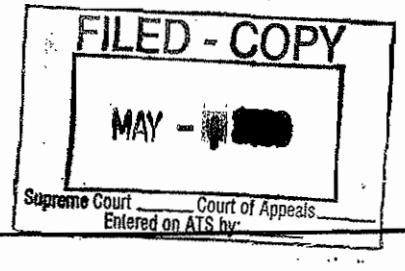
5-1-2009

Funes v. Aardema Respondent's Brief Dckt. 35923

IN THE SUPREME COURT OF THE STATE OF IDAHO

FILADELFO M. FUNES,	)	
	)	
Claimant/Appellant,	)	
v.	)	
	)	**Docket No. 35923-2008**
AARDEMA DAIRY, Employer, and STATE INSURANCE FUND, Surety,	)	
	)	
Defendants/Respondents.	)	
	)	
	)	



RESPONDENTS' BRIEF

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION
Chairman James E. Kile Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Respondents Aardema Dairy, Employer, and State Insurance Fund, Surety (hereinafter "the Defendants") note that Appellant Filadelfo M. Funes (hereinafter "Claimant") failed to provide a Statement of the Nature of the Case or Statement of the Course of Proceedings Below. Defendants submit that this case involves an appeal from a well-supported decision of the Industrial Commission which awarded the Claimant substantial workers' compensation benefits. The issue before this Court is whether Claimant can bear his burden of proving that the Industrial Commission's decision was not based upon substantial competent evidence. Claimant is objecting to the findings of fact by the Industrial Commission, which findings are subject to limited appellate review.

B. Course of Proceedings Below.

The hearing on this matter was conducted on December 14, 2007 before Referee Michael E. Powers. On August 1, 2008, Referee Powers filed his "Findings of Fact, Conclusions of Law, and Recommendation." By Order dated August 12, 2008, the Industrial Commission approved, confirmed, and adopted the Referee's proposed Findings of Fact and Conclusions of Law pursuant to Idaho Code §72-506 and ordered that Defendants pay certain medical bills, attorney fees, and benefits for a 25% Whole Person Permanent Partial Disability award. Defendants paid those benefits. Claimant moved for reconsideration of the factual findings by the Commission on September 4, 2008, but that motion was denied by Order of the Industrial Commission dated October 21, 2008. Claimant then timely filed this appeal.

C. Statement of the Facts.

The Commission's Findings of Fact (Agency Record ("R") pp. 10-21) are complete and accurate. Based upon the evidence received at the hearing, the Industrial Commission concluded that the Claimant was entitled to a Permanent Partial Impairment rating of 10% as specified by Dr. Verst, (R. p. 26), found that the Claimant had not proven that he was totally and permanently disabled, (*id.*, pp. 27-28), and found that the Claimant had a permanent partial disability rating of 25%, inclusive of the impairment rating. (*Id.*, p. 3 and p. 34). Claimant moved for reconsideration, (*id.* pp. 46-53), but the Industrial Commission denied Claimant's motion, noting that it "amounts to a request to re-weigh evidence and arguments already considered." (*Id.*, p. 62). Claimant's Statement of Facts ignores many of the findings of the Commission. Those omitted facts will be discussed below.

Before coming to the United States, the Claimant drove a taxi and/or a truck for 15 years since he was 18 years old. (Reporter's Transcript ("TR") p. 21). There was no indication that these jobs required any type of heavy lifting or any physical exertion. The Claimant has an Idaho drivers' license. (TR p. 62). The Claimant came to the United States in 1997, but allegedly has not learned any English in the ten years he lived in the United States. (*Id.*, p. 60). After obtaining work authorization in 1998, the Claimant worked in the assembly line at Rite Stuff Foods and then began his career doing dairy work, either milking or herding or driving. (*Id.*, pp. 24, 32). At the time of injury, the Claimant did quite a bit of driving, and also picked up calves. He had to keep track of these transactions and accordingly was required to and did keep records. (*Id.*, pp. 65-66).

While working at the Employer in January 2005, he suffered an industrial injury when he was picking up a newborn calf and allegedly another newborn calf struck him in the left hip. (*Id.*, p. 32). He claims that this caused him to feel that "something just exploded in my head." (*Id.*).

