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IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY CORGATELLI,
Claimant/Appellant,

vs.

STEEL WEST, INC. and IDAHO STATE INSURANCE FUND,
Defendants/Respondents,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,
Defendant/Respondent/
Cross-Appellant.

Supreme Court Docket No. 41012

FILED - COPY
OCT 25 2013
Supreme Court Court of Appeals
Entered on ATS by

ISIF APPELLANT'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO
CHAIRMAN THOMAS E. LIMBAUGH, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a decision of the Industrial Commission rejecting the Referee's proposed findings and holding that the Claimant's industrial injury combined with a pre-existing permanent physical impairment to render him totally and permanently disabled, thereby subjecting the Industrial Special Indemnity Fund (ISIF) to liability. The ISIF agrees that the Claimant was totally and permanently disabled after reaching maximum medical improvement in August of 2010, from an industrial accident that occurred in January of 2005, and which was aggravated in August of 2008.

The Claimant's brief on appeal describes the accident succinctly and then suggests that this is just a dispute over who should pay the Claimant's total permanent disability benefits. From Claimant's perspective that is not an unfair statement since his arguments focus not on whether Claimant is so disabled, but on a reimbursement issue between Claimant and the Employer/Surety. For the ISIF, it is "why" Claimant is totally and permanently disabled that causes this case to present much more than a fight over "who pays."

This case presents the Court with the opportunity to reaffirm for the Industrial Commission what is meant by "substantial and competent evidence," as was addressed not long ago in *Mazzone v. Texas Roadhouse, Inc.,* 154 Idaho 750, 302 P.3d

718 (2013). In this case, the only professional medical opinion in the record providing a basis or reason for the final restrictions and limitations resulting in Claimant's total and permanent disability was given by Dr. David Simon. It is the Industrial Commission's second-guessing of his medical testimony and creating its own medical opinion from the lack of medical evidence that is the problem in this case. The Commission created its own medical facts and opinion, rather than recognizing and applying the competent medical evidence before it, as Referee Taylor had done in his proposed decision.

Additionally, this case presents the opportunity for the Court to reaffirm that the "but-for" test set forth in *Garcia* is still the test to be used by the Industrial Commission in determining the "combined with" factor of ISIF liability, and that if ignored, the Industrial Commission has committed legal error.

B. Course of Proceedings Below, Disposition and Judicial Facts

Claimant filed a Complaint on July 8, 2009, in respect to an injury date of January 3, 2005. The Employer/Surety filed an Answer to Complaint on July 17, 2009, admitting there had been an accident on January 3, 2005. Claimant later filed a Complaint against the Industrial Special Indemnity Fund (ISIF) on January 26, 2011, alleging a low back injury as a preexisting physical impairment of consequence. The ISIF filed an Answer that denied liability. R., pp. 1-13.

A hearing was held before Industrial Commission Referee Alan Reed

Taylor on the following issues: "(1) Whether, and to what extent, Claimant is entitled to disability in excess of impairment; (2) Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate; (3) Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise; (4) Whether the Industrial Special Indemnity Fund is liable pursuant to Idaho Code § 72-332; (5) Apportionment under the Carey Formula; and (6) Pursuant to Idaho Code § 72-406(2), upon a subsequent injury to the same body part for which income benefits were previously paid and now culminating in total permanent disability, is there a deduction for the previously paid income benefits received for the previous injury to the same body part and, if so, does that deduction inure to the Employer/Surety or to the Industrial Special Indemnity Fund (ISIF)?" R., pp. 14-15. The parties agreed that those were the issues that needed to be determined.

