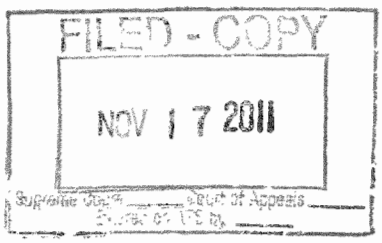
11-17-2011

Henry v. Department of Correction Appellant's Brief Dckt. 39039

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH HENRY,	)	
	)	
Claimant/ Appellant,	)	**SUPREME COURT NO. 39039-2011**
	)	
vs.	)	
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants/ Respondents.	)	
	)	



APPELLANT'S BRIEF

Appeal from the Industrial Commission, State of Idaho

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

This is an appeal from the Idaho Industrial Commission of the Findings of Fact, Conclusions of Law, Recommendation, and the accompanying Order filed July 15, 2011.

II. COURSE OF PROCEEDINGS BELOW

Appellant Joseph Henry brought his case against the Defendants, Department of Corrections and the State Insurance Fund, to determine whether Mr. Henry's heart attack suffered on November 15, 2009 was caused by an accident in the course and scope of his employment, among other issues. The Industrial Commission found the testimony of Mr. Henry's treating cardiologist insufficient to establish the required causal relationship between Mr. Henry's employment and the November 15, 2009 heart attack. The Industrial Commission's finding on this threshold issue rendered the remaining issues moot and therefore unaddressed. Mr. Henry thereafter filed a Notice of Appeal on July 29, 2011.

III. STATEMENT OF FACT

The undisputed facts relevant to this appeal are as follows: Claimant, Joseph Henry, worked as a prison guard at the Idaho State Correctional Institution since 2001. On November 15, 2009, Mr. Henry suffered a heart attack after arriving at the prison in the early morning hours. Mr. Henry had never suffered any symptoms related to a heart attack prior to November 15, 2009 (R p. 10, ¶¶ 1-2) and prior testing had ruled out occlusion of his coronary arteries. (*See*, Parent Depo., pp. 73-74).

In the early morning hours of November 15, 2009, Mr. Henry drove from Caldwell to the prison. Once there, Mr. Henry passed through a series of checkpoints and walked into the

Administration building. After check-in procedures, Mr. Henry left the Administration building and hurriedly walked approximately 400 yards in the cold morning air to the building that housed Unit 15. Once inside Unit 15, Mr. Henry began sweating profusely and had a strange appearance. Mr. Henry sat down in the control room to rest but his symptoms escalated to include pain in his arm and chest heaviness. Mr. Henry requested medical help and was transported by ambulance to St. Alphonsus Regional Medical Center. (R pp. 11-15, ¶¶ 6-14).

Once at the hospital, Cardiologist Mark G. Parent M.D. diagnosed Mr. Henry with an "acute posterolateral myocardial infarction due to a blockage of the right circumflex obtuse marginal artery." (R p. 15, ¶ 15). Mr. Henry promptly underwent an emergency operation in which Dr. Parent placed a stent in the occluded artery. During this surgery, Dr. Parent observed an additional occlusion in a separate artery, but noted that this second blockage was bypassed through collateralization[1] by other vessels. Dr. Parent initially thought that this second occluded artery was not contributing to Mr. Henry's symptoms. (R pp. 15-16, ¶ 15).

Following the successful placement of a stent in Mr. Henry's right marginal artery, Mr. Henry experienced continued chest pain. Nevertheless, Dr. Parent found Mr. Henry to be hemodynamically stable and authorized Mr. Henry's discharge from the hospital on November 17, 2009. (R p. 16, ¶ 15).

On November 25, 2009, just ten days after his heart attack, Mr. Henry underwent a cardiac stress test. While on the treadmill, Mr. Henry suffered another cardiac event, which

[1] Collateralization is the process by which two or more capillaries join together to form an alternate pathway for the flow of blood. It is a process where "you can have one artery actually supporting and supplying an artery with blood that's totally occluded." (Parent Depo. p. 12:23-25).

ultimately led to triple bypass surgery on November 26, 2009. After recovering from this second heart surgery, Mr. Henry attempted light duty at the prison, but ultimately resigned in March of 2010. (R p. 16, ¶ 16-17).

Prior to hearing, both parties herein communicated with Claimant's treating physician, Dr. Mark Parent, with regard to the cause of Claimant's heart attack and subsequent cardiac difficulty. On April 6, 2010, Claimant's attorney wrote to Dr. Parent and asked him to consider whether or not Claimant's work activities immediately before his heart attack were a factor in causing his heart attack. In this letter, Claimant's counsel supplied Dr. Parent additional factual information which was lacking from his medical records. (*See*, Joint Exhibit No. 13, pp. 1-2).

In response, Dr. Parent wrote back to Claimant's counsel, recounting the details of Claimant's work activities on the morning of his heart attack and opined as follows:

> "You have asked me in my opinion whether or not Mr. Henry's activities of that morning, getting to work were a factor in causing his heart attack, and knowing these other details of the temperature, the time of day, the activity level and the mental stress he was under, I think it is quite likely that these factors contributed to his myocardial infarction that day."

(*See*, Joint Exhibit No. 12, p. 9).

