's C6-7 fusion remained in question. Further, he believed that the lifting restriction given by Drs. Jessen and Larson was overly aggressive, and that he believed Claimant should lift no more than 20 to 25 pounds on a frequent basis. Dr. McDonald agreed with the 15% whole person impairment awarded by the IME panel.

26. Claimant developed a pseudarthrosis at C6-7, and Dr. McDonald recommended a second surgery. A cardiac arrhythmia was detected, and before Claimant could undergo the surgery, he had a cardiovascular assessment. The cardiac care was a prerequisite to the second surgery at C6-7. On July 10, 2003, Dr. McDonald performed a revision of Claimant's prior C6-7 fusion. By September, Claimant's left upper extremity pain had improved, but he was experiencing pain in the right upper extremity. His neck pain was still present, and not improving. Of greater concern to Dr. McDonald was that Claimant had developed a drooping right eyelid and smaller pupil on the right side. Dr. McDonald diagnosed Horner's syndrome with ptosis and melosia. Dr. McDonald ordered an MRI of Claimant's neck to rule out an anatomic or pathological basis for the Horner's syndrome. The MRI was negative.

27. Claimant returned to Dr. McDonald for follow up in November 2003. Claimant reported posterior neck pain, and an occasional sensation similar to an electric shock at the base

of his neck with certain movements. His right upper extremity complaints continued. In March 2004, Claimant reported the persistence of the same symptoms he reported in November, including pain at the base of his neck, the occasional electrical shock-like pain when he moved his head, constant numbness through his right shoulder and occasional numbness of the left hand. Dr. McDonald noted that Claimant's C6-7 fusion was still incomplete.

28. Claimant returned for a one-year follow-up on July 23, 2004. He was not doing well, reporting increased neck pain radiating bilaterally into his arms. He still reported the jolt of pain like an electrical charge with some movements. Dr. McDonald diagnosed another failed fusion at C6-7. The only treatment Dr. McDonald could offer was another revision of the C6-7 fusion with a posterior stabilization. Dr. McDonald noted that Claimant was scheduled for an IME in the near future and thought it appropriate that he have the IME, as he was stable unless he chose to try another surgery.

29. Dr. Jessen and William R. Pace, III, M.D., an orthopedic surgeon, conducted an IME of Claimant on August 12, 2004. At the time of the IME, Claimant's complaints that related to the 1999 cervical injury included: 1) a constant toothache-like pain in the vicinity of the C7 spinous process; 2) intermittent sharp stabbing pain when turning head; 3) upper extremities falling asleep or becoming paralyzed if left in one position too long; and 4) headaches that spread from the occipital region to the frontal region, occurring two or three times a week. Following a review of the medical records, taking a patient history, and performing exams, the panel opined that:

- Claimant's cervically related complaints were the result of the 1999 injury;

- The only remaining appropriate treatment for Claimant would be a posterior stabilization of the cervical spine at C6-7;
- Claimant was not stable since an additional surgery was planned. Medical stability would not be expected for at least a year following the surgery;
- Claimant was “essentially unemployable” at the time of the IME based on imaging studies and clinical physical findings; and
- Claimant might benefit from some assistance with regard to his anger and depression.

30. Claimant chose to try a third fusion at C6-7 and Dr. McDonald opted to do both an anterior and a posterior approach. The scheduling of the surgery was delayed by the need for cardiac clearance. Dr. McDonald ultimately performed both the anterior and posterior fusion and fixation on February 23, 2005. Claimant was seen eight days after his surgery and was in extreme discomfort from posterior cervical muscle spasm. Dr. McDonald counseled Claimant regarding use of his medications and prescribed some physical therapy to alleviate the muscle spasm. The muscle spasm was much improved on a follow-up visit several days later. By August 2005, Claimant admitted to clear improvement in his condition after the surgery, but was still experiencing interscapular pain and stinging and some numbness and tingling in his upper extremities, bilaterally. Dr. McDonald determined Claimant was medically stable as of October 31, 2005, but did not release him to return to work at that time.

31. Dr. Vincent conducted an IME of Claimant on January 6, 2006, at Surety's request. Claimant advised Dr. Vincent that his condition had worsened since the severe spasms he experienced immediately after the surgery. Complaints included a stabbing and aching

headache, stabbing and burning pain in the posterior neck, aching over the shoulders and numbness and tingling in the upper extremities bilaterally. Claimant described his pain as constant and intense. Following a review of the medical records, taking a history, and performing an examination, Dr. Vincent opined that Claimant's cervical complaints flowing from the several failed fusions were the result of his 1999 injury. Dr. Vincent was very concerned and recommended immediate follow-up for the Horner's syndrome because it could indicate a tumor or aneurism. Dr. Vincent noted that Claimant still had at least one more appointment with Dr. McDonald and so had not reached medical stability. He also thought that a pain clinic to help Claimant manage his chronic pain syndrome would be helpful. Given that he did not find Claimant fixed and stable, Dr. Vincent did not rate Claimant's impairment or impose restrictions.

32. Claimant returned to Dr. McDonald for his one-year follow up on February 17, 2006. Prior to that visit, Dr. McDonald had an opportunity to review Dr. Vincent's IME report. Dr. McDonald found Claimant's medical condition essentially unchanged from his August 2005 visit. Plain films indicated that Claimant might finally have achieved a fusion at C6-7. Dr. McDonald requested a noncontrast CT scan to definitively assess the fusion. The doctor asserted, once again, that Claimant was as fixed and stable as he was ever going to be. Dr. McDonald discussed Dr. Vincent's recommendation that Claimant participate in a pain management program, and Claimant responded with alacrity that he would do no such thing. Dr. McDonald disagreed with Dr. Vincent regarding Claimant's vision problems, and remained convinced that Claimant's Horner's syndrome was the direct result of the multiple cervical

surgeries. Further, if Claimant did have ophthalmoplegia, it could not be related to his industrial injury. Dr. McDonald did refer Claimant for a neurological/ophthalmologic evaluation, however.