After hearing the evidence presented at the hearing and reviewing the post-hearing briefs and deposition transcripts, Referee Taylor issued his proposed Findings of Fact, Conclusions of Law, and Recommendation on June 8, 2012, finding no liability on the part of ISIF. Referee Taylor noted that the opinions of disability were based on restrictions found by the FCE, and that it was Dr. Simon's opinion that the restrictions in the FCE were due to the 2005 accident. *Referee Alan Taylor's Findings of Fact, Conclusions of Law, and Recommendation* (June 8, 2012), p. 13, ¶ 32. Further, Referee

Taylor found that "Dr. Simon reaffirmed in his post-hearing deposition that Claimant's symptoms and increasing back problems in 2008 were related to his 2005 industrial accident. There is no conflicting medical opinion." *Id.* Referee Taylor concluded that "[t]he evidence establishes that Claimant's permanent physical restrictions rendering him unemployable all arise from the 2005 accident. Claimant and Employer/Surety have failed to establish that Claimant's preexisting impairment combined with his 2005 industrial injury so as to invoke ISIF liability." *Id.*, pp. 13-14, ¶ 33.

Referee Taylor stated his conclusions as follows:

> 1. Claimant has proven he suffers permanent disability of 100%, inclusive of his 15% permanent impairment. He has proven he is totally and permanently disabled.
>
> 2. Apportionment pursuant to Idaho Code § 72-406(1) is moot.
>
> 3. ISIF bears no liability pursuant to Idaho Code § 72-332.
>
> 4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), is moot.
>
> 5. Pursuant to Idaho Code § 72-406(2), Employer/Surety are entitled to a deduction of $27,348.75 for permanent disability benefits previously paid for the same body part.

Id., p. 17.

In contrast, the Industrial Commission filed its Findings of Fact, Conclusions of Law, and Order on July 26, 2012 (hereinafter referred to as the decision

and/or order). That Order rejected Referee Taylor's proposed findings, and instead stated as follows:

> 1. Claimant has proven that he is totally and permanently disabled;
>
> 2. ISIF liability is established;
>
> 3. Claimant has permanent physical impairment totaling 15%, with 5% referable to the 1994 accident and 10% referable to the 2005 accident;
>
> 4. Per Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), Employer's liability is calculated as follows: 10/15 x 85 = 56.7 + 10 = 66.7%, or $99,599.78;
>
> 5. ISIF is liable for the payment of statutory benefits commencing 333.5 weeks subsequent to Claimant's August 4, 2010 date of medical stability;
>
> 6. Employer/Surety is not entitled to offset its obligation to pay the award by the provisions of Idaho Code 72-406(2).
>
> 7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

R., p.41-42.

This appeal was timely filed seeking this Court's review of the errors in the Industrial Commission's final action in adopting its own medical opinion and findings, outside the evidence.

C. Statement of Facts

The ISIF agrees with the basic facts related in Claimant's brief on appeal concerning the Claimant's upbringing, education and work history. Likewise, competent medical evidence shows Claimant had a previous injury at the interspace between the L3 and L4 vertebrae of the lumbar spine which resulted in a 5% permanent impairment.

On January 3, 2005, Claimant was in the course of his employment performing his usual mandatory under-the-hood pre-trip inspection of his delivery semi-truck which required him to climb about 36" off the ground. When stepping down off the truck, his foot slipped on a steel panel under the snow resulting in a very awkward fall causing an injury at the L4-5 interspace of his lumbar spine. He received treatment from Dr. Clark Allen who eventually performed surgery at the single L4-5 interspace. Ex. D, p. 16. In August 2008, Claimant suffered an aggravation of that injury as a result of driving a stick-shift pickup truck to Jackson, Wyoming and back to Pocatello in the course of his employment. Ex. D, p. 33. In response to a letter from the Surety inquiring about the cause for treatment, i.e. whether it was related to his original injury of January 3, 2005, Dr. Allen's partner, Dr. Honeycutt opined that it was related to the 2005 injury with no evidence of a new injury, i.e. a progression of the original injury of January 3, 2005 and a continued decline and failure of his injured disc. Ex. D, p. 43. Dr. Allen ultimately performed a lumbar fusion from L2 to L5 to treat the 2005 injury. Ex. D, p.

