12-13-2013

Corgatelli v. Steel West Cross Respondent's Reply Brief Dckt. 41012

IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY R. CORGATELLI, Appellant / Cross Respondent, vs. STEEL WEST, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Respondents / Cross Respondents, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Respondent / Cross Appellant.	)	Supreme Court No. 41012 Industrial Commission No. 05-501771

EMPLOYER/ SURETY - CROSS RESPONDENTS' REPLY BRIEF TO ISIF - CROSS APPELLANT'S BRIEF

Appeal from the Industrial Commission of the State of Idaho
Chairman, Thomas P. Baskin, Presiding with
Commissioners Thomas E. Limbaugh and R.D. Maynard

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STATEMENT OF THE CASE

The nature of this case has been generally described from client advocacy viewpoint by multiple prior brief of the respective party.

However, the ISIF has brought its Cross-Appeal contending in essence that the proposed Decision authored by the Hearing Referee should have been adopted to the extent that there was factual finding that the Claimant's manifest pre-existing physical impairments under a "but for" test did not combine with the physical effects of the last injury so as to cause the Claimant's total and permanent disability.

In essence, the ISIF would argue that the Claimant's manifest "Degenerative disc and joint disease L1-5. Left facet arthritis L3-4" medically documented in 1994 and 1995 with resultant employment activity restriction and with concurrent 25% salary reduction did not combine with Claimant's disc L4-5 herniation occurring in 2005, and thence, going on to posterior lumbar interbody fusion from L2 to L5 in 2009, so as to cause total permanent disability.

The Employer/Surety would advance that the ISIF, under the guise of asking that a legal issue of ISIF liability be determined under a "but for" test instead of "combined" test, is instead asking for a re-weighing of the determined facts.

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EMPLOYER/SURETY – CROSS RESPONDENTS' ISSUE ON APPEAL

1. Is there substantial competent, although perhaps conflicting, evidence to support the Industrial Commission's factual, and thence legal finding, that Claimant is totally and permanently disabled by combination of the combined effects of both the pre-existing impairment and subsequent injury?

ARGUMENT

Standard of Appellate Review and Application to Cross-Appeal

For the purposes of this brief, it is appropriate to clearly and distinctly set out the standards of appellate review which we believe to be applicable.

The Idaho Supreme Court's jurisdiction in appeals from decisions of the Industrial Commission in workers' compensation cases is limited to a review of questions of law. *Tarbet v. J. R. Simplot Co.*, 151 Idaho 755, 264 P.3d 394 (2011) citing *McAlpin v. Wood River Med. Ctr.* 129 Idaho 1, 3-4, 921 P.2d 178, 180-81 (1996); *Idaho Constitution*, Article V, Section 9.

The Idaho Supreme Court is "constitutionally compelled to defer to the Industrial Commission's findings of fact where supported by substantial and competent evidence." *Tarbet,* (supra) citing *Teffer v. Twin Falls School Dist. No. 411,* 102 Idaho 439, 631 P.2d 610 (1981).

"Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. Because the Commission is the fact finder, its conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly

erroneous. This Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. Whether a claimant has an impairment and the degree of permanent disability resulting from an industrial injury are questions of fact." *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 735, 40 P.3d 91, 93 (2002). Whether the Commission's factual findings are supported by substantial and competent evidence is a question of law. *Fife v. Home Depot, Inc.*, 151 Idaho 509, 260 P.3d 1180 (2011).

The Idaho Supreme Court's review of Findings of Fact from the Industrial Commission is limited to a determination whether such findings are unsupported "any substantial competent evidence" or are not supportable as a matter of law. *Idaho Constitution*, Article 5, Section 9. Idaho Code §72-732. *Bruce v. Clear Springs Trout Farm*, 109 Idaho 311, 707 P.2d 422 (1985). *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696-699 (1981). *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980).

The appellate standard of review restated in *Zapata v. J.R. Simplot Co.*, 132 Idaho 513 (1999), provides:

Standard of Review

> When this Court reviews a decision of the Industrial Commission, it exercises free review over questions of law. See *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). With respect to questions of fact, the Court's review is limited to determining whether substantial and competent evidence supports the decision. See *Matter of Wilson*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). If the Commission's findings of fact are supported by substantial and competent evidence, they will not be disturbed on

appeal. See *Reedy v. M.H. King Co.*, 128 Idaho 896, 920 P.2d 915 (1996). Further, "[t]his 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. See Boley, 130 Idaho at 280, 939 P.2d at 856. It is relevant evidence that a reasonable mind might accept to support a conclusion. Id.