Despite these alleged problems, Claimant did not seek medical care for two days. He saw Dr. Thomas Zepeda at St. Benedict's Medical Center on February 1, 2005 and told Dr. Zepeda that he had low back pain as a result of picking up a calf. (R, Claimant's Exhibit ("Clmt.'s Ex.")1).

Claimant underwent conservative treatment and was referred to Dr. David Verst, a spine surgeon, on March 16, 2005. Dr. Verst diagnosed an "uncomplicated" low back herniated nucleus pulposus based on the MRI report. (R., Defendants' Exhibit ("Defs.' Ex.") 3, p. 5). When conservative care did not resolve Claimant's complaints, Dr. Verst performed surgery on May 2, 2005. (R., Defs.' Ex. 3, p. 13). Surgery was a far lateral diskectomy at L5-S1, and the Operative Report noted "underlying degenerative disk disease at the L5-S1 level." The report also noted that the surgery went well and the "foramen was fully free, with no evidence of nerve root compression." Claimant was discharged on the same day. (*Id.* at 3, p. 15).

Claimant apparently had a different understanding than did Dr. Verst about the surgery. He testified that the "surgery wasn't done right. The doctor also explained this to me that when they did the surgery, they split the nerves. When they closed me up after the surgery, they didn't reconnect the nerves. They just left them one on top of another . . . . The doctor didn't cut part of the nerves that were sticking out, part of the nerves that were hitting the nerve that goes down to my leg." (TR, pp. 39 and 38). Objective testing, however, shows that the surgery was successful.

By June 2, 2005, a month after the surgery, the Claimant's pain had diminished and he had "marked functional improvement." (R., Defs.' Ex. 3, p. 18). Dr. Verst released him to return to work with restrictions by June 27, 2005 and planned to release him to return to work without restrictions after four weeks of physical therapy. (*Id.*, pp. 3 and 20).

The Employer provided light-duty work within Dr. Verst's restrictions, having the Claimant drive a water truck which travels less than one mile per hour. On the first day, the Claimant did not even drive for the four-hour shift Dr. Verst had allowed, and on the second day, the Claimant left work before his four-hour shift ended. He contended that he was in severe pain and that his back was swollen. (TR pp. 45-46). He stated that he returned to Dr. Verst two days later and Dr. Verst told him he could not work anymore. (*Id.*). Once again, Dr. Verst's chart notes and testimony are directly to the contrary. His chart note of July 21, 2005 states nothing regarding any swelling in the Claimant's back and specifically states that the Claimant should continue working within his restrictions four hours a day. (R., Defs.' Ex. 3, p. 22 and R, Depo. of David Verst, M.D. ("Verst Depo."), p. 27). Dr. Verst testified that the Claimant did not have any swelling in his back when he saw him two days after the Claimant attempted the light-duty work at the Employer and also testified that he never told the Claimant that he should not go back to work. (*Id.*, p. 27).

Dr. Verst could find nothing objectively wrong with the Claimant following the surgery other than the subjective complaints. He referred the Claimant to Dr. Clinton Dillé in November of 2005 for epidural steroid injections. Dr. Dillé noted that Claimant's symptoms appear "to be greatly exaggerated." (R., Defs.' Ex. 5, p. 3). Dr. Verst then referred the Claimant to Dr. Wiggins for pain management because of the Claimant's continuing complaints. Dr. Verst concluded on February 18,

2006 that the Claimant was medically stable and had a 10% impairment rating, which was based on the herniated disk, the surgery and the continued subjective complaints of pain. (R., Defs.' Ex. 3, p. 30; R., Verst Depo. p. 14:13-18).

The Claimant saw Dr. Wiggins for the first time on March 8, 2006, and she noted that he demonstrated "regionalization and pain behaviors." (R., Clmt.'s. Ex. 6). She prescribed medications and scheduled him for follow-up treatment. On March 30, 2006, on only her second dealing with the Claimant, she began to notice "some symptom magnification." (*Id.* on 3/30/06 chart note). She noted that while he ambulated slowly into the examination room with a cane, "he did ambulate a little bit faster after leaving my office when not conscious of being observed." (*Id.*). She continued conservative treatment, including attempting physical therapy, and continued to prescribe medications. (*Id.* at 4/27/06 chart note). However, she noted that the Claimant would or could not cooperate with the physical therapist. By May 25, 2006, Dr. Wiggins' suspicions were growing. She noted his multiple complaints, including symptoms like "ants walking on and biting his legs" as well as new knee problems. (*Id.* at 5/25/06 chart note). Her impression was as follows:

> At this point, I honestly do not know what is going on with Mr. Funes. His complaints continue to increase in number. He does not tolerate examination of even superficial palpation. His MRI only shows a significant straightening of the cervical lordosis along with a disc protrusion at C4-5 that contacts the cervical cord. Unfortunately, this does not correspond with any of the complaints that he tells me about.

(*Id.*).

She suggested an Independent Medical Examination ("IME") as she had no idea whether the Claimant had a real problem. On August 16, 2006 she noted that he had "migratory areas of

multiple pain that are obviously not all related to his initial low back injury." (*Id.* at 8/16/06 note). On November 14, 2006, in response to a request from the Claimant's attorney, she confessed that "I do have some concerns due to the migratory nature of his pain and the fact that some of his symptoms quite frankly do not make sense. Also, I am quite concerned that I am not getting complete cooperation on physical examinations from Mr. Funes." (*Id.* at 11/14/06 letter).

The Claimant returned to Dr. Wiggins on February 7, 2007. She noted that "he is tender to palpation to the point of staggering and almost falling. This is even to very light touch." (*Id.* at 2/7/07 note). She noted on her examination of the upper extremities that "this examination was not very useful as there was obvious fictitious breakaway strength even with minimal resistance from me. He also demonstrated variable strength in muscles although nothing represented a maximal effort in my opinion." She noted that "Mr. Funes' exam is extremely difficult to interpret as there are many obvious fictitious elements." Her impression was:

> Mr. Funes has an aching back pain. Unfortunately, I do have difficulty assessing the true extent of these limitations due to some malingering on the physical examination. At this point, I think that he is at MMI. I believe some of his back and neck pain come from his original injury, although I don't think that he has significant limitations as a result. He also has had West Nile virus which is at least partly responsible for some of his symptoms as well.

She then awarded him a 12% impairment rating for the lumbar spine injury and released the Claimant. (*Id.*).

Because of Dr. Verst's and Dr. Wiggins' inability to find any objective problems with the Claimant despite his continuing and increasingly widespread and bizarre pain complaints, and based on their suggestions that an IME be undertaken, the Defendants commissioned an Independent

Medical Examination with orthopedic surgeon Joseph Daines, M.D., psychiatrist Eric Holt, M.D., and neurologist Richard Wilson, M.D., on April 12, 2007. (R., Defs.' Ex. 6). Dr. Holt's psychiatric evaluation concluded that the Claimant was "exaggerating his pain symptoms in a naïve and unsophisticated manner and is attempting to portray himself as an invalid so that he would have secondary gain, i.e., qualify for Social Security Disability." (*Id.*, p. 15). The Panel as a whole examined the Claimant and noted the claim of symptoms from his forehead and right eye down his back through his leg. He manifested prominent pain behavior, and had some muscle tenderness but no involuntary muscle spasm. (*Id.*, p. 6). The Panel concluded as follows:

> Mr. Funes likely sustained a far right lateral L5-S1 intervertebral disk herniation as a result of his work injury of 1/29/05. He is now status post right L5-S1 laminectomy and diskectomy. He has persistent, atypical low back pain with grossly over-determined pain behavior on examination and diminished sensation and giveaway weakness in his right leg and mild anatomic/physiologic pattern. His post-operative diagnostic workup has not shown any evidence of recurrent lumbar disk herniation nor does his diagnostic workup or current examination support objective evidence for his persistent back and right leg complaints.

(*Id.*, p. 7).

The Panel noted the Claimant had somewhat bizarre symptoms in his head and behind his eye but had no anatomical or physiologic findings to explain these. The Panel stated these upper back complaints were not the result of injury and had no viable medical explanation. It stated that the Claimant had reached maximum medical improvement and agreed with Dr. Verst's 10% impairment rating. It stated that Claimant would qualify for light to medium work activities with lifting limited to 50 pounds, 25 pounds on a regular basis, and limited stooping and bending. It

stated that no further medical treatment was indicated and that Claimant's abilities "may likely improve following settlement of his workmens compensation claim." It agreed with Dr. Verst that this claim should be brought to closure. (*Id.*, p. 8). Dr. Verst concurred with the Panel's conclusions. (R., Defs.' Ex. 3, p. 35).