60. Maximum medical improvement was reached on August 4, 2010 subsequent to the fusion surgery, with a diagnosis of failed back syndrome.

The deposition testimony of David C. Simon, M. D., was taken December 7, 2011, at Idaho Falls, Idaho. David C. Simon is a physician licensed in the state of Idaho specializing in physical medicine and rehabilitation, and board-certified in that field. He has practiced in the Idaho Falls area since July 1995. Dr. Simon Depo., p. 5, L. 2 – p. 6, L. 8. He interviewed the Claimant at the request of the Idaho State Insurance Fund and authored reports dated 12/10/2008, 3/1/2009 and 8/4/2010. He also had certain medical records pertaining to Claimant for review prior to issuing those reports. Dr. Simon Depo., p. 6, LL. 9-25.

The doctor explained his opinion that the appropriate impairment rating following the 2005 accident would have been a total of 13% whole person, 5% pre-existing and 8% new, and after the 2008 aggravation, an additional 2% assigned by Dr. Simon himself, or 15% total. Dr. Simon Depo., p. 11, L. 24 – p. 14, L. 11; p. 22, L. 24 – p. 27, L. 10.

Dr. Simon also stated that Dr. Allen's lumbar decompression and fusion surgery on April 6, 2009 was, in his opinion, for treatment of the problems from the work-related 2005 injury at the L4-5 level of the lumbar spine, with the fusion spanning from L2 to L5. The prior problems in 1994 were at L3-4 and did not require treatment at

that point in time. Dr. Simon Depo., p. 14, L. 12 – p. 15, L. 5; p. 27, L. 16 – p. 29, L. 12.

In Dr. Simon's opinion, Claimant's date of maximum medical improvement was August 4, 2010, when he examined the Claimant, rather than earlier, even though the fusion was fixed and stable earlier. Dr. Simon Depo., p. 31, L. 9 – p. 33, L. 21. In the records Dr. Simon had to consider was a Functional Capacity Examination report from Corey Rasmussen, PT, DPT from August 2009. Dr. Simon also expressed his opinion that the restrictions found in FCE "are permanent and they would be related to the industrial injury." Ex. K, p. 14. There is no contradictory or conflicting medical opinion in the record.

II. ISSUES PRESENTED ON APPEAL

A. The Industrial Commission's finding of combination, subjecting ISIF to liability, is not supported by substantial and competent evidence in the record.

B. The Industrial Commission failed to apply the correct legal test regarding the potential combined causal effect of the industrial injury of 2005 and preexisting permanent physical impairment for purposes of ISIF liability.

III. STANDARD OF REVIEW ON APPEAL TO THE SUPREME COURT

Factual determinations made by the Industrial Commission will not be overturned on appeal if supported by substantial and competent evidence. Idaho Code §

72-732; *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 281, 207 P.3d 1008, 1012 (2009). "However, if the findings of the Commission are not supported by substantial, competent evidence, they are not binding or conclusive . . . [and such] findings of fact will be set aside on appeal." *Mazzone v. Texas Roadhouse, Inc.,* 154 Idaho 750, 302 P.3d 718, 726 (2013) (internal citations and quotation marks omitted). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Henry v. Dept. of Correction and State Insurance Fund*, 154 Idaho 143, 295 P.3d 528, 530 (2013). "Whether the Commission's factual findings are supported by substantial and competent evidence is a question of law." *Tarbet v. J.R. Simplot Company*, 151 Idaho 755, 758, 264 P.3d 394, 397 (2011). The Court exercises free review over questions of law. *Henry v. Dept. of Correction and State Insurance Fund*, 154 Idaho 143, 295 P.3d 528, 530 (2013). "Whether the Commission correctly applied the law to the facts is an issue of law over which [the Court] exercises free review." *Id.* While Idaho's worker's compensation statutes are construed liberally in favor of the worker, "conflicting facts need not be construed liberally in favor of the worker." *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718, 723 (2013).

