

9-6-2012

# Harris v. Independent School Dist. No. 1 Appellant's Brief Dckt. 39968

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IN THE SUPREME COURT OF THE STATE OF IDAHO

KATHERINE H. HARRIS

Claimant/Appellant,

v.

INDEPENDENT SCHOOL DISTRICT NO.  
1, EMPLOYER, and IDAHO STATE  
INSURANCE FUND, Surety,

Defendants/Respondents.

Supreme Court No. 39968

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**APPELLANT'S BRIEF**

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On appeal from the Industrial Commission  
State of Idaho

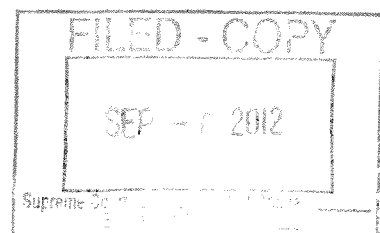
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## STATEMENT OF THE CASE

### *Nature of the Case and Course of Proceedings before the Industrial Commission*

This is an appeal from the Industrial Commission's April 6, 2012 *Order*.<sup>1</sup> In its decision, the Industrial Commission found that Mrs. Harris sustained a compensable industrial accident on January 9, 2008; but, the Commission denied Mrs. Harris temporary total disability ("TTD"), medical care benefits, and palliative medical care after February 19, 2008. Nearly all of Ms. Harris's medical care for her injury was accrued after February 19.

The Industrial Commission found that Mrs. Harris lacked credibility as to the nature and extent of her own injuries. According to Referee Douglas L. Donohue, Mrs. Harris was allegedly "faking" her injuries in order to feed her alleged addiction to prescription narcotics. Referee Donohue and the Industrial Commission found that Mrs. Harris failed to show it likely that her injury accelerated, exacerbated, or lit up any underlying degenerative condition that existed before the industrial accident.

### *Brief Statement of the Facts*

#### **The Compensable Work Accident and Injury—a Cervical and Lumbar Strain—on January 9, 2008**

Kathy Harris injured her neck and low back when she fell from the steps of a school bus on January 9, 2008. She was found by a coworker lying on the icy ground

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<sup>1</sup> Order, R. pp. 47-48.

at the steps of the bus that she drove. An ambulance was called, and it arrived about 10 minutes after it was called. Mrs. Harris received emergency treatment at St. Joseph Regional Medical Center.

Referee Douglas L. Donohue found in his *Findings of Fact, Conclusions of Law, and Recommendation*, that “Claimant unquestionably suffered an accident and injury when she fell from the bus steps on January 9, 2008. That injury has been consistently described as a cervical and lumbar strain.”<sup>2</sup>

According to Referee Donohue, “Claimant established it likely that she sustained a strain of both her cervical and lumbar areas in the industrial accident. She alleged a reasonable chronological link between that accident and the onset of symptoms from her degenerative cervical spine.”<sup>3</sup> The Industrial Commission accepted Referee Donohue’s finding, “Claimant sustained an injury—a lumbar and cervical strain—in a compensable industrial accident on January 9, 2008.”<sup>4</sup>

Notwithstanding Referee Donohue’s finding that Mrs. Harris fall was linked to the “onset of symptoms from a degenerative cervical spine,” he found the following:

She alleged, but failed to show, a change in her lumbar complaints before and after the accident. Claimant failed to show an objective basis upon which to establish a likely causal link between that accident and her degenerative spine condition.<sup>5</sup>

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<sup>2</sup> Findings of Fact, Conclusions of Law, and Recommendation, R., p. 42, ¶ 54.

<sup>3</sup> Id., R. p.41, ¶ 59.

<sup>4</sup> Id., R. p.45, ¶1.

<sup>5</sup> Id., R. p.41, ¶ 59.

**Referee Donohue diagnosed Mrs. Harris with a prescription-drug addiction and then determined that Mrs. Harris lacked credibility due to the alleged addiction.**

Referee Donohue personally diagnosed Mrs. Harris with a prescription drug addiction. According to Referee Donohue, Mrs. Harris lacked credibility because she was allegedly addicted to prescription pain medications. The Referee first raised the issue when referring to Mrs. Harris's credibility:

Claimant's 'addictive tendency' opens the door to the question of secondary gain in the form of continuing her prescriptions for narcotic pain medication."<sup>6</sup>

Mrs. Harris had never been diagnosed with any addiction, and the record lacked any diagnosis by any trained medical professional. Yet, Referee Donohue referenced the addiction throughout his decision.

From physician to physician, from visit to visit, the major consistency was Claimant's focus upon obtaining narcotic pain medication. Because her addictive tendency was well documented before the industrial accident, it is unreasonable to assign a causal link between her addiction and the industrial accident.<sup>7</sup>

The Referee suggested that even the accident was an effort to obtain pain medications:

Although the accident on January 9, 2008 is found to have occurred, it was suspiciously timely because NP Stolte had discontinued Claimant's longstanding prescriptions for narcotics as recently as mid-November 2007. The record contains no evidence regarding how much narcotic medication Claimant had stockpiled, if any, or how much she rationed that potential stockpile. Additionally, Claimant later made frank admission of her fear of withdrawal.<sup>8</sup>

The Referee then relied upon his diagnosis to discredit Mrs. Harris's other witnesses:

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<sup>6</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.41, ¶ 52.

<sup>7</sup> Id., R. p.41, ¶ 56.

<sup>8</sup> Id., R. p.41, ¶ 57.



