8-7-2008

Christensen v. S.L. Start & Associates, Inc. Surety Dckt. 35169

IN THE SUPREME COURT OF THE STATE OF IDAHO

BETTY S. CHRISTENSEN, Appellant, vs. S.L. START & ASSOCIATES, INC., Employer, and STATE INSURANCE FUND, Surety and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Respondents		DOCKET NO. 35169 **RESPONDENT EMPLOYER/SURETY'S BRIEF**

RESPONDENT EMPLOYER/SURETY'S BRIEF

Appeal from the Idaho Industrial Commission.

Hearing Officer Rinda Just presiding.

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

Paul J. Augustine
Residing at Boise, ID for Respondent, S.L. Start & Associates, Inc. and Idaho State Insurance Fund

Thomas W. Callery, Esq.
Residing at Lewiston, ID for Respondent, State of Idaho, Industrial Special Indemnity Fund

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STATEMENT OF THE CASE

A. Nature of the Case

Respondent agrees with the Appellant's statement of the Nature of the Case.

B. Course of Proceedings

Following the hearing on this matter before the Idaho Industrial Commission (herinafter "Commission"), Referee Rinda Just entered Findings of Fact and Conclusions of Law on November 5, 2007. R., pp. 31-50. On November 20, 2007, the Commission entered an Order adopting the Referee's proposed findings of fact and conclusions of law and specifically ordered that the Claimant was totally and permanently disabled under the odd lot doctrine prior to her December 2002 industrial accidents. R., p. 53. As a result, all other issues, including the Claimant's claims against the Industrial Special Indemnity Fund (hereinafter "ISIF"), were rendered moot. Id. Thereafter, the Commission denied the Claimant's Motion for Reconsideration and ordered that the Claimant was not entitled to any permanent partial impairment for her December 2002 accidents. R., pp. 69-70.

C. Statement of the Facts

1. *The Claimant's Pre-Existing Disease and Chronic Pain*

At the time of the hearing, the Claimant was 47 years old. Tr., p. 96, L. 1. Following a series of work-related injuries in 1991, the Claimant was diagnosed with and has been afflicted by Charcot Marie Tooth Disease (hereinafter "CMT") a hereditary, progressive neuropathy. Tr., p. 32, Ll. 20-25; p. 33, Ll. 1-8; p. 44, Ll. 19-23 . In the Claimant's case, her CMT is severely

painful, which required the use of "large doses" of narcotics since 1997. Prior to her employment with SL Start -- the Employer in the instant case -- the Claimant was taking Oxycontin, which is a time release form of Oxycodone designed to give continuous relief to her chronic pain caused by the CMT. Tr., p. 53, Ll. 1-21. She was taking Oxycontin 3 - 4 times per day as far back as 1996 due to her CMT. Tr., 53, L. 12. In addition to high doses of Oxycontin, the Claimant was also prescribed hydrocodone for "breakthrough" pain. Tr., p. 54, Ll. 20-25; p. 55, Ll. 1-15. She took hydrocodone regularly; in November of 2001, one year before her employment with SL Start, claimant was prescribed 7.5 mg. of hydrocodone and 500 mg. of Tylenol every 4 hours for pain in addition to her Oxycontin. Employer/Surety Ex. B, p. 140.

The Claimant's pain due to her progressive CMT increased in the year prior to her employment with SL Start. During that time the Claimant's intake of Oxycontin for pain due to her CMT doubled. For example, in 2001 she was prescribed 20 mg of Oxycontin, 2-4 times per day, but Dr. Carraher did not feel that was sufficient to control her pain. Tr., p. 60; p. 61, Ll. 1-8; Employer/Surety Ex. B., p. 142. Therefore, in July of 2002, 5 months before her accident, she was prescribed 40mg of Oxycontin, 3-4 times per day due to her CMT. Tr., p. 61, Ll. 15-21; p. 62, Ll. 12-23; Employer/Surety Ex. B, p. 160. Dr. Carraher admitted that these were "large doses" of narcotics. Tr., p. 84, Ll. 1-3. In 2001, she was also prescribed Soma, a muscle relaxant, 350 mg pills, 3 pills per day for muscle tension related, in part, to low back pain. Tr., pp. 57-58; Employer/Surety Ex. B, p. 141.

