

6-4-2008

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

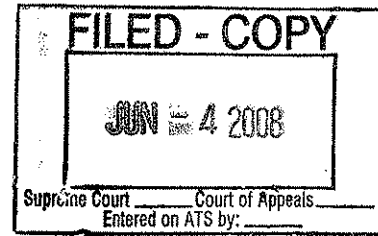
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## Recommended Citation

"Davidson v. Riverland Excavating, Inc. Appellant's Reply Brief Dckt. 34626" (2008). *Idaho Supreme Court Records & Briefs*. 1702.  
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IN THE SUPREME COURT OF THE STATE OF IDAHO

CHET DAVIDSON,

Appellant,

vs.

DOCKET NO. 34626

STATE INSURANCE FUND,

Respondent.

**APPELLANTS' REPLY BRIEF**

Appeal from the Idaho Industrial Commission.

Hearing Officer 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.

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### **III. INTRODUCTION**

Respondent/Employer, State Insurance Fund and the Idaho Special Indemnity Fund have filed briefs responsive to Claimant's opening brief. Respondent/Employer has largely avoided the issues brought up in Claimant's Memorandum save and except the issue of whether or not the Commission should retain jurisdiction and the attorney's fee issue.

Respondent/Idaho Special Indemnity Fund has responded to most of the issues set forth in Claimant's opening brief. This brief will be a global reply to the issues raised by both responding parties.

### **IV. DISCUSSION**

#### **A. Impairment was not properly assessed by the Commission.**

Notwithstanding, the well reasoned assertions of the Idaho Special Indemnity Fund ("ISIF"), it is strenuously urged that the Commission did not properly assess impairment on this record. There is no serious debate from any of the medical examiners that Mr. Davidson suffered from extreme debilitating pain. The Employer retained expert stated that he did not think pain could be used as part of the impairment methodology *per se*. As ISIF points out, Dr. Vincent did, in fact, consider that there was pain and that there was an organic basis for the same.

Consider for example the following portion of testimony from Dr. Vincent:

Q. You've stated that he had stabbing and aching headache and stabbing and burning pain in his posterior neck. Is there an anatomical explanation for the burning pain in his posterior neck? Yes or no.

A. Yes.

Q. Is there an anatomical explanation for the aching pain over the clavicular areas bilaterally?

A. Possibly.

Q. Is there an organic or anatomical reason for him to have aching pain over both shoulders associated with burning and stabbing pain over the posterior left shoulder?

A. Yes.

*Deposition of Ronald L. Vincent, M.D., page 78, ln. 15 - page 79, ln. 4.*

There follows in the next several pages of the deposition transcript of Dr. Vincent some verbal jousting between the Undersigned and the insurance doctor over whether or not various and sundry specific pain or sensation issues were anatomically appropriate considering three cervical surgeries endured by Mr. Davidson. Finally, there is this ultimate statement on the issue:

Q. I guess what I'm getting at, Doctor, is that, just so we're not mincing words too much, he does have an organic explanation for some of these complaints, correct?

A. Yes.

Q. For a lot of these complaints?

A. Yes.

*Deposition of Ronald L. Vincent, M.D., page 83, lns. 13 - 19.*

Thus, there is **no** question on this record that the defense retained doctor found that there was an organic explanation for these complaints of pain. We also know that the doctor did **not** utilize pain as a component of his assessment. We also know that counsel that retained the doctor did not inform him of the teachings of *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P2d. 1122 (1989). *Deposition of Ronald L. Vincent, M.D., pg. 77, lns. 11 - 12.* This is important because this is precisely the fact pattern commented on by the Supreme Court when Mr. Urry underwent a repeat hip replacement following an industrial accident.

