8-21-2014

Sevy v. SVL Analytical, Inc. Respondent's Brief 1 Dckt. 41994

IN THE SUPREME COURT OF THE STATE OF IDAHO

KELLI SEVY, Claimant-Appellant, vs. SVL ANALYTICAL, INC., Employer, STATE INSURANCE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants-Respondents.	)	Supreme Court Docket No.: 41994 Case No.: I. C. 06-526107

RESPONDENT ISIF'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO
CHAIRMAN THOMAS BASKIN PRESIDING

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I. STATEMENT OF THE CASE

This is an appeal from a decision of the Industrial Commission which found that the Claimant was not entitled to disability benefits over and above the 2% whole person impairment rating she was provided as a result of a 2006 industrial accident.

The Claimant seeks review of the Industrial Commission determination that the Claimant did not suffer any disability in excess of her 2% whole person impairment rating, arguing that there is no substantial and competent evidence to sustain the factual finding by the Industrial Commission.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDING

The Claimant was injured on October 31, 2006 while employed by SVL Analytical Inc. She tripped over a dog at work falling to the floor. Prior to the industrial accident the Claimant had undergone a discectomy and fusion of her cervical spine at C5-6 to correct a degenerative disc condition. The initial surgery was performed by Dr. Jeffrey Larson on May 15, 2006. X-rays taken subsequent to the initial surgery showed a successful fusion progressing.

Two weeks after the industrial accident, the Claimant again saw Dr. Larson. Based on results of a second x-ray exam, Dr. Larson determined there was a pseudoathrosis or non-union of the fusion at C5-6. Dr. Larson attributed the pseudoathrosis to the fall at work. (Larson Deposition, p. 14). Dr. Larson performed a supplemental fusion on January 19, 2007 at the same C5-6 level. (Larson Deposition, pp. 10, 11).

The claim was accepted by the Surety and medical and time loss benefits were paid to the Claimant. The Claimant filed a Complaint against both the Employer (SVL Analytical) and

Surety (State Insurance Fund). The State of Idaho Industrial Special Indemnity Fund, hereinafter referred to as the ISIF, was also joined by the Claimant. In her complaint against the ISIF, the Claimant asserted that she was totally and permanently disabled based on her pre-existing lumbar, cervical and knee condition and the effects of the October 31, 2006 industrial accident. (R. p. 36).

A hearing was conducted on February 15, 2012, by an Industrial Commission Referee who subsequently issued Findings of Fact and Conclusions of Law and Recommendation. The Referee found that the Claimant suffered permanent disability from all causes of 45% inclusive of permanent partial impairment but apportioned all but 2% to pre-existing conditions. (R. p. 55). In essence, the Referee found no disability in excess of the 2% impairment attributable to the 2006 industrial accident. The Referee also found that the Claimant was not 100% totally and permanently disabled, nor an odd-lot worker. (R. p. 55).

The Industrial Commission did not adopt the Referee's recommendation and issued its own Findings of Fact and Conclusions of Law. (R. p. 56). The Commission found that the Claimant had failed to establish that she has suffered any disability as a result of the subject accident over and above her 2% PPI rating. The Commission relied upon the testimony of Dr. Larson (the treating surgeon) and Dr. Stevens (who performed an Independent Medical Exam) that the 2006 accident did not result in any additional restrictions or limitations. The Commission also determined that Claimant had failed to establish that she was totally and permanently disabled.

> We find Claimant's testimony that she experienced a permanent worsening of her condition following the October 31, 2006 accident to be unpersuasive. More persuasive to the Commission is the testimony of Dr. Larson, as supported by his records and objective medical testing. Claimant suffered from non-work related disease of the cervical spine which led to spinal fusion surgery on May 15, 2006. Claimant may or may not have reached a point of medical stability from this surgery by the time the accident of October 31, 2006 occurred. Regardless, although Claimant has successfully demonstrated that the October 31, 2006 accident did cause a fracture of the C5-6 fusion mass, there is no evidence that that accident caused additional injury at levels above or below C5-6. Claimant received appropriate medical care for the C5-6 fracture and follow-up medical records demonstrate a solid fusion at C5-6. Although Claimant has gone on to require additional surgery at C4-5, the parties are in agreement that the subject accident did not contribute to the need for that surgery. Claimant's treating physician has cogently testified that with the successful fusion revision, Claimant has returned to base line without any additional limitations that can fairly be referred to that accident. We find this testimony persuasive.

Findings, Conclusion and Order, p. 26 (R. pg. 81).

The Claimant filed a Motion for Reconsideration. (R. p. 86). The Commission denied the Motion for Reconsideration, again holding that Dr. Larson's testimony was entitled to greater weight than that of the Claimant on the issue of whether the Claimant had any new limitations or restrictions as a result of the industrial accident and the supplemental fusion. The Commission made the factual finding, based upon Dr. Larson's medical records and his post hearing deposition testimony, that the industrial accident did nothing to increase Claimant's permanent limitations or restrictions. Finally, the Commission also found that the Claimant did not meet her burden of proof concerning her establishing permanent disability either under the 100% method or by use of the Odd-Lot Doctrine. (R. p. 89).

III. ADDITIONAL ISSUES ON APPEAL

1. Is the Respondent ISIF entitled to an award of attorney fees pursuant to I.A.R. 11.2?

IV. ARGUMENT

1. THE SUPREME COURT REVIEWS QUESTIONS OF FACT ONLY TO DETERMINE WHETHER SUBSTANTIAL AND COMPETENT EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS.