2. The Claimant's Pre-Existing Permanent Physical Restrictions and Employment

The Claimant had numerous permanent physical restrictions imposed upon her prior to her employer with SL Start. Due to complications from her right foot fusion surgery and hardware removal, on August 27, 1996, her foot and ankle surgeon, Dr. Hansen, opined that the Claimant would only be able to work in sedentary employment the rest of her life. R., p. 37; ISIF Ex. 9, p. 308. In 1997 Dr. Chiu, a pain specialist who treated the Claimant, indicated that her severe pain prevented her from working full-time. Employer/Surety Ex. H, p. 3. In a January 9, 1997 letter to the Claimant's counsel Michael Verbillis, the Claimant's main treating physician, Dr. Carraher indicated that she was disabled and that any future work should be part-time, primarily sedentary with minimal ambulation. Tr., p.85, Ll. 9-25; p. 86, Ll. 1-9; Employer/Surety Ex. 14, p. 672. In May 1997, Dr. Carraher limited the Claimant to lifting 20 lbs., no prolonged usage of her arms and no prolonged walking. Tr., p. 227, Ll. 2-10. Since her pre-existing CMT also affected her hands and grip strength, in 2000 Dr. Carraher restricted the Claimant from repetitive work with her upper extremities. Tr., p. 68, Ll. 16-24; Employer/Surety Ex. B., p. 107. Then, in 2001 the year before she obtained her employment with SL Start, due to the progressive nature of her CMT, Dr. Carraher restricted the Claimant to working only 8-12 hours per week. Tr., p. 71, Ll. 4-11; Employer/Surety Ex. B, p. 144.

In spite of these part-time, sedentary restrictions, the Claimant found limited employment in part-time, short term positions with accommodating employers. For example, in 1997, the Claimant started to work for Dr. Carraher, who was starting a new medical practice, as a medical assistant. Tr., p.106, Ll. 19-23. Dr. Carraher allowed the Claimant to work at her own pace due

to her CMT and he admitted that she worked part-time with accommodation, which included a special chair, accommodation of her physical needs, limited hours, and allowing her to rest when she became fatigued. ISIF Ex. 14, p. 504; Tr., p. 75, Ll. 3-6; p. 81, Ll. 17-25; p. 82, Ll. 1-4. When Dr. Carraher's practice became busier, the Claimant could no longer perform her work duties for him with these accommodations. Tr., p. 82, Ll. 5-12.

The Claimant then began a series of part-time, temporary jobs. Following the termination of her employment with Dr. Carraher, she took a temporary job with the CDA Hand Therapy clinic. Tr., pp.108, Ll. 20-25; p. 109, Ll. 1-5. She then worked a few months for Dr. Beaton, an ENT, while his regular medical assistant was on maternity leave. Tr., p. 111, Ll. 1-14. She was unemployed for about one year and then found work with Lakeland Family Medicine. Employer/Surety Ex. N. She worked there part-time for approximately one year and was forced to quit as the practice and job demands grew. Tr., p. 111, Ll. 19-25; p. 112, Ll. 1-8. During her employment with Lakeland Family Medicine, Dr. Carraher restricted the Claimant to 8-12 hours of work per week. Tr., p. 71, Ll. 4-11; Employer/Surety Ex. B. p. 144.

3. *Expert Opinions Regarding Claimant's Pre-Existing Odd Lot Status*

Following the hearing, the Claimant's own vocational expert, Tom Moreland, testified that based upon the Claimant's part-time, sedentary restrictions prior to her employment with SL Start, she was totally and permanently disabled under Idaho's worker's compensation laws. He testified as follows:

> Q. And somebody who is restricted in that manner, restricted to eight to 12 hours per week, sedentary work, no prolonged sitting or