Dr. Colburn's opinions are well explained and are respected. However, his opinions rely upon the accuracy of Claimant's recitation of her history and symptoms. These opinions are thus based upon a shaky foundation.<sup>9</sup>

**Defendants hired Doctor Warren Adams to examine Mrs. Harris on February 19, 2008.**

Defendants hired Dr. Adams to examine Mrs. Harris on February 19, 2008. His examination notes can be found at *Defendants' Rule X Exhibit 8/H*. Dr. Adams opined that Mrs. Harris's neck and low back injury, relatable to the industrial accident, were at MMI. He also expressed his opinion that Mrs. Harris suffered no PPI and needed no restrictions and could return to bus driving.<sup>10</sup>

Claimant's Exhibit G 00324 through 00372 set out a history of Dr. Warren Adams showing that his practice is, and for many years has been, limited to writing insurance reports for insurance companies. Exhibit G sets forth the Industrial Commission case of *Jolliff v. Sears, Roebuck Company and Lumbermen's Mutual Casualty Company* wherein the Idaho Industrial Commission totally discredited Dr. Adams. Claimant's counsel presented the Defendants herein with all materials included in Exhibit G 00324 through 00372, and yet neither of the Defendants nor Referee Donohue recognized the inherent bias of Dr. Adams.<sup>11</sup>

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<sup>9</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.45, ¶65.

<sup>10</sup> Id., R. p.34, ¶8.

<sup>11</sup> See also Claimant's Hr'g Ex. E 00272 to 00275.

**Referee Donohue denied medical expenses after February 19, 2008—nearly all of Kathy Harris’s medical expenses.**

Referee Donohue accepted Doctor Adams’ opinions and established February 19, 2008 as the point in time when Mrs. Harris’s employer had “a reasonable basis for discontinuing medical care benefits and for discontinuing TTDs.”<sup>12</sup> Referee Donohue chose February 19, 2008 despite substantial and competent evidence in the record that that Mrs. Harris received medical care related to her injury after February 19, 2008.

Referee Donohue acknowledged that “[t]reating physicians NP Stolte, Dr. Demakas, and Claimant’s IME physician Dr. Colburn have expressed the opinion that her industrial accident aggravated the preexisting degenerative condition in her neck, low back, or both.”<sup>13</sup> Additionally, ninety-eight percent of Mrs. Harris’s medical expenses were incurred after February 19, 2008.<sup>14</sup> A neurosurgeon, Dr. Demakas, performed surgery on Mrs. Harris on June 11, 2009: a cage fusion after discectomy and decompression of C5-7.

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<sup>12</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.44, ¶61.

<sup>13</sup> Id., R., p. 37, ¶26.

<sup>14</sup> Claimant’s Ex. G, “Medical Expenses”, R. pp.22-26.

## ISSUES ON APPEAL

1. Whether the Industrial Commission erred by finding that Katherine Harris lacked credibility because of her supposed addictive tendencies and/or supposed addiction to pain medications?
2. Whether the Industrial Commission erred in disallowing Katherine Harris's reasonable and necessary workers' compensation benefits, including medical expenses, subsequent to February 19, 2008, despite finding that she had suffered a compensable industrial accident on January 9, 2008?
3. Whether there was substantial and competent evidence supporting the Industrial Commission's decision that Ms. Harris "failed to show it likely that her injury accelerated, exacerbated, or lit up any underlying degenerative conditions that existed before the industrial accident"?
4. Whether the Commission abused its discretion in failing to award Ms. Harris attorney fees and costs pursuant to Idaho Code § 72-804 because Ms. Harris's employer and surety contested her claim for compensation without reasonable grounds to do so?
5. Whether attorney fees and costs are warranted on this appeal pursuant to Idaho Code § 72-804 and Idaho Appellate Rule 41 based on the grounds that Ms. Harris's employer and surety refused to pay workers' compensation benefits without reasonable grounds to do so?

## ARGUMENT

This Court exercises free review over the Idaho Industrial Commission's legal conclusions and may substitute its view for the Commission's view. *Kessler ex. Rel. Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997). The Commission's factual findings will not be disturbed so long as they are supported by substantial and competent evidence. I.C. § 72-732; *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 803, 118 P.3d 133, 135 (2005). Substantial evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 344, 109 P.3d 1084, 1086 (2005). Credibility of witnesses and evidence is a matter within the province of the Commission. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). As such, the Commission's findings on weight and credibility will not be disturbed on appeal if they are supported by substantial and competent evidence. *Id.*

It is established Idaho law that provisions of Idaho's workers' compensation law are to be liberally construed in favor of the injured employee:

In making our determinations, this Court “must liberally construe the provisions of the worker's compensation law in favor of the employee, in order to serve the humane purposes for which the law was promulgated.” *Jensen v. City of Pocatello*, 135 Idaho 406, 413, 18 P.3d 211, 218 (2000) (citing *Murray-Donahue v. Nat'l Car Rental Licensee Ass'n.*, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995)).

*Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 328-29, 179 P.3d 288, 291-92 (2008).

**1. Referee Donohue and the Industrial Commission erred as a matter of law in their decision that Kathy Harris lacked credibility**

**a. Referee Donohue's decision as to Kathy Harris's substantive credibility is unsupported by substantial and competent evidence.**

The Industrial Commission erred by finding that Katherine Harris's supposed addictive tendencies and/or supposed addiction to pain medications precluded her entitlement to all workers' compensation benefits after February 19, 2008. The Referee's and the Industrial Commission's decision to deny benefits was largely based on its erroneous ruling as to Mrs. Harris's credibility.