IV. THE LAW DEFINING THE SCOPE OF ISIF LIABILITY

The ISIF is often referred to as the Second Injury Fund because of the law governing the circumstances under which a claimant is entitled to benefits from the Fund.

The scope of ISIF liability is governed by Idaho Code § 72-332, which states, in relevant part:

> 72-332. Payment for second injuries from industrial special indemnity account. (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account... .

Idaho Code § 72-332.

The Idaho Supreme Court has repeatedly held that under this provision, in order for ISIF liability to be established, a claimant must prove four elements of a prima facie case, as follows: "(1) that there was a pre-existing impairment; (2) that the impairment was manifest; (3) that the impairment was a subjective hindrance; and (4) that the pre-existing impairment and the subsequent injury in some way combine[d] to result in total permanent disability." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996) (citing *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990)).

V. ARGUMENT

A. The Industrial Commission's finding of combination, subjecting ISIF to liability, is not supported by substantial and competent evidence in the record.

The Industrial Commission's decision to impose liability on ISIF must be supported by substantial and competent evidence as to all elements of the prima facie case. Idaho Code § 72-732; see also *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). The burden is on the party seeking to impose liability on ISIF to prove all elements of the prima facie case. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 970, 772 P.2d 173, 177 (1989). Substantial and competent evidence is "more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion." *Funes v. Aardema Dairy*, 150 Idaho 7, 10–11, 244 P.3d 151, 154–55 (2010) (internal citations and quotation marks omitted). Though the Commission is the final arbiter of the evidence, it cannot arbitrarily create medical evidence nor weigh medical evidence that is not part of the evidentiary the record. Finally, a finding that a particular fact cannot be found to the requisite certainty is the equivalent of a holding that the burden of proof has not been met. *Manning v. Potlatch Forests, Inc.*, 93 Idaho 856, 857, fn. 2, 477 P.2d 97, 98 (1970).

A recent Idaho Supreme Court case, *Mazzone v. Texas Roadhouse, Inc.*,

154 Idaho 750, 302 P.3d 718 (2013), is highly instructive with respect to what will be considered substantial and competent medical evidence in a worker's compensation case. In that case, the Court found that the Commission's referee had disregarded qualified medical opinions and had substituted her own medical opinion. *Mazzone*, 302 P.3d at 727. In so holding, the Court stated that the referee and Commission "must accept as true the positive, uncontradicted testimony of a credible witness, unless the testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial." *Mazzone*, 302 P.3d at 726, quoting *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447, 72 P.2d 171 (1937). The Commission's role "is that of a finder of fact and not a medical expert," and the Commission may not exceed that role and "engage[] in medical diagnosis." *Mazzone*, 302 P.3d at 728.

Further, the Court stated that although members of an administrative board or agency may have acquired some expertise in a particular area of administrative law, "[t]here is . . . a line between use of that expertise and the adjudicative function of resolving factual disputes in administrative proceedings." *Id.* The Court noted that the United States Supreme Court has held that administrative officers may not act on their own information, and "that an agency that uses its specialized knowledge as a substitute for evidence will not have its order sustained." *Mazzone*, 302 P.3d at 728–29, quoting *Baltimore & Ohio R.R. Co. v. United States*, 264 U.S. 258, 263 (1924). The Court

concluded that "an agency may not use its specialized knowledge as a substitute for evidence presented at a hearing. An agency may, however, utilize its expertise in drawing inferences from the facts or record or to resolve conflicts in the evidence." *Mazzone*, 302 P.3d at 729 (internal citations and quotation marks omitted).

The legal error in the Commission's fact-finding methodology is evident when paragraphs 19-22, 26, 27, 36, and 45-47 are considered under the legal criteria set forth in *Mazzone*.