> standing, no repetitive hand movements, no grip strength, but who has experience working in the medical field, are they able to compete in the regular labor market in north Idaho prior to 2002?
>
> A. Restate that, would you.
>
> ....
>
> Q. Right.
>
> A. *It looks -- well, I think you pretty well disabled everybody from working.*
>
> ....
>
> Q. So if those restrictions are imposed on an individual who lives in north Idaho, those restrictions would pretty much make them unemployable in north Idaho without substantial accommodations by an employer, correct?
>
> A. Correct.
>
> ....
>
> Q. *Someone who had those restrictions, would they be, in your eyes, totally and permanently disabled under Idaho law as you understand it for purposes of workers' comp –*
>
> A. *The way you present it, yes.*

Deposition of Tom Moreland dated January 30, 2007 (hereinafter "Moreland depo."), p. 40 L. 24 - p. 42, L. 11 (emphasis added).

Douglas Crum, the Employer/Surety's vocational expert, testified at hearing and agreed with Mr. Moreland. He opined that, based upon his review of the Claimant's medical records, her pre-injury restrictions related to her CMT and ankle fusion, and his knowledge of her labor market, she was totally and permanently disabled prior to October 2002 when she became

employed with SL Start. Tr., p. 231. He testified that the Claimant was an odd-lot, totally disabled worker prior to her employment with SL Start and that she was not capable of competitive full time or part time employment. Tr., pp. 233 – 234. He added that the Claimant's post-accident restrictions were identical to her pre-injury restrictions, namely that she was restricted to part-time sedentary work. Tr., p. 235, Ll. 3-8. The Commission specifically embraced this last point in its Order. R., p. 48.

4. *Claimant's Employment at SL Start*

On October 24, 2002, the Claimant applied for work with SL Start and filled out an Applicant Certification of Capability. Employer/Surety Ex. L, p. 19. On this form, the Claimant certified to SL Start that, among other things, she was able to lift and transfer non-ambulatory individuals requiring her to bear up to 50 lbs of unbalanced weight, stand or sit for one hour at a time, and climb stairs carrying 10 lbs. Id. The Claimant, despite making this certification in order to obtain employment with SL Start, testified that she was not capable of these tasks. Tr., p. 181, Ll. 13-25; p. 182, L. 1. In fact, prior to her employment with SL Start, Dr. Carraher restricted the Claimant from prolonged standing or walking due to her CMT and the associated problems in her legs. Tr., p. 69, Ll. 15-21. She was hired by SL Start worked with ambulatory clients as an accommodation to her beginning in November 2002. Tr., p. 113, Ll. 4-12; Employer/Surety Ex. L, p. 64.

During her approximately one month tenure at SL Start, the Claimant earned $7.00 per hour and averaged 24 hours of work per week. Id. Within a short period of time, she suffered

two injuries, the first on December 5, 2002 and the second on December 9, 2002. Following her accidents, the Claimant continued to work for SL Start until April 2004. Tr., p. 123, Ll. 5 – 12. On July 15, 2004, one of her treating physicians, Dr. Kody, released her to return to her normal occupation regarding her shoulder injury. Tr., p. 168, Ll. 14 - 20; Ex. C, p. 22. Dr. Carraher did not disagree with Dr. Kody's release. Tr., p. 73, Ll. 12-25. The Claimant admitted that none of her treating physicians placed any restrictions on her due to any perceived back injury. Tr., p. 169, Ll. 12- 23. Dr. Carraher admitted that the Claimant's prescription drug intake, which was verified by her prescription records, including Oxycontin, hydrocodone and Soma following her accidents was identical to her intake in the months prior to her accidents. Tr., p. 55, L. 1- p. 56, L. 14; p. 57, Ll. 1-25, p. 62, Ll. 1-11.

The Claimant was subsequently examined by Drs. Adams and Bozarth at the request of the Idaho State Insurance Fund. Drs. Adams and Bozarth opined that, following their examination of the Claimant, she did not suffer any injuries in December of 2002 and as a consequence she did not suffer any permanent physical impairment. R., p. 42; Employer/ Surety Ex. 7, p. 0293.

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Is the Commission's finding that the Claimant was totally and permanently disabled prior to her December 2002 accident(s) supported by substantial and competent evidence?

2. Are Respondents Employer/Surety entitled to attorney fees on appeal pursuant to I.A.R 11 and *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995)?