The Referee first raised the issue when referring to Mrs. Harris's credibility: "Claimant's 'addictive tendency' opens the door to the question of secondary gain in the form of continuing her prescriptions for narcotic pain medication."<sup>15</sup> The Referee continued:

From physician to physician, from visit to visit, the major consistency was Claimant's focus upon obtaining narcotic pain medication. Because her addictive tendency was well documented before the industrial accident, it is unreasonable to assign a causal link between her addiction and the industrial accident.<sup>16</sup>

The Referee suggested that even the accident was an effort to obtain pain medications:

Although the accident on January 9, 2008 is found to have occurred, it was suspiciously timely because NP Stolte had discontinued Claimant's longstanding prescriptions for narcotics as recently as mid-November 2007. The record contains no evidence regarding how much narcotic medication Claimant had stockpiled, if any, or how much she rationed that potential stockpile. Additionally, Claimant later made frank admission of her fear of withdrawal."<sup>17</sup>

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<sup>15</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.41, ¶ 52.

<sup>16</sup> Id., R. p.41, ¶ 56.

<sup>17</sup> Id., R. p.41, ¶ 57.

The Referee also used the alleged addiction to discredit Mrs. Harris's other witnesses. "Dr. Colburn's opinions are well explained and are respected. However, his opinions rely upon the accuracy of Claimant's recitation of her history and symptoms. These opinions are thus based upon a shaky foundation."<sup>18</sup>

Without a doubt, there is ample evidence in the record that Mrs. Harris used a variety of pain medications, and she has used them consistently. Such evidence supports the reasonable conclusion that Mrs. Harris has suffered from severe and consistent pain in her neck and lumbar region—the region of her body injured when she fell off of a bus.

There is absolutely no evidence in the record that Mrs. Harris has been diagnosed with a prescription-pain-medication addiction. Mrs. Harris used the pain medications she was prescribed by competent medical professionals. It was legal error for Referee Donohue to conclude that Mrs. Harris lacked credibility due to an alleged drug addiction.

In *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003), this Court noted that the issue of credibility includes both "observational credibility" and "substantive credibility."

Observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in order to judge it. Substantive credibility, on the other hand, may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing. The Commission's findings regarding substantive credibility will only be disturbed on appeal if they are not supported by substantial competent evidence.

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<sup>18</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.45, ¶65.

*Id.* 138 Idaho at 313, 63 P.3d at 439.<sup>19</sup>

In *Stevens-McAtee v. Potlatch Corp.* 145 Idaho 325, 179 P.3d 288 (2008), this Court considered whether the Commission's findings as to a witness's substantive credibility were supported by substantial and competent evidence. This Court concluded, "Because we find that the Commission's findings on McAtee's substantive credibility are not supported by substantial and competent evidence, this Court is not bound by those findings on appeal and may review the factual record in a light independent of those findings." *Id.* 145 Idaho at 151, 179 P.3d at 294. Similarly here, Referee Donohue's finding that Kathy Harris's injury and subsequent medical care were motivated by her addiction to pain medications is not supported by substantial and competent evidence. It follows that this Court is not bound by those findings on appeal.

In the case of *Moore v. Moore*, 152 Idaho 245, 269 P.3d 802 (2011), this Court upheld a Commission decision as to an employee's credibility regarding substantive credibility in part because the Referee elicited specific examples of inconsistencies.

Next, with regard to substantive credibility, Claimant argues that the Referee misstated and misconstrued his testimony when determining that various aspects of it were inconsistent. However, the Referee pointed to specific examples of when Claimant's testimony was inconsistent. First, the Referee noted that Claimant gave inconsistent testimony about how many trips he took after the accident and about how many days he worked. The Referee also pointed out that Claimant's testimony about being unable to work after the accident was undercut by Moore Enterprises' business records, which showed that Claimant continued to do business with Moore Enterprises as an independent contractor shortly after the accident.

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<sup>19</sup> Internal citations omitted.

*Id.* 152 Idaho at 254-55, 269 P.3d at 811-12.

In this case, the referee made specific references to Kathy Harris use of pain medications. From her use of medications, Referee Donohue deduced that Kathy Harris possibly staged her injury was “faking” the symptoms in order to acquire more medication. That is legal error. Mrs. Harris had never been diagnosed with a prescription pain medication addiction. Even if she were addicted to pain medications, it does not follow that her accident and subsequent medical care were motivated out of an effort to obtain additional medication. Rather, the evidence in the record supports the reasonable conclusion that Kathy Harris was in fact injured when she fell off the bus, and she sought medical care due to persistent, nagging pain in the region of her injury—her neck and lumbar region.

**b. Referee Donohue ignored substantial and competent evidence supporting Kathy Harris’s credibility.**

Referee Donohue ignored and discredited the following evidence in the record. Kathy Harris missed very few days of work in 18 years driving a bus, from her original hire date of March 2, 1990, until she was injured on January 9, 2008 (“DOI”). She was hired by the Lewiston School District as a substitute bus driver, ultimately acquiring her own route and bus in February 1992. Other than a few isolated sick days, Kathy did not miss any days of driving.<sup>20</sup> She never asked for her work to be adapted to her, never asked for special accommodations or care, and never complained of

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<sup>20</sup> Hr’g Tr. 59:6-22, Dec. 3, 2010.



working “shoulder to shoulder” with her fellow bus drivers.<sup>21</sup> However, since her DOI, Mrs. Harris has not driven a single route because of her injuries and because her treating doctors have not released her back to work.<sup>22</sup>

Kathy’s primary care physicians are from Valley Medical Center, Lewiston, Idaho, and have treated her before and after her DOI.<sup>23</sup> From the Valley Medical Center staff, Kathy was primarily cared for by Carmen Stolte, NP. Prior to her DOI, Kathy had suffered occasional low back complaints, as all professional drivers probably do. Such complaints were treated briefly, and other than a day or two, never kept Kathy from her bus route. Furthermore, Kathy’s medical records do not indicate any problems or previous injuries to her neck.<sup>24</sup> Subsequent to her DOI, Kathy’s medical records extensively document her neck and back injuries and her depression, along with all care and treatment.<sup>25</sup>

**c. Referee Donohue exhibited an unexplained prejudice toward Kathy Harris.**

Kathy Harris was denied a reasonable and fair hearing by the Commission due to undo delay between the date of the Hearing (December 3, 2010), the date her case’s submission (May of 2011), and Referee Donohue’s final entry of *Findings of Fact, Conclusions of Law, and Recommendation and Order* (April 6, 2012). There is no

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<sup>21</sup> Hr’g Tr. 59:23 to 60:25.