At the Hearing, the Claimant admitted that he had not applied for jobs or attempted work since the accident, other than the two partial days of light-duty work supplied by his Employer. (TR pp. 83-84 and 127).

At the hearing, Greg Taylor, Field Consultant for the Industrial Commission Rehabilitation Division, testified. On direct examination he supported some of Claimant's arguments that he had disability above impairment, but on cross-examination, Mr. Taylor admitted that the major reason Claimant was not able to find work was because he believed himself to be disabled. (TR pp. 131-32). Mr. Taylor admitted that under Dr. Verst's restrictions there were jobs available to the Claimant. (TR pp. 110-11). He admitted that there are jobs available that Claimant would have the physical capability to do based on Dr. Verst's limitations and that most 49 year olds generally do not have jobs lifting over 50 pounds anyway. (*Id.*, p. 112). He acknowledged that the Claimant could most likely return to driving a truck or taxi or farm vehicles. He acknowledged that no physician had stated the Claimant could not perform the water tractor driving job that he had been given after the accident. (*Id.*, pp. 115-16). He acknowledged that the Claimant under Dr. Verst's restrictions would also be able to perform the other job offered by the Employer inspecting calves. (*Id.*, pp. 116-17).

Mr. Taylor acknowledged that under the IME Panel's restrictions, with which Dr. Verst

agreed, the labor market was even more open to the Claimant. (*Id.*, p. 120). He noted a number of different types of jobs, including many jobs available for Spanish-speaking individuals. (*Id.*, pp. 121-23). He also acknowledged in response to the Referee's questions that there was nothing physically that would prevent the Claimant from obtaining a commercial driver's license. (*Id.*, pp. 130-31).

The deposition of Dr. Verst, the Claimant's treating surgeon, was taken on January 21, 2008 and his testimony is quite revealing. Discussing his treatment of the Claimant, he stated that the surgery on May 2, 2005 was only an outpatient surgery which went well with no complications and was "executed well with decompressing the L5 nerve root." (R., Verst Depo., p. 9). He also stated that he found underlying degenerative disk disease which was pre-existing and was not caused by the accident, and that the pre-existing disk disease was causing at least some of the symptoms and restrictions. (*Id.*, pp. 8-9). He noted the Claimant had marked physical improvement after the surgery and was released to light-duty work after June 27, 2005, starting with four hours a day and then progressing to eight hours a day. (*Id.*, p. 11). He testified there were no objective reasons why the Claimant should not have been able to perform the four hours' work at the Employer and that he could continue working.

Dr. Verst discussed Claimant's 10% impairment rating, and emphasized that he had considered the pain complaints and had not underestimated the percent of impairment. (*Id.*, pp. 14-15). He testified that his comments regarding the "limited job opportunities" for the Claimant were based on Claimant's belief that he could not return to work, not Dr. Verst's belief or the objective signs. (*Id.*, p. 16). As a matter of fact, he explained that the Claimant had "an unusual,

disproportionate amount of pain and what made it more complex was that the pain was 'atypical' in the sense that it did not follow a particular dermatomal pattern, meaning it didn't follow a specific nerve root." He stated there was no consistency with the pain and that there were no objective findings "that substantiated his subjective complaints." (*Id.*, pp. 17-18). He said any pain the Claimant was actually suffering could very well be related to the underlying degenerative disk disease and that there were no real lifting or activity restrictions based solely on the industrial accident and surgery. (*Id.*).

Dr. Verst stated that he had an MRI performed because he could find no objective reason for Claimant's complaints. He stated the MRI was negative for nerve root compression, although there was multi-level disk degeneration involving both the cervical and lumbar spine which was not caused by the industrial accident. (*Id.*, p. 19).