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. See *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996). The Commission's conclusions on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous. See *Wheaton v. Indus. Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

Finally, in reviewing a decision of the Commission, this Court "views all the facts and inferences in the light most favorable to the party who prevailed before the Commission." Boley, 2130 Idaho at 280, 939 P.2d at 856 (citing *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996)).

Idaho Code § 72-506 provides:

> **72-506**. Acts of commission or reference -- Hearing officers.
> (1) Any investigation, inquiry or hearing which the commission has power to undertake or hold may be undertaken or held by or before any member thereof or any hearing officer, referee or examiner appointed by the commission for that purpose.
> (2) Every finding, order, decision or award made by any member, hearing officer, referee, or examiner pursuant to such investigation, inquiry or hearing, when approved and confirmed by the commission, and ordered filed in its office, shall be deemed to be the finding, order, decision or award of the commission.

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Idaho Code § 72-717 provides:

> **72-717**. Effect of decision by one member or assigned officer -- Claim for review. If the matter has been assigned for hearing by a member, hearing officer, referee, or examiner, the record of such hearing, together with the recommended findings and determination, shall be submitted to the commission for its review and decision.

Lorca-Merono v. Yokes Washington Foods, Inc., 137 Idaho 446 (Idaho 2002), 27050 notes the following:

> The findings of fact made by the referee were merely recommendations to the Industrial Commission. Upon reviewing those findings, it could either adopt them or enter its own findings. Idaho Code §§ 72-506(2) & 72-717 (1999). [2] The Commission need not explain why it did not adopt certain findings recommended by the referee. The Industrial Commission, as the factfinder, is free to determine the weight to be given to the testimony of a medical expert. *Eacret v. Clearwater Forest Indus., Inc.*, 136 Idaho 733, 40 P.3d 91 (2002). The Commission is not bound to accept the opinion of the treating physician over that of a physician who merely examined the claimant for the pending litigation. *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 29 P.3d 390 (2001). We will not disturb the Commission's conclusions as to the weight and credibility of expert testimony unless such conclusions are clearly erroneous. *Eacret v. Clearwater Forest* [50 P.3d 467] *Indus. Inc.*, 136 Idaho 733, 40 P.3d 91 (2002).

The extent of an injured worker's disability for work is a factual matter committed to the particular expertise of the Industrial Commission. *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1530 (1975).

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The Industrial Commission has wide discretion in making factual determinations and the Supreme Court will use a clearly erroneous standard in reviewing those determinations. *Vernon v. Omark Industries*, 113 Idaho 358, 744 P.2d 86 (1987).

Findings of Fact from the Industrial Commission will be set aside only if the record is devoid of any competent evidence to support them. *Quintero v. Pillsbury, Co.*, 119 Idaho 918, 811 P.2d 843 (1991).

In *Dumaw v. J.L Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements that a claimant must meet to establish Industrial Special Indemnity Fund liability under Idaho Code § 72-332:

(1) Whether there was indeed a pre-existing impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance to employment; and

(4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

Claimant's Facts

Claimant was born in 1947. He was 63 years old and resided in Chubbuck, Idaho at time of Hearing. Claimant was raised on the ranch. Claimant had attended Idaho State University one term where he obtained his welding certification. R., p. 20 (see para. 1).

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Beginning in 1973 Claimant commenced work for the Employer as a fitter and welder. In the 1980's, Claimant was promoted to a lead man and help the foreman run construction jobs. Later, he was promoted to shipping and receiving and paint foreman. He also drove delivery trucks. R., p. 20 (see para. 2).

In 1994, Claimant injured his low back at the Employer. At that time, he was earning $12.06 per hour. Claimant received multiple but different medical diagnosis. A bone scan ordered by Dr. Fields, D.O., which was undertaken in December 1994, was read to show injury at L3-4. R., pp. 20-21 (see para. 4).

In February 1995, Dr. Fields placed Claimant on permanent restrictions against lifting more than 35 pounds. He recommended against Claimant bending and stooping on a frequent basis. R., p. 21 (see para. 5).

In March 1995, Claimant was seen in second opinion by Pocatello neurosurgeon Peter Schossberger, M.D. Dr. Schossberger's review of Claimant's MRI indicated that Claimant had nuclear dehydration at four lumbar levels, multiple osteophytes and superior L4 in plate and surrounding bone changes including focally positive bone scan at about left 3-4 are more likely than not of degenerative cause and/or a result of cumulative life working lifting activities. R., pp. 21-22 (see para. 7-8).