In preparation for the hearing, Defendants' attorney also wrote to Dr. Parent. That letter is included in the record in Joint Exhibit No. 13, pp. 3-6. In this letter, the Defendants' attorney recounted Claimant's health history and made mention of Claimant's use of a C-Pap machine for a sleep disorder, his chronic anxiety, his high cholesterol difficulties, his use of Viagra, his tobacco abuse and his alcohol intake. After recounting these prior health troubles, defense

counsel recounted the activities the Claimant was engaged in immediately prior to his heart attack and asked a series of questions of Dr. Parent taking into account all of the preexisting health difficulties. Dr. Parent responded by discussing these prior health difficulties and the affect of the Claimant's activities on the morning of his heart attack and summarized as follows:

> "A likely trigger for heart attacks is often early morning exertion under cold temperatures along with the stress and anxiety of going to work. As you know, Mr. Henry has had a very difficult time handling daily life stressors and has required treatment with anxiolytics and antidepressants for a number of years. I would think that the patient had a 50% contribution to his myocardial infarction from his long standing risk factors mentioned above and 50% due to the acute provoking risk factors of early morning walking in cold weather to work."

(*See*, Joint Exhibit No. 12, pp. 2-4).

At hearing, Claimant testified about his work activities and the onset of his heart atack and the parties then thereafter adjourned to take the deposition of Dr. Parent on March 4, 2011. During Dr. Parent's deposition, he once again discussed Claimant's prior risk factors for heart attack and the activities which proceeded his heart attack as Claimant got to work on the morning of November 15, 2009. Dr. Parent testified that in his opinion, Claimant's activities of exertion in cold weather immediately prior to his heart attack were a factor in causing his heart attack on the morning of November 15, 2009. (*See*, Dr. Parent Depo., p. 44). Again, on cross examination, Dr. Parent testified that Claimant's activities on the morning of November 15, 2009, contributed to the onset of his heart attack on that date. Dr. Parent certified that he held this opinion to a reasonable degree of medical probability. (*See*, Dr. Parent Depo., p. 49, ll. 1-11).

Dr. Parent also reiterated his opinion that the work-related activities were not the sole cause but were a 50% contributing cause to the triggering of Claimant's heart attack. (*See*, Dr. Parent Depo., p. 50, ll. 1-25, p. 51, ll. 1-5).

In addition, Dr. Parent was asked about different scenarios and the importance of other factors including the fact that Claimant might have looked ill on the morning of his heart attack and might have been exposed to cold weather at his home prior to leaving for work. Dr. Parent testified that in assessing major stressors and minor stressors, the decisions are very difficult and although some other minor stressors may have been involved, he stuck by his opinion on causation. (*See*, Dr. Parent Depo., pp. 51-55).

In summary, Dr. Parent testified that Claimant's artery appeared to be fine based upon the medical evidence when he was driving to work that morning from Caldwell to Boise and that, as far as he could tell, it closed up when Claimant was walking up stairs at work and that the symptoms hit him very suddenly. (*See*, Dr. Parent Depo., p. 55, ll. 15-20).

Dr. Parent explained that when a person has an artery that clogs suddenly, symptoms come on very suddenly and a person can go from feeling just fine to appearing gray and ashen in a very short time. Likewise, Dr. Parent testified that when that artery is treated and cleared, the resumption of normal symptoms can be very dramatic. Dr. Parent explained that Claimant in this case was very much like that and had a very dramatic response when the clogged artery was opened and reported a cessation of pain and a very dramatic and sudden relief of his symptoms. Dr. Parent explained that this was part of the rationale for the opinion which he had expressed. (*See*, Dr. Parent Depo., pp. 54-55).

It should be remembered that Dr. Mark Parent was the only cardiologist who testified in this case and the only physician who offered an opinion on the causation element of this case.

IV. ISSUES ON APPEAL

1. Whether the Industrial Commission erred as a matter of law by requiring the Claimant to rule out all possible causes of his November 15, 2009 heart attack in order to meet his burden of proof on causation.
2. Whether substantial and competent evidence supports the Industrial Commission's denial of benefits to Claimant.

V. STANDARD OF REVIEW

When the Supreme Court reviews the Findings of Fact and Conclusions of Law made by the Industrial Commission, the Court exercises free review of questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Hughen v. Highland Estates*, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002). Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion. *Id.* Finally, unless clearly erroneous, the Commission's determinations of credibility and weight of evidence will not be disturbed. *Id.*

As a matter of policy, the Court "must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated." *Page v. McCain Foods, Inc.*, 141 Idaho 342, 345, 109 P.3d 1084, 1087 (2005). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

VI. ARGUMENT

The Industrial Commission ("Commission") denied Mr. Henry's claim for workers' compensation benefits based on an erroneous legal standard. Specifically, the Commission discredited the only medical testimony in this case on the basis that the medical testimony did not narrow causation to a single work-related factor. Even if this Court were to find that the Commission applied the appropriate legal standard, the Commission's denial was not based on substantial and competent evidence. More precisely, the Commission discredited the testimony of Dr. Parent without a substantial and competent basis in the record.

A. The Industrial Commission committed reversible error by requiring the Claimant to rule out all possible causes for his November 15, 2009 heart attack.

Paragraph 41 of the Commission's Findings of Fact, Conclusions of Law, and Recommendation ("Decision") sets forth the basis for discrediting the testimony of Cardiologist Mark Parent M.D., the only medical expert to testify in this case. The finding reads as follows:

> "The Referee finds Dr. Parent's testimony insufficient to establish that any of Claimant's activities at his workplace on November 15, 2009 triggered his heart attack because he failed to rule out the earlier morning activities. He acknowledged that he should have considered Claimant's earlier activities including getting into a cold car, gripping a cold steering wheel and driving though traffic to get to work but, nevertheless, he did not. To the extent Dr. Parent's opinion relies upon Claimant's exertional activities at work to establish an industrial accident, it is materially flawed because it fails to rule out Claimant's prior exertional activities that morning."

(R p. 28, ¶ 41).