33. Dr. McDonald's February 17 chart note and the subsequent CT scan were provided to Dr. Vincent for review. By letter dated April 12, 2006, Dr. Vincent agreed that if Claimant was not interested in pursuing pain management, there was no further curative treatment to offer and he was, indeed, fixed and stable. Dr. Vincent opined that Claimant's impairment rating would remain unchanged at 15% of the whole person. Finally, Dr. Vincent opined that Claimant was capable of medium work, and should avoid work that required maintaining his head in a reading position for long periods, and should be able to move around and change positions freely. He also noted that Claimant would have some limitations for working overhead due to his loss of range of motion. Dr. McDonald agreed with Dr. Vincent's conclusions, except the conclusion that Claimant was capable of medium work. It was Dr. McDonald's opinion that Claimant would be limited to light or sedentary work "due to the acknowledged level of pain." Defendants' Ex. 2, p. 4.

34. Surety wrote Dr. Vincent seeking clarification as to whether Claimant's limitations and restrictions *prior* to his 1999 injury were any different from the restrictions as outlined in Dr. Vincent's April 2006 addendum to his IME report. Dr. Vincent replied that although Claimant had problems with pain following the 1990 surgery, Claimant did ultimately return to his time-of-injury work as a heavy equipment operator. Dr. Vincent opined that

Claimant was capable of performing "at least light work activities." Defendants' Ex. 3, p. 99.

Dr. Vincent went on to state:

There are other problems, however, that may prevent him from exceeding light work activities. The first would be the fact that he does have some symptom embellishment. There is also deconditioning present, and he also has an underlying neurological condition. None of these are related to the injury of record.

Were it not for these conditions, however, he would be capable of medium work at the current time.

Id., at pp. 99-100.

35. Claimant sought assistance from the Industrial Commission Rehabilitation Division (ICRD) on several occasions. ICRD was unable to provide much in the way of meaningful vocational assistance because Claimant had not been released to work.

36. Claimant hired Tom Moreland, a vocational and rehabilitation consultant, to review Claimant's employability in light of his work history and his injuries. Mr. Moreland did not prepare a written report but did testify at hearing. Mr. Moreland reviewed Claimant's extensive medical history, met with him, and obtained information concerning Claimant's work history, educational background, daily activities and perceptions of his physical impairments. Mr. Moreland also communicated with Dr. McDonald by mail seeking clarification regarding Claimant's physical limitations.

37. In a June 14, 2006 letter to Dr. McDonald, Mr. Moreland wrote:

In my review of the medical records, it appears as though you strongly disagreed with Dr. [Vincent's] assessment that the client could perform medium work. In speaking with counsel, and [Claimant], it appears as though you felt he could

perform sedentary work. Sedentary work as defined by the U.S. Department of Labor is defined as follows:

“SEDENTARY WORK: Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.”

Additionally, [Claimant] tells me that he, on a normal day, requires a certain amount of “down time.” Meaning that he needs to take rest periods where he needs to lie down completely for upwards to [sic] 30 minutes at a time. These breaks take place at intermittent and unpredictable times when the pain is overwhelming, according to [Claimant]. It would be very important to know if there is a medical basis. He also complains of headaches, which require him to be in a dark room for a period of time.

Do you agree that he is capable of performing sedentary work, and his complaints as indicated above would be appropriate?

Claimant's Ex. 1, p. 1. The letter then provides an opportunity for Dr. McDonald to mark either “YES” or “NO,” and sign and date his response. Dr. McDonald checked “YES,” and signed the letter on June 19, 2006.

38. Mr. Moreland testified that based on a sedentary work capacity and Claimant's need to rest at intermittent and unpredictable times, and his need to retreat to a darkened room for his headaches, there was no work that Claimant could perform on a continuous or sustained basis.

39. In his hearing testimony, Mr. Moreland also took issue with a number of jobs that had been identified as suitable by Surety's vocational consultant and approved by Dr. Vincent, including: dietary aide, auto sales lot attendant, janitor, fast food grill team member, hotel desk

clerk, and surface mount solderer. Mr. Moreland had concerns about the suitability of these positions because many of them were classified as light or medium work capacity.

Mr. Moreland acknowledged that individual jobs within the general category might require more or less physical exertion, but without knowing whether these positions were for *particular* jobs, it seemed likely that they exceeded Claimant's physical capacity. Other positions identified by Surety's vocational specialist and approved by Dr. Vincent were either semi-skilled or required customer service skills, neither of which were a good fit for Claimant. Mr. Moreland admitted that if Dr. Vincent's restrictions were used, there were jobs regularly available that were within Claimant's physical ability and skill set.

40. Surety retained Douglas N. Crum, CDMS, to prepare a disability assessment of Claimant -- essentially a quantification of Claimant's pre-injury and post-injury employment options. Mr. Crum reviewed Claimant's medical records, the records of ICRD, Claimant's deposition, and spoke with Employer. Mr. Crum attempted to meet with and interview Claimant, but was denied access. Mr. Crum prepared a lengthy written report, dated October 16, 2006, and was deposed post-hearing.

41. Mr. Crum conducted an extensive review of Claimant's medical history, which will not be repeated here. Mr. Crum found Claimant's work history more problematic, as his deposition testimony regarding his employment history is significantly at odds with his social security earnings record -- the only verifiable evidence of Claimant's employment history. Mr. Crum also noted that Claimant's job application for Employer was not consistent with his work history as provided in his deposition testimony.

42. Mr. Crum determined that, until he went to work for Employer in the summer of 1999, Claimant had not really worked since his 1989 industrial injury, earning only \$1,722 in that ten-year period before he went to work with Employer. Based on Claimant's work history and his medical history during this period, Mr. Crum determined that Claimant was employable only in light or sedentary occupations in the years leading up to his work with Employer. Mr. Crum opined that Claimant's eighteen weeks of work for Employer did not demonstrate that Claimant was capable of working beyond the light-to-sedentary range, and in fact, proved that he could not.