In August 1995, Claimant was seen by Kevin Hill M.D. Dr. Hill also identified degenerative disc and joint disease L1-5 as well as left facet arthritis L3-4. Dr. Hill declined to assign a permanent

impairment rating to the 1994 accident believing that Claimant's significant degenerative disc and lumbar spine disease impairment was pre-existing. Dr. Hill did assign permanent activity restriction. R., pp. 22-23 (see para. 9).

In October 1995, Dr. Fields awarded Claimant a 5% whole person rating. R., p. 23 (see para. 10).

In March 1996, Claimant and Employer/Surety executed a lump sum settlement agreement wherein Claimant was paid $27,348.75 for disputed permanent impairment and permanent disability. R., p. 23 (see para. 11). By reference to the State of Idaho Industrial Commission average weekly state wage for 1994, the average weekly state wage was $390. Permanent impairment calculation at 55% of the average weekly state wage is $214.50. Idaho Code § 72-428. In continuing the calculations, the Claimant received 127.5 weeks of benefits, or in other words, 25.5% whole man PPI/PPD. This settlement was approved by the Industrial Commission and is indicative of both Claimant's manifest pre-existing physical impairment and its actual hindrance to Claimant's employment.

Claimant could not tolerate the bending, stooping and lifting required within the position of foreman at the Employer. He accepted a $3. per hour pay cut and undertook a new position as safety director. Within this new position, Claimant largely did paperwork, inventory and limited computer work. Claimant did not use and was not familiar with, Excel, WordPerfect, or Microsoft Word. As the safety director, Claimant had a part-time employee type out his safety meeting agendas.

Claimant did maintain, correlate and file material safety data sheets. Claimant did fill out workers' compensation accident reports. Claimant still drove delivery trucks and delivered steel while keeping within his 35-pound lifting restriction. R., pp. 23-24 (see para. 12).

On January 3, 2005 Claimant sustained another workplace injury. Medical work-up by Dr. Fields, including MRI testing, showed the presence of degenerative disc disease at all of the lumbar levels along with "something new" being a disc herniation at L4-5. R., pp. 24-25, (see para. 13-14). Claimant went on to a decompressive laminotomy, facetotomy, and excision of herniated disc at l4-5. R., pp. 25-26 (see para. 15).

Notably, Claimant returned to his work with the Employer. He continued to handle paperwork and to make deliveries. R., pp. 26 (see para. 16).

Claimant's back and leg discomfort gradually worsened. Steroid injections and physical therapy provided no relief. New MRI testing revealed tight foraminal stenosis at L4-5 along with disc bulging and central spine stenosis at L2-3, L3-4, and L4-5. In April 2009, Dr. Allen performed posterior lumbar interbody fusion from L2 to L5. The operative report reflects that among the indications for this procedure were the fact that Claimant has severe disc collapse with herniated discs at L2-3, L3-4, and L4-5. R., pp. 26-27 (see para. 18, 22).

While Claimant had some benefit from the L2 to L5 interbody fusion surgery, his back and leg pain persisted. Dr. Allen later diagnosed Claimant with "failed back syndrome". R., p. 28 (see para. 23).

Within functional capacity evaluation, Claimant was deemed to be at a sedentary activity level with limited sitting, lifting as related to his 3 level lumbar fusion. Claimant also had non-accident related difficulty with hand coordinated tasks. R., pp. 28-29 (see para. 24).

Within subsequent deposition, Dr. Simon proposed that the need for the 2009 surgery was in part causally related to Claimant's multilevel degenerative disc disease. R., pp. 29-30 (see para. 26).

The liability of the ISIF is addressed within R., pp. 36-37 (see para. 44-47).

The Industrial Commission found the Claimant to be totally and permanently disabled as a consequence of the fact that the L2-5 fusion surgery was less than successful. It is equally clear that Claimant had manifest, objectively documented multilevel degenerative changes first medically appreciated in 1994.

Based upon those multilevel degenerative changes, the Claimant was forced to change his duties within the Employer, and most importantly, for him to accept a wage differential cut that lasted his remaining career.

Claimant's documented 2005 injury was an L4-5 disc herniation. There was neither medical testimony nor objective medical test reporting that the 2005 injury aggravated or accelerated the prior multilevel degenerative changes.

Dr. Allen's L2-5 fusion in 2009 was to address not only the L4-5 level, but also the severe degenerative disc disease above and below the L4-5. His operative report clearly reflects that the

indications for surgery are multifactoral and not solely related to the need to address the L4-5 level.