Claimant contends that this finding, which effectively imposes a burden on Claimant to prove that his industrial accident is the only cause for his accident and that all other causes are noncontributory, is a misstatement of law.

To prevail in a worker's compensation claim, a Claimant need only prove "to a reasonable degree of medical probability [that] the injury for which benefits are claimed is causally related to an accident occurring in the course of employment." *Wichterman v. J.H. Kelly, Inc.*, 144 Idaho 138, 141, 158 P.3d 301, 304 (2007).

While the Industrial Commission did cite to the language as set forth above, requiring a Claimant to prove causation by medical proof establishing causation to a reasonable degree of medical probability, the Industrial Commission's Decision violates established Idaho law by requiring Claimant to rule out all other possible causes in order to prevail.

In the case of *Bowman v. Twin Falls Construction Company,* 99 Idaho 312, 581 P.2d 770 (1978), (overruled on other grounds by *DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999)), the Industrial Commission was concerned with medical causation in relation to a worker who claimed that his exposure to dust in the work place caused the development of pulmonary emphysema and, secondarily, congestive heart failure. In that case, it appeared that the Claimant *Bowman* was a heavy equipment operator who had worked for eighteen years in a job that exposed him to dusty conditions which he alleged was a causative factor in his development in pulmonary emphysema. After finding that the Claimant had proved that he was totally and permanently disabled, the Industrial Commission found that the Claimant's working conditions did contribute to the development of his emphysema but only to a

slight degree. The Industrial Commission therefore denied benefits to Claimant because he had not proven that the working conditions were a major contributing cause to the development of his disabling condition.

On appeal, the Supreme Court reversed and remanded and found that the Industrial Commission had erred in applying the law with regard to the Claimant's burden of proof. Citing to *Hamlin v. University of Idaho*, 61 Idaho 570, 576, 104 P.2d 625, 627 (1940), the Supreme Court noted that long established Idaho law held as follows:

> "Where injury results partly from accident and partly from preexisting disease, it is compensable if the accident hastened or accelerated the ultimate result, and it is immaterial that the Claimant would, even if the accident had not occurred have become totally disabled by the disease."

See, *Bowman*, 99 Idaho at 315, 581 P.2d at 773.

Continuing, the Supreme Court in *Bowman,* set out the long established rationale for this reason as follows:

> "Nothing is better settled in compensation law than that the act takes the workman as they arrive at the plant gate. Some are weak and some are strong. Some, particularly as age advances, have a preexisting 'disease or condition' but some have not. No matter. All must work. They share equally the hazards of the press and their families astringencies of want, and they all, in our opinion, share equally in the protection of the act in the event of accident, regardless of their prior condition of health."

Id. (Citing, *Laird v. State Highway Dept.*, 80 Idaho 12, 232 P.2d 1079 (1958); *Teater v. Dairyman's Cooperative Creamery*, 69 Idaho 152, 190 P.2d 687 (1948); *Nistad v. Winten Lumber Co.*, 61 Idaho 1, 99 P.2d 52 (1940); *In re: Larson*, 48 Idaho 136, 279 P. 1087 (1929)).

The Supreme Court went on in *Bowman* to hold as follows:

> "Nor is the Commission required to seek out a distinction between those work-related contributing factors which are 'major' and those which are 'slight.' When one's employment aggravates, accelerates or 'lights up' a preexisting disease so that total permanent disability results, the employee is entitled by statute to 100% disability benefits.... The Commission here did indulge in such a distinction, saying that 'the inhalation of dust during the Claimant's employment aggravated his pulmonary disease to a slight extent, ' but that 'it was not the underlying cause of the disease or a major aggravating factor.' The language of *Beaver* is applicable: 'mere predisposing physical condition does not affect the right to compensation.' It does not make any difference that the inhalation of dust during employment is slight rather than a major contributing cause of resultant total disability."

Id. at 316, 774.

The finding of *Bowman*, applied to the facts of this case demonstrate that the Industrial Commission applied the wrong legal standard in making a judgment on the causation proof offered herein. *Bowman* stands for the proposition that if the Claimant offered proof to a reasonable degree of medical probability that the working conditions of the Claimant on the morning of his heart attack even slightly contributed to his heart attack, he is entitled to full compensation. As long as Claimant offers this proof to a reasonable degree of medical probability, the Claimant's proof is sufficient under the ruling of *Bowman*.

Implicit in the *Bowman* ruling, as set forth above, is the idea that many health-related problems are multi-factorial in nature. The *Bowman* decision, as cited above, stands for the proposition that as long as a Claimant can demonstrate, to a reasonable degree of medical

probability, that his or her work has contributed to the health problem, even to a slight degree, the worker's compensation act has been satisfied and benefits will be awarded.

In this case, the Industrial Commission violated the holding of *Bowman* in ruling the Claimant needed to rule out all other possible causes in order to present persuasive evidence on causation. The ruling of the Industrial Commission herein violates the standard set forth in *Bowman* and constitutes reversible error.

In much the same way, when multiple causes may be responsible for an injury in the context of standard civil cases, Idaho has adopted the "substantial factor" test. In *Newberry v. Martins*, this Court explained the proper usage of the substantial factor test in analyzing causation. 142 Idaho 284, 127 P.3d 187 (2005).

In *Newberry*, jury instructions as to causation were at issue in a medical malpractice case. Specifically, the dispute centered on whether a "but for" instruction versus a "substantial factor" instruction was proper. *Id.* This Court explained, "In short, the 'but for' test may be employed when there is a single possible cause, but when there are multiple possible causes of the plaintiff's injury a 'substantial factor' instruction must be given instead." *Id.* at 288.