ARGUMENT

A. The Commission's Finding that the Claimant was Totally and Permanently Disabled Prior to her December 2002 Accidents is Supported by Substantial and Competent Evidence

In her Brief, the Claimant implies that the facts do not support the Commission's finding that the Claimant was totally and permanently disabled pursuant to the odd lot doctrine prior to her accidents at SL Start. However, Respondents herein maintain that the crux of this appeal is that the Commission's finding of total and permanent disability prior to the claimant's December 2002 accidents is supported by substantial and competent evidence.

It is well settled that whether a claimant is totally and permanently disabled is a question of fact. *Boley v. State,* 130 Idaho 278, 280, 939 P.2d 854, 856 (1997). When the Supreme Court reviews a decision from the Industrial Commission, it reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Ogden v. Thompson,* 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund (In re Wilson),* 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). The Supreme Court will not disturb the Commission's factual findings unless they are clearly erroneous. *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000). Finally, all facts and inferences must be viewed in the light most favorable to Respondents herein as they prevailed before the Industrial Commission. *Stolle v. Bennett*, 144 Idaho 44, ___, 156 P.3d 545, 548-49 (2007)

1. The Odd Lot Doctrine

In cases such as this, where the claimant seeks to establish ISIF liability, Idaho Code § 72-332(1) places the initial burden on the claimant to establish that her pre-existing impairment and her subsequent injuries combined to result in total permanent disability. *Garcia v. J.R. Simplot,* 115 Idaho 966, 968, 772 P.2d 173, 175 (1989); *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 82, 921 P.2d 1200 (1996). However, if the claimant's total permanent disability predates the industrial injury, this requirement is not met. *Bybee,* 129 Idaho at 82.

Therefore, in order to impose liability on the ISIF, the Claimant must establish that she was not an odd-lot worker prior to her employment with SL Start. She did so by showing that she was working regularly at a job at the time of injury. *Bybee,* 129 Idaho at 82. The analysis does not stop here. Once she met her burden, the ISIF must establish that she was an odd-lot worker even though employed at that time of her injury. *Id.*

A claimant falls within the odd-lot category if he or she was so injured that he or she can only perform services which are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Arnold v. Splendid Bakery,* 88 Idaho 455, 463, 401 P.2d 271, 276 (1965) (citing *Crawford v. Nielson,* 78 Idaho 526, 307 P.2d 229 (1957)); *Lyons v. Industrial Special Indem. Fund,* 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1977). 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." *Bybee,* 129 Idaho at 82 (quoting *Lyons v. Industrial Special Indem. Fund,* 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1977)). The ISIF must show that in light of the claimant's pre-existing condition, the search for other suitable employment would have been futile. *Id.* As is shown below, there is substantial and competent evidence to support the Commission's finding that the Claimant was totally and permanently disabled as an odd lot worker prior to her employment with SL Start.

2. The Claimant was an Odd Lot Worker Prior to Her Employment with SL Start

An examination of the facts of record, coupled with the testimony of the vocational experts, establishes that the Claimant was an odd lot worker prior to her employment with SL Start. First, the Claimant's permanent restrictions prior to her accidents were identical to those following her accidents. Prior to her employment with SL Start, she was restricted to sedentary, part-time employment (actually Dr. Carraher restricted her to working only 8-12 hours per week) with no prolonged standing or walking, no prolonged usage of her arms and no repetitive work with her upper extremities due to the progressive nature of her CMT. Tr., p. 71, Ll. 4-11; Tr., p. 68, Ll. 16-24; Tr., p. 227, Ll. 2-10; Tr., p.85, Ll. 9-25; p. 86, Ll. 1-9. The Commission properly relied on these facts in reaching its decision:

> 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 bearing, then she was totally and permanently disabled before her 2002 accident.

R., p. 48. Moreover, as Claimant's own vocational expert testified, a person with the Claimant's pre-existing physical restrictions is totally and permanently disabled under Idaho's worker's compensation law:

> Q. Someone who had those restrictions, would they be, in your eyes, totally and permanently disabled under Idaho law as you understand it for purposes of workers' comp –
>
> A. The way you present it, yes.

