7-23-2012

Waters v. All Phase Const. Respondent's Brief Dckt. 39556

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM J. WATERS,

Claimant/Appellant,

vs.

All Phase Construction,

Employer,

and

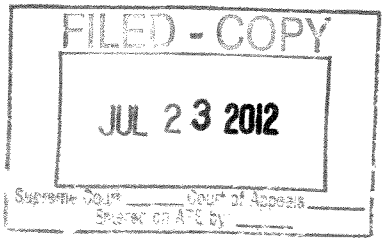
IDAHO STATE INSURANCE FUND,

Surety,
Defendants/Respondents.

Docket No. 395556-2012

I.C. NO. 2006-522008

DEFENDANTS/RESPONDENTS' BRIEF



DEFENDANTS/RESPONDENTS' BRIEF

Appeal from the Industrial Commission of the State of Idaho

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STATEMENT OF THE CASE

Respondents agree with the "Course of Proceedings" as set forth in the Appellant's brief; however, Respondents do not agree with the characterization of the "Nature of the Case" by the Appellant.

NATURE OF THE CASE

On June 16, 2006, William Waters (hereafter "Claimant") suffered an industrial injury to his neck while hanging sheet rock for All Phase Construction (hereafter "Employer"). Claimant was treated for his injury and a surgical fusion was performed. He ultimately received a 12% whole person impairment rating, which the Idaho State Insurance Fund (hereafter "Surety") has paid, along with all of his medical expenses and temporary total disability benefits. Following a hearing, the Industrial Commission found that the Claimant had not suffered any disability in excess of his impairment rating and from this decision, the Claimant has appealed.

STATEMENT OF FACTS

1. At the time of the hearing before the Industrial Commission, the Claimant was 38 years of age. He was 33 years old at the time of the accident. He graduated from high school but did not obtain any other formal education. (Tr. p. 13, LL. 12-21).

2. The Claimant's primary work experience consists of doing concrete work, drywall, framing, counter tops and wall panels. He also has experience in bartending. (Tr. p. 14, LL. 1-21).

3. The Claimant was injured on June 16, 2006, while working for the Employer. By the Claimant's own account, he was hanging a piece of sheetrock over his head and was pushing it up when he felt a "snap kind of noise" in his neck. (Tr. p. 16, LL. 1-12).

4. Prior to the accident on June 16, 2006, the Claimant had suffered injuries involving his neck. On March 7, 1991, the Claimant was taken to Eastern Idaho Medical Center following an injury to his neck while at a high school wrestling match. His neck was immobilized and he was taken to the hospital on a backboard. He was diagnosed with a hyperflexion injury of the cervical spine and was released with a soft collar. (Ex. p. 6; Tr. p. 44, LL. 1-12). (References to the Joint Exhibits in the Agency's Record shall be designated by "Ex.")

5. On April 19, 2002, the Claimant and a male friend had been drinking excessively. They were involved in a motor vehicle accident. The Claimant's head pierced the windshield and lacerated his scalp. Eastern Idaho Medical Center records indicate he suffered from a

cervical and thoracic somatic dysfunction and post-concussive headaches. The doctors noted this was a cervical/whiplash-type injury to his neck. (Tr. p. 45, LL. 6-21; Ex. p. 35).

6. Following his industrial injury on June 16, 2006, the Claimant continued to work and did not seek medical attention until five or six weeks later. On July 29, 2006, he went to the Burke Family Chiropractic complaining of neck pain. (Tr. p. 16, LL. 7-12; Ex. p. 36).

7. On September 26, 2006, the Claimant saw Dr. Gregory West at Summit Orthopedics with complaints of shoulder pain and weakness (Ex. p. 54). The Claimant was later referred to Dr. Phillip McCowin, also at Summit Orthopedics, for neck surgery. On February 6, 2007, Dr. McCowin performed an anterior cervical discectomy and fusion. (Ex. p. 75) On April 11, 2007, Dr. McCowin indicated the Claimant had minimal pain and allowed him to return to work on April 23, 2007 with an interim forty-five pound lifting restriction. He also indicated he was to return in six weeks after which time he would allow him to return to full activities. (Ex. p. 86).

