8-7-2008

Christensen v. S.L. Start & Associates, Inc. Respondent's Brief Dckt. 35169

IN THE SUPREME COURT OF THE STATE OF IDAHO

BETTY S. CHRISTENSEN Claimant/Appellant, v. S.L. START & ASSOCIATES, INC., Employer, and STATE INSURANCE FUND, Surety, And STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants-Respondents.	)	SUPREME COURT NO. 35169

BRIEF OF RESPONDENT
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF THE CASE

Betty S. Christensen (hereinafter referred to as "Christensen") appeals from the Findings of Fact and Conclusions of Law and Order of the Idaho Industrial Commission which found that Christensen was totally and permanently disabled under the odd-lot doctrine prior to her December 2002 industrial accidents. The Commission made the additional factual finding that Christensen suffered no permanent physical impairment as a result of her December 2002 accidents at S.L. Start & Associates (hereinafter referred to as "S.L. Start"). As a result, Christensen did not recover any physical impairment nor disability benefits from either defendant. Christensen had argued that she was entitled to a finding of total and permanent disability requiring apportionment pursuant to the Carey Formula between the State of Idaho Industrial Special Indemnity Fund (hereinafter referred to as "ISIF") and the employer's surety, the State Insurance Fund.

STATEMENT OF THE FACTS AND COURSE OF PROCEEDING

Christensen applied for employment at S.L. Start in late October 2002. She was hired as an adult community support specialist. She worked with developmentally disabled adults. *Tr.*, p. 112. Christensen worked approximately one month before her first on the job injury on December 5, 2002. Christensen injured herself on December 5, 2002 loading a

client onto a bus. A few days later, December 9, 2002, while assisting a patient at Kootenai Medical Center, Christensen grabbed a patient who went faint under the arms and assisted her to a bench. She immediately felt severe pain in the right shoulder, mid-back, lower back, and both hips and down her leg. *Tr.*, p. 118-119. Christensen alleges that she injured her lower back, as well as her right shoulder, and the large toe on her right foot.

Christensen had surgery on her right large toe in April 2003 and had two follow-up procedures involving a fusion and the eventual removal of hardware. *ISIF Ex. 16*, p. 767. Christensen eventually underwent right shoulder surgery in April 2004 consisting of an arthroscopic distal clavicle excision. *ISIF Ex. 7*, p. 275.

Christensen was released by her orthopedic surgeon, Dr. Kody, to her usual occupation without shoulder restrictions subsequent to her shoulder surgery. *SIF Ex. C.*, p. 22. Dr. Dunlap, who performed the toe fusion procedures, indicated in his last chart note that she was doing well with no complaints.

Two independent medical examinations were done in this case at the request of the State Insurance Fund which both found that Christensen had pain complaints, but no objective evidence of injuries as a result of the December 2002 incidents. *ISIF Ex. 7, p. 292.* Dr. Demaksus, a Spokane neurosurgeon who treated Ms. Christensen, noted that she had a non-surgical back injury. *ISIF Ex. 13, p. 358.* A Functional Capacity Evaluation performed by physical therapist Mark Bengston at the request of the ISIF indicated that Christensen was not able to work a full eight-hour day at the sedentary level of work. *ISIF Ex. 8.*

At the time of the hearing, Christensen was 47-years of age and living in Coeur d'Alene, Idaho. *Tr., p. 96.* She had been receiving Social Security disability benefits since the mid-1990's. *Tr.,* p. 186. She has not been employed in any capacity since the incidents at S.L. Start in December 2002. She had graduated in 1988 from Trend College in Spokane, Washington with certification as a medical secretary and medical assistant. *Tr., p. 99.*