<sup>22</sup> Hr’g Tr. 60:10-25.

<sup>23</sup> See Claimant’s Ex. C.

<sup>24</sup> See Bailey’s Deposition Tr. pp.8-14; Bailey Deposition Ex.2.

<sup>25</sup> See Claimant’s Exs. A-F.

explanation offered to account for the nearly year-and-a-half delay from the hearing until a decision was offered.

Referee Donohue concluded that because Ms. Harris was prescribed prescription narcotics, she must have been addicted. He then concluded that her addiction drove her to seek medical care. Even assuming Kathy were addicted to pain medications, it is neither Referee Donohue's privilege nor the Industrial Commission's obligation to diagnose her.

Given the facts in the record, a more compelling deduction (and less biased conclusion) would be that an individual in Kathy's position—an individual seeking significant amounts medical care and undergoing invasive surgeries to her spine—was an individual suffering significant pain.

The following statements do not represent a fair and impartial referee:

- After Referee Donohue just finished explaining how Kathy Harris fell off of a bus and was driven to the hospital in an ambulance, he stated that her neck pains in the ER were consistent with her prior shoulder pain: “The upper thoracic tenderness was not inconsistent with preexisting shoulder complaints—she has a congenital type III acromion—for which she had previously received chronic treatment.”<sup>26</sup>
- Referee Donohue stated, “From physician to physician, from visit to visit, the major consistency was Claimant's focus upon obtaining narcotic pain medication. Because her addictive tendency was well documented before the industrial accident, it is unreasonable to assign a causal link between her addiction and the industrial accident. No physician has opined such a causal link exists.”<sup>27</sup> Referee Donohue failed to note that no physician had diagnosed Mrs. Harris with a drug addiction. Nor had any physician changed Mrs. Harris's pain management regimen. A reasonable mind would conclude that

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<sup>26</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.42, ¶55. Counsel for appellant respectfully submits that a fair and impartial mind would never use the double negative “not inconsistent.”

<sup>27</sup> Id., R. p.42, ¶56.

Kathy Harris and her medical providers were managing her pain to the best of their abilities.

- Referee Donohue stated, “Although the accident on January 9, 2008 is found to have occurred, it was suspiciously timely because NP Stolte had discontinued Claimant’s longstanding prescriptions for narcotics as recently as mid-November 2007. The record contains no evidence regarding how much narcotic medication Claimant had stockpiled, if any, of how much she rationed of that potential stockpile. Additionally, Claimant later made frank admissions of her fear of withdrawal.”<sup>28</sup> The only possible explanation for this paragraph is that Referee Donohue reached a conclusion (Kathy Harris was addicted to drugs), and then Referee Donohue invented an explanation of Kathy’s accident consistent with his own preconceived notions (Kathy fell off the bus in order to obtain more pain medications). Referee Donohue’s inclusion of the foregoing paragraph in his decision is naked decision-maker bias.
- Referee Donohue stated, “NP Stolte’s additional treatment beyond the date of medical stability as declared by Dr. Adams was not related to the industrial accident. Moreover, the record does not unequivocally demonstrate that Claimant showed gradual improvement thereafter from NP Stolte’s care.”<sup>29</sup> Idaho law does not require that a claimant establish any fact by the “not unequivocally” standard. Referee Donohue’s “not unequivocally” standard is a higher standard than that required of Mrs. Harris under Idaho law.<sup>30</sup>

**d. Referee Douglass L. Donohue was the referee in two prior cases where this Court found his credibility opinions “unsupported by substantial and competent evidence.”**

Referee Donohue presided over the case *Stevens–McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008) and *Knowlton v. Wood River Medical Center*, 151 Idaho 135, 144, 254 P.3d 36, 45 (2011). In both of those cases, Referee Donohue made unfounded determinations as to the employee’s credibility. In *Knowlton v. Wood*

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<sup>28</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.42, ¶57.

<sup>29</sup> *Id.*, R. p.44, ¶63; Referee Donohue had ample evidence before him as to Dr. Adams’ insurance bias, but ignored that evidence (See Claimant’s Ex. G 00324 to 00372).

<sup>30</sup> Again, counsel submits that the use of the double negative “not unequivocally” suggests that the writer is attempting to obfuscate the meaning of his sentence; a fair decision maker would never use such a term.

*River Medical Center* this Court noted Referee Donohue’s credibility determinations as follows:

In this case, it does not appear from the record that the Referee had any reason to doubt Knowlton's credibility. Knowlton's explanation of the events leading up to, and following, the incident on September 12, 2000, has been consistent. Although the Referee is correct that some details have been forgotten over the eight years leading up to the hearing, such is to be expected. However, the fact that Knowlton at times had difficulty remembering certain details does not support the Commission's conclusion that Knowlton's testimony could “not be accepted at face value.” Interestingly, the Referee in this case is the same Referee that presided over the hearing in *Stevens–McAtee v. Potlatch Corp.* In that case, the Referee held that the claimant's testimony was not credible because the claimant “improved” or “enhanced” his testimony by adding specific details at the hearing. On appeal, this Court found that the Referee's findings with regard to the claimant's credibility were not supported by substantial and competent evidence because, although there may have been slight differences or additions at the hearing, the claimant's testimony regarding how he was injured had remained consistent, and any differences in his testimony did not support the Referee's conclusion that he was not credible. Similarly in this case, the differences or additions in Knowlton's testimony over the eight years preceding the hearing does not support the Referee's conclusion that Knowlton was not credible.