The substantial factor instruction, upheld in *Newberry*, reads as follows:

> "When I use the expression 'proximate cause,' I mean a cause which, in natural or probable sequence, produced the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor concurring with some other cause acting at the same time, which in combination with it, causes the damage.
>
> A cause can be a substantial contributing cause even though the injury, damage or loss would likely have occurred anyway without that contributing cause. A substantial cause need not be the sole

> factor, or even the primary factor in causing plaintiffs injuries, but merely a substantial factor therein."

Id. at 287. (Emphasis Added). *See* also, *Garcia v. Windley*, 144 Idaho 539, 164 P.3d 819 (2007).

In this case, Dr. Parent's testimony was discounted as "materially flawed" for failing to discount all other possible causal sources of Mr. Henry's heart attack. (R p. 28, ¶ 41). Claimant contends that Dr. Parent's testimony, when analyzed in its entirety, satisfies both *Bowman*'s slight factor test as well as *Newberry*'s substantial factor test by affirmatively linking Mr. Henry's November 15, 2009 heart attack with the mental and physical stresses Mr. Henry faced after arriving at work.

In its Decision, the Commission excerpted the deposition testimony of Dr. Parent at length. Indeed, the Commission noted in Paragraph 20 of its Decision that during direct examination, Dr. Parent stated that Claimant:

> "had a 50% contribution to his myocardial infarction from his longstanding risk factors mentioned above and 50% due to the acute provoking risk factors of early morning walking in the cold weather to work. Therefore, I would agree with you that it is equally likely that the heart attack could have been caused by either the longstanding risk factors that caused the development of an atherosclerotic plaque and then the triggering risk factors of that morning's activities."

(R p. 13-14, ¶ 20).

Although the Commission apparently adopted Dr. Parent's 50% attribution to Claimant's workplace activities, the Commission nonetheless ruled against the Claimant for failing to rule out all other possible causes. Claimant would submit that Dr. Parent's testimony that multiple causes were responsible for Claimant's heart attack brings the causal analysis squarely under the purview of

either the slight risk test, or the substantial factor test. Under either test, a 50% contribution of work-related factors would support a finding of medical causation to a reasonable degree of medical probability.

Therefore, Claimant contends that the Commission committed reversible error by applying an inappropriate legal standard to the present case. Claimant contends that the testimony given by Dr. Parent satisfies either the slight risk or the substantial factor test. The Claimant is not required to show that the activities at work were the sole cause, or even a major cause, for his industrial accident as the two tests, cited above, demonstrate. Claimant therefore contends that he is not required to rule out any and all other possible causes of his injury in order to present a *prima facie* case or a persuasive opinion. The law does not require that and Claimant respectfully requests that this Court remand this matter to the Industrial Commission for consideration under the appropriate legal standard.

B. The Industrial Commission's findings are not supported by substantial and competent evidence

1. Claimant's burden of proof

As with a Plaintiff in a standard civil case, the Claimant in a workers' compensation case bears the initial burden of proof to show that he is entitled to benefits. *See, Cole v. Stokely Van Camp*, 118 Idaho 173, 175, 795 P.2d 872 (1990), *Evans v. Hara's, Inc.,* 123 Idaho 473, 849 P.2d 934 (1993). In this case, the Commission found that the heart attack was an "accident" within the scope of Idaho Code § 102(18)(b). (R p. 26, ¶ 33). The Commission's Decision ultimately turned on whether the accident occurred while the Claimant was already at work, or on his way to work. As the Commission rightfully noted, "Claimant need not identify, with any great specificity, the time when and place where the accident occurred. All that Claimant is required to do is to reasonably locate the occurrence of the accident in time and space." (R p. 25, ¶ 30).

Claimant contends that he readily satisfied this burden through the following testimony of Dr. Parent:

> "And when an artery closes – to give you an example. When an artery closes, somebody goes from feeling absolutely fine to dead or almost dead, and then when that artery opens on the cath lab table, that gray ashen appearing and that pain goes away and their sweating stops. And they want sometimes to get up and go home, and ten minutes ago they were about dead.
>
> And so this process of being normal flow through that artery and everything is fine, to no flow through that artery and you're having a heart attack, to restoration and normal flow, can be in some people a very dramatic recovery.

> So you can go from being very unimpaired to being very impaired to being very unimpaired very rapidly sometimes. And Mr. Henry was a bit like that in the cath lab to me. He went from being diaphoretic, cold ashen to when that artery opened, to being, I feel good, I feel great, I'm so glad that pain's gone. So they recover very quickly.
>
> **I don't think that artery was closed when he drove from Caldwell to Boise. I think it closed when we [sic] was walking up those stairs, and it hit him very suddenly.**"

(Parent Depo. p. 54, ll. 20-25, p. 55, ll. 1-19.) (Emphasis Added). [2]

Claimant contends that this testimony substantially and competently supports a finding that Claimant's heart attack occurred after he had already arrived at work. Dr. Parent was able to reasonably locate the occurrence of the accident in time and space. In fact, based on Claimant's physical activities, mental stressors, and symptomology, the cardiologist was able to pinpoint the occurrence of the arterial occlusion to the time when Claimant was climbing the stairs of Unit 15. Accordingly, Claimant contends that he satisfied his initial burden of showing that the accident at issue occurred after his arrival at work.