Moreland depo., p. 42, Ll. 7 – 11.

Just as the Claimant's restrictions did not change following her accidents, the Commission's finding of pre-existing odd lot status is supported by medical evidence, including her prescription records which show that her use of substantial amounts of narcotic pain medications and muscle relaxants due to her painful CMT remained the same following her accidents. Similarly, the Commission relied upon the examination findings of Drs. Adams and Bozarth that the Claimant did not suffer any injuries in December of 2002 and as a consequence she did not suffer any permanent physical impairment. R., p. 42; Employer/ Surety Ex. 7, p. 0293.

The Commission also considered the Claimant's sedentary, less than part-time employment in the years leading up to her employment with SL Start. The evidence of record supports a finding that the Claimant was employed by either sympathetic employers or temporary good luck. For example, Dr. Carraher was a sympathetic employer, which the Commission recognized. R., p. 47. Prior to the Claimant's employment with him, he certified to

an insurance company to a reasonable degree of medical probability that the Claimant was totally and permanently disabled, yet he still employed her. Tr., 67-68; Employer/Surety Ex. 14, p. 662. He admitted that he accommodated her disability by allowing her to work at her own pace due to her CMT, he gave her a special chair, limited her hours, and allowed her to rest when she became fatigued. ISIF Ex. 14, p. 504; Tr., p. 75, Ll. 3-6; p. 81, Ll. 17-25; p. 82, Ll. 1-4.

Once she left Dr. Carraher's employ because he could not longer accommodate her disabilities, she was only able to find temporary employment on a less than part-time basis which the Commission took into account. R., 47. Her ability to find temporary, sedentary, less than part-time employment was the result of temporary good luck. She averaged 10.67 hours per week working for Dr. Beaton while his assistant was on medical leave. Tr., p. 111, Ll. 1-14. At Lakeland Family Medicine she averaged 14.3 hours per week, but was forced to cut back her time to less than 8-12 hours per week in 2001. Tr., p. 230, Ll. 1 – 7. In each instance, her significant restrictions were accommodated by her employers; once they required more than 12 hours per week she was terminated.

SL Start also provided the claimant with significant accommodations. Even though the job required her to bear up to 50 lbs of unbalanced weight, stand or sit for one hour at a time, and climb stairs carrying 10 lbs., she admitted that she was not capable of these essential functions of the job. Tr., p. 181, Ll. 13-25; p. 182, L. 1. Therefore, SL Start accommodated her by allowing her to work with ambulatory client. Tr., p. 113, Ll. 4-12; Employer/Surety Ex. L, p. 64.

The Claimant's accommodating employers were similar to the sympathetic employers in *Hamilton v. Ted Beamis Logging & Constr.*, 127 Idaho 221, 899 P.2d 434 (1995) and *Bybee.* In *Hamilton*, evidence of a sympathetic employer included special accommodations for Hamilton such as restricting his work to level ground and allowing him to take more breaks. *Hamilton,* 127 Idaho at 224. In *Bybee* the Court found that there was substantial evidence to find that the claimant was employed by a sympathetic employer because she could barely perform light duty work in a job classified as medium duty. *Bybee*, 129 Idaho at 83. It is important to note that Bybee worked for several years in a full-time capacity prior to her second accident. In the present case, the claimant could only muster temporary, less than part-time employment with accommodating employers.

The Claimant argues that the facts do not support a finding that she was an odd lot worker because she was able to hold down several jobs over a several year period. However, the mere fact that the Claimant worked for several years prior to her most recent accident does not preclude a finding that she was totally and permanently disabled prior to her December accidents. In *Redman v. State Industrial Special Indemnity Fund*, 138 Idaho 915, 71 P.3d 1062 (2003), this Court upheld the Commission's ruling that a claimant who had been gainfully employed for 6 years on a full-time basis following an initial injury, but who did not suffer any additional injury or impairment in a subsequent accident, save an aggravation of her original injury, was totally and permanently disabled prior to her second accident. In *Redman*, the claimant was a gas station clerk who suffered a back injury in 1987 resulting in restrictions of no

lifting more than 15 lbs. and no bending at the lumbar spine. *Id.*, 138 Idaho at 916. She then found employment with Maverik and was told by her supervisor to work as long as she could within her capacities and then to go home. *Id.* Following a second injury to her back in 1997, she sued the ISIF alleging that she her second injury combined with the first resulting in total permanent disability. The ISIF argued that her employment was due to a sympathetic employer, and that she failed to prove her recent accident when combined with her previous disability caused her total impairment. The ISIF based it argument on medical records which stated her most recent pain was due to an aggravation of a previous injury, not a new one.