43. Mr. Crum concluded that, based upon the restrictions provided by both Drs. McDonald and Vincent, Claimant could return to work in light or sedentary work -- the same level of physical exertion he was capable of following his first cervical surgery in 1990. Because Claimant sustained no reduction in his ability to engage in gainful work as a result of the 1999 accident, Mr. Crum determined that Claimant had sustained no disability in excess of his impairment as a result of that accident.

44. Surety received the first notice of Claimant's injury on January 20, 2000. The notice of injury listed the date of injury as December 30, 1999, and alleged a shoulder injury. A letter from Employer outlining its concerns with the validity of the claim accompanied the notice of injury. Employer's concerns included inconsistencies regarding the body part that was injured and the date that it occurred. Claimant's version of events was substantially at variance from that of his co-workers. Further, Claimant had not returned to work, and was calling

frequently telling Employer that he could not return to work because of his injury, while the medical provider was stating that there was no reason Claimant could not work.

45. Surety immediately turned the claim over to one of its investigators. The investigator spoke with Claimant, Bill Steinpreis, Employer's shop supervisor, John Davis, Employer's mechanic, and Lea and Jim Rigby, co-owner and superintendent respectively. The investigation report was forwarded to the attorney for Surety in mid-February.

46. Surety denied the claim on March 7, 2000, based on inconsistencies between and among the statements of Claimant, witnesses, and Employer, questions as to the date of injury, and concern regarding the role played by Claimant's preexisting conditions. Despite the denial, Surety forwarded the claim to its in-house physician for review of the request for surgery that was pending at the time the claim was denied. Dr. Swartley recommended that the fusion be authorized.

47. Counsel for Claimant contacted Surety in late March, advising Surety that he was representing Claimant, and asking Surety to reconsider its denial. Surety replied in mid-April that it was standing on its earlier denial, citing to Claimant's failure to provide complete medical information. Surety advised that once it received releases for all of Claimant's prior medical providers, it would re-examine the denial.

48. Surety reversed its position and accepted the claim in early May. Surety immediately paid Claimant's past time-loss benefits (TTDs) and the costs of the medical care Claimant had received. Dr. Swartley once again reviewed Claimant's medical records and recommended that in light of Claimant's previous fusion and the invasive nature of the proposed

surgery, Surety should refer Claimant for a panel evaluation. Drs. Jessen and Linder conducted the panel exam, expressed strong reservations about proceeding with the surgery, determined Claimant was medically stable, and gave him an impairment rating.

49. Based on the panel report, Surety ceased paying Claimant TTD benefits, and began paying out his impairment benefits (PPI). Surety paid PPI benefits until March 21, 2001, when it authorized the surgery recommended by Dr. McDonald. Surety properly recast the PPI benefits that it had been paying as TTDs, and continued paying TTDs until Surety learned that Claimant had not had the surgery. TTDs were restarted on August 15, when Claimant was scheduled for surgery. In fact, the surgery did not occur until August 22. Surety continued to pay TTD benefits until June 20, 2002, when Claimant was found to be medically stable by the second panel of physicians, consisting of Drs. Jessen and Larson. As soon as Surety received the panel report, it ceased paying TTD benefits and began paying out PPI benefits.

50. Claimant continued to receive PPI benefits until July 9, 2003, when he had a second cervical surgery. Thereafter, Surety paid TTD benefits until November 7, 2005, the date that Surety received notice from Dr. McDonald that Claimant was medically stable from his last surgery. At that time, Surety voluntarily paid an additional 5% PPI pending a panel evaluation and a determination whether Claimant sustained additional impairment as a result of the last surgery.

51. Ultimately, Dr. Vincent and Dr. McDonald agreed that Claimant's impairment did not increase as a result of the third cervical surgery, and remained at 15% of the whole person. In total, Surety paid PPI benefits based on 20% whole person impairment, thus over-

paying PPI benefits by approximately \$5,500. By April 30, 2006, Claimant had received payment for all PPI benefits to which he was entitled, and an additional 5%, and Surety stopped paying benefits.

52. In June 2003, following his first cervical surgery related to the 1999 accident, Drs. Jessen and Larson rated Claimant's impairment from the 1999 accident at 15% whole person. Claimant was not rated following his second surgery because he was never medically stable. In the spring of 2006, Dr. Vincent determined that Claimant was medically stable and that his total permanent impairment arising from the 1999 accident remained at 15% whole person. In a note dated May 1, 2006, Dr. McDonald agreed with Dr. Vincent's impairment rating. Dr. McDonald later expressed a contrary opinion in an October 2, 2006 letter to Claimant.

53. The 15% whole person impairment awarded by Drs. Jessen, Larson, and Vincent is consistent with DRE Category III impairment as set out in the *AMA Guides*, 5th Ed. Dr. McDonald initially agreed with this rating, and although he later reconsidered, he provided no rating and no analysis of how he would have determined a rating. Claimant sustained a 15% whole person impairment of his cervical spine as a result of his 1999 industrial accident, which amount has been paid in full by Surety.

54. Claimant now has Horner's syndrome which involves drooping in his right eyelid and a smaller pupil in that eye. Dr. McDonald attributes the Horner's syndrome to the three cervical surgeries he performed. According to Dick L. Vester, O.D., the optometrist who examined Claimant, there was no loss of visual acuity as a result of the Horner's Syndrome.