Dr. Verst stated that he did agree with the findings of the IME Panel as well as those of Dr. Wiggins, who both commented on the rather bizarre symptoms and the fictitious elements exhibited by the Claimant. (*Id.*, pp. 21-24). He also stated that he believed the Claimant could return to the work he was doing prior to the time of injury. (*Id.*, p. 25). He testified that he disagreed with Dr. O'Brien's impairment rating and the limitations suggested. (*Id.*, p. 26).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Are Defendants entitled to an award of attorney fees based on Rule 11.1, Idaho Appellate Rules, as Claimant's counsel simply asks the Supreme Court to re-weigh the evidence?

III. ARGUMENT

A. Standard of Review.

The Idaho Supreme Court has recently reiterated the black letter law on its scope of review of a decision of the Industrial Commission:

> **STANDARD OF REVIEW**
>
> When reviewing a decision of the Industrial Commission, this Court exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 803, 118 P.3d 133, 135 (2005). Substantial and competent evidence is "relevant" evidence which a reasonable mind might accept to support a conclusion." *Id., quoting Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). It is more than a scintilla of proof, but less than a preponderance. *Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000). All facts and inferences will be viewed in the light most favorable to the party who prevailed before the Industrial Commission and the Commission's conclusions regarding credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. *Neihart*, 141 Idaho at 802-03, 118 P.3d at 134-135.

Stolle v. Bennett, 144 Idaho 44, 47-48, 156 P.3d 545, 549-50 (2007).

The scope of review is firmly established in the Idaho Constitution, the Idaho Code, and case law. On appeal, this Court's review of the decision from the Industrial Commission is limited to questions of law. Idaho Const. Art. V, §IX; I.C. §72-732; *Langley v. Idaho Industrial Special Indemnity Fund*, 126 Idaho 781, 784, 890 P.2d 732, 735 (1995); *Talbot v. Ames Construction*, 127 Idaho 648, 649-50, 904 P.2d 560, 561-62 (1995). "The law is well established that this Court does not scrutinize the weight and credibility of the evidence relied upon by the Commission and will

only disturb the Commission's findings as to weight and credibility if they are clearly erroneous." *Talbot*, 127 Idaho at 650, 904 P.2d at 562. Idaho Code §72-732 provides that the Court may only set aside an order of the Idaho Industrial Commission if the Commission's findings of fact are not based on any substantial competent evidence, the Commission has acted without jurisdiction or in excess of its powers, the order was procured by fraud, or the findings of fact do not as a matter of law support the order or award.

The Court in the *Talbot* case made the following observations which are equally applicable to the present circumstance:

> On appeal, Talbot requests this Court to reconsider the testimony and evidence and to call into question and review the credibility determinations of the Commission. In addition, Talbot asks this Court to reconsider the testimony from one of Talbot's physicians and to engage in reweighing of the facts, contrary to the long established rule that this Court does not reweigh the findings of the Commission. Talbot essentially invites this Court to depart from the long standing and traditional scope of reviewing a decision from the Industrial Commission, as required by the Constitution, statutes, and a long line of case law, and review *de novo* the findings and credibility determinations of the Commission. No argument is made by Talbot that the Commission's findings are not supported by substantial, competent evidence in the record. In fact, at oral argument before this Court, the attorney for Talbot admitted without exception that the record contains substantial, competent evidence to support the Commission's findings. Additionally, no argument was made that the Commission's findings are clearly erroneous, that the conclusions are not supported by the findings, or that the Commission committed error as a matter of law. Talbot's single argument on appeal is a plea to this Court to call into question and review anew the findings of the Commission in the hope that this Court might come to a different conclusion than that of the Commission. This Court will not abandon established precedent and may not ignore the express directive of the Idaho Constitution and the Idaho Code. We will review the findings of the Commission on the

> exclusive basis of determining whether the findings are supported by substantial and competent evidence in the record. *Langley*, 126 Idaho at 784, 890 P.2d at 735; *Roberts*, 124 Idaho at 947, 866 P.2d at 970.

Talbot, 127 Idaho at 650, 904 P.2d at 562.

B. The Industrial Commission's Finding that the Claimant Was Not Totally and Permanently Disabled Is Supported by Substantial and Competent Evidence in the Record.

Claimant asserts on his "Issues on Appeal" that the Commission committed error in its failure to find that he was totally and permanently disabled or to find that he was classified as an Odd Lot worker, but does not support either issue in his briefing other than to assert that the Claimant is an Odd Lot worker. When the Court reviews the Commission's findings of fact on total disability (R. pp. 27-28), it will recognize that the Commission's findings are supported by substantial and competent evidence.