*Knowlton v. Wood River Medical Center*, 151 Idaho 135, 144-145, 254 P.3d 36, 45 - 46 (2011) (citing *Stevens–McAtee*, 145 Idaho at 329, 179 P.3d at 292). In this case, Kathy Harris submits that Referee Donohue has once again made an unfounded decision as to an employee’s credibility.

**2. The Industrial Commission erroneously limited Kathy Harris’s reasonable medical care to care received within only 40 days of her compensable work accident.**

**a. Kathy Harris suffered a compensable industrial accident on January 9, 2008.**

The Industrial Commission unequivocally found that Ms. Harris suffered a compensable industrial accident, a cervical and lumbar strain, on January 9, 2008: “Here, Claimant unquestionably suffered an accident and injury when she fell from the bus steps on January 9, 2008.”<sup>31</sup> But, the Commission disallowed Katherine Harris’s reasonable and necessary workers’ compensation benefits, including medical expenses, after February 19, 2008—merely 40 days after the accident. On that date, Mrs. Harris’s employer had her examined by its doctor, Dr. Adams.

Claimant’s Exhibit G 00324 through 00372 set out a history of Dr. Warren Adams showing that his practice is, and for many years has been, limited to writing insurance reports for insurance companies. Exhibit G sets forth the Industrial Commission case of *Jolliff v. Sears, Roebuck Company and Lumbermen’s Mutual Casualty Company* wherein the Idaho Industrial Commission totally discredited Dr. Adams. Claimant’s counsel presented the Defendants herein with all materials included in Exhibit G 00324 through 00372, and yet neither of the Defendants nor Referee Donohue recognized the inherent bias of Dr. Adams.<sup>32</sup>

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<sup>31</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p. 42, ¶ 54.

<sup>32</sup> See also Claimant’s Hr’g Ex. E 00272 to 00275.

**b. Referee Donohue ignored substantial and competent evidence as to Kathy Harris's need for subsequent medical care after February 19, 2008.**

Referee Donohue and the Industrial Commission erred when it arbitrarily determined that February 19, 2008 was the cut-off date for Kathy Harris's further workers' compensation benefits.

An employer is required to provide reasonable medical care for a reasonable time. I.C. § 72-432(1). That Section states,

(1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

This Court has interpreted Section 72-432(1) in the case *Magee v. Thompson Creek Mining Co.*, 142 Idaho 761, 133 P.3d 1226 (2006).

An employer must provide an injured employee with reasonable medical care for a reasonable time after a work-related injury. I.C. § 72-432(1). Therefore, an employee is entitled to continuing medical care when such care is reasonable and prescribed by a physician. Such medical care is reasonable when: "(1) the claimant made gradual improvement from the treatment received; (2) the treatment was required by the claimant's physician; and (3) the treatment received was within the physician's standard of practice and the charges for the treatment were fair, reasonable, and similar to charges in the same profession." *Jarvis*, 136 Idaho at 585, 38 P.3d at 623 (citations omitted).

*Id.*, 142 Idaho at 766, 133 P.3d at 1231.

Referee Donohue opined, “Strains of the type diagnosed here could well have resolved to baseline and MMI by the time of Dr. Adams’ evaluation [February 18, 2008].”<sup>33</sup> Rather than fairly consider the evidence before him as to Kathy Harris’s continued medical care after February 2008, Referee Donohue preferred to deduce that all the medical care Kathy received was an effort on her part to obtain prescription medications.

The following evidence was either not considered, or interpreted by Referee Donohue as a scheme to get prescription medications. On the DOI, Kathy was transported on a cervical board by Lewiston Fire Department Ambulance from the accident site at the Lewiston School District Bus Grounds to St. Joseph Regional Medical Center.<sup>34</sup> The EMTs found her laying on her back on the frozen ground “with a bystander holding her C-spine” and first responders providing care. EMTs and paramedics also worked to immobilize her cervical spine with a rigid collar.<sup>35</sup> Significant initial physical findings at the hospital included Kathy suffering pain in her right knee, lower back, and neck.<sup>36</sup>

Care providers at St. Joseph’s found injury at Kathy’s low back, right knee, left shoulder, and neck.<sup>37</sup> While Kathy reported that her low back had previously been sore, she noted that she had not suffered trauma to either her low back or neck prior to the DOI.<sup>38</sup>

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<sup>33</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.44, ¶ 62.

<sup>34</sup> Claimant’s Hr’g Ex. A.

<sup>35</sup> Id.

<sup>36</sup> Claimant’s Hr’g Ex. A 00003.

<sup>37</sup> Claimant’s Hr’g Ex. A 00007.

<sup>38</sup> Claimant’s Hr’g Ex. A 00011.