In 1991 Christensen went to work for Group Health Northwest as a medical assistant. She continued in this employment until 1996. *Claimant's Ex. 8.* Christensen had a series of industrial injuries to her right foot and ankle while employed at Group Health Northwest. During this same time period Christensen was diagnosed with a degenerative neurological disease known as 'Charcot Marie Tooth Syndrome', or CMT. She underwent a series of surgical procedures ultimately resulting in a triple arthrodesis of her right ankle. *ISIF Ex. 9, p. 312.* Her treating surgeon, Dr. Hansen, noted in 1996 that the long-term prognosis for a patient with triple arthrodesis is that the patient must be involved in non-impact activities and is limited to sedentary work. *ISIF Ex. 9, p.308.* It was at this time that Christensen was awarded Social Security disability benefits. Christensen ultimately settled her industrial claims for $76,850 on a lump sum basis. *SIF Ex. M.*

In 1997 Christensen began working for Dr. Carraher as a medical assistant. Dr. Carraher was also Christensen's primary care physician. *Tr.,* p. 106. Dr. Carraher was starting up his own practice and Christensen was able to work part-time at a slow pace. *Tr., p. 107.* By 1998, however, she had cut back, to eight hours per week and had gross earnings of $1,265 for the entire year. *Tr., p. 188-190.*

While employed by Dr. Carraher, Christensen underwent a Social Security disability review in which Christensen stated that Dr. Carraher bought her a special chair, accommodated her needs, allowed her to work limited hours and to rest when she became fatigued. *ISIF Ex. 14, p. 504.*

Approximately four years later in 2001, Dr. Carraher's practice became busy to the point Christensen was no longer able to meet the demands of the job. She then took a series of temporary part-time jobs working for Coeur d'Alene Hand Therapy on a part-time basis to help start up their office. *Tr., p. 110.* Christensen then worked a few months for Dr. Beaton while his medical assistant was on maternity leave. *Tr., p. 111.* She was then unemployed for almost a year until she found part-time temporary work at Lakeland Family Medicine. *SIF Ex. N.* She worked there for approximately one year, but could not meet the demands of the job. *Tr., p. 111-112.* She was restricted to eight to twelve hours per week at Lakeland Family Medicine by Dr. Carraher. *Tr., p. 71.* Following the termination of her employment as a medical assistant at Lakeland Family Medicine, Christensen was unemployed for most of the next seven or eight months during 2002 until she applied for work on October 24, 2002 with S.L. Start. *SIF Ex. N,* p. 1

Two vocational experts testified - Doug Crum for the defendants and Tom Moreland on behalf of Christensen. Crum's testimony was that Christensen was an odd-lot worker who was totally disabled prior to her employment with S.L. Start in October 2002. Crum also testified that Christensen's post-accident restrictions were the same as the restrictions she had prior to her employment with S.L. Start. *Tr., p. 233-235.*

Included in Crum's testimony was an analysis of the average hours Christensen worked subsequent to her ankle surgery in 1996. In 1999, Christensen earned $4,336 which he calculated to be an average of 8.3 hours work per week. *Tr., p. 228-229.* In 2000 Christensen earned a total of $4,576 which Mr. Crum calculated to be 6.96 hours per week working for Dr. Carraher and working 10.67 hours per week while working for Dr. Beaton. *Tr.*, p. 229. In 2001 Ms. Christensen earned $6,821 all from Lakeland Family Medical for nine months of work which calculated to 14.3 hours per week. In November 2001, Dr. Carraher restricted Ms. Christensen to eight to twelve hours per week. *Tr., p.230.*

Mr. Crum testified that Christensen was not capable of entering the general labor market and finding regular employment prior to the 2002 accidents at S.L. Start. *Tr., p. 234.* Mr. Crum summarized Christensen's pre-accident work history, as follows:

> Well, it's been talked about today that she had a lot of - I believe Dr. Carraher even called it heavy using narcotics. Prior to the 2002 injury, she had a history of being in very light-duty work, often heavily accommodated, and failing to be able to put up with the number of hours that were being requested of her. She failed to succeed in several of these jobs even with accommodation. She had limited use of her upper extremities. She was taking additional narcotics for break-through pain. She had limited gripping and reach ability. She had problems with fatigue that were apparently severe. She had the inability to spend much time on her feet. And then today Dr. Carraher added that he felt that she would be unable to do very much keyboarding prior to December 2002.
>
> *Tr., p. 230*

ISSUES PRESENTED ON APPEAL

The ISIF would restate the issues on appeal, as follows:

1. Did the Industrial Commission correctly apply the *Page v. McCain Foods, Inc.*, two-tiered analysis of disability?

2. Was the Industrial Commission factual finding that Christensen was totally disabled pursuant to the odd-lot doctrine prior to her last industrial accidents supported by substantial and competent evidence?