8. On May 23, 2007, Dr. McCowin released the Claimant to full activities without restrictions, with the exception that he was to avoid "impact loading with axial activities such as diving and gymnastics, etc." He rated the Claimant at a 9% whole person impairment ("PPI"), with healed fusion, some loss of muscle function and some mild residual symptoms. (Ex. p. 87).

9. There is no record of any further medical treatment for the Claimant's condition until approximately fifteen months later, when on August 28, 2008, the Claimant went back to Summit Orthopedics and saw Dr. Gregory West for right shoulder pain. Dr. West believed

the right shoulder pain was related to his previous surgery. (Ex. p. 89). At first, Dr. West agreed with Dr. McCowin that his PPI rating would remain the same at 9% (Ex. p. 93), however, on March 31, 2009, Dr. West decided he should have rated the Claimant under the Sixth Edition of the AMA Guidelines and raised the Claimant's PPI rating to 12% of the whole man. (Ex. p. 94). The State Insurance Fund has paid the entire 12% PPI rating and all medical expenses related to the industrial injury. (Tr. p. 10, LL. 14-23; Ex. pp. 152-153).

10. On March 31, 2009, Dr. West indicated the Claimant should seek different employment than framing and construction so he does not have to lift heavy tools. (Ex. p. 94). Shortly before the hearing on May 4, 2010, Dr. West signed a form provided to him by Claimant's counsel entitled a "Physician's Functional Assessment" which appeared to restrict the Claimant's activities far more than had been previously stated by Dr. McCowin. (Ex. pp. 102-103). At his deposition, however, Dr. West seemed to retreat from what was stated in this form testifying that it did not have much detail and it was not like a functional capacity exam that would have three or four pages worth of detailed information. (West Depo. pp. 10-11, LL. 18-25, 1-11). Of critical importance, Dr. West admitted he was not aware the Claimant suffered additional injuries following his fusion surgery by Dr. McCowin. (West Depo. p. 25, LL. 14-19, p. 27, LL. 1-7, pp. 28-29, LL. 24-25, 1-20).

11. Towards the end of July in 2007, the Claimant was involved in a motor vehicle accident in which the vehicle he was driving was rear ended and he suffered a whiplash-type injury. He went to an emergency care facility, but he could not remember the name of the

emergency care facility and did not provide any medical records of that injury. (Tr. pp. 48-50, LL. 3-25, 1-25, 1-16).

12. The Claimant suffered another post-industrial injury accident while returning home from work in the fall of 2008 from the Golden Crown Lounge where he was working as a bartender. At that time, he was running back to his apartment and fell on his right shoulder and back, bruising his right shoulder. He sought treatment at the same emergency facility as before, but again, could not remember the name of the facility and did not provide any medical records of his treatment. (Tr. pp. 50-52, LL. 17-25, 1-25, 1-25).

13. At his deposition, Dr. West modified the opinion of the restrictions he gave to the Claimant. While reviewing the possibility of the Claimant performing a janitorial-type position he stated, "What it says: Strength, medium, which would kind of be where I'd put him in the medium category. Twenty, fifty pounds occasionally, ten to twenty-five pounds frequently. Up to ten pounds constantly. But he is not going to be able to wash ceilings, walls frequently." (West Depo. p. 18, LL. 1-17).

14. After his injury, the Claimant continued to work for the employer for approximately six to seven weeks. (Tr. p. 16, LL. 7-12). Following his surgery on February 26, 2007, the Claimant began working for Trent Buckmaster doing similar work to what he had done at All Phase Construction, including drywall and texture. He did not attempt to go back to work with All Phase Construction. He worked for Mr. Buckmaster from approximately May 23 to the end of July, 2007, earning approximately $8.00 per hour. (Tr. p. 21, LL. 2-17; p. 23, LL. 5-16; p. 24, LL. 3-7).

15. After leaving Mr. Buckmaster's employment, the Claimant testified, "I pretty much just kind of become a recluse and lived off my impairment for the next ten to twelve months". (Tr. p. 27, LL. 15-17). When his impairment ran out, the Claimant obtained a job at the Golden Crown Lounge as a bartender. He had previously worked as a bartender prior to his industrial injury. While working at the Golden Crown Lounge, he made $10.00 per hour. He left that employment because he began to drink again. (Tr. pp. 27-29, LL. 18-25, 1-25, 1-14).