Kathy again presented to St. Joseph's Hospital Emergency Room five months after her initial visit; on June 13, 2008, ER doctor, David Kendrick, M.D., registered history that:

Katherine is a 52-year-old white female who presents today for increased lower back pain. She is having persistent back pain since January from a fall. She says that she has, what sounds like, an annular tear in one of the lumbar discs. She had an MRI up at Valley Medical Center. She has been on hydrocodone 10 mg, as well as Soma. This has not done a whole lot for her. She unfortunately had an exacerbation of her pain since yesterday. She just woke up out of bed and had sudden pain. She keeps saying that she was not doing anything to exacerbate anything. Her husband says that she does sit and work on the computer quite a bit. The patient says that everything hurts her. She tries to be active doing the dishes and the laundry and making dinner, but all of that hurts and she has to sit down in the middle of all of it. Now she has just chronic pain. There are no radicular symptoms. No neurovascular deficits. No change in her bowel or her bladder function. She had been to physical therapy but after her MRI she said this was discontinued. In the meantime, she does have a follow-up appointment with Carmen Stolte next week and Dr. DeMarcus [sic John J. Demakas, M.D.] next week as well. Past Medical History: Significant for the chronic back pain. I believe she has some depression and hypertension, as well as acid reflux problems.<sup>39</sup>

Kathy revisited St. Joseph's Medical Center Emergency Room again on July 6, 2008, for cervical and lumbar pain.<sup>40</sup> In November 2008, Kathy returned, asserting that, among other things, her pain was "out of control."<sup>41</sup> Again on January 23, 2009, Kathy presented to St. Joseph's Emergency Room with the following history by Nancy Berkheister, M.D.:

Katherine is a 52 year-old female who suffered an injury to her neck while working as a bus driver one year ago. She does have diagnosis of bulging discs at C6 and C7. She has seen Dr. Demakas in Spokane. She

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<sup>39</sup> Claimant's Hr'g Ex. A 00020.

<sup>40</sup> Claimant's Hr'g Ex. A 00028 and 00029.

<sup>41</sup> Claimant's Hr'g Ex. A 00032 to 00036.



is managed locally by her primary care provider, Carmine Stolte. She is due to be scheduled to have disc replacement in her neck and was actually supposed to have a phone consultation with Dr. Demakas today, however, he was called away for any Emergency. There has been some ongoing discussion with Workman's Compensation as well. Additionally, the patient notes that she has a [,] I believe [,] an annual tear in one of her lumbar discs as well and has some pain in the back and into the left leg. Her primary concern however, is of neck pain with pain into the left arm, down to the hand. She has some weakness in the hand. This is no worse than usual. She has not had any recent injury or aggravating activity. She does take oral Demerol.<sup>42</sup>

Throughout said time frame, Kathy was also treating with Carmen Stolte, NP, at Valley Medical Center, and with Kirke White, M.D. at the Tri-State Hospital Pain Clinic, Clarkston, Washington. Kathy was consistent in relating her pain to her DOI.<sup>43</sup> Kathy diagramed her pain, for Dr. White, to reside primarily in her neck, headaches, tingling and weakness in her hands, pain in her low back, and pain in and around her outer thighs. Dr. White performed epidural injections in Kathy's low back and neck;<sup>44</sup> (Cl't.'s Hr'g Ex. B 00082-00085); cervical epidural number two was performed on August 12, 2008.<sup>45</sup> Dr. White also injected Kathy's 'trigger points' in an attempt to relieve her severe headaches. Along with comments noted (Claimant's Hr'g Ex. B 00070), Dr. White also diagnosed C5-6 and C-7 stenosis with upper extremity radiculitis, along with continuing severe headaches.<sup>46</sup> Although Kathy experienced relief from Dr. White's multiple pain and trigger injections, she continued struggling from her bus-fall injuries.<sup>47</sup>

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<sup>42</sup> Claimant's Hr'g Ex. A 00038.

<sup>43</sup> Claimant's Hr'g Ex. B 00061.

<sup>44</sup> Claimant's Hr'g Ex. B 00082 to 00085.

<sup>45</sup> Claimant's Hr'g Ex. B 00110 to 00111.

<sup>46</sup> Claimant's Hr'g Ex. B 00103.

<sup>47</sup> Claimant's Hr'g Ex. B 00110 to 00111.

A review of Kathy's medical records prior to her DOI, including Valley Medical Center records (Claimant's Hr'g Ex. C 00001-00147), do not show any complaint of neck/cervical pain, or discomfort until DOI.<sup>48</sup> To date, Carmen Stolte, NP, has not released Kathy back to work based on Kathy's continuing symptoms directly related to and caused by her comp injury. Carmen Stolte has continued treating Kathy's neck and other comp. injuries as noted in the post DOI medical records.<sup>49</sup>

Among others, Carmen Stolte's records are excerpted as follows:

- "Back, neck, head pain, numbness in fingers. . . back pain . . . depression";<sup>50</sup>
- "Patient complains of increased neck pain. . .";<sup>51</sup>
- ". . .Kathy has been getting headaches after physical therapy (PT). The pain comes up from the neck. She still has numbness and tingling in her fingers which is worse after PT or activities, such as driving . . .head and neck pain to palpation over musculature in neck and shoulders . . . cervical strain, acute cervical MRI due to numbness and tingling in her hands and fingers and worsening pain."<sup>52</sup>

Because of symptoms, including pain, from her DOI, Kathy was referred to a neurosurgeon in Spokane, John J. Demakas, M.D., Spokane Brain and Spine, and team leader of the gammaknife neurosurgical department at Sacred Heart Medical Center, Spokane, Washington. Dr. Demakas recognized Kathy's injuries to have been caused

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<sup>48</sup> Claimant's Hr'g Ex. C 00147 to 00148.

<sup>49</sup> Claimant's Hr'g Ex. C 00147 to 00255.

<sup>50</sup> Claimant's Hr'g Ex. C 00147.

<sup>51</sup> Claimant's Hr'g Ex. C 00149.