2. Defendant's burden – the risk of nonproduction

Once a Claimant comes forward with sufficient evidence to support a *prima facie* entitlement to benefits, the Defendant must present evidence or elicit testimony that contradicts or diminishes the Claimant's evidence. This evidentiary shift is clearly marked in the context of standard civil cases. "If the opponent's motion for a directed verdict is denied, he or she faces what is sometimes called the risk of nonproduction: if he or she produces no evidence, he or she

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[2] Although the Industrial Commission's Decision incorporated a block quote with the doctor's response to questions of causation, the portion excerpted herein, which identifies the doctor's ultimate causal conclusion, was replaced by ellipses in the Commission's Decision. (*See*, Parent Depo. p. 54, ll.20-25, p. 55, ll. 1-19; *but see* R p. 22, ¶ 22).

runs the risk that the [finder of fact] will find that the proponent has met the burden of persuasion." 29 Am. Jur. 2d Evidence § 183.

This evidentiary shift of the burden of proof is plain in workers' compensation cases and is consistent with the shifting of the burden of proof in civil cases. In *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002), the Claimant presented evidence that while sitting at a conveyor belt sorting seeds, she reached out to pick up a seed and felt a pop in her shoulder. Within a short time her shoulder became symptomatic and she was ultimately diagnosed with a rotator cuff tear. Her treating physician testified that the motion of reaching out to pick up the seed was enough to cause a rotator cuff tear in the setting of some pre-existing degenerative changes. The Defendant offered another doctor's testimony to the contrary and the Industrial Commission ultimately sided with the treating physician, finding that Claimant had proven a compensable case under the Worker's Compensation law.

On appeal, the Court noted that after the Claimant had presented a *prima facie* case establishing that she was entitled to benefits, the burden of proof shifted to the Defendants to present evidence disproving the Claimant's case.

> "Spivey provided substantial and competent evidence to allow the Commission to conclude that she had suffered a compensable injury. The burden was on the Appellants to present evidence that showed the injury was personal to Spivey [and not caused by her work]. *Id.* at 35."

In *Seamans v. Maaco Auto Painting & Bodyworks,* 128 Idaho 747, 918 P.2d 1192 (1996), it appeared that the Claimant was attempting to clean a ventilation stack at his place of work when he fell off the roof sustaining serious injury.

The Defendants contended that the Claimant's injury had been intentional, contending that the Claimant suffered from a paranoid psychosis which lead him to injuring himself intentionally.

The Industrial Commission found that the Claimant had proven a *prima facie* case that his accident and injury were related to the duties of his employment but found that the Defendant's proof did not satisfy their burden of disproving the Claimant's case.

On appeal, the Supreme Court found that once the Claimant offered a *prima facie* case satisfying the burden of proving that he had a compensable accident and injury under the Worker's Compensation law, the burden of proof shifted to the Defendant to prove every element of their defense. Interpreting Idaho Code § 72-208(1) which discusses willful and intentional injuries, the Court noted at follows:

> "To give the statute a reasonable construction requires that 'willful intention to injure himself' be deemed an affirmative defense the employer must prove. On the affirmative defenses in the realm of civil litigation are proven by the party asserting them, I.R.C.P. 8(c); *see, e.g. Hawley v. Green*, 117 Idaho 498, 503, 788 P.2d 1321 (1990) (Defendant has burden of proving every element necessary to establish affirmative defense of statute of limitation). Similarly here, it is reasonable to require that the bar to compensation be proven by the employer."

Seamans, 128 Idaho at 752.

Both *Spivey* and *Seamans* stand for the proposition that once a Claimant has offered proof which satisfies his or her burden of proof establishing a valid case under the Worker's Compensation law, the burden of proof shifts to the Defendant to offer proof to refute that offered by the Claimant.

Thus, the burden of proving that Dr. Parent's opinion was unsound or flawed in some manner rested with the Defendants. Appellant contends that the Defendants did not satisfy this burden of proof.

Here, Claimant put forth testimony from his treating cardiologist, Dr. Parent. Dr. Parent stated that in his expert medical opinion, Claimant's heart attack occurred after his arrival at his Employer's premises. Claimant contends that through this testimony, he satisfied his initial burden of showing that the accident at issue occurred after his arrival at work. At this point, the burden of proof shifts.

Despite Dr. Parent's unwavering medical testimony, the Defendant chose not to elicit testimony from an independent medical expert. In fact, the Defendant raised no argument as to the time when and place where the accident occurred. Instead, Defendant argued that Claimant never engaged in any "actual" work activities prior to his heart attack and was thus not entitled to benefits. (Def. Resp. Br. at 4). This legal argument was flatly denied by the Commission. (R p. 25, ¶ 31).

Defendants in this case did attempt to offer evidence through Dr. Parent himself in an effort to discredit and lessen the force of his opinion. It should be remembered that the Defendants started this process before the hearing by writing to Dr. Parent and suggesting to him that there were other causes, personal to the Claimant, which lead to his heart attack. (*See*, Joint Exhibit No. 13, pp. 3-6). Dr. Parent explained that while these causes may have had some causative affect on Claimant's heart attack, he still believed that the work-related activities in

which Claimant was engaged on the morning of November 15, 2009, were at least a 50% reason for his heart attack. (Joint Exhibit No. 12, pp. 2-4).

At hearing, as Claimant testified to additional circumstances and other evidence was introduced, Defendants had additional information about Claimant's symptoms and statements which had been made about his symptoms by other witnesses. When this information was conveyed to Dr. Parent on his deposition, Dr. Parent dismissed these statements as medically insignificant. (*See*, Parent Depo., p. 54, ll. 15-19.)

Claimant contends that despite Defendants best efforts, therefore, Dr. Parent remained steadfast in his opinion that Claimant's heart attack was caused, at least 50%, solely by his working activities on the morning of November 15, 2009.