Whether a claimant is totally and permanently disabled is a question of fact. *Boley v. State,* 130 Idaho 278, 281, 939 P.2d 854, 856 (1997). In determining whether a claimant has met his burden of proving 100% disability, the Commission considers the nature of the injury, the claimant's age at the time of the accident, his occupation, his education level and his ability to work. I.C. §72-430. The primary focus when evaluating disability is the effect these factors have on the claimant's "present and probable future ability to engage in gainful employment." I.C. §72-425; *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001); *McGee v. Thompson Creek Mining Co.*, 142 Idaho 761, 133 P.3d 1226 (2006). The only "evidence" that Claimant presented to the Commission is his testimony that he does not think that he can work, and the testimony of physicians and Mr. Taylor of ICRD that the Claimant told them he does not think he can work. This

does not carry his burden of proving total disability, and he makes no additional argument in his brief to this Court.

C. The Industrial Commission's Finding that the Claimant was Not an Odd Lot Worker Is Supported by Substantial and Competent Evidence in the Record.

At the Commission level, the Claimant bears the burden of proving of *prima facie* case for Odd Lot status. *Boley*, 130 Idaho at 281, 939 P.2d at 857. A *prima facie* case of Odd Lot status is only established "if the evidence is undisputed and is reasonably susceptible to only one interpretation." *Thompson v. Motel 6*, 135 Idaho 373, 376, 17 P.3d 874, 877 (2001).

Claimant has not borne his burden of establishing a *prima facie* case of odd-lot status by proving the unavailability of suitable work. *Huerta v. School District No. 431*, 116 Idaho 43, 47, 773 P.2d 1130, 1134 (1989). He must do more than assert that he cannot perform his previous type of employment. *Id.* at 49, 773 P.2d at 1136. Claimant did not even establish that he could not return to his previous employment, as Dr. Verst has stated that he could do so.

In order to carry his burden, the Claimant could have shown what other types of employment he had attempted; shown that vocational counselors or employment agencies or the Job Service had searched for other work and that such work was not available; or shown that any efforts to find suitable employment would have been futile. *Huerta* at 48, 773 P.2d at 1135. As to the first factor, the evidence clearly established that Claimant had not attempted other work for two and a half years. He did not show that any employment counselors had searched for work for him and that such work was not available. Mr. Taylor admitted that he had never searched for work for the Claimant since the Claimant had told him that he was not able to work. Finally, the Claimant did not show that any

efforts to find suitable employment would have been futile, as all of his physicians allowed him to return to work and his treating physicians and the IME Panel allowed him to return, if not to his pre-injury work, at least to the work that he was assigned after surgery. Moreover, he had not attempted to find any jobs in the driving industry, even though he has at least 15 years of experience and his physical limitations would not preclude him from driving. Claimant has not shown medical inability to engage in gainful activities. *See Baldner v. Bennett*, 103 Idaho 458, 649 P.2d 1214 (1982). He received medical approval to return to work. Dr. Verst stated that, from an objective point of view, the Claimant could return to the work he was doing prior to the time of injury. (R., Verst Depo. at 25). The Commission's decision that Claimant did not prove he was an Odd Lot worker is supported by substantial and competent evidence.

D. Substantial and Competent Evidence Supports the Industrial Commission's Finding that the Claimant Was Entitled to a Permanent Partial Disability Rating of 25% of the Whole Person.

The degree of permanent disability resulting from an industrial injury is a question of fact. *McCabe v. JoAnn Stores, Inc.*, 145 Idaho 91, 95, 175 P.3d 170, 184 (2007); *Anderson v. Harper's, Inc.*, 143 Idaho 193, 195, 141 P.3d 1062, 1064 (2006). Here, as in *McCabe*, Claimant's assertions of error in determining permanent disability are in reality a challenge to the Commission's weighing of evidence. "It is a claimant who must bear the burden of proof in establishing that she is disabled in excess of impairment." *McCabe*, 145 Idaho at 96, 175 P.3d 780 at 785; *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 440, 680 P.2d 539, 541 (1984). Thus, the question before this Court is whether the Commission's determination that Claimant failed to carry his burden of proving that he was disabled in excess of 25% is supported by the factual record. Here, as in *McCabe*, "Because the

record indicates that [the Claimant] failed to produce any substantial evidence bearing on [his] disability in excess of impairment," the Court should affirm the order of the Commission. *Id.* at 96, 175 P.3d at 785.