In paragraph 19, the Commission found that "[t]he record does not reflect that Dr. Huneycutt took any history from Claimant concerning the low back difficulties from which he had suffered prior to the date of the January 3, 2005 accident . . . Therefore, in the absence of a history of an intervening event, Dr. Huneycutt was of the view that Claimant's continuing problems at L4-5 represented a natural progression from the original injury. Notably, Dr. Huneycutt did not comment on the genesis or cause of Claimant's degenerative disc disease at levels other than L4-5." R., p. 26-27, ¶ 19. Similarly, in paragraph 21, the Commission stated: "As did Huneycutt, Dr. Simon concluded that in the absence of a history of intervening injury or MRI changes consistent with an acute disc herniation, Claimant's L4-5 problems were likely a progression of the problems first noted following the 2005 work injury." R., p. 28, ¶ 21.

The Commission takes Dr. Huneycutt's and Dr. Simon's failure to mention

the prior low back injuries as a failure to *consider* those injuries. The Commission takes the absence of a fact in the record or notes by Dr. Huneycutt or Dr. Simon reflecting a review of the prior low back problems and turns it into a positive fact that the doctors did not know about or consider the prior low back injuries. The absence of notes or testimony could just as easily mean that the doctors did not think they were important and did not contribute to the Claimant's current problems. There is no substantial and competent evidence in the record as to why the doctors did not mention the prior low back problems, and the Commission cannot create this as evidence in the record and rely upon it to make its own findings. Even if it is true that the doctors did not review the prior low back problems, it does not follow that a review of those problems would have changed their opinions. In *Mazzone*, the referee excluded a certain doctor's opinion because she believed that the doctor's "opinions would change if she had considered additional evidence." *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718, 727 (2013). The Court stated: "A referee may not undiagnose a claimant before the Commission based on the referee's own lay understanding of what the referee believes would change a qualified medical professional's diagnosis and professional opinion." *Id.*

Next, the Commission concluded, in paragraph 45, that "[i]t is equally clear that Claimant's L2-5 fusion was undertaken because of the L4-5 lesion thought to be related to the January 3, 2005 accident and the multilevel degenerative changes in

Claimant's lumbar spine first noted in 1994, and progressing thereafter." R., p. 20, ¶ 45. There is no competent medical evidence in the record establishing that surgery was necessitated by the 2005 accident and the prior low back problems. The Commission appears to have concluded that because the surgery covered both the L4-5 problem and the higher levels, the surgery was, at least in part, necessitated by the prior problems. Going even further, the Commission appears to conclude, in the absence of any competent medical evidence, that the surgery would not have been necessary due to the 2005 accident alone. These possible steps of logic cannot substitute for medical opinion on these issues.

Similarly, the Commission found that "it is notable that the only injury identified with the January 3, 2005 accident is the L4-5 disc herniation. However, the February 15, 2005 MRI demonstrates severe degenerative changes at levels above and below the L4-5 level. The findings at these levels demonstrate significant progression of the degenerative process in the years since the prior 1994 study, a progression that has not been related by any medical expert to the January 3, 2005 accident." R., pp. 36-37, ¶ 45. No one is denying that Claimant had pre-existing problems at other levels of the spine that were not related to the 2005 accident. According to the Commission's analysis, the fact that those problems existed, and no doctor says they are related to the 2005 accident, means the inquiry is over.

In paragraph 46 of its decision, the Industrial Commission further substituted its own experience for medical opinion in the record when it stated "[I]n the absence of multilevel problems, surgeons typically prefer to limit fusion procedures to levels where it is absolutely necessary in order to preserve lumbar spine motion." R., p. 37, ¶ 46.