The Commission agreed, stating "The combination of medical and vocational records and opinions shows it more likely than not that Claimant's permanent disability before the 1997 accident was no different than afterward." *Id.* at 918. This Court agreed with the Commission, stating that "it is not necessary to address the Commission's determination that Redman was *otherwise unemployable but for a sympathetic employer*" since she had not suffered any new injury. *Id.* The same rationale holds true here, where as in *Redman*, the medical evidence supports the conclusion Claimant did not suffer a new injury or any additional impairment.

The evidence of record establishes that the Claimant had pre-existing restrictions to sedentary, less than part-time employment. These restrictions/limitations made her unemployable except as an odd-lot worker. The Claimant failed to produce any evidence that these restrictions changed following her industrial accidents. Saddled with these restrictions, her efforts to openly compete in the labor market were futile. Due to her restrictions and limited

tolerances for activity, she was only capable of obtaining extremely limited, temporary work in medical offices and required significant accommodation. As the Commission noted, since she suffered no change in her restrictions, pain, or any new injury, if she was totally disabled after her December 2002 accidents, she was totally disabled prior to them. R., pp. 48-49. Even her own expert agreed that her restrictions made her virtually unemployable without significant accommodations. Moreland depo., p. 41, Ll. 19 – 24. Moreover, vocational expert Douglas Crum testified that, based upon her restrictions and her labor market, the Claimant was an odd-lot, totally disabled worker prior to her employment with SL Start and that she was not capable of competitive full time or part time employment. Therefore, there is substantial and competent evidence to support the Commission's finding that she was an odd-lot worker prior to her employment with SL Start.

B. Since There Is Substantial and Competent Evidence to Support the Commission's Finding that the Claimant is an Odd Lot Worker, the "Two-Tiered" Apportionment Analysis Set Forth in *Page v. McCain* is Not Required

The Claimant argues that this Court's recent decision in *Page v. McCain Foods, Inc.*, ___ Idaho ___, 179 P.3d 269 (2008) requires that the Commission make a separate finding of the claimant's degree of permanent disability from all sources and then apportion disability between the pre-existing injury and the current injury. Appellant's Brief, p. 5. In *Page*, this Court made it clear that this apportionment analysis is required when the Commission apportions disability between a pre-existing condition and the current injury. *Page,* 179 P.3d at 271-272 (discussing apportionment in the context of Idaho Code § 72-406 for pre-existing conditions where

permanent disability is less than total). However, as the *Bybee* and *Hamilton* decisions make clear, when a claimant is totally and permanently disabled prior to a subsequent accident, no apportionment analysis, e.g., apportioning liability/disability between the Employer/Surety and the ISIF under the *Carey* formula, is required. *See* Idaho Code § 72-332; *Bybee,* 129 Idaho at 82; *Hamilton,* 127 Idaho at 225.

In this case, as in *Hamilton* and *Bybee,* the Claimant was already totally disabled prior to her second accident. By definition her injuries from her second accident did not combine with her pre-existing impairments, so apportionment under the *Carey* formula is not required. The *Carey* formula is a mathematical formula developed by the Idaho Supreme Court in order to effectively administer the provisions of I.C. § 72-332. *Carey v. Clearwater County Rd. Dep't,* 107 Idaho 109, 118, 686 P.2d 54, 63 (1984). The *Carey* formula is only applicable when the preexisting injury combines with the current injury to create total and permanent disability. The purpose of this formula is to apportion liability such that employers are liable only to the extent of disability caused by the second industrial accident, with the remainder being paid by the ISIF. *Id.* at 117, 686 P.2d at 62. In *Hamilton*, the Supreme Court concluded that the *Carey* formula is inapplicable when the pre-existing impairment does not combine with the subsequent injury to result in total disability. 127 Idaho at 224-25, 899 P.2d at 437-38. In *Bybee*, the Supreme Court explained that in *Hamilton* "there was no question that pre-existing conditions did not combine with the subsequent injury since 'Hamilton was already totally and permanently disabled