3. The Commission's denial of benefits lacked the support of any substantial and competent evidence.

In Idaho, when a Claimant sets forth expert medical testimony, the Commission must cite substantial and competent evidence upon which the rejection of the testimony is based. *See*, e.g., *Hughen*, 137 Idaho at 349. Specifically, "[u]nless some explanation is furnished for the disregard of all the uncontradicted testimony or other evidence in the record, the Commission may find its award reversed as arbitrary and unsupported." Larson's Workers' Compensation Law § 130.05[3] (2007).

The Commission's grounds for rejecting Dr. Parent's uncontradicted expert testimony are twofold. First, the Commission relied on ambiguous testimony that "would suggest an onset of symptomatology prior to Claimant's arrival on the premises." (R p. 27, ¶ 36). Secondly, the

Commission listed a variety of variables which, according to the Commission's Decision, were not considered by Dr. Parent in formulating his opinion on medical causation and thus rendered his opinion "materially flawed." (R p. 28, ¶ 41). Claimant contends that in both instances, the Commission relied upon conjecture, speculation and evidence which had been dismissed as inconsequential.

a. The Commission's reliance on ambiguous lay testimony to diminish Dr. Parent's expert medical testimony as to the onset of Claimant's heart attack was clearly erroneous.

On appellate review, the Commission's conclusions on the credibility and weight of evidence are subject to reversal when the conclusions are clearly erroneous. *Jensen v. City of Pocatello*, 135 Idaho 406, 409, 18 P.3d 211 (2000). Here, the Commission had to evaluate evidence in order to reasonably locate in time when the Claimant's symptoms of a heart attack were manifest. As the Commission points out, the manifestation of symptoms would indicate when the actual arterial occlusion took place. (R p. 26, ¶ 34).

The only medical expert opinion as to the timing of the onset of Claimant's arterial occlusion came from Dr. Parent. In no uncertain terms, Dr. Parent said, "I think [the artery] closed when [h]e was walking up those stairs [at work], and it hit him very suddenly." (Parent Depo. p. 55, ll. 17-19). This testimony indicates that Dr. Parent, based on his knowledge and experience as a board certified cardiologist, believed that Claimant's heart attack took place after his arrival at work, on the steps of Unit 15. Importantly, Dr. Parent was given facts related to Claimant's pre and post-arrival activities in formulating this opinion. As Dr. Parent's

unwavering testimony indicates, he was willing to give a precise opinion as to when Claimant's cardiac artery was occluded and the heart attack was manifest.

Despite Dr. Parent's clear and unequivocal testimony, the decision below points to two sources of testimony upon which it bases its denial of compensability in this case. First, in a telephone call while still recovering from heart surgery, Claimant told his superior at the prison that he felt unwell on his drive to work the morning of his heart attack.

> "Q. And then your second call, anything specific you remember about that as far as the nature of the call in general?
>
> A. Again, it was kind of a checkup, how are you doing? What's your recovery—you know, what's it been like. In one of the conversations, you know, Officer Henry was telling me that when he had come in to work that day he wasn't feeling well. And, you know, kind of—during the drive and things like that, he should have kind of paid attention to, I guess, his own feeling of—but that was after the fact.
>
> ...
>
> Q. And he was describing the heart attack that he'd suffered on November 15?
>
> ...
>
> A. Yeah. He was referring to the morning coming to work on the 15th. . . ."

(R pp. 11-12, ¶ 6).

As evident from this testimony, there is no indication that the Claimant's vague and unspecified feelings on his drive into work were in any way related to his heart. Claimant readily volunteered the fact that he felt a general sense of malaise when he drove into work on the morning of November 15, 2009. (R p. 12, ¶ 7). Reliance on this comment to discredit Dr. Parent's testimony regarding the onset of Claimant's heart attack is unreasonable.

It should be remembered that Dr. Parent specifically addressed Claimant's activities before he got to work on the morning of November 15, 2009, and unequivocally and emphatically testified that he thought that Claimant's heart attack occurred while he was going up the steps into Unit 15 at his work place. Dr. Parent based this testimony upon the sudden onset of Claimant's symptoms and the fact that he recovered just as suddenly when the occluded vein was cleared. (*See*, Parent Depo., pp. 51-55). Claimant herein contends that the decision below therefore attached medical significance to evidence without any medical importance. This evidentiary factor had been considered by Dr. Parent and dismissed as medically insignificant. The Industrial Commission therefore had no substantial or competent evidence to indicate that this particular evidentiary feature was of any significance.

The second source of testimony used to discount Dr. Parent's medical opinion came from an unnamed coworker at the prison. Claimant made the following offhanded comment during his deposition:

> "A. [Spontaneously] I was reminded by one of my fellow workers there [at the Administration Building] that I didn't - - they told me I didn't look very good.
>
> Q. At this point when you were checking in with the shift lieutenant or his
> designee?
>
> A. Yes.
>
> Q. So on the day in question someone that was assigned to that duty mentioned to you didn't look well?
>
> A. They said I didn't look very well.

> Q. They reminded me. I had forgotten completely about it but...[end of response]."

(R pp. 12-13, ¶ 8).

Significantly, the Defendant did not depose this unnamed coworker, nor did the Defendant elicit further clarification from the Claimant. Like the other comment about feeling unwell, Claimant would submit that any reliance on this ambiguous testimony is clearly erroneous.