<sup>52</sup> Claimant's Hr'g Ex. C 00150.

by and related to her January 9, 2008 workers' compensation accident and injury. In Dr. Demakas's initial outpatient neurosurgical consultation, he reported that among other things;

[Kathy] states that since that time [DOI] she has been having problems with severe neck pain, fairly persistent headaches, intermittent numbness and tingling down into the arms, particularly if they are extended out in front of her or above her head. She has neck pain and headaches almost daily. She also has been having low back pain at approximately the waist level and paraspinals that rotates laterally into the hips in both sides, and down the anterior portion of her thighs . . . [She is suffering] numbness in the legs and arms.<sup>53</sup>

In the "Comments" portion of his Initial Consultation Report, Dr. Demakas wrote:

In reviewing the patient's case, at least historically from what I have, this lady appears to have certainly pre-existing degenerative changes in the neck and low back, but it was made symptomatic by her fall [on January 9, 2008]. I certainly could picture her slip and fall with brief loss of consciousness causing not only injury to already weakened degenerative discs at C5-6 and C6-7, but probably some soft tissue injury in the neck, as well as low back, as well as straining those joints. She has rather moderate stenosis at L4-5 in the lumbar area, and all of that could aggravate things and keep her symptomatic . . . I would agree with her family doctor, at least on my assessment that she should probably not have been returned to work. She should have had the opportunity to get the bone scan and fuller specialty assessment other than a one-time visit with the IME [referring to Defendants' doctor, Warren Adams, M.D.; additionally see Claimant's Ex. G 00324-00372], and a more aggressive reconditioning program put in place before putting her back in the bus.<sup>54</sup>

Dr. Demakas finished by stating "we will see what the bone scan shows and make recommendations from there. I told her to go ahead and keep her appointment

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<sup>53</sup> Claimant's Hr'g Ex. E 00272 to 00275.

<sup>54</sup> Claimant's Hr'g Ex. E 00272 to 00275.

with the pain specialist [Dr. Kirke White] in Clarkston.”<sup>55</sup> Dr. Demakas diagnosed Kathy’s injuries the same as R.C. Colburn, M.D., who testified at hearing and opined that, among other things, Kathy’s comp. accident caused her current medical problems and on-going symptoms.<sup>56</sup>

Dr. Demakas further ordered and studied a bone scan and MRIs of the cervical spine (Claimant’s Hr’g Ex. E 00280), limited cervical spine, three views, (Claimant’s Hr’g Ex. E 00282) lumbar spine MRI (Claimant’s Hr’g Ex. E 00279). In his May 14, 2009 office report Dr. Demakas commented, “Kathy continues to complain of pretty significant cervical pain. As well as leg pain and paresthesias that run down into the arm. This is pretty constant pain that she does not feel she can deal with any longer.” In Dr. Demakas’s report, his “Impression” stated, “continued degenerative disc disease C5-6, C6-7 with neck and arm pain.”<sup>57</sup>

In Dr. Demakas’s June 9, 2010 “Operative Report,” he presented the same Pre-Operative Diagnosis and Post-Operative Diagnosis, to wit: “degenerative disc disease, spondylosis, with stenosis with neck and arm pain C5-6, C6-7.” According to Procedures portion of Dr. Demakas’s Operative Report, he performed an “anterior cervical disectomy and decompression of canal foramina C5-6, C6-7; anterior arthrodesis with STALIF C cage with Vitoss-BA/BMAC C5-6. C6-7; anterior screw fixation of cages C5-6, C6-7; bone marrow aspiration right anterior illium; bone marrow aspiration left anterior illium.”<sup>58</sup>

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<sup>55</sup> Claimant’s Hr’g Ex. E 00275.

<sup>56</sup> Hr’g Tr. pp. 25-29.

<sup>57</sup> Claimant’s Hr’g Ex. E 00295.

<sup>58</sup> Claimant’s Hr’g Ex. A 00302.

In and throughout Dr. Demakas's studies and care, he opined that Kathy's injuries were directly related to her January 9, 2008, workers' comp. injury.<sup>59</sup> At his six-weeks, post-surgery evaluation, Dr. Demakas quoted in his report that "[Kathy] is doing well. Preoperative left arm symptoms have resolved."<sup>60</sup>

Concurrent with the filing of Claimant's Post-Hearing Memorandum, Claimant filed a motion to supplement her Hearing exhibits by the inclusion of additional notes and records from Dr. Demakas. The Supplement included Hearing Exhibit E, pages 00311 through 00323. Dr. Demakas presented his additional comments by a letter dated March 1, 2011, wherein he responded to the undersigned's email dated February 9, 2011, shown as Claimant's Hearing Exhibit E, page 00312, and email shown as Claimant's Hearing Exhibit E, page 00313. Dr. Demakas's letter that supplements Claimant's Hearing Exhibit E, at page 00311, states, "I apologize for the tardiness to your response. I have reviewed Dr. Colburn's evaluation and I agree with his conclusions. I must admit that I do not recall, nor do I have a retained copy of her evaluation by Dr. Larson, so I am not sure where exactly what I was agreeing with in that particular report." Referee Donohue refused to allow the admission of this supplemental material to Hearing Ex. E pages 00311 to 00323.<sup>61</sup> Appellant petitions the Court to order the admission of the supplement to Exhibit E.

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<sup>59</sup> Claimant's Hr'g Ex. E 00284.

<sup>60</sup> Claimant's Hr'g Ex. E 00308.

<sup>61</sup> "Claimant's Motion to Supplement Rule X Exhibits", "Claimant's Affidavit Re: Rule X Exhibits," R. pp. 6 to 21.

Dr. Colburn's conclusions, with which Dr. Demakas agrees, are clearly set forth in his report dated October 21, 2010, (Clt.'s Hr'g Ex. E 00322-00323; Clt's Hr'g Ex. F 00321-00323) and in his live testimony.