3. Can Christensen recover benefits for total disability from the ISIF even though the "combined with" requirement of Idaho Code §72-332(1) is not satisfied?

4. Can Christensen recover any disability benefits when the Industrial Commission makes a factual finding that she has zero physical impairment as a result of the December 2002 accidents?

ARGUMENT

I.

THE INDUSTRIAL COMMISSION CORRECTLY APPLIED A TWO-TIERED ANALYSIS OF DISABILITY

The first issue alleged by Christensen is that the Industrial Commission violated the dictates of the recent Idaho Supreme Court case of *Page v. McCain Foods, Inc. Supreme Court Docket No. 33158.* A review of the findings of fact in the present case demonstrates that the Industrial Commission engaged in a comprehensive and detailed analysis of Christensen's disability both before and after the December 2002 accidents. The type of analysis required by the Idaho Supreme Court in *Page* was precisely what was done in the instant case.

A permanent disability rating is an appraisal of the worker's present and probable future ability to engage in gainful activity as it affected by the medical factor of permanent impairment and by the pertinent non-medical factors as provided in Idaho Code §72-430, Idaho Code §72-425. The focus of Idaho Code §72-425 is on the ability to engage in gainful activity. *Smith v. Payette County*, 105 Idaho 618 (1983).

The Supreme Court has recognized that the degree of permanent disability and the cause of the disability are factual questions committed to the expertise of the Idaho Industrial Commission. *Thom v. Callahan*, 97 Idaho 151 (1975). In the *Page* case, the Supreme Court found that the Industrial Commission had failed to make a finding as to the total amount of

permanent disability based on all factors and then apportion that disability between the pre-existing injuries and the injury from the last accident. Idaho Code §72-406 provides if the degree of disability resulting from an industrial injury is increased because of a pre-existing physical impairment, the employer is liable only for that disability which is caused by the industrial injury. In this case, the factual finding of the Industrial Commission was that Christensen was totally and permanently disabled on an odd-lot basis prior to the last accidents. The Commission also found that Christensen had neither physical impairment nor any restrictions attributable to the December 2002 accidents. The Commission made a factual finding that Christensen was totally disabled before and after the last accidents. In *Page*, the Court specified the two step analysis:

> We observe there are two steps when making an apportionment: (1) evaluating a claimant's disability in light of all his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident.
>
> *Page v. McCain*, Docket No. 33158

In the instant case, this is exactly what the Commission did. The Commission evaluated the claimant's permanent disability in light of all of her physical impairments, including the industrial accident and pre-existing conditions. Further, the Commission apportioned the amount of permanent disability attributable to the industrial accidents. In the present case, the Commission found there was no disability related to the December 2002 accidents:

> 47. The Referee finds that Claimant was an odd-lot worker and totally and permanently disabled prior to her 2002 industrial injuries. Claimant has failed to establish that her limitations and restrictions after her 2002 accident were substantively more onerous than her limitations and restrictions before her 2002 accident.
>
> *R., p. 46*
>
> ...
>
> 53. Fundamentally, Claimant's work limitations were the same both before and after her 2002 injuries. Even her own vocational expert could not identify any factors that substantively distinguish her condition before and after the 2002 accident. If Claimant was totally and permanently disabled at the time of hearing, then she was totally and permanently disabled before her 2002 accident.
>
> *R. p. 48-49*

The evidence in this case demonstrated that Christensen was limited to less than full-time sedentary employment prior to December 2002 and the Commission found that after the industrial accident and injuries of December 2002, she was likewise limited to less than full-time sedentary employment.