Notwithstanding the ambiguous nature of the comment, the significance of this comment was taken into account in the considered analysis of Dr. Parent. Dr. Parent wholly disregarded the comment by the unnamed coworker during his cross-examination. To be sure, after being asked about the statement by the unnamed coworker, Dr. Parent stated, "I think a nonmedical person looking at someone who's late to work and who's under stress might easily make a judgment on somebody's health. Mr. Henry is an anxious person who displays that anxiety on his sleeve and you see that in him." (Parent Depo. p. 54, ll. 15-19). Clear from this testimony, Dr. Parent accorded the ambiguous comment no medical significance.

Claimant contends that the Commission's reliance on the two aforementioned ambiguous and rather vague comments to disregard and contradict Dr. Parent's expert medical opinion as to the onset of Claimant's heart attack was erroneous and without the support of substantial and competent evidence. Both of the comments relied upon by the Commission were vague, generalized and ambiguous. When Dr. Parent was asked about these two evidentiary points, he dismissed them as being medically insignificant. Dr. Parent did consider these elements and

testified that they did not change his opinion nor did they constitute evidence which impacted his opinion. (*See*, Parent Depo. pp. 54-55).

Nonetheless, the Industrial Commission cited to these two evidentiary points as being significant and constituting a basis for disbelieving Dr. Parent's opinion. Claimant contends that the Industrial Commission committed reversible error by unreasonably relying upon evidence which has no medical significance based upon the only doctor's testimony in this record. The evidence relied upon by the Industrial Commission falls well below the substantial and competent standard upon which a factual finding must rest.

b. <u>The Commission's reasons for finding Dr. Parent's opinion "materially flawed" with respect to the onset of Claimant's heart attack was not supported by substantial and competent evidence in the record.</u>

As a threshold matter, it must be remembered that "[s]ubstantial and competent evidence is more than a scintilla of proof, but less than a preponderance." *Mancilla v. Greg*, 131 Idaho 685, 687, 963 P.2d 368, 370 (1998). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Id.*

The Decision of the Commission emphasizes that the Claimant did not look well when he got in to the first Administration Building at the Employer's premises and that Claimant was inconsistent about his actual state of symptomatology at the time he first arrived in the building at work. (R pp. 17-18, ¶ 19; p. 23, ¶ 24; p. 28, ¶ 41). The Commission concludes that because Dr. Parent did not consider this information, as well as other non-work-related factors, his opinion is "materially flawed." (R p. 28, ¶ 41).

Claimant contends that Dr. Parent was asked about many of the factors which the

Commission considered and that Dr. Parent replied to the defense questions on all of these points convincingly. Dr. Parent testified that the points raised by the Defendant and the Commission did not change his opinion.

> "Q. (By Ms. Vaughan) Would your opinion be at all affected by evidence which suggested he appeared to be ill when he went through the check-in station, the first building he entered that day after coming from the parking lot?
>
> A. I think a nonmedical person looking at someone who's late to work and who's under stress might easily make a judgment on somebody's health. Mr. Henry is an anxious person who displays that anxiety on his sleeve and you see that in him.
>
> And when an artery closes – to give you an example. When an artery closes, somebody goes from feeling absolutely fine to dead or almost dead, and when that artery opens on the cath lab table, that gray ashen appearing and that pain goes away and their sweating stops. And they want sometimes to get up and go home, and ten minutes ago they were about dead.
>
> And so this process of the normal flow through the artery and everything is fine, to no flow through the artery and you're having a heart attack, to restoration at normal flow, can be in some people a very dramatic recovery.
>
> So you can go from being very unimpaired to being very impaired to being very unimpaired very rapidly sometimes. And Mr. Henry was a bit like that in the cath lab to me. He went from being diaphoretic, cold ashen to when that artery opened, to being, I feel good, I feel great, I'm so glad that the pains gone. So they recover very quickly.
>
> I don't think that artery closed when he was getting in the car that morning or when he drove from Caldwell to Boise. I think it closed when he was walking up those stairs, and it hit him very suddenly.
>
> For you to ask me what's the contribution of the cold morning

> getting in the car and the drive to Boise is for me too fine a print to be so accurate to give you an opinion on what contribution – I just can't give that."

(Parent Depo. at 54, ll. 10-25, p. 55, 11 1-24).[3] (Emphasis Added)

Claimant contends that this answer dramatically and conclusively demonstrates that the scenario described by the Commission did not change Dr. Parent's opinion and did not influence the opinion which he gave in response to Claimant's counsel. The Decision of the Commission discounts Dr. Parent's opinion because he did not take this into account when, in fact, Dr. Parent did take this into account and discounted it.[4] The Commission's Decision that Dr. Parent's opinion must be discounted because he failed to take these other factors into account is therefore not supported by substantial or competent evidence.

The Commission's Decision also indicates that there is no support in the record for the proposition that Claimant was cold as he walked from the first Administration Building to the

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[3] To be precise, Dr. Parent is referring back to the following question posed by Defendants' counsel:

> "Q. (By Ms. Vaughn) Would your opinion with respect to causation change under a slightly different factual scenario, if the facts established that Mr. Henry commuted from Caldwell to his work; that on the morning in question he was aware he was running late while still in Caldwell prior to reporting for work at the correctional facility; that he entered a vehicle that had not been warmed up, that had been parked outside, presumably was exposed to the same temperatures in Caldwell, or close to the same temperatures, and on route to Boise, although in a vehicle, and was aware he was late during that commute, do you think any of those factors may have caused the onset of the myocardial infarction that morning?"

(Parent Depo. at p. 51, ll. 6-20).