16. The Claimant next began work for Ronald Kempers doing cleanup and framing construction type work. He worked for Mr. Kempers for approximately one year and then was laid off due to the poor economy impacting construction. (Tr. pp. 30-31, LL. 13-25, 1). After being laid off by Mr. Kempers, the Claimant began receiving unemployment benefits and was on his fourth or fifth extension of those benefits at the time of the hearing. (Tr. p. 65, LL. 12-24). The Claimant also believed he could become re-employed with J.R. Construction should the housing market begin to improve. (Tr. p. 66, LL. 11-25).

17. A non-industrial factor that may affect the Claimant's employability is that he was convicted of and placed on probation for aggravated assault. (Tr. p. 67, LL. 12-15). See opinion of Bill Jordan (Jordan Depo. p. 34, LL. 15-23).

18. A rehabilitation expert hired by the Claimant, Kent Granat, believes the Claimant has a 58.4% disability, inclusive of impairment. (Ex. p. 130).

19. The surety's rehabilitation expert, William Jordan, was of the opinion the Claimant had a 25-27% disability inclusive of impairment. (Ex. p. 143).

20. Dan Wolford of the Idaho Industrial Commission Rehabilitation Division, indicated, "Based on the restrictions/limitations from this industrial injury, the Claimant is able to return to his customary occupation". (Ex. p. 116).

ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Are the Industrial Commission's Findings of Fact supported by substantial and competent evidence?

2. Does the ultimate decision regarding Claimant's degree of disability rest upon the Industrial Commission or upon the opinions of experts?

STANDARD OF REVIEW

On appeal, the decision of the Industrial Commission shall be limited to a review of questions of law. *Idaho Constitution* Const. Art. V, §9.

"The Commission's factual findings are subject to a clear error standard, and will be upheld if supported by competent and substantial evidence construed most favorably to the party who prevailed below." *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). The findings of fact of the Industrial Commission should be set aside only if the record is "devoid of substantial competent evidence to support them". *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 900, 591 P.2d 143, 147 (1979). On appeal, the Court does not "weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented". *Gooby v. Lake Shore Management Co.*, 136 Idaho 79, 82, 29 P.3d 390, 393 (2001). "Whether a claimant has an impairment and the degree of permanent disability resulting from an industrial injury are questions of fact". (emphasis added). *McCabe v. Jo-Ann Stores, Inc.*, 145 Idaho 91, 95, 175 P.3d 780, 784 (2007). "The Commission is not required to construe facts liberally in favor of the worker

when evidence is conflicting". *Aldrich v. Lamb-Weston, Inc.,* 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

ARGUMENT

I. THERE IS SUBSTANTIAL AND COMPETENT EVIDENCE TO SUPPORT THE INDUSTRIAL COMMISSION'S FINDINGS OF FACT.

A. THE REQUIREMENTS OF *IDAHO CODE* § 72-430(1) REGARDING PERMANENT DISABILITY WERE FULLY EVALUATED BY THE COMMISSION IN ITS FINDINGS.

Idaho Code §72-430(1) sets forth several "matters" which may be considered by the Industrial Commission in determining a percentage of permanent disability. Those factors applicable to this claim are: (1) the nature of physical disablement which would limit employment; (2) the cumulative effect of multiple injuries; (3) occupation of employee; (4) age at time of accident; (5) consideration given to diminished ability of claimant to compete in an open labor market within a reasonable geographic area; (5) personal and economic circumstances of employee; and (6) other factors deemed relevant by the Commission. Although the Industrial Commission made findings on all of these factors, no "litany of non-medical factors is statutorily mandated". *Smith v. Payette County*, 105 Idaho 618, 621 fn 1, 671 P.2d 1081, 1084 (1983). There is substantial evidence in the record to support the Commission's findings on the requirements of *Idaho Code* §72-430(1).

(1) The nature of physical disablement which would limit employment.