Referee Donohue allowed the admission of the supplemental comment of Dr. Demakas after the Defendants, employer and surety, moved for the admission of supplemental comment from Dr. Demakas, wherein he wrote, "I agree with Dr. Larson," on a post-hearing note. The note lacked any context as to which portion or portions of Dr. Larson's report(s) were referenced. Claimant was not allowed to clarify Dr. Demakas's statement. Referee Donohue disallowed Claimant's supplement to Exhibit E that would have clarified the context of Dr. Demakas's statement, as well as furthering Dr. Demakas's opinions.

Dr. Colburn, in his report, recognized Dr. Demakas's consultation notes indicating that:

[Kathy] was seen at the hospital and discharged and since that time has been having problem with severe neck pain, fairly persistent headaches, intermittent numbness, and tingling down into the arms, particularly if they are extended out in front of her or above her head. . . The doctor [Demakas] noted in that her slip and fall [January 9, 2008] with brief loss of consciousness causing not only injury to the already weakened degenerative disc at C5-6 and C6-7 but probably some soft tissue injury in the neck as well as the low back as well as straining those joints.<sup>62</sup>

Dr. Colburn in his IME report also recognized that in preparing for surgery, Dr. Demakas noted that "[Kathy] was continuing to complain of pretty significant cervical

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<sup>62</sup> Claimant's Hr'g Ex. F 00316 to 00318.

pain as well as leg pain and paresthesias that run down into the arm (sic). This is a pretty constant pain that she does not feel she can deal with any longer.”<sup>63</sup>

According to Referee Donohue,

Claimant failed to show a persuasive factual basis upon which to find Dr. Adams’ examination or opinions to be inaccurate in this instance. Claimant failed to show a likely basis upon which to choose another treater’s opinion or another expert’s opinion over Dr. Adams’. Strains of the type diagnosed here could well have resolved to baseline and MMI by the time of Dr. Adams’ evaluation. The record shows these strains likely did.<sup>64</sup>

This conclusion is unsupported by the record.

**3. Referee Donohue erred as a matter of law in determining both that Ms. Harris suffered an accident, but that she failed to establish a causal link between her injuries and the accident.**

According to Referee Donohue,

Claimant established it likely that she sustained a strain of both her cervical and lumbar areas in the industrial accident. She alleged a reasonable chronological link between that accident and the onset of symptoms from her degenerative cervical spine. She alleged, but failed to prove, a likely causal link. She alleged, but failed to show, a change in her lumbar complaints before and after the accident. Claimant failed to show an objective basis upon which to establish a likely causal link between that accident and her degenerative spine condition.<sup>65</sup>

The evidence cited above also supports Kathy Harris’s position that there was a causal link between her accident and her subsequent medical treatment.

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<sup>63</sup> Claimant’s Hr’g Ex. F 00317.

<sup>64</sup> Findings of Fact, Conclusions of Law, and Recommendation, R. p.44, ¶ 62.

<sup>65</sup> Id., R. p.43, ¶ 59.

**4. Ms. Harris should have been awarded attorney fees and costs before Commission because her employer unreasonably ceased paying her claims.**

The Commission abused its discretion in failing to award Ms. Harris attorney fees and costs pursuant to Idaho Code § 72–804 because Ms. Harris’s employer and surety contested her claim for compensation without reasonable grounds to do so. This case presents the situation that Section 72-804 was drafted to combat—the Defendants wrongfully and unreasonably stopped paying Ms. Harris’s claim, and when presented with an analysis and a reasonable opportunity reverse the cessation, they unreasonably and blindly continued to rely on their original denial.

The Defendants have forced Mrs. Harris to present her claims to the Commission rather than spend time being medically treated and cared for as Idaho’s Workers’ Compensation law demands. The plain meaning of this statute is that the Commission "shall" award attorney fees to the employee when the Commission makes the determination that the denial of compensation was unreasonable. *Bradley v. Washington Group Int’l*, 141 Idaho 655, 115 P.3d 746 (2005).

The Idaho Supreme Court in *Page v. McCain Foods, Inc.*, 141 Idaho 342, 346, 109 P.3d 1084, 1088 (2005) re-stated the standard proposition:

Idaho's workers' compensation law is remedial legislation. It is a well-known canon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature. The intent of the Idaho Legislature in enacting the workers' compensation law was to provide "sure and certain relief for injured workmen ... regardless of questions of fault and to the exclusion of every other remedy."

*Id.*, 141 Idaho at 346, 109 P.3d at 1088. In this case, Kathy Harris was erroneously denied attorney fees and costs before the Commission.



**5. Ms. Harris respectfully petitions this Court to award her attorney fees and costs on appeal.**


Mrs. Harris respectfully petitions this Court to award attorney fees and costs associated with this appeal pursuant to Idaho Code § 72-804 and Idaho Appellate Rule 41. Mrs. Harris's employer and surety have refused to pay workers' compensation benefits without reasonable grounds to do so. Kathy Harris has been forced to pursue this appeal due to a referee's erroneous determination that she was "faking" her injuries in order to obtain prescription medications.

**CONCLUSION**

Ms. Harris respectfully petitions the Court for the following relief: that provisions 2, 3, and 4 of the Industrial Commission's Order filed on April 6, 2012, be set aside and reversed to order Ms. Harris's entitlement for all TTD, medical benefits, and all other benefits on and after February 19, 2008; that in the alternative, if this Court finds that additional fact finding is necessary, that the case be remanded back to the Industrial Commission with instructions.

DATED this 4<sup>th</sup> day of September, 2012.

SMITH & CANNON PLLC

  
NED A. CANNON  
Attorney for Claimant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of September 2012, a true and correct copy of the foregoing document was served to the following individual(s) via the indicated method:

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By: 