Within effort to seek a re-weighing of the evidence instead of addressing whether or not there is a scintilla of evidence to support the finding of combination, the ISIF addresses at length the proposed findings of the Referee.

Findings of a Referee are merely recommendations to the Industrial Commission. Upon review of those findings, the Industrial Commission has the legal authority to adopt them, or to even enter its own findings. Indeed, the Industrial Commission need not explain why it did not adopt certain findings as recommended by the Referee. *Lorca-Merono v. Yokes Washington Foods, Inc.* supra.

While the Industrial Commission has authority to refer Hearings to Referees, any proposed decision must be approved by the Commission. §§72-506 and 72-717, Idaho Code. In conceptual illustration, the statutory framework of the Industrial Commission for referral of matters to a Referee or even single Commissioner for hearing is different than the statutory framework found within the interplay between a Magistrate Court and a District Court. Within this latter court system, the District Court undertakes the role and duty of an appeals court. Within the Industrial Commission, while either a Referee or even one or more Commissioners may undertake to receive through hearing process the submitted evidence a decision does not come about until opportunity for all Commissioners to participate.

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For purposes of this appeal, the question is not whether the Referee is more right in fact-finding than the Industrial Commission. The appeal question is whether there is a scintilla of evidence to support the findings of fact leading to the legal conclusion of the Industrial Commission.

The Industrial Commission, as a fact finder, is free to determine the weight to be given the testimony of a medical expert. *Lorca-Merono v. Yokes Washington Foods, Inc.* supra.

The corollary to determining the weight to be given to the testimony of a medical expert is likewise the weight to be given one part or another of the testimony of a medical expert. Within the instant case, the Industrial Commission chose to accept the deposition testimony of Dr. Simon over a written report because of that deposition testimony specifically referred to the Claimant's prior manifest multilevel degenerative disc disease.

Within the instant case, it cannot be said that the deposition testimony of Dr. Simon is clearly erroneous. (Emphasis added.) R., pp. 29-30 (see para. 26).

Within the instant case, it cannot be said that the Commission's factual finding that Dr. Allen's operative report clearly reflects that the indications for surgery are multi-factorial including the L4-5, but also the Claimant's severe degenerative disease at levels above and below L4-5. R., p. 37 (see para. 46).

The deposition testimony of Dr. Simon and the operative report of Dr. Allen are a sufficient scintilla of evidence to support the factual finding and resulting legal conclusion that Claimant's

prior manifest multilevel degenerative disc disease, combined with the injury at L4-5, to cause Claimant's total permanent disability.

The "But For" Rule

The ISIF has argued at length that this claim should be decided under a " but for" standard reciting *Garcia v. J.R. Simplot, Co.* 115 Idaho 966, 968, 772 P2d 173, 175 (1989).

Recall that there are four elements of a *prima facie* claim against the ISIF including: (1) a pre-existing impairment; (2) that the impairment was "manifest"; (3) that the alleged impairment was a "subjective hindrance"; and (4) that the alleged impairment combines and causing total disability.

Interestingly, in *Dumaw v. J.L.Norton Logging,* 118 Idaho 150, 795 P2d 312 (1990), again in *Wernecke v. St. Maries Joint School District #401 and the State of Idaho Industrial Special Indemnity Fund,* 147 Idaho 277, 207 P.3d 1008, and again in *Stoddard v. Hagadone Corp.,* 147 Idaho 186, 857 P3d 162, (2009), this Court identified the fourth element of the *prima facie* claim to be: (4) *that the alleged impairment combines with the subsequent injury to cause total disability.*

Within the instant case, Claimant underwent multiple level fusion surgery to address pre-existing disc degeneration as well as subject 2005 accident disc injury. The functional capacity evaluation addressed the claimant's physical capabilities following the multiple level fusion wherein 4 vertebrae had became surgically fused into 1. The four vertebrae are "combined".

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This Court should uphold its previous pronouncement that the fourth element of a "*prima facie*" claim be: (4) that the alleged impairment combines with the subsequent injury to cause total disability. This Court should reject the attempt to add in a "but for" element.

Again, under such fourth element, there is sufficient scintilla of evidence to support liability of the ISIF.

CONCLUSION

Wherefore it is requested that the cross-appeal of the ISIF be denied and that Employer/Surety received its appellate costs incurred.

RESPECTFULLY SUBMITTED this 11th day of December, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 11th day of December, 2013, I caused a true and correct copy of the foregoing EMPLOYER/SURETY - CROSS RESPONDENTS' REPLY BRIEF TO ISIF - CROSS APPELLANT'S BRIEF to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

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