The Industrial Commission made an extensive review of the medical records, noting the Claimant's symptoms, restrictions and treating physicians' opinions as part of its findings. (R. pp. 12-22). The Commission noted that following a cervical fusion surgery by

Dr. McCowin, "He released Claimant to 'full activities', restricting him only from impact loading with axial activities, such as diving and gymnastics, explaining, 'I think with reasonable work accommodations this should not be a problem'". (R. p. 14; Ex. p. 87).

The Commission noted the Claimant had pre-existing cervical injuries, citing an incident on March 7, 1991, in which he was transported by ambulance to the Eastern Idaho Medical Center following a wrestling injury. (R. p. 10; Ex. p. 6; Tr. p. 44, LL. 1-12). The Commission was also aware of the Claimant's 2002 automobile accident in which he suffered a neck injury. (R. p. 10-11; Tr. p. 45, LL. 6-21; Ex. p. 35).

The opinion authored by Referee LaDawn Marsters, took into account Dr. McCowin's and Dr. West's opinions as to restrictions and impairment. (R. pp. 21-22). She analyzed MRI findings, nerve conduction studies, surgery results and the Claimant's own statements regarding his condition. (R. pp. 13-15, 19-20).

The Commission chose to follow the recommendations of Dan Wolford, Industrial Commission Rehabilitation Division Consultant, and quoted his records regarding whether the Claimant's disability would limit his employment. Mr. Wolford wrote, "Based on the restriction/limitations from this industrial injury, the Claimant is able to return to his customary occupation". (R. pp. 22-23; Ex. p. 116) .

The Claimant reached maximum medical improvement ("MMI") on May 23, 2007. The Commission noted that no other medical record has been presented for treatment of Claimant's condition from May 23, 2007 until August 28, 2008. (R. p. 25; Ex. pp. 87 and 89).

(2) Cumulative Effect of Multiple Injuries.

In its findings, the Commission took into account Claimant's previous neck injury while wrestling at school in 1991 and the motor vehicle accident in which he suffered cervical injuries in 2002. (R. p. 10). Of greater significance, the Commission was troubled by the two injuries that occurred between the last date of treatment by Dr. McCowin on May 23, 2007 and the next date of treatment by Dr. West fifteen months later on August 28, 2008. The whiplash automobile accident in July, 2007, and the slip and fall injury in the fall of 2008 could have had considerable impact on the Claimant's condition as subsequent intervening events, which would explain Dr. West's opinion vis-a-vis Dr. McCowin's prior release to full activity. It was no coincidence the Claimant went to see Dr. West in the fall of 2008, for right shoulder pain when he slipped and fell leaving the Golden Crown Lounge during the same time period. (R. pp. 16-17, Tr. pp. 48-52).

When Dr. West gave his opinion regarding Claimant's injuries and restrictions, he was not made aware of Claimant's July, 2007, whiplash injury nor the subsequent slip and fall injury on his right shoulder in 2008. (R. p. 20; West Depo. p. 25, LL. 14-19, p. 27, LL. 1-7). Because of Dr. West's lack of knowledge of these subsequent injuries, the Commission found:

> **Claimant has failed to prove that the complaints with which he presented after August 28, 2008, are referable to the subject accident as opposed to one or more of the intervening events. Therefore, the symptoms reported to Dr. West cannot be assumed to have existed, either as of the date Dr. McCowin found Claimant reached MMI, or because of the industrial injury. As a result, Dr. West's opinions with respect to Claimant's industrially-related limitations and restrictions lack**

foundation, are given no weight and are unpersuasive for the purpose of challenging Dr. McCowin's MMI assessment.

(R. p. 26). (emphasis added).

(3) Occupation of Employee.

The Claimant was employed as a drywall hanger and taper. He had worked in the construction industry doing concrete, drywall and other types of work. He had also worked as a bartender. Following the industrial accident, he worked as a drywall installer and did construction cleanup. He also did some framing as a construction worker. (R. p. 8; Tr. pp. 14, 1-21; Waters Depo. pp. 15-16, LL. 9-12, 10-15).

(4) Age at Time of Accident.

The Claimant was 33 years of age at the time of his industrial accident. (R. p. 8; Tr. p. 13, LL. 12-13).

(5) Consideration given by the Commission to Diminished Ability of Claimant to Compete in an Open Labor Market Within a Reasonable Geographic Area.