A claimant seeking compensation has the burden of proving a compensable disablement under the Idaho Workers' Compensation Act. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). Proof must be in the form of expert medical evidence on the extent of any disability. The burden of proof always rests on the claimant. *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 764, 604 P.2d 939, 943 (1980). Claimant here presented no proof, much less expert medical or vocational proof, that he was entitled to disability above his 10% impairment. *See, e.g., Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 445, 649 P.2d 1197, 1201 (1982). Idaho Code §72-425 provides that the evaluation or 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 non-medical factors [such as age, sex, education, economic and social environment] as provided in §72-430, I.C." Under the Idaho Workers' Compensation Law, "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 non-medical factors." I.C. §72-102(11). The burden of proof is always on the Claimant to prove disability in excess of his impairment rating. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985).

"Where a claimant has produced no significant evidence in the record which bears on a disability in excess of the permanent impairment rating, an additional award in excess of the

impairment may not be sustained. *Smith v. Payette County*, 105 Idaho 618, 622, 671 P.2d 1081, 1085 (1983)." *McCabe, supra* at 96, 175 P.3d at 785.

The Commission need not make detailed findings on every fragment of evidence regarding degree of disability submitted to it. *Swanson v. Kraft, Inc.*, 116 Idaho 315, 319, 775 P.2d 629, 633 (1989). As this Court stated in *McCabe*, "It is apparent from the record that the Commission considered the non-medical factors set forth in I.C. §72-430 as they affected [the Claimant's] ability to engage in gainful activity. As permitted by I.C. §72-506, the Commission adopted the findings of fact, conclusions of law, and recommendation of the Referee as its own. By doing so, the Commission adopted the Referee's findings regarding the essential I.C. §72-430 non-medical factors addressed therein. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 516, 975 P.2d 1178, 1181 (1991). These findings included, *inter alia*, [the Claimant's] age, educational background, employment history, employment history, occupation at the time of injury, nature of the injury, subsequent impairment, work limitations, post-injury labor market analysis, and her personal and economic circumstances." *McCabe*, 145 Idaho at 99, 175 P.3d at 788. In the present case, the evidence and the testimony of Dr. Verst in his post-hearing deposition and the testimony of Mr. Taylor of the Industrial Commission Rehabilitation Division are relevant evidence that a reasonable mind might accept to support a conclusion. *Zapata*, 132 Idaho at 516, 975 P.2d at 1181. Claimant here failed to provide any evidence from a vocational analyst or a physician to carry his burden of proving that he was disabled more than the 25% disability awarded by the Commission.

"A determination by the Commission as to the degree of permanent disability resulting from an industrial injury is a factual question committed to the particular expertise of the Commission."

McCabe, 145 Idaho at 99, 175 P.3d at 788; *Zapata,* 132 Idaho at 516, 975 P.2d at 1181. "The Court cannot re-weigh the evidence or consider whether it would have drawn a different conclusion from the evidence presented unless it is clearly erroneous." *McCabe*, 145 Idaho at 99, 175 P.3d at 788. The Commission in the present case did not err as a matter of law and its decision is not clearly erroneous. Claimant's physicians and the Independent Medical Examination Panel have all stated that the Claimant could (and should) return to work. Mr. Taylor of ICRD provided a labor market analysis showing that under the restrictions imposed by Dr. Verst, Dr. Wiggins, and the IME panel, the Claimant did have significant employment opportunities which would allow him to earn wages at a pre-injury status or close thereto. The Commission's finding is supported by substantial and competent evidence.

The only claim that the Claimant makes to this Court is that the Industrial Commission "ignored" evidence showing that the Claimant suffered from chronic pain. It is crystal clear, however, that the Industrial Commission considered Claimant's subjective complaints of pain, as well as the medical findings regarding pain. *See, e.g.,* Findings of Fact at R. p. 11, ¶¶11 and 12; p. 12, ¶14; p. 13, ¶19; p. 14, ¶24; p. 17, ¶37; and p. 18, ¶¶38-39.