Claimant did, according to Dr. Vester, sustain some loss of visual field as a result of the syndrome, which Dr. Vester rated in conformity with the *AMA Guides*, 5th Ed., determining that Claimant had 37% whole person impairment as a result of the loss of visual field. However, total loss of vision in one eye is a statutory benefit pursuant to Idaho Code § 72-428, and is only rated at 150 weeks, or 30% whole person. Claimant's loss of *some* visual field in *one* eye must necessarily result in impairment significantly less than the total loss of vision in one eye. The Referee finds that Claimant is entitled to 5% whole person impairment for his loss of field of vision in his right eye resulting from his Horner's Syndrome. Surety overpaid Claimant's PPI for his cervical injuries by 5%. The combined value of the two impairments is 19%. Claimant has already been paid impairment of 20%, so Claimant has been fully compensated, in fact overcompensated, for his permanent impairment stemming from his 1999 accident.

R., pp. 44-65.

55. The Commission addressed the issue of permanent impairment, noting,

"Permanent impairment" is any anatomic or functional abnormality or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating of permanent impairment)" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

56. As to the cervical injury, the Commission found Claimant sustained a 15% whole person impairment as a result of the 1999 industrial accident which had been fully paid by the Surety based upon the opinions of Drs. Jessen, Larson and Vincent with a concurrence by Dr. McDonald in a note dated May 1, 2006, and that that rating is consistent with the DRE Category III impairment as set out in the *AMA Guides*, 5th Edition.

57. The Commission found Claimant is entitled to 5% whole person impairment for loss of field of vision in his right eye resulting from Horner's Syndrome, noting that the impairment rating given by Dick L. Vester, O.D., an optometrist, for loss of visual acuity in one eye was greater than loss of total vision in one eye pursuant to Idaho Code § 72-428. The combined value of the cervical impairment of 15% whole person and the 5% for the Horner's syndrome is 19%. The Commission noted that Claimant is already been paid impairment of 20% so Claimant had been fully compensated, in fact, overcompensated for his permanent impairment from the 1999 accident.

58. As to disability, the Commission summarized the law, stating,
The definition of "disability" under the Idaho workers' compensation law is:

... a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Idaho Code § 72-102 (10). A permanent disability results:

when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected.

Idaho Code § 72-423. A rating of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors. Idaho Code § 72-425. Among the pertinent nonmedical factors are the following: the nature of the physical disablement; the cumulative effect of multiple injuries; the employee's occupation; the employee's age at the time of the accident; the employee's diminished ability to compete in the labor market within a reasonable geographic area; all the personal and economic circumstances of the employee; and other factors deemed relevant by the commission. Idaho Code § 72-430.

59. As to total permanent disability, the Commission summarized the law stating,

A Claimant may establish that he is totally and permanently disabled in one of two ways.

First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. See *Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997).

When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001) citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

They are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.

Id. 136 Idaho at 584, 38 P.3d at 622. Although the issue as stated at the outset of this proceeding was couched in terms of the first methodology, Claimant actually argued in his briefing that he was totally and permanently disabled as an odd-lot worker.

60. An employee may prove total disability under the odd lot worker doctrine in one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or, (3) by showing that any efforts to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging & Const.*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995). Claimant has failed to make a *prima facie* case that he is an odd-lot worker.

61. The Claimant had not worked since the 1999 injury. In fact, Claimant made no meaningful attempts to find work sine his 1999 industrial injury. Claimant's several fleeting contacts with ICRD staff were undertaken only to provide an appearance that he was interested in returning to work. He made it perfectly clear to ICRD staff, and to his doctors, that he did not believe he could work. Neither Mr. Crum nor Mr. Moreland were retained to assist Claimant in actually finding a job.

62. Claimant's odd-lot argument would hence be based upon the futility requirement that it would be futile for him to even look for work. In discussing the testimony, the Commission concluded that Mr. Moreland, Claimant's expert, was not persuasive. The problem with the limitations used and premised upon by Mr. Moreland is that they were largely concocted by him, not the physicians involved in Claimant's case.

Dr. McDonald deferred to an IME panel for Claimant's final impairment rating and work restrictions. Dr. Vincent did the rating and imposed the following restrictions:

- Claimant was capable of *medium* work;
- Claimant should avoid work that required maintaining his head in a reading position for long periods of time;
- Claimant would have difficulty with over-head work; and
- Claimant needed to move around and change positions freely.

Dr. McDonald agreed with everything in Dr. Vincent's evaluation *except* Claimant's physical work capacity, which he rated to be *light to sedentary*. R., pp. 64-68.

63. The Commission concluded Claimant failed to carry his burden of proving that he is totally and permanently disabled as an odd-lot worker. It stated, "Claimant has not sought work, has not enlisted the aid of others to look for work on his behalf, and there is no persuasive evidence that it would be futile for Claimant to even look for work." R., p. 69.

64. As to the issue of disability in excess of impairment, the Commission correctly noted that whether Claimant has sustained disability in excess of impairment turns upon

Claimant's ability to work before the 1999 accident is compared with his ability to work after the accident.

65. Claimant averred he was performing heavy work at the time of his 1999 injury and that is proof enough that he was capable of performing heavy work before his injury. Relying on Dr. McDonald's check mark, Claimant asserts he is now limited to sedentary work, thus, as stated in his brief: "One thing is clear, if [Claimant] is not totally and permanently disabled, he has substantial disability in excess of his impairment." Claimant's Post-Hearing Memorandum, p. 9. R., p. 70.

66. On the other hand, Mr. Crum opined that claimant's lack of work history in the ten years leading to the 1999 accident, together with the short period of time he worked for Employer before his injury, is proof that Claimant could not perform the heavy labor that had been his primary occupation, if not the source of his income. Based on the records he reviewed, including Claimant's work history, his medical records, and the proceedings from his Washington workers' compensation case, together with Claimant's own testimony, Mr. Crum opined that prior to the 1999 injury, Claimant was functioning in a light or sedentary capacity. R., p. 70.