When the Supreme Court reviews a decision of the Industrial Commission, it exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Gooby v. Lake Shore Mgmt. Co.,* 136 Idaho 79, 29 P.3d 390 (2001). Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.* 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. *Id.* The Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Id.* Whether a claimant has an impairment and the degree of permanent disability resulting from an industrial injury are questions of fact. *Id.*

A claimant has permanent disability "when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can reasonably be expected." I.C. § 72-423. A permanent disability rating is the appraisal of the claimant's "present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors as provided in [I.C. § 72-430]." I.C. § 72-425. "The central focus of [I.C. § 72-425] is on the ability to engage in gainful activity.'" *Smith v. Payette County,* 105 Idaho 618,

621, 671 P.2d 1081, 1084 (1983) (quoting *Baldner v. Bennett's Inc.*, 103 Idaho 458, 462, 649 P.2d 1214, 1218 (1982)).

The degree of a permanent disability and the cause(s) of disability are factual questions committed to the particular expertise of the commission. *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

2. BOTH DR. STEVENS AND THE TREATING SURGEON DR. LARSON WERE OF THE OPINION THAT THE INDUSTRIAL ACCIDENT DID NOT RESULT IN ANY ADDITIONAL PHYSICAL RESTRICTIONS OR LIMITATIONS.

In this case there are two medical doctors who have provided opinions concerning the effects of the Claimant's October 2006 industrial accident; the treating surgeon, Dr. Larson who performed the initial non-industrial fusion surgery at C5-6 and the redo fusion surgery necessitated by the industrial accident, and Dr. Stevens who performed an Independent Medical Exam at the request of the Surety.

Dr. Larson in a letter to the State Insurance Fund stated:

> "Ms. Sevy does not have any work restrictions related to her neck condition. She has a history of having an anterior cervical discectomy and fusion at C5-6 on 5/15/2006. She then fell at work and had developed pseudoarthrosis at that level, and had surgery for pseudoarthrosis on January 19, 2007. Any restrictions that she may have, and I don't think there are any related to her neck, would relate to the to [*sic*] previous condition for which she had surgery done on May 15, 2006. The second surgery was a supplemental fusion at that same level and would not add any restrictions." [emphasis added]

Exhibit 1, p. 9.

The Claimant underwent an independent medical evaluation by J. Craig Stevens, M.D., in October 2007, almost one year after the dog incident. Dr. Stevens agreed that the Claimant sustained a failure of her cervical fusion on the date of injury, October 31, 2006. (Exhibit 2, p. 108). He found that the Claimant was at maximum medical improvement and medically stable as of October 3, 2007. (Exhibit 2, p. 108). With regard to physical restrictions related to the October 31, 2006, fall and subsequent supplemental fusion, Dr. Stevens stated as follows:

> PHYSICAL RESTRICTIONS: The incident of October 31, 2006, and subsequent surgery of January 19, 2007, will not result in permanent work restrictions. While her most recent FCE did result in the identification of a 45 lb. lift "limitation"; those restrictions based on that would relate in their entirety to her lumbar and thoracic condition and not to her cervical condition. No restrictions are indicated pertinent to her cervical condition.

(Exhibit 2, p. 109).

Dr. Stevens apportioned 2% percent of a 12% whole person impairment to the industrial accident (Exhibit 2, p. 110)[1]. In a written response to the Idaho Industrial Commission dated September 25, 2007, Dr. Stevens indicated that the Claimant could return to her employment based upon the job site evaluation of extraction lab technician. He again noted no restrictions pertinent to her cervical neck condition or the effects of the October 31, 2006 incident. (Exhibit 2, p. 111).

[1] The additional 2% impairment is based on Table 15-7, p. 404 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. A second cervical fusion entitles the worker to a 2% upward adjustment.

3. THE FUNCTIONAL CAPACITY EVALUATION DOES NOT ADDRESS WHICH RESTRICTIONS RELATE TO THE INDUSTRIAL ACCIDENT OR THE INITIAL FUSION SURGERY.

A functional capacity evaluation was performed by Mark Bengston of Pinnacle Physical Therapy and Sports Medicine. (Exhibit 10). The Claimant demonstrated, as part of the functional capacity evaluation, the ability to lift on an occasional basis up to forty-five pounds, and the ability to stand and walk up to eight consecutive hours. The FCE did not find a match between her abilities and the physical requirements of the Claimant's job at SVL Analytical. The report did find that the Claimant could perform sedentary and light duty work pursuant to the U.S. Department of Labor Physical Demand Level. The projection was for full time employment of eight hours a day, five days per week. (Exhibit 10, p. 322).

On the issue of whether the October 31, 2006, accident resulted in any additional restrictions or limitations, the functional capacity evaluation performed by Mark Bengston is not helpful. It is beyond Mr. Bengston's area of expertise to render opinions as to medical causation and/or apportionment. The purpose and scope of the FCE was limited to measuring the Claimant's ability to do a set of physical functions over a one day testing period. At no time during Mr. Bengston's deposition did he venture any opinion on the effects of the industrial accident, as opposed to the pre-existing cervical fusion as it related to the results of the FCE. In fact, Claimant's counsel never inquired of Mr. Bengston as to his opinion on which restrictions might relate to the first fusion or the industrial accident.

As the Commission noted in its findings:

> Importantly, however, Mr. Bengston did not provide any testimony on the question of whether or not, or to what extent, Claimant's cervical spine limitations/restrictions are referable to the subject accident versus Claimant's documented history of pre-existing cervical spine injury. In short, his testimony does not support a finding that Claimant has limitations/restrictions that are referable to the subject