The Commission did a substantial amount of careful analysis on the issue of Claimant's ability to work in the open labor market. (R. pp. 22-29). Throughout Claimant's work history, both before and after his industrial injury, he displayed a marked aversion to working on a continuous basis. In her Findings of Fact, the Referee noted that historically, the Claimant had not been a high wage earner. In the past five years preceding the date of the industrial injury, the Claimant never earned more than $12,774.00. Based upon a 40-hour work week, the Claimant could replace this income by working at a job paying $6.14 per hour (less than minimum wage). (R. pp. 9-10; Ex. p. 136; Ex. pp. 146-151; Ex. p. 116).

The Claimant has worked for a number of employers, mostly in the construction industry. He did work both before and after the industrial injury for the Golden Crown Lounge as a bartender making $10.00 per hour. He left that employment because he began to drink again. (Tr. pp. 27-29, LL. 18-25, 1-25, 1-14).

The Claimant has demonstrated a pattern of taking benefits, either from worker's compensation or unemployment, until the benefits run out, and then he finds a job. For example, when the Claimant began receiving PPI benefits, he made no effort to obtain employment, but in his own words,

> **A. I pretty much just kind of became a recluse and lived off of my impairment for the next 10 to 12 months.**
>
> **Q. And what happened at the end of that 10 to 12 months?**
>
> **A. I started getting worried because I didn't have any more money, so I went - I was actually living downtown in Idaho Falls at a studio apartment and I happened to go into the Crown for a few drinks and was offered a job.**

(Tr. p. 27, LL. 15-24). (emphasis added).

After leaving Golden Crown's employment as a bartender, he worked on various construction jobs until he was laid off and then he would receive unemployment benefits for as long as they lasted. At the time of the hearing, he was on his fourth or fifth extension of unemployment benefits. (Tr. pp. 65-66, LL. 4-25, 1-12).

It is no wonder the Commission found the Claimant was not "highly motivated to search for employment following his date of medical stability". The Referee wrote:

> **For a number of months, possibly ten to twelve, he simply turned into a recluse, living off his PPI award. Also, although Claimant did perform**

an employment search during the time he was receiving unemployment benefits, this work search was half-hearted at best. Indeed, even though Claimant had been released without restrictions by Dr. McCowin, he divulged facts about his injury at the time he applied for work at Enterprise. Predictably, this led to no job offer being extended to him.

(R. p. 28; Tr. pp. 25-26, LL. 9-25, 1-16). (emphasis added).

Following his surgery and a period of recovery, Dr. McCowin gave the Claimant a full release to go back to work without restrictions except for "impact loading with axial activities, such as diving and gymnastics, etc." (Ex. p. 87). Almost two years later, Dr. West gave conflicting restrictions with regards to Claimant's condition. As previously noted, he did not know of the intervening injuries to Claimant's neck and shoulder and when questioned more carefully regarding his previous light-duty recommendations, he stated the Claimant could do medium category type work. (R. pp. 27-28; West Depo. pp. 17-18, LL. 11-25, 1-7). Based upon Dr. McCowin's recommendations and Dr. West's medium category restrictions, the Commission found that he would have no problem in obtaining employment allowing him to meet or exceed his pre-injury income. (R. p. 29).

The Commission chose to follow Dan Woldford's evaluation rather than either of the privately hired vocational rehabilitation consultants. He stated the Claimant could return to his customary occupation. (Ex. p. 116).

(6) Personal and Economic Circumstances of Employee.

In its findings, the Commission stated the Claimant had graduated from high school and that he had no education or training beyond high school, other than what he had learned

on the job. He had taken welding classes in high school, but had never worked as a welder. (R. pp. 9, 23-24; Tr. p. 13, LL. 14-15).

The Claimant considers himself an alcoholic. Although he has worked as a bartender, he does not consider this work suitable for himself based upon his own personal restrictions. However, this would not prohibit him from working as a waiter or in a store where he could use transferable skills, if he were interested in working. (R. p. 9; Tr. p. 64, LL. 22-25; Jordan Depo. p. 46, LL. 7-24).

(7) Other Factors Deemed Relevant by the Commission.