The Commission's findings on impairment pay lip-service to the *Urry* case, but fail to contain any meaningful analysis as to why the 15% whole man impairment for the cervical condition was appropriate. *R.p. 64.* This finding of 15% whole man impairment for the cervical injury and subsequent surgeries is particularly confusing when one considers that the Claimant's pre-existing impairment from the historic neck injury that occurred in the late 80s was 25% whole man. *R.p. 48.* Did the Commission intend for the total rating for the Claimant's cervical surgeries, inclusive of the 1988 injury and the 1999 injury and three successive surgeries to be a total of 40% whole man (that's 25% pre-existing and 15% per Dr. Vincent)?

Did the Commission properly consider pain as it pertained to functional loss, as is well documented not only by the treating physician and the consultant? One cannot intelligently answer these questions by reading this record and the Findings and Conclusions by the Referee, which were

ultimately adopted by the Commission. Of course, the Undersigned feels that the answer to the latter question regarding pain as a component of impairment is a fatal failure by the Commission and demands and requires a remand.

**B. Assessment of disability was flawed.**

As pointed out in the opening brief, the Commission, under recent guidance by this Court, is obliged to follow a two step assessment of disability. *Page v. McCain Foods, Inc.*, docket no. 33158. That does not mean that the Commission is free to ignore this sequential analysis. These terms have real meaning, both legally and factually. The teachings from this Court require the Commission to assess all disability from all sources, then to tease out, if you will, the aspects of disability that relate to the industrially related impairment(s).

Where is the Commission's analysis of the Claimant's disability? Is there an assessment by the Commission as to the number of pounds the Claimant can lift or carry, whether he can bend, stoop, climb, crawl, or whether he can tie his shoes for that matter. The Undersigned respectfully submits there is no such analysis of how the impairment (admittedly assessed inaccurately) affects those factors listed in the statutory provision. *Idaho Code §72-430(1)*. In particular, the Commission has not articulated how the overall disability of Claimant was arrived at with respect to "the nature of the physical disablement, the disfigurement, . . . , the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of the accident . . ." *Id.*

The Commission has utterly failed in making a global assessment of disability from all sources, including the pre-existing impairments which, by the way, were not simply limited to the cervical injury that Claimant suffered from previously.

More precisely, it would have been helpful if the Commission had said "owing to the Claimant's prior low back injuries, he's restricted in lifting "x" number of pounds, owing to his knee injuries, he's restricted from crawling, kneeling, or climbing."

As the Undersigned interprets the *Page* case, each and every physical impairment that Claimant had suffered from at the time of the hearing should be separately assessed and a global

picture thus painted, if you will, showing all of the disabilities, including the cumulative effect. There is no such analysis set forth in the Commission's Findings Fact or Conclusions of Law. Accordingly, notwithstanding the fact that the Commission made a determination that the Claimant's ability to work was diminished previously on account of his cervical injury, the analysis falls short of passing the test announced in *Page*.

Moreover, the hearing officer's reliance upon the testimony of Mr. Crumb, the Surety retained vocational expert, is misplaced. Mr. Crumb testified that Claimant was functioning at a light to sedentary level at the time of his injury. R.p. 61. What Mr. Crumb apparently overlooked in his "lengthy written report" was the fact that Mr. Davidson was, in fact, engaged in heavy physical labor when he was injured in December of '99. It is this self-serving logic that apparently allowed the hearing officer to determine that, even though Chet Davidson was doing hard physical labor when he got hurt, his "real" capacity was only light to sedentary. Perhaps Mr. Crumb's testimony, and the concordant conclusion put upon the same by the hearing officer would have had more validity had there been evidence in the record that for the six months Chet Davidson was operating heavy equipment and involved in strenuous physical labor that he had had frequent trips to the doctor or frequent absenteeism owing to complaints of pain. Those were not the facts.

Simply stated, the hearing officer, and ultimately the Commission, did not exercise proper review of the disability question under the sequential two-tiered approach as required by law.