Finally, and most importantly, the Commission completely disregarded the only competent medical opinion in the record as to the cause of Claimant's current restrictions and thus his total and permanent disability. In paragraph 26, the Commission stated: "Although Dr. Simon stated that a causal relationship existed between Claimant's complaints and the 2005 work injury, he did not state that the 2005 work injury was the exclusive cause of Claimant's failed back syndrome. Indeed, in his subsequent deposition, Dr. Simon proposed that the need for the L2-5 fusion surgery was, in part, causally related to Claimant's multilevel degenerative disc disease." R., p. 29, ¶ 26. Although Dr. Simon did not use the word "exclusive," it does not mean the Commission can substitute its own medical opinion based on the doctor's clear speculation that the need for the surgery may have been related to the degenerative disc disease. Far from "proposing" that the need for surgery was related to the prior back problems, what Dr. Simon actually said was: "I'm not a surgeon. I'm not sure why he went up to the L2, but that being closer to the L3-4 level. I mean, that level would also be – you know, that

would more likely be related to the pre-existing problems and the problems at the L3-4 level than the work-related L4-5 level." Dr. Simon Depo., p. 14, L. 25 – p. 15, L. 5.

Further, the Commission found:

> We recognize that Dr. Simon has stated that the limitations/restrictions defined in the FCE are related to the January 3, 2005 accident. At first blush, this appears to support a conclusion that it is the 2005 accident, standing alone, and without contribution from the preexisting impairment, that renders Claimant totally and permanently disabled. If true, then there can be no 'combining with' and the claim against the ISIF would fail on this element of the prima facie case. *However, Dr. Simon was not examined about this statement at the time of his deposition, and it is not entirely clear that his intentions in making this statement are as described by the ISIF.*

R., p. 36, ¶ 44 (emphasis added). Dr. Simon stated a clear medical opinion regarding the cause of the restrictions resulting in Claimant's total permanent disability. The Industrial Commission disregarded that clear opinion because the doctor was not asked about it at his deposition, and they do not know what his "intentions" were. This is the creation of evidence from the lack of evidence discussed in *Mazzone* as a denial of due process. The Commission shifted the burden to ISIF to prove the case against itself where the evidence was not in the record.

There was one competent medical opinion that Claimant's total and permanent disability was the result of the 2005 industrial accident. There is absolutely no contradicting medical opinion. In the absence of a contradicting opinion, the

Commission disregarded the one qualified medical opinion and substituted its own unqualified, and wholly unsupported, opinion.

The Referee's proposed findings and conclusions followed the law and the proper legal analysis of the evidence of record. As noted previously, that proposed decision noted the Claimant's total permanent disability in the opinions of both vocational experts, received into evidence, but each of which relied on the restrictions contained in the Functional Capacity Examination of August 2009, which according to the only medical opinion in the evidence, were causally related to the injury of January 2005. As was noted in that recommended decision, *"[t]here is no conflicting medical opinion." Referee Alan Taylor's Findings of Fact, Conclusions of Law, and Recommendation* (June 8, 2012), p. 13, ¶ 32 (emphasis added).

The Commission, on the other hand, came up with an analysis based on the lack of evidence of information considered by various physicians to create positive evidence, and on its own experience of why surgeons fuse more than one level of a spine, to decide that there was a conflict in the medical evidence justifying their rejection of Dr. Simon's clearly stated opinion. Such is reversible error, not harmless error as it was deemed in *Mazzone*, as this action of the Commission hits right to the heart of the issue of ISIF liability. The Court should not condone such legal error.

B. The Industrial Commission failed to apply the correct legal test regarding combination for purposes of ISIF liability.

The fourth element in a prima facie case to establish ISIF liability is combination – the preexisting physical impairment and the industrial injury must combine in some way to cause the claimant's total and permanent disability. In *Garcia v. J.R. Simplot Co.*, the Court set forth the test that is to be utilized by the Industrial Commission in determining whether the combination element of a prima facie case against ISIF has been met. 115 Idaho 966, 772 P.2d 173 (1989). In that case, ISIF argued, and the Idaho Supreme Court agreed, "that is it not sufficient under I.C. § 72-332(1) to show simply that a claimant is totally and permanently disabled and suffered from some pre-existing condition that can be defined as a permanent physical impairment." *Garcia*, 115 Idaho at 970, 772 P.2d at 177. Instead, the Court held "that the burden of proof is on the party seeking to invoke the liability of ISIF under the statute to show that the disability would not have been total 'but for' the pre-existing condition." *Id.* The Commission cannot arbitrarily shift the legal burden of proof to the party defending the claim.