67. Claimant's work capacity following his 1999 injury is also disputed. Dr. Vincent initially determined that Claimant could perform medium work. Dr. McDonald disagreed and thought Claimant could perform light-to-sedentary work. Dr. Vincent later clarified that Claimant might not be able to perform medium work, but it was because of other problems not related to the industrial injury. He believed that but for those other issues, Claimant was capable

of medium work. Taking those other issues into account, Claimant could perform "at least *light* work activities." Def. Ex. 3, p. 99. R., p. 71.

68. Each theory as to Claimant's work capacity prior to his 1999 injury has some merit, but at the end of the day, each is speculation. As to Claimant's work capacity following his 1999 injury, the weight of authority supports a finding that Claimant could work at either light or sedentary occupations, as both Drs. McDonald and Vincent find common ground there, along with Mr. Crum. R., p. 71.

69. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with nonmedical factors, has reduce the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d 1 (1986).

Claimant has failed to carry his burden of proving disability in excess of his impairment. Claimant offered no substantial competent evidence to support his assertion that he was capable of heavy or medium work on a sustained basis before his 1999 injury. Absent proof that he could perform at a medium or heavy level for a sustained period, Claimant cannot establish that his capacity for gainful activity has diminished in any appreciable way as a result of the 1999 industrial accident. R., pp.71-72.

II.

RESTATED ISSUES PRESENTED ON APPEAL

1. Whether the Commission's conclusion that Claimant is entitled to whole person impairment of 19% for his injuries arising from the 1999 industrial accident is supported by substantial and competent evidence.
2. Whether the Commission's conclusion that Claimant has not sustained any disability in excess of 19% impairment as a result of his 1999 industrial accident is supported by substantial and competent evidence.
3. Whether Claimant can argue on appeal whether or not the Commission abused its discretion by not retaining jurisdiction when the issue was never before raised.
4. Whether the Commission's conclusion that Claimant is not entitled to attorney's fees pursuant to Idaho Code §72-804 is based upon substantial and competent evidence.

III.

WHETHER RESPONDENTS ARE ENTITLED TO ATTORNEY FEES ON APPEAL

Respondents claim entitlement to attorney fees on appeal pursuant to I.A.R. 11.1, which directs the Court to award expenses, including attorney fees, incurred because of an appeal not reasonably grounded in fact or law and filed for an improper purpose. *Shriner v. Rausch*, 141 Idaho 228, 232, 108 P.3d 375, 379 (2005). Attorney fees are awardable under I.A.R. Rule 11.1 when a party requesting them proves (1) the other party's arguments are not well-grounded in fact, warranted by existing law, or made in good faith, and (2) the claims for an improper

purpose, such as unnecessary delay or increase in the cost of litigation. *Frank v. Bunker Hill Co.*, 142 Idaho 126, 132, 124 P.3d 1002, 1008 (2005).

IV.

STANDARD OF REVIEW

The Court may set aside an order or award by the 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, 345-46, 63 P.3d 469, 471-72 (2003). The 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.

When hearing an appeal from a decision of the Idaho Industrial Commission, this Court must view the facts and all inferences therefore most favorably to the party who prevailed before the Commission. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 969, 772 P.2d 173 (1989). When this Court reviews the Commission's factual findings, we must affirm if those findings are supported by substantial and competent evidence. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987).

In addition, it is within the Commission's province to decide what weight should be given to the facts presented and conclusions drawn from those facts. The Commission's

conclusions on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999).

Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.*

V.

ARGUMENT

A. **THE COMMISSION FINDING THAT CLAIMANT HAS SUSTAINED A 19% PERMANENT PARTIAL IMPAIRMENT IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.**

Claimant readily admits that determination of physical impairment is a question of fact for the Commission. What Claimant is arguing are weight and credibility issues between various opinions in the record below. Claimant again on appeal is attempting to attack the credibility of Ronald L. Vincent, M.D. Dr. Vincent, a board certified neurosurgeon, licensed in the State of Washington, has practiced there since 1971. Depo. of Ronald L. Vincent, M.D., Exhibit 1. He has been board certified since November 1973 in neurological surgery. *Id.*, p. 6, ll. 7-12. Dr. Vincent was familiar with Claimant as he had performed an intercervical disectomy at the C5-6 level in 1990 on Claimant. *Id.*, at 7, ll. 9-17. Claimant was given a Category II impairment for that procedure. *Id.*, at 7, 11-18-25. On April 12, 2006, Dr. Vincent wrote a report stating that Claimant's impairment for the December 30, 1999, injury was 15% whole person impairment based upon the *AMA Guides to Evaluation of Impairment*, 5th Edition. *Id.*, Ex. 2 at

00103. Dr. Vincent clarified his opinion in his correspondence of June 27, 2006, to Jeanne Kelsch, Senior Claims Examiner, Idaho State Insurance Fund, writing,

At this time, he is capable of performing at least light activities. There are other problems, however, that may prevent him from exceeding light work activities. The first would be the fact that he does have some symptom embellishment. There is also the condition present, and he also has an underlying neurological condition. None of these are related to the injury of record.

(Emphasis supplied.) *Id.*, at Ex. 2, p. 00099. Dr. Vincent testified that Claimant has chronic pain and had it before and after his surgery in 1990 and Dr. Vincent considered it still a part of his condition. Depo. of Ronald L. Vincent, M.D., p. 22, ll. 1-15. Jeffrey McDonald, M.D., agreed with the impairment rating and recommendations and conclusions of Dr. Vincent. Def. Ex. 2, at 00004.

The court has consistently stated it does not scrutinize the weight and credibility of evidence relied on by the Commission and will not disturb any findings regarding weight and credibility unless they are clearly erroneous. *Soto v. J.R. Simplot*, 126 Idaho 535, 539, 87 P.2d 1043, 1046 (1994); *Page v. McKean Foods, Inc.*, 2008 Opinion No. 19 (January 31, 2008). A physician's opinion is advisory to the Industrial Commission, which is the ultimate fact-finder, and will determine the extent of impairment based on all of the evidence obtained and other pertinent factors. *Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 756, 769 P.2d 1122, 1128 (1989). The Commission determined that Claimant had sustained a 15% whole person impairment of cervical spine based upon opinions of Drs. Jessen and Larson, Dr. Vincent,

and Dr. McDonald's agreement with Dr. Vincent's impairment rating. The finding is supported by substantial and competent evidence.