[4] Despite Dr. Parent's testimony regarding the onset of Claimant's symptoms, and his consideration of the comments made by Claimant's coworker, the Commission made the following finding:

> "Dr. Parent was unaware that Claimant told Mr. Kimmel he suspected something was wrong on the drive to work or that a coworker thought he looked unwell on arrival at the Administration Building. He presumed that Claimant exhibited no onset symptoms until he reached Unit 15; however, the evidence in the record suggests Claimant may have been experiencing onset symptoms before then. Because Dr. Parent failed to consider this evidence, his opinion lacks foundation."

(R p. 23, ¶ 24)

second Administration Building on the morning at issue.

> "Finally, Dr. Parent testified that research has shown that cold temperature is implicated in contributing to the onset of myocardial infarction. Here, Claimant has testified that on the morning of November 15, 2009, it was "brisk." He stepped out of his Caldwell home, started his car and drove to the prison. The record does not reflect how Claimant was dressed, whether appropriately or inappropriately for the conditions. There is no testimony that even though it was cold outside, Claimant was himself cold. In fact, Claimant testified that he was comfortable. Claimant's Dep., p. 83. On balance, the evidence is insufficient to establish that Claimant was actually exposed to any risk of vasoconstriction due to cold temperatures. Even if he was, the evidence shows he was exposed to this risk both before and after his arrival at the premises."

(R p. 28, ¶ 40).

It appears that the Commission – without any basis in the record – assumed that the Claimant needed to be physically cold from the weather because of inadequate clothing before the coldness factor became an issue.

Claimant finds this assumption to be completely without any support in the record, serving only to cast unsupported doubt on a credible and informed medical opinion. Dr. Parent, when arriving at the only medical opinion on causation in this case, was made aware of the temperature on the morning in question and the Claimant's activities that exposed him to the cold weather. (Joint Exhibit 13 at 4.) At no point in Dr. Parent's opinion does he question the clothing worn by the Claimant or whether the Claimant felt physically cold, nor does he qualify his opinion based on those factors. Suffice it to say, Dr. Parent, a board certified cardiologist, was confident to a reasonable degree of medical probability that the cold weather was a

contributory factor in triggering Claimant's heart attack without further inquiry into the Claimant's attire or subjective feelings. There is no evidence in the record to suggest that these facts were necessary for the doctor to form a reliable medical opinion.

Claimant contends that the morning temperature may indeed have been at play simply because Claimant was outside breathing in the cold air as he hurried from the first Administration Building to the second. A letter from the Defendant to Dr. Parent indicates that the outside temperature on the morning in question was only twenty-five degrees. (Joint Exhibit 13 at 4.)

Common sense indicates that the cold temperature would not have been such a factor as Claimant drove his warm car from Caldwell to Boise for forty-five minutes. On the other hand, breathing in the below-freezing air while hurrying from one Administration Building to the other over 400 yards would indeed expose Claimant to enough cold air to pose a problem.

Again, Claimant would note that the Commission's Decision discounting the cold temperature is based upon an assumption, which is not based on any facts in this record. It is therefore not based on substantial or competent evidence.

In summation, the Commission's finding that Dr. Parent's medical opinion was materially flawed was arbitrary and unsupported. The very factors that were used to discredit Dr. Parent were both addressed by the cardiologist and properly considered. Therefore, the Commission committed reversible error by discrediting the testimony of Dr. Parent without citing to substantial and competent evidence in the record.

Claimant would note that the Defendants in this case did their job admirably and

properly. Defense counsel asked Dr. Parent both in letters prior to the hearing and during his deposition about the factors set forth by the Industrial Commission. The Defendants asked Dr. Parent whether or not it mattered to him if the Claimant felt ill during his drive from Caldwell to the site of his employment and Dr. Parent explained that this was not a factor in his opinion. The Defendants asked Dr. Parent about whether or not it mattered to him that Claimant "appeared ill" when he first arrived at work. Dr. Parent explained that this was not important to him and was not medically significant. Dr. Parent explained about the cold weather and the influence of the inhalation of cold air on a person's cardiac system and Defendants had full opportunity to explore this factor both in letters and in correspondence.

Defendants did their job in exploring all the other possible causes or factors which may have led Claimant to his heart attack and Dr. Parent specifically addressed these both before the hearing and in post-hearing depositions.

Nonetheless, the Industrial Commission ignored Dr. Parent's explanations and assigned medical weight and importance to factors which had been dismissed by the physicians. The Industrial Commission's Decision therefore lacks substantial and competent evidence and should be reversed.

VII. SUMMARY

Appellant Joseph Henry suffered a major heart attack while making his way to his guard post on the morning of November 15, 2009. Mr. Henry came forward with substantial and competent evidence that the accident arose out of and in the course of his employment, while engaged in work-related activities. Dr. Mark Parent, Mr. Henry's treating cardiologist, gave

uncontradicted medical testimony establishing the causal connection between the accident and Mr. Henry's workplace to a reasonable degree of medical probability.

In denying Mr. Henry workers' compensation claim, the Industrial Commission applied an erroneous legal standard which required Mr. Henry to disprove every conceivable cause of his injury. Furthermore, the Industrial Commission failed to support several of its material findings on substantial and competent evidence.

In accordance with the reasons set forth above, Claimant respectfully asks this Court for an order reversing the Decision of the Industrial Commission and remanding the matter to the Industrial Commission for reconsideration under the appropriate legal standard.

RESPECTFULLY SUBMITTED.

DATED This 17 day of November, 2011.

Richard S. Owen

David M. Farney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 17 day of November, 2011, a true and correct copy of the foregoing document was mailed, U. S. Postage prepaid, to:

Bridget A. Vaughan
1001 N. 22nd St.
Boise, Idaho 83702

by causing the same to be deposited in the United States Mail, postage prepaid, enclosed in an envelope addressed as above set forth.

Richard S. Owen