Moreover, both Dr. Verst and Dr. Wiggins, as well as the IME panel, took into consideration the Claimant's reports of pain in their impairment ratings. (R., Defs.' Ex. 3, pp. 29, 30, 34; R., Claimant's Ex. 6 at 2/7/07 note; R., Defendants' Ex. 6 at p. 8 ("We agree with the previously noted impairment rating of 10% of the whole person as related to his lumbar laminectomy with residual subjective symptoms of back and leg discomfort."). Thus, the Industrial Commission did not ignore the issue of pain, but incorporated it into its decision finding a 25% disability. As the reports of

physicians take into account Claimant's complaints of pain, and the Commission considered these requests, there is substantial evidence supporting the Industrial Commission's finding. *See Pomerinke v. Excel Trucking Transport*, 124 Idaho 301, 305, 859 P.2d 337, 341 (1993).

E. Defendants Are Entitled to an Award of Attorney Fees.

While generally attorney fees are not awardable to defendants in workers compensation appeals, when a claimant simply requests the Supreme Court to reweigh the evidence the Court will award fees under Rule 11.1 of the Idaho Appellate Rules. See, for instance, *Talbot v. Ames Construction*, 127 Idaho at 653, 904 P.2d at 565, in which the Court imposed sanctions where in addition to acknowledging that the record supported the findings of the Commission, the attorney's "sole argument on appeal was an attempt to have this Court try this case anew. [The attorney] requested this Court to examine the findings of the Commission and to reweigh the evidence and credibility determinations of the Commission, which this Court may not do as prescribed by the Constitution, statute, and established precedent." Moreover, in *Stolle v. Bennett*, the Court also awarded sanctions to the defendants under I.A.R. 11.1. 144 Idaho 44, 51, 156 P.3d 545, 552 (2007). In that case, the Court noted that it has awarded attorney fees in the past when the appealing party is simply asking the Court to reweigh the evidence and credibility determinations. The Court noted that "under clear case precedent, [reweighing evidence and evaluating credibility determinations] is not this Court's role; therefore, the appeal is frivolous and without any legitimate basis." *Id.*

In the instant case, the Industrial Commission set out in great detail the evidence and the testimony it considered, set out the legal guidelines and applied the facts to come to a reasoned conclusion. Claimant nevertheless sought reconsideration at the Industrial Commission level of the

findings of the Commission. (R. p. 46). The Industrial Commission denied that motion, noting that "Claimant's motion amounts to a request to reweigh evidence and arguments already considered." (*Id.*, p. 62). It noted in its order denying reconsideration that it had carefully considered the evidence and the arguments regarding the issues of permanent partial disability and permanent total disability, and denied reconsideration as its decision was fully supported by the evidence in the record. (*Id.*, p. 63). The Claimant now comes before this Court making the same arguments. He has no good faith argument for a modification of existing law and simply asks this Court, as he asked the Industrial Commission, to reweigh the evidence considered by the Industrial Commission. He points to no issue that the Industrial Commission overlooked. He sets out no relevant argument that the Commission's determinations were not supported by substantial and competent evidence. Rule 11.1 sanctions are appropriate.

IV. CONCLUSION

Defendants submit that the Industrial Commission's determination that Claimant had not carried his burden of establishing that he was disabled in excess of the 25% total disability awarded by the Industrial Commission is correct. Claimant failed to present any substantial evidence that his disability exceeded the amount awarded. The Industrial Commission's decision is supported by substantial and competent evidence.

Defendants respectfully request this Court to affirm the Industrial Commission's decision and impose sanctions on the Claimant's attorney under I.A.R. 11.1 as he is merely asking the Court to reweigh the evidence already considered by the Industrial Commission.

DATED this 1st day of May, 2009.

EBERLE, BERLIN, KADING, TURNBOW &
MCKLVEEN, CHARTERED

By Neil D. McFeeley
Neil D. McFeeley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to I.A.R. 34(d), on the 1st day of May, 2009, I caused to be served two (2) true and correct copies of the above and foregoing Defendants/Respondents Brief to each party in this appeal, addressed and sent by the method indicated below:

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