B. THE COMMISSION'S FINDING THAT CLAIMANT HAS NOT SUSTAINED DISABILITY IN EXCESS OF HIS 19% IMPAIRMENT IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

Claimant must bear the burden of proof in establishing that he is disabled in excess of impairment. *Bennett v. Clerk Herford Ranch*, 106 Idaho 438, 440, 680 P.2d 539, 541 (1984). The issue before the Court is whether the Commission's determination that Davidson failed to carry his burden of proving that he was disabled in excess of the 19% whole person impairment is supported by the factual record. *McCabe V. Jo-Ann Stores, Inc.*, 2007 Opinion No. 142 (December 27, 2007).

Under the Idaho worker's compensation law a "disability" is defined as "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors." I.C. § 72-102(11).

A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." I.C. §72-425.

As far as the medical factor of disability is concerned, Davidson was assigned a permanent physical impairment rating of 19% whole person. See I.C. § 72-422. However, a claimant's impairment rating is only one, but not the exclusive, element considered in determining permanent partial disability. I.C. §§ 72-425, 72-427. A disability rating may

exceed a claimant's impairment rating after the nonmedical factors are taken into consideration.

Baldner v. Bennett's, Inc., 103 Idaho 458, 461, 649 P.2d 1214, 1217 (1982).

Idaho Code § 72-430(1) identifies the essential nonmedical factors: the nature of the physical disablement; the cumulative effect of multiple injuries; the occupation of the employee; the employee's age at the time of accident; all personal and economic circumstances of the employee; and other factors as the Commission may deem relevant.

This Court has long rejected the assertion that whenever a permanent physical impairment rating is given, the disability rating must exceed the impairment rating. *Houser v. S. Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 445, 649 P.2d 1197, 1201 (1982). Although expert testimony on this issue need not be presented, the burden of proof is upon the claimant to provide disability in excess of her impairment rating. *Bennett*, 106 Idaho at 440, 680 P.2d at 541.

This Court has previously held that "the test for determining whether a claimant has suffered permanent disability greater than medical impairment is *not whether claimant is able to return to work at some employment.*" *Bennett*, 106 Idaho at 440, 680 P.2d at 541 (emphasis added). Rather the correct test is whether, after consideration of the pertinent nonmedical factors outlined in Idaho Code § 72-430, the claimant's "probable future ability to engage in gainful activity" is accurately reflected by the impairment rating, *Houser*, 103 Idaho at 445, 649 P.2d at 1202; *Graybill v. Swift & Co.*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988).

The Commission found as a fact that Claimant could work at a light or sedentary occupation in accordance with the medical evidence from Drs. McDonald and Vincent and expert vocational assessment of Mr. Crum.

The SIF Fund retained Douglas N. Crum, CDMS, as a vocational expert. Crum is a highly experienced professional in his expertise. Depo. of Douglas N. Crum, Depo. Ex 1. Crum prepared a 60-page report. Def. Ex. 16; Depo. of Douglas N. Crum; Ex. 2. Crum is of the opinion that there is no basis to conclude that Claimant has sustained any reduction in his ability to engage in gainful activity and that Claimant has sustained no permanent partial disability in excess of his permanent partial impairment rating for the 1999 industrial injury. Def. Ex. 16 at 01217. In addition, Dr. Vincent approved jobs that are within Claimant's current and preexisting capacities. The jobs Dr. Vincent approved are regularly available in good quantities in Claimant's labor market. *Id.* at 01216.

Doug Crum never met with Claimant. He requested of Mr. Verbillis to meet with Claimant several times. He was not permitted. He would have preferred to meet with him but it does not affect his opinion. Depo. of Douglas N. Crum, p. 9, l. 16 – p. 10, l. 2.

Tom Moreland testified at the hearing. Moreland is a frequent Claimant expert. Moreland did not do a written report. He did not speak with Dr. McDonald. He did not ask Dr. McDonald if Claimant could do light work. Moreland agreed that Dr. McDonald agreed with Dr. Vincent that Claimant was capable of light and sedentary work. Moreland did not do a labor market survey. He acknowledged that Claimant has not done any type of job search. Moreland did not provide Claimant with assistance regarding a job search. Moreland admitted that Claimant is employable if he can perform light duty work. Hr. Tr. p. 143, ll. 11-15. His opinion of the level of Claimant's ability to work is based, in part, upon Claimant's self-described limitations and conditions. *Id.* at ll. 16-20. The problem with Moreland's analysis is

that he has ignored Dr. McDonald's approval of light duty work entirely. Instead, he focused on a sedentary work limitation with Claimant's self-imposed and perceived restrictions. Vocational opinions not based upon actual medical restrictions are neither objective nor credible. Finally, Moreland was unfamiliar with Claimant's preexisting history and conditions to the extent necessary. He admitted that he looked at some of the Washington L&I file from 1988 and scanned a portion of it. *This, of course, contains a multitude of facts regarding a number of* vocationally related issues. Moreland's testimony was not persuasive.

There was a dispute as to Claimant's prior work ability before the 1999 injury. The Commission correctly determined that Claimant offered no substantial and competent to support his assertion that he is capable of heavy or medium on a sustained basis before the 1999 injury. Indeed, the weight of evidence was that Claimant had little earnings from his 1988 injury until he went to work for the Employer in a job in which he sat and operated heavy equipment vehicles. Claimant's disability focus was on disagreement with limitations preinjury and post-injury, which is a factual issue. The Commission's decision was based upon the medical factor per testimony and records of Dr. Vincent and Dr. McDonald, and nonmedical factors including but not limited to: (1) preexisting limitations; (2) effect of preexisting injuries; (3) Claimant's work history; (4) Claimant's earning history per reported income for Social Security (Def. Ex. 1); (5) Claimant's employment history; (6) Claimant's age; (6) vocational work of Douglas Crum (Depo. of Douglas N. Crum); (7) Claimant's return to work attempts; and a myriad of other relevant factors.