Burden of proof means both the "duty of establishing the truth of a given proposition or issue by such quantum of evidence as the law demands and an "obligation resting upon a party to meet with evidence of a prima facie case." *Harman v.*

Northwestern Mutual Life Insurance Co., 91 Idaho 719, 721, 429 P.2d 849, 851 (1967), *citing* 29 Am. Jur.2d Evidence, Sec. 123, p. 154. In Worker's Compensation cases, the Claimant must show a "claim for compensation to a reasonable degree of medical probability." *Cole v. Stokely Van Camp,* 118 Idaho 173, 175, 795 P.2d 872, 874 (1990).

The "but for" test set forth in *Garcia* has been consistently reiterated and applied by the Court since that time. See, e.g., *Selzler v. State of Idaho, Industrial Special Indemnity Fund*, 124 Idaho 144, 146, 857 P.2d 623, 626 (1993) ("ISIF is not liable unless the disability would not have been total but for a preexisting condition."); *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 192, 207 P.3d 162, 168 (2009) (Industrial Commission used correct standard when it "looked at 'whether [claimant's] pre-existing physical impairments combined with the last accident to render him totally and permanently disabled, or stated another way, whether [claimant] would have been totally and permanently disabled but for his last accident.'"); *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 284, 207 P.3d 1008, 1015 (2009) ("ISIF is liable to provide compensation to a worker *only when* the claimant shows that he or she is totally and permanently disabled because of the combination of a permanent pre-existing physical impairment and a new industrial injury.") (emphasis in original).

In the instant case, the Commission failed to apply the but-for test set forth in *Garcia* in its analysis of the combination factor of ISIF liability. The Commission

concluded that because Claimant was rendered totally and permanently disabled after his back surgery, and because the Commission decided that the back surgery addressed both new and old physical problems, ISIF liability was established. That analysis and conclusion utterly fails to apply the but-for test. The inquiry the Commission should have made is: Would Claimant have been totally and permanently disabled but for the preexisting impairment; and, would he have been totally and permanently disabled but for the last accident, or in other words, would the restrictions from the 2005 accident have rendered the Claimant totally and permanently disabled without regard to the prior physical impairment? The Commission must find from the evidence, not its own medical opinion, that but for the pre-existing impairments, Claimant would not have been totally and permanently disabled. That analysis cannot be satisfied merely by finding that Claimant had pre-existing permanent physical impairments.

By its analysis, the Industrial Commission impermissibly shifted the burden to the ISIF to produce evidence that it is not liable, rather than examining the record to see whether there is a prima facie case against it. By taking medical opinion, for which there was no conflicting medical opinion, and creating a conflict, not from evidence but from its medical analysis, the Commission impermissibly shifted the burden of proof to the ISIF, a legal error.

The case of *Tarbet v. J.R. Simplot Co.* is instructive here. 151 Idaho 755,

264 P.3d 396 (2011). In that case, the Industrial Commission held "that the employee's final injury caused him to be permanently and totally disabled, without considering his prior injuries, so that the employer, rather than the Industrial Special Indemnity Fund, [was] liable for the employee's total disability payments." *Tarbet*, 151 Idaho at 757, 264 P.3d at 396. On appeal to the Idaho Supreme Court, the employer argued that "the uncontested evidence showed 'that [employee] had significant problems with his hearing loss and low back injury and these impairments impacted [employee's] ability to perform his job.'" *Tarbet*, 151 Idaho at 759, 264 P.3d at 398. The employer "then recount[ed] testimony showing the impact of these impairments upon how [employee] performed his job, the actions he took such as changing how he performed certain work and requesting assistance from others, and the accommodations made by Employer." *Id.* As to that argument, the Idaho Supreme Court stated: "Employer's argument in this regard misses the point. Employer cannot sustain its burden of proof merely by showing that Claimant had pre-existing impairments. Employer has not contended that Claimant was totally disabled prior to his last industrial accident. It must show that but for the pre-existing impairments, Claimant would not have been totally and permanently disabled. Employer cannot sustain that burden merely by showing that Claimant had pre-existing permanent impairments." *Id.*