**C. The Commission Should Have Retained Jurisdiction.**

Defendant/Employer incorrectly makes the statement in its Memorandum that Mr. Davidson is asking this Court to reverse the Commission on the basis of its' failure to exercise its discretion by retaining jurisdiction for the first time. Such a statement is not supported by the record. The Claimant, in his Memorandum submitted to the Commission, specifically asked for the Commission to keep the record open and retain jurisdiction. *Additional documents; Claimant's Post Hearing Memorandum, pg. 9.*



ISIF takes a different approach to the question of jurisdiction retention. It argues that even though Mr. Davidson's condition is factually progressive, because he was considered "rateable" by Drs. Vincent and McDonald that his condition is *ipso facto*, not progressive in a legal sense.

The record is replete with references that Davidson's condition is a progressive one. That he had been stable in the past for intermittent periods following the various surgeries performed on his neck, only to find that he was considered unstable due to the failure of the bone in his neck to fuse, should be sufficient evidence of the progressive nature of the impairment and disability that Mr. Davidson suffers from.

Consider, for example, this dialogue, taken from the deposition of Dr. Vincent:

Would you agree that with respect to Chet's condition in his neck, that it's a degenerative condition?

A. You're talking about the levels above?

Q. Yes, above and below.

A. Yes.

Q. In other words, it's likely to get worse rather than better?

A. Yes, on a natural basis.

Q. It will get worse in all likelihood if he lives another ten years or so, right?

A. Yes.

*Deposition of Ronald L. Vincent, M.D., page 54, ln. 20 - page 55, ln. 6.*

As expressed in Davidson's opening brief, the Commission should have retained jurisdiction based upon the weight of the medical evidence in this case, that his condition is a progressive one. The fact that he had had successive surgeries only underscores the poignancy of the foregoing statement. The Commission was reversed in the *Reynolds* case for failure to make an additional impairment award after it had specifically retained jurisdiction on the basis of a progressive condition. *Reynolds vs. Browning Ferris Industries*, 113 Idaho 965, 751 P.2d. 113 (1988). This case is analogous, but also contrasts with *Reynolds* in that the Commission failed to follow the evidence and the timely request by Claimant to retain jurisdiction.

What other protection would a Claimant have against the statutory provisions that bar filing a complaint after a finite time period (Idaho Code §72-719), save and except a proper exercise of the tribunal's discretion to retain jurisdiction? As the Court mentioned in *Reynolds*, the Commission

has an alternative when making an impairment award to assess the probable future impairment at the time of hearing.

It perhaps could be argued that the Commission did precisely that. However, one cannot say with a great deal of clarity that the Commission made such an award inasmuch as it clearly ignored or was confused by the prior 25% whole man rating for the cervical condition of Mr. Davidson before he encountered the problems that brought this case to bar.

On other words, three surgeries prior to the industrial accident at bar Mr. Davidson was an impaired person with a 25% impairment, owing to his 1988 neck injury. He then is awarded a 15% impairment, owing to the cervical condition from the 1999 accident by the Commission. No acknowledgment is given by the Commission that his condition is progressive and likely to get worse, in direct conflict with the weight of the evidence and, thus, he is found to have less impairment after three more surgeries without any consideration for how he may do in the future.

### **CONCLUSION**

In conclusion, it is respectfully submitted that this case must be remanded for a variety of reasons as set forth in the opening brief and in this reply brief. Those reasons include the improper impairment award, the improper failure to exercise a two-tiered approach to disability and the failure to retain jurisdiction. The other issues raised in the opening brief will surely be resolved following a successful remand.

Respectfully submitted this 2 day of June, 2008.

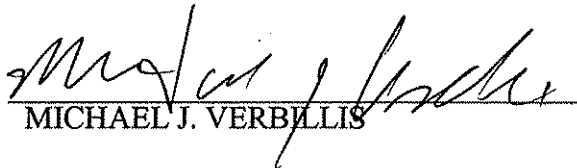
  
\_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

I certify that on the 2 day of June, 2008, two true and correct copies of the foregoing was sent via U.S. mail to:

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