Finally, the Industrial Commission entered a factual finding that the December 2002 accidents resulted in no physical impairment for Christensen. This factual finding was based upon an independent medical evaluation panel consisting of Drs. Bozarth and Adams, who opined that Christensen's medical condition was the result of her CMT disease and not her December 2002 industrial injuries. The Commission also noted that none of Christensen's treating specialist imposed any restrictions on Christensen as a result of the 2002 injuries.

R., p. 69. The Commission specifically rejected the 18% whole person impairment rating made by Dr. Carraher. The Commission found the panel IME more persuasive on the issue of permanent physical impairment. Since the Claimant did not sustain any permanent physical impairment as a result of the December 2002 industrial accidents, there can be no disability attributed to those accidents. *Sund v. Gambrel*, 127 Idaho 3 (1995); *Idaho Code* §72-425. Based upon the factual determination made by the Commission in this case, there simply is no disability to be apportioned.

Finally, the apportionment discussed in the *Page* case refers to the apportionment mandated by Idaho Code §72-406. This code section, however, applies in cases involving less than total and permanent disability. In the present case, Christensen is alleging she is totally disabled and therefore the apportionment is done pursuant to the well known Carey Formula. Since the Commission found there was no physical impairment from the December 2002 injuries and found that Christensen was totally disabled prior to December 2002, there could be no finding of Industrial Special Indemnity Fund liability and, therefore, the Commission never reached the issue of Carey apportionment.

II.

THE FINDING BY THE INDUSTRIAL COMMISSION THAT CHRISTENSEN WAS AN ODD-LOT WORKER PRIOR TO HER LAST INDUSTRIAL ACCIDENTS IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE

It is well established that the issue of whether a claimant is an odd-lot worker is a factual determination best left to the Idaho Industrial Commission. *Bybee v. State, Industrial*

Special Indemnity Fund, 129 Idaho 76 (1996); *Rost v. J.R. Simplot Co.*, 106 Idaho 444 (1984). A finding that a worker is odd-lot, therefore, will not be overturned on appeal when it is supported by substantial and competent, although conflicting, evidence. *Hutchinson v. J.R. Simplot Co.*, 98 Idaho 346 (1977).

In the present case, the defendants, including the ISIF have asserted Christensen's odd-lot status as a defense to her claim. In any case in which a claimant seeks to establish ISIF liability, Idaho Code §72-332 (1) places the burden of proof upon the claimant to establish that the pre-existing impairment and the final industrial injury combine to result in total and permanent disability. Idaho Code §72-332(1). This requirement cannot be met if, in fact, the claimant is totally and permanently disabled prior to her last industrial injury. According to the Idaho Supreme Court in *Bybee*, a claimant can establish that she is not an odd-lot worker by simply showing that she was working regularly at a job at the time of injury. In this case, Christensen was working for approximately one month, part-time, prior to her December 2002 accidents at S.L. Start.

Idaho law recognizes that the term "total disability" is not to be interpreted literally. Total disability does not mean that the injured person must be absolutely helpless or entirely unable to do anything worthy of compensation. An employee who is so injured that he can perform no services other than those which are limited in quality, dependability, or quantity such that a reasonable stable market for them does not exist, may well be classified as totally disabled. *Arnold v. Splendid Bakery*, 88 Idaho 455 (1965); *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403 (1977).

Once a claimant makes an initial showing of employment, the ISIF must establish that the employee was, in fact, an odd-lot worker even though employed at the time. The ISIF would assert in the instant case that Christensen failed in her initial burden to demonstrate that she was working regularly at a job at the time of the industrial injury. Christensen was on Social Security disability in December 2002 and working on a very limited basis for S.L. Start approximately 20-hours per week. *Deposition of Betty Christensen, Def. ISIF Ex.* 1, p. 115. An individual such as Christensen who is on Social Security disability and working on a part-time basis has not established that regular and continuous employment is available to her and has failed to make the initial required showing that she is not an odd-lot worker.

III.