Like the employer's argument in *Tarbet*, the Industrial Commission's

analysis in this case "misses the point." The Commission rests its finding of ISIF liability solely on the fact that when doing surgery to address the problems at the L4-5 level of Claimant's lumbar spine, Dr. Allen also extended the fusion to the L2-3 and L3-4 levels. The problems at the L4-5 level were due to the 2005 industrial accident, while the problems at L2-3 and L3-4 were due to pre-existing degenerative disc disease. Therefore, the Industrial Commission concludes without medical opinion that Claimant's surgery, and the extent of it, was necessitated by both the subject accident and Claimant's preexisting condition. This is the equivalent of the employer's argument in *Tarbet*, and completely disregards the requirement of combination.

No one is disputing that Claimant had pre-existing degenerative disc disease at those levels of his lumbar spine. However, the mere fact that he had such a pre-existing condition, or even that the surgeon spanned those levels while trying to stabilize the L4-5 disc space, does not mean that the pre-existing condition "combined with" the new injury to render Claimant totally and permanently disabled. The medical evidence in the record is to the effect that the 2005 injury, as aggravated in 2008, was the reason surgery was performed. There is no competent medical opinion in the record indicating anything otherwise. There is likewise no conflicting medical opinion that the restrictions following surgery were causally related to the 2005 injury, with no opinion attributing them to preexisting physical impairment.

In other words, there is no competent medical evidence in the record that "but for" the pre-existing impairment, the 2009 surgery, as performed, would not have been necessary. However, the Industrial Commission did not even mention or attempt to apply the "but for" test necessary for finding ISIF liability. Instead, the Commission simply determined that since there was a pre-existing impairment, and since the surgeon spanned higher levels of the spine in attempting to fix the 2005/2008 L4-5 injury from the industrial accident, "it is clear that the combining with element of the prima facie case has been met." R., p. 37, ¶ 47.

VI. RESPONSE TO CLAIMANT'S APPEAL

It is evident, but nevertheless should be expressed, that the ISIF has no interest in the issue raised by the Claimant/Appellant. Therefore, the ISIF will not present written or oral argument on that issue.

VII. CONCLUSION

The Industrial Commission both created its own medical opinion to serve the decision it wished to issue imposing liability on the ISIF, rather than relying on the evidence of record, and also ignored the "but for" test on whether the last industrial injury combined with any preexisting permanent physical impairment in causing the Claimant's total and permanent disability. This case is not one where the Industrial Commission issued an opinion requesting more evidence to clarify issues it felt were not resolved by

the evidence of record. Rather, the Commission acted upon the evidence of record improperly to reach a result and ordered that the decision was final and conclusive as to all matters adjudicated pursuant to Idaho Code section 72-718. The Commission's decision acknowledges that the ISIF would not be liable absent ignoring Dr. Simon's clear medical opinion that the 2005 injury was the cause of the restrictions resulting in Claimant's total permanent disability. Accordingly, the Court should reverse the Industrial Commission's decision and order the case against the ISIF dismissed upon the evidence in the record.

DATED this 23rd of October, 2013.

HOPKINS RODEN CROCKETT
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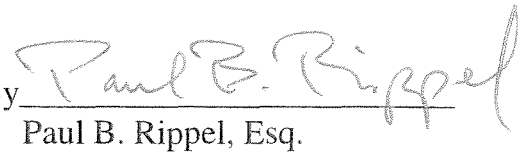
By 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below by mail, hand delivery or facsimile transmission.

DATED this 23rd day of October, 2013

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