C. RETENTION OF JURISDICTION WAS NOT AN ISSUE BEFORE THE INDUSTRIAL COMMISSION AND CANNOT BE RAISED ON APPEAL.

Claimant requested pursuant to Rule XII³ of the Rules of Practice and Procedure of the Industrial Commission calendaring on the issues of: (1) whether Claimant is totally and permanently disabled; (2) apportionment; (3) impairment disability; and (4) attorney's fees. R., p. 34.

Respondents Riverland and SIF filed a response requesting additional issues of apportionment be heard. R., p. 36. Respondent/ISIF filed a response requesting certain additional issues to be heard, not including retention of jurisdiction. R., p. 39.

In *Horton v. Garrett Freightlines, Inc.*, 106 Idaho 895, 896, 684 P.2d 297, 298 (1984), this court stated,

Idaho's workmen's compensation statutes are designed to provide "sure and certain relief for injured workmen and their families. . ." I.C. Sec. 72-201. This Court has consistently held that legislative policy requires our statutes be construed "liberally in favor of the claimant." *Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 672 P.2d 1055 (1983) (82 IWCD 2 at 496); *Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977); *Miller v. FMC Corp.*, 93 Idaho 695, 471 P.2d 550 (1970); *Kiger v. Idaho Corporation*, 85 Idaho 424, 380 P.2d 208 (1963). In keeping with that legislative intent, it is a prudent practice for the Industrial

³ J.R.P. Rule 8.C is the applicable rule. It states in part, "1. Unless otherwise scheduled for a hearing under these rules, no case shall be set for hearing until the time for filing an answer has passed and a party shall have filed with the Commission and served on all other parties a written request for hearing which shall contain the following: . . . (b) Clear and concise statement of the factual and legal issue or issues which the party desires the Commission to hear and decide." (Emphasis added.)

Commission to retain jurisdiction in cases where, as here, it is clear that there is a probability that medical factors will produce additional physical impairment in the future. In essence, we approved of this practice in *Brooks v. Duncan*, 96 Idaho 579, 583, 532 P.2d 921, 925 (1975); stating that limitation periods for filing claims “do not bear upon the authority of the Commission to retain jurisdiction regarding an industrial claim.

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.

Reynolds v. Browning Ferris Industries, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988).

It is important to note that in both *Horton* and *Reynolds* Claimant requested retention of jurisdiction. This was an issue for consideration by the Commission. Here it was not an issue in front of the Commission and cannot be raised on appeal. It is well-established that, in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error. *Whitted v. Canyon County Board of Com’rs*, 137 Idaho 118, 121-22, 44 P.3d, 1173, 1176-77 (2002). An issue raised for the first time on appeal will not be considered by the Supreme Court. *Cristo Viene Pentecostal v. Paz*, 160 P.3d 743, 144 Idaho 304 (2007). *See also, Painter v. Potlatch Corp.*, 138 Idaho 309, 314, 63 P.3d, 435, 440 (2003). Since the issue of retention to jurisdiction was not raised as an issue for consideration by the Industrial Commission and there was no adverse ruling, it cannot be considered here.

Claimant’s pain complaints for the claim of July 11, 1988, are well documented as continuing through around August of 1997 when that claim was finally closed. Def. Ex. 4. The medical evidence in the record for this injury is not in dispute as to the nonprogressive nature of

Claimant's condition. He was deemed stable by Dr. McDonald, his treating neurosurgeon, after the third cervical surgery. Claimant refused further treatment including a pain clinic and trigger point injection as recommended by Dr. Vincent and Dr. McDonald. Def. Ex. 2 at 00006. He was then found stable without in need of further medical treatment by Dr. Vincent. Def. Ex. 3 at 00103. Likewise, his treating physician, Dr. McDonald, concurred. Def. Ex. 2 at 00004. There is simply no evidence that Claimant's impairment is progressive, and therefore, even if the Commission had heard the retention of jurisdiction issue, it would have likely not retained jurisdiction.

D. THE COMMISSION'S FACTUAL FINDINGS REGARDING THE ATTORNEY FEE ISSUE IS BASED UPON SUBSTANTIAL AND COMPETENT EVIDENCE.

Idaho Code §72-804 provides for an award of reasonable attorney's fees when the Commission determines that the employer contested a claim for compensation without reasonable grounds. The question of whether grounds exist for awarding a claimant attorney's fees is a question of fact for the Commission; therefore, the Court will uphold the Commission's determination on this issue if supported by substantial and competent evidence. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976); *Wutherich v. Tertling Co., Inc.*, 135 Idaho 593, 595, 21 P.3d 915, 917(2001).

The arguments on the attorney's fees issues at the Commission level were factually complicated. On appeal Claimant's argument is limited to the initial denial. Appellant's Brief, pp. 16-18. The Commission found that after Claimant's filing of the claim there was confusion

about the date of the injury, the type of injury, inconsistency in witness testimony, and there was a lapse in time from the date of injury to the filing of the claim. These findings support the Commission's conclusion that the Employer/Surety actions were reasonable.

Three time lines regarding processing of this claim set forth the history of acceptance of the claim. Depo. of Jeanne Kelsch, Depo. Ex. 3 pp. 11-12; *Id.* at Depo. Ex. 2, p. 26; Depo. Ex. 3 pp. 25-29.

On January 20, 2000, the Surety received notice of injury and a letter dated January 14, 2000, from the Employer requesting that the claim be investigated. *Id.*, Ex. 3 at 25; *Id.*, at 57.