THE EVIDENCE IN THIS CASE ESTABLISHES THAT CHRISTENSEN WAS AN ODD-LOT WORKER EVEN THOUGH EMPLOYED AT THE TIME OF HER LAST ACCIDENTS

The *Bybee* case does hold that if a claimant can establish that she was working regularly at a job at the time of injury, the burden shifts to the ISIF to demonstrate that the injured worker was in fact an odd-lot worker. To do so the ISIF must show that the claimant's actual employment was due to a "business boom, the sympathy of a particular

employer or friends, temporary good luck, or a superhuman effort on her part." *Lyons v. Industrial Special Indemnity Fund,* 98 Idaho 403 (1977).

In this case the ISIF has succeeded in showing that the actual employment by Christensen was due to a series of such unusual circumstances. First, Dr. Hansen, who performed four surgical procedures on Christensen's right ankle in the 1990's, restricted her to sedentary work for the rest of her life. *Def. ISIF Ex. 9*, p. 308. Dr. Carraher who was both Ms. Christensen's physician and her employer, in a March 1997 tele-recorder transcription for Social Security purposes stated to the Idaho Disability Determination Unit, as follows:

> The long-term outlook for Betty is that she will have progressive neurological disease. This is a heredity neurological degenerative disease of the muscles in both lower legs. Because of this, Betty will also need various accommodations in the future for whatever she does and the need for these accommodations put her at a relative disadvantage of her competition for a job in the workplace.
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> *Def. ISIF Ex. 14*, p. 657

The Commission in this case made the factual finding that Christensen was an odd-lot worker. The question then is whether or not there is substantial and competent, although conflicting, evidence to support that factual determination. The evidence in this case is substantial to support the factual finding of odd-lot status prior to the December 2002 accidents at S.L. Start. The Commission found, with regard to Christensen's odd-lot status:

> 48. Despite the difficulties that her CMT and triple arthrodesis posed, Claimant was able to find some work in her field in the subsequent years because she wanted to work, was dogged in her efforts, had excellent skills to offer, had the good luck to find start-up medical practices or

> temporary fill-in work, and just possibly, because some employers were willing to make accommodations in order to have the benefit of her skills. Did that make them "sympathetic employers"? Possibly. But being a sympathetic employer does not mean that the employee is pathetic or in need of charity, merely that the employer is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services. Those who hired Claimant certainly got the benefit of their bargain. But, as evidenced by her employment history in the years leading up to her work for Employer, the services she could offer an employer were so limited that even the most well-disposed employers had few positions that were suitable. ***Claimant is the odd-lot worker personified.*** *(Emphasis added).*
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> *Findings of Fact, Conclusions of Law, and Recommendation,* R., p. 46

As the Commission found, claimant was limited to sedentary work following her last ankle surgery. As early as 2000, Dr. Carraher indicated that the claimant could perform the duties of a medical assistant only with limited hours and substantial accommodation. She never went back to full-time employment and the Commission found that she was working twenty or fewer hours per week in November 2001 when Dr. Carraher reduced her maximum work hours from twenty to twelve. R., p. 47,

The Commission further found that Dr. Carraher had told the Social Security Administration that Christensen had limited ability to walk, fatigued easily and had difficulty with prolonged use of her upper extremities and had a 20-lb. lifting restriction. In 2000, Dr. Carraher advised the Idaho Disability Determination Office that Christensen had limited ability to stand and walk and could only work as a medical assistant on a limited basis with accommodations. R., p. 48.

Vocational expert Doug Crum testified on behalf of the defendants. Included in his testimony was a summary of Ms. Christensen's work history prior to the December 2002 incidents at S.L. Start. He testified that in 1999 Ms. Christensen earned $4,336 on an annual basis which by his calculation worked out to be 8.3 hours per week. In 2000, Ms. Christensen earned a total of $4,576 which Mr. Crum calculated to be 6.96 hours per week while working for Dr. Carraher and 10.67 hours per week while working for Dr. Beaton. In 2001, Ms. Christensen earned $6,821, all from Lakeland Family Medical for nine months of work which calculated to 14.3 hours per week. However, in November 2001, Dr. Carraher restricted Ms. Christensen's to eight to twelve hours per week. *Tr.*, p. 230. In 2002, Ms. Christensen worked briefly for Lakeland Family Medicine at approximately 10.98 hours per week. Mr. Crum summarized Ms. Christensen's pre-industrial accident work, as follows:

> Well, it's been talked about today that she had a lot of – I believe Dr. Carraher even called it heavy using narcotics. Prior to the 2002 injury, she had a history of being in very light-duty work, often heavily accommodated, and failing to be able to put up with the number of hours that were being requested of her. She failed to succeed in several of these jobs even with accommodation. She had limited use of her upper extremities. She was taking additional narcotics for break-through pain. She had limited gripping and reach ability. She had problems with fatigue that were apparently severe. She had the inability to spend much time of her feet. And then today Dr. Carraher added that he felt that she would be unable to do very much keyboarding prior to December 2002.
>
> *Tr.*, p. 230.

Mr. Crum went on to state that in his opinion Ms. Christensen was not capable of entering the general labor market and finding regular employment. Tr., p. 234. He explained his analysis, as follows:

> Well, only on sort of an odd-lot basis. I mean, she had in the past been able to pick up these jobs that are often temporary jobs or fill in jobs when there was a special need, and some of the jobs it appears to have been a regular job for a while and then she couldn't do it anymore.
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> Tr., p. 234

Ms. Christensen herself testified that she could not continue to work for Dr. Carraher or continue to work for Lakeland Family Medicine because those were start-up medical practices and they simply got too busy for her to continue employment. Tr., p. 195. She testified that she filled in for an employee who was out on maternity leave with Dr. Beaton for approximately four months. Tr., p. 111. She was hired by Coeur d'Alene Hand Therapy to help them open their clinic and once the Clinic was up and running, her position was terminated. Tr., p. 110.

Under the facts of this case, there is substantial evidence that Christensen is, in fact, an odd-lot worker. She qualified for Social Security disability in the mid-1990's. She was restricted to part-time sedentary work by her employer and physician, Dr. Carraher. Her treating surgeon in Seattle, Dr. Hansen, limited her to sedentary work after her final ankle procedure. She was unable to continue working for Dr. Carraher despite the numerous accommodations he made as his practice grew busier. She eventually was limited in 2001 to working no more than 12 hours per week. She used a large amount of

pain medication on a continuous basis since at least 1996. In 2002 Christensen was unemployed for a seven month period before she attempted briefly to return to work at S.L. Start in a position that was not sedentary. She worked only a few short weeks before the December 5, 2002 incident when she was injured. Her records indicate that in 2002 (the year of the accident) she earned a total of $2,200 from Lakeland Family Medicine and S.L. Start. Tr., p. 195. Christensen was forced to leave Lakeland Family Medicine because the practice simply grew too busy for her limitations. Tr., p. 195. As the Idaho Industrial Commission found,

> Despite the difficulties that her CMT and triple arthrodesis posed, Claimant was able to find some work in her field in the subsequent years because she wanted to work, was dogged in her efforts, had excellent skills to offer, had the good luck to find start-up medical practices or temporary fill-in work, and just possibly, because some employers were willing to make accommodations in order to have the benefit of her skills.
>
> R., p. 46

IV.

SEARCHING FOR OTHER WORK WOULD BE FUTILE

According to the *Bybee* decision, the ISIF also must demonstrate that in light of the claimant's pre-existing condition, search for other suitable work would be futile. *Bybee v. State of Idaho Industrial Special Indemnity Fund*, 129 Idaho 76 (1996). In this case, it is clear that Ms. Christensen was restricted to sedentary part-time work of twelve hours per

week by her treating physician, Dr. Carraher prior to the 2002 accident. All prior attempts at employment had failed. She also had limitations for standing, walking and use of her upper extremity. Tr., p. 226-227. Christensen fatigued easily and used large doses of pain medication. Tr., p. 230. A search for work by Ms. Christensen under these circumstances would clearly be futile.

V.