Perhaps the most important "other factor" which impacts Claimant's disability claim is the Referee found the Claimant to not be credible. (R. p. 23). As a result, little weight was given to his testimony regarding his disability absent corroborating evidence. Decisions regarding credibility are particularly within the province of the trier-of-fact and should not be disturbed on appeal unless they are clearly erroneous. *Challis v. Louisiana-Pacific Corp.*, 126 Idaho 134, 138, 879 P.2d 597, 601 (1994).

The Commission considered all of the medical and non-medical factors included in the criteria set forth in *Idaho Code*, §72-425 in making its findings regarding disability. The findings are thorough and backed up by substantial and competent evidence in the record.

B. THE INDUSTRIAL COMMISSION IS NOT REQUIRED TO FOLLOW THE OPINIONS OF VOCATIONAL CONSULTANTS.

The evaluations and opinions of three rehabilitation consultants are found in the record. The consultant hired by the Claimant, Kent Granat, was of the opinion the Claimant had a 58.4% disability inclusive of impairment. (Ex. p. 130). The consultant hired by the

Surety, William Jordan, believed the Claimant has a 25-27% disability, inclusive of impairment. (Ex. p. 143). Dan Wolford of the Idaho Industrial Commission Rehabilitation Division was of the opinion, based on the Claimant's restrictions and limitations, he could return to his customary occupation. (Ex. p. 116). Given the extensive quotes from Mr. Wolford's records, it appears the Industrial Commission chose to follow the opinion of Mr. Wolford. (R. pp. 22-23).

The Industrial Commission is not bound to follow evaluations made by experts, including physicians and vocational rehabilitation experts. "The opinions of an expert, whether given by direct testimony, or by way of written reports, such as here, are not binding upon the trier of the facts, but advisory only". *Graves v. American Smelting and Refining Co.*, 87 Idaho 451, 455, 394 P.2d 290, 293 (1964). The Idaho Supreme Court reaffirmed that holding in *Nelson v. David L. Hill Logging*, 124 Idaho 855, 857, 865 P.2d 946, 948 (1993).

C. BECAUSE A PERMANENT IMPAIRMENT RATING IS GIVEN DOES NOT AUTOMATICALLY JUSTIFY A DISABILITY RATING IN EXCESS OF THE PERMANENT IMPAIRMENT RATING.

The Claimant argues the disability ratings given by the private vocational rehabilitation consultants must be followed. This is not the case. The Court made this point clear in *McCabe,* 145 Idaho at 96-97, 175 P.3d at 785-786, when it said:

> **This Court has, however, long rejected the assertion that whenever a permanent physical impairment rating is given, the disability rating must exceed the impairment rating.** (cite omitted) **Although expert testimony on this issue need not be presented, the burden of proof is upon the claimant to prove disability in excess of her impairment rating.**

This same Court went on to say:

> **The Worker's Compensation Law was intended only to compensate for loss of earning power.** (cite omitted) **A worker is considered disabled only if their injury has caused them to suffer a decrease in 'wage-earning capacity' as that capacity is affected by the pertinent medical and non-medical factors. I.C. §72-102(11). Although it is not in and of itself conclusive, a mathematical comparison of pre- and post-injury wages is evidence of an injured worker's ability to engage in gainful activity.** (cite omitted) (emphasis added).

When reviewing a case involving an issue of disability in excess of impairment on appeal, the Supreme Court has reiterated over and over again that it will not reverse a decision of the Commission when the decision is supported by any substantial competent evidence, especially with regards to the Commission's findings of fact. "Whether a Claimant has an impairment and the degree of permanent disability resulting from an industrial injury are questions of fact". *McCabe*, 145 Idaho at 95, 175 P.3d at 784; *See also Gooby*, 136 Idaho at 89-90, 29 P.3d at 399-400.

Where, as here, the record indicates the Commission has considered the effect of medical and non-medical factors bearing upon the Claimant's ability to be engaged in gainful activity, and those factors are incorporated into the Commission's findings, the Commission's decision should not be overturned. The Commission carefully reviewed the Claimant's wage history and compared those findings to his current wage earning capacity. (R. pp. 9-10). The Supreme Court in *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P.2d 1, 3 (1985), stated "...a mathematical comparison of pre- and post-injury wages is evidence of an injured worker's ability to engage in gainful activity". The Commission found the Claimant should have "no difficulty" in replacing or exceeding his pre-injury income. (R. p.