Lea Rigby with the Employer informed the SIF that Claimant told her on January 3, 2000, that he was injured on December 30, 1999. She told him to immediately go to the doctor. Claimant also indicated that he did not tell her earlier as he had told the mechanics. She spoke with the mechanics who indicated that Claimant pulled a muscle in his shoulder on the 23rd of November, 1999, but continued to work. He worked part-time due to lack of work through the month of December 1999. Ms. Rigby spoke with Mindy at North Idaho Immediate Care, Claimant's medical treater, on January 14, 2000, and was informed there was no medical reason why Claimant cannot work. *Id.*

The Surety initiated investigation on February 3, 2000. On that day Employer told the SIF that it has serious doubts that Claimant's injuries were a result of his November 23, 1999, accident. On February 4, 2000, the case was assigned to an investigator who contacted the Employer, coworkers and Claimant to take statements. At that time there was a discrepancy as to what date the incident possibly occurred and what happened. Larry Gardner, investigator,

prepared an investigative report detailing interviews with Claimant, Bill Steinpreis, shop foreman for the Employer, John Davis, mechanic and coworker, and Lea Rigby, coowner of Employer, and Jim Rigby, superintendent. *Id.* pp. 46-52. Issues were raised regarding when the alleged accident happened and possible physical injury. On March 13, 2000, Bill Steinpreis, Claimant's supervisor, called the SIF stating he could not have been injured on the dates claimed because he did not work those days. *Id.*, at 26. About that time the Surety became aware of preexisting medical issues and sent a priority request to Washington L&I for records on March 13, 2000, and to Sacred Heart. On March 14, 2000, the Surety denied the requested surgery as the claim was denied. On March 20, 2000, the Surety received a letter dated March 13, 2000, from the Employer requesting that he return to work as he had a light duty work release from North Idaho Immediate Care. Claimant notified the Employer subsequently that he is not released per Dr. McDonald. The Employer contacted the Surety on April 4, 2000, indicating that Dirk from IC (Industrial Commission) showed her a medical report that indicated it (the injury) was not related to the alleged incident.

On April 13, 2000, the Surety contacted Claimant's attorney stating its standing on the original denial of March 7, 2000. The Surety was aware that Claimant sought medical treatment for a cervical condition up through and possibly later than 1995. That treatment was not reflected in a list of physicians he provided that he had seen. Request was made again for a complete list of medical providers Claimant has seen. Claimant was notified that the Surety will reevaluate upon receiving the information. Immediately a Complaint was received by the SIF and referred the next day to outside counsel. On May 9, 2000, the Surety issued checks for total

temporary disability to Claimant due from January 5, 2000, to May 9, 2000, started paying regular total temporary disability benefits and set up a panel evaluation to address medical issues and surgery. *Id.*, Ex. 2 at 26.

Factual disputes surrounding the acceptance of the claim cannot be said to be unreasonable and were not found to be unreasonable by the Commission. The test for when attorney's fees are awardable are not judged by hindsight. *Gordon v. George R. White Bark Processing*, 2006 IIC 0582, 06 IWCD_____, (2006). The Commission's decisions on the attorney's fees issues and specifically the initial denial were based upon competent and substantial evidence.

E. RESPONDENTS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL.


Respondents request attorney fees on the grounds that Appellant has done nothing more than ask the court to re-weigh the evidence. There is substantial competent evidence supporting the decisions of the Commission. An award is proper in such a case where the court is again asked to re-weigh the evidence and the appeal has done nothing more than to needlessly increase the cost of litigation. I.A.R. 11.1. In this case Claimant attempts to raise a credibility issue when there is no such issue. There is no merit in this argument. It is unjustified by the facts and records. Therefore, attorney fees are awardable to the Respondents as these proceedings have been instituted in this court and continued without reasonable grounds. *See, Rivas v. K.C. Logging*, 134 Idaho 603, 609, 7 P.3d 212 (2000).

VI

CONCLUSION

The Industrial Commission findings are based upon substantial and competent evidence. Claimant merely asks the Supreme Court to re-weigh the evidence and credibility. The Industrial Commission's orders must be affirmed.

RESPECTFULLY SUBMITTED this 16th day of May, 2008.


H. JAMES MAGNUSON
Attorney for Respondents

AFFIDAVIT OF MAILING

STATE OF IDAHO)
)ss.
County of Kootenai)

H. JAMES MAGNUSON, being first duly sworn on oath, deposes and states as follows:

That I am and at all times hereinafter mentioned was a citizen of the United States and a resident of the State of Idaho, over the age of 21 years, and not a party to this action; that I served the RESPONDENTS' BRIEF in the above-entitled action upon the attorney for the Claimant/Appellant and upon the attorney for the Respondent State of Idaho, Industrial Special Indemnity Fund in the above matter as follows:

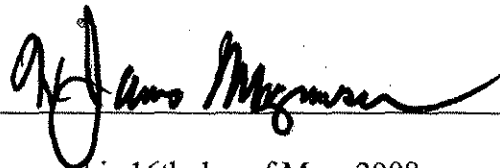
Michael J. Verbillis, P.A.
601 E. Sherman Avenue
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Thomas W. Callery
Jones, Brower & Callery, P.L.L.C.
P. O. Box 854
Lewiston, ID 83501

by depositing in the United States mail, with postage prepaid, two true copies of said Respondents' Brief to each on the 16th day of May, 2008, addressed to said attorneys as hereinabove set forth.


Further, on said date, the original and seven copies of said Respondents' Brief were deposited in the United States mail, with postage prepaid, addressed to:

Mr. Stephen W. Kenyon
Clerk of the Supreme Court
451 W. State Street
P. O. Box 83720
Boise, ID 83720-0101



SUBSCRIBED AND SWORN to before me this 16th day of May, 2008.




Notary Public for the State of Idaho
Residing in Coeur d'Alene
Commission Expires 3/8/2010