THE INDUSTRIAL COMMISSION MADE A FINDING OF NO PERMANENT IMPAIRMENT RELATED TO THE DECEMBER 2002 INJURIES

Completely ignored in Christensen's brief is the finding made by the Industrial Commission in its Order on Reconsideration where it determined that Christensen had a zero impairment rating related to the 2002 industrial accidents. R., p. 69. This rating was based upon the IME panel report of Drs. Bozarth and Adams who indicated that Christensen's medical conditions were a result of her CMT disease and not her December 2002 industrial injuries. The Industrial Commission also noted that none of Christensen's treating specialists provided any new physical restrictions for Claimant as a result of her 2002 injuries. R., p. 69. The Commission rejected the physical impairment rating by Dr. Carraher.

Without an impairment rating there can be no disability and there is nothing for the pre-existing impairment to combine with to render the Claimant totally and permanently

disabled as required by Idaho Code §72-332 (1) for ISIF liability purposes. Without an impairment rating and without any restrictions related to the December 2002 industrial accidents, the claim of Christensen must fail. The finding by the Idaho Industrial Commission of no impairment is a factual finding that should not be overturned on appeal since it is supported by substantial and competent, although conflicting, evidence.

VI.

CHRISTENSEN CANNOT RECOVER DISABILITY BENEFITS FROM THE ISIF FOR TOTAL DISABILITY UNLESS THE "COMBINED WITH" REQUIREMENT OF IDAHO CODE § 72-332(1) IS SATISFIED

Christensen argues that the so-called *Hamilton/Bybee* doctrine should be overruled. A review of the *Hamilton v. Ted Beamis Logging & Const.*, 127 Idaho 221 (1995) and *Bybee v. State Indus. Special Indem. Fund*, 129 Idaho76 (1996) cases demonstrate that neither of those cases adopt a legal doctrine but are cases applying Idaho Code §72-332 (1) to particular factual situations. Both *Hamilton* and *Bybee* deal with whether there was substantial and competent evidence in the record to support an Industrial Commission finding that the injured worker was, in fact, totally disabled on an odd-lot basis prior to his last industrial injury. Contrary to the allegation made by Christensen, this is not a judicial doctrine imposed on the working people of the State of Idaho, but is, in fact, an Idaho statute designed to benefit both the employer and the employee in those limited situations

when a pre-existing impairment combines with a new industrial accident to render the claimant totally disabled. Idaho Code §72-332 (1) has four requirements that a claimant must satisfy in order to obtain benefits from the ISIF:

1. There must be a pre-existing physical impairment;
2. The impairment must have been manifest;
3. The impairment must have constituted a subjective hindrance to obtaining employment; and
4. The impairment must combine with the industrial injury to render the claimant totally and permanently disabled.

Dumaw v. J.L. Norton Logging, 118 Idaho 150 (1990).

Christensen would have the Idaho Supreme Court disregard the requirements contained in Idaho Code §72-332(1) that the pre-existing impairment must combine with the industrial injury to render the claimant totally and permanently disabled in order to impose liability upon the ISIF. This the Court should not do.

CONCLUSION

In summary, this is a case in which there is substantial and competent evidence that demonstrates that Christensen was totally and permanently disabled under the odd-lot doctrine prior to the December 2002 accidents. As such, Christensen was unable to demonstrate the "combined with" requirement to impose liability upon the ISIF. Moreover, the Industrial Commission made a factual finding that Christensen had no

physical impairment as a result of the December 2002 accidents and a factual finding that she had no additional physical restrictions caused by the December 2002 injuries. Without restrictions and without a physical impairment rating related to the December 2002 injuries, there is nothing to combine with. The Supreme Court should affirm the Industrial Commission's order and findings because both the factual finding of no physical impairment from the December 2002 accidents and the factual finding that Christensen was totally and permanently disabled prior to December 2002 are supported by substantial and competent evidence.

DATED *this* 6 day of August, 2008.

THOMAS W. CALLERY
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Industrial Special Indemnity Fund

CERTIFICATE OF SERVICE

I certify that on the 6 day of August, 2008, a true and correct copy of the *Respondent's Brief* was served by the method indicated below and addressed upon each of the following:

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