29); (*See also, McClurg v. Yankee Machine Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

(1) The fact the Claimant suffered two intervening injuries between his industrial accident and the time Dr. West gave his opinion on restrictions is also a factor justifying the Commission's finding of no disability over impairment.

As previously noted, a claimant bears the burden of proof regarding disability in excess of his or her impairment. The Claimant was involved in an automobile accident subsequent to his industrial injury in which he had a serious whiplash-type injury to his neck which obviously had an effect on his neck condition. Further, he suffered a slip and fall injury in which he injured his right shoulder in the fall of 2008. During the same time period, he saw Dr. West complaining of right shoulder pain. Dr. West was not even aware of these injuries when he did his evaluation almost two years from the date of the industrial accident. These intervening injuries were taken into account by the Commission in determining that the Claimant did not shoulder his burden of proof, which would justify a disability rating over his impairment rating. (R. p. 26). (*See, Monroe v. Chuck & Del's Inc.*, 123 Idaho 627, 629, 851 P.2d 341, 343 (1993).

D. THE FINDINGS OF THE COMMISSION ARE NOT SUBJECT TO 'DE NOVO" REVIEW IF THEY ARE SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD.

A good definition of what is substantial evidence is found in *Zapata v. J.R. Simplot Company*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). wherein the Court stated:

Further, 'this court's review of Commission decisions is limited to a determination of whether the Findings of Fact are supported by

> **substantial and competent evidence'. (Boley v. State, 130 Idaho 278, 280, 939 P.2d 854, 856 (1997) I.C. §72-732(1). Substantial evidence is more than a scintilla of proof, but less than a preponderance.** (cite omitted) **It is relevant evidence that a reasonable mind might accept to support a conclusion.**
>
> **In addition, it is within the Commission's province to decide what weight should be given to the facts presented and conclusions drawn from those facts.** (cite omitted) **The Commission's conclusions on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous.** (cite omitted)
>
> **Finally, in reviewing a decision of the Commission, this court 'views all of the facts and inferences in the light most favorable to the party who prevailed before the Commission.** (cites omitted) (emphasis added).

Certainly the criteria for "substantial evidence" has been met by the Commission's findings supported by evidence in the record. Although the claimant is critical of the Commission's findings, they only need to be "sufficient to enable meaningful appellate review. (cite omitted) It is not required to make a specific finding with regard to every fact; rather, a finding is only necessary for those facts which support the award". *Zapata*, 132 Idaho at 515, 975 P.2d at 1180.

Finally, it is not incumbent upon this Court to make a *de novo* determination of fact overlaying its own opinions on the Commission's findings of fact. "In other words, this Court does not try the matter anew, acting as a trial court does in weighing the evidence before it. Rather, 'we are not concerned with whether this Court would have reached the same conclusion, but rather, with whether the Findings of the Commission are supported by substantial, competent evidence.'" (*Monroe*, 123 Idaho at 344, 851 P.2d at 630).

CONCLUSION

There is no issue of law being challenged by the Claimant in this case. He is unhappy because the Industrial Commission did not choose to follow the opinions of the private vocational rehabilitation consultants and instead made a determination the Claimant did not suffer a disability in excess of his impairment. Since disability in a worker's compensation claim has been held to be a finding of fact, specifically in the province of the Industrial Commission, and so long as there is substantial and competent evidence to support the findings of fact, the Commission's decision must be upheld. The medical and non-medical factors described in Idaho Code §72-430(1) were competently and thoroughly reviewed by the Commission in its 25-page decision. Unless this Court wishes to follow what is being urged upon it by Claimant and substitute its own findings on disability and credibility of the Claimant, for those of the Commission, the Commission's decision should not be disturbed on appeal.

RESPECTFULLY SUBMITTED this 19th day of July, 2012.

FULLER & FULLER, PLLC

By: _____
STEVEN R. FULLER
Attorney for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DEFENDANTS/RESPONDENTS' BRIEF** was served on the 19th day of July, 2012,

On:

JAMES C. ARNOLD
ATTORNEY AT LAW
PO BOX 1645
IDAHO FALLS, ID 83403-1645

By:

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