[pursuant to the odd-lot doctrine] coming into the second injury.'" 129 Idaho at 81 (quoting *Hamilton*, 127 Idaho at 225, 899 P.2d at 438.)

Thus, this "two-tiered" analysis referred to by the Claimant is only applicable if *apportionment* is an issue. As the *Bybee* and *Hamilton* decisions make clear, apportionment is not required in this case as there is substantial and competent evidence to support the Commission's finding of total disability predating the second accident.

Even if this Court were to require the "two-tiered" analysis referred to by the Claimant, the Commission's decision complies with this requirement. An examination of paragraphs 48 – 52 of the Findings of Fact, Conclusions of law and Recommendation, establishes that the Commission compared the Claimant's pre and post injury restrictions, medication usage, and work limitations. R., pp. 46 – 48. Contrary to the Claimant's assertions in her Brief, this included an analysis of the Claimant's physical capabilities and restrictions pertaining to her pain, sitting, standing, walking, and lifting tolerances. Based upon this analysis -- which showed no difference in the Claimant's restrictions or prescription medication use following her December 2002 accidents -- the Commission concluded, in line with this Court's reasoning and decision in *Redman*, that the Claimant was totally disabled prior to her employment with SL Start. R., pp. 48 – 49.

C. Respondents Employer/Surety Are Entitled to Attorney Fees Pursuant to I.A.R 11 and *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995)

Pursuant to Idaho Appellate Rule 11.1, a party may be subject to sanctions if an appeal is brought frivolously and without foundation. "Under IAR Rule 11.1, sanctions will be awarded on appeal if the 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 were brought for an improper purpose, such as unnecessary delay or increase in the costs of litigation." *Frank v. Bunker Hill Co.,* 142 Idaho 126, 124 P.3d 1002, 1008 (2005). In *Talbot v. Ames Constr.,* 127 Idaho 648, 904 P.2d 560 (1995), this Court held that all the claimant's attorney asked the Court to do on appeal was re-weigh the evidence and reach a different conclusion than that reached by the Commission and awarded attorney fees on appeal against the Claimant's counsel.

As was the case in *Talbot*, all that the Claimant asked this Court to do is re-weigh the evidence and enter a new conclusion favorable to her. Her argument that the apportionment analysis set forth in *Page* is required in this case is clearly contrary to the Court's precedent in *Bybee and Hamilton.* In fact, Claimant devotes almost all of her brief arguing the facts and asking this Court to re-weigh the evidence. As such, Respondent herein is entitled to attorney fees.

CONCLUSION

The Commission's finding that the Claimant was totally disabled prior to her industrial accidents in December 2002 is supported by substantial and competent evidence and is consistent with well-settled Supreme Court precedent in *Bybee*, *Hamilton*, and *Redman.* The

Commission analyzed the following pertinent facts -- that the Claimant's sedentary, less than part-time physical restrictions were unaffected by her industrial accidents, her use of narcotic pain medications remained the same, and that she did not suffer any new injury or impairments due to her accidents -- and concluded that she was totally disabled prior to employment with SL Start. Since the *Bybee* and *Hamilton* make it clear that no apportionment is necessary if the Claimant is totally disabled prior to her second accident, the Claimant's argument that the Commission is required to perform an apportionment analysis has no merit. As a result, the Respondents herein respectfully request that this Court uphold the Commission's decisions and orders in their entirety.

Dated this 7th day of August, 2008.

AUGUSTINE & MCKENZIE, PLLC

By: _____

Paul J. Augustine - Of the Firm
Attorneys for Employer/Surety - Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

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111 North 2nd Street, Suite 300
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Attorney for Claimant

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___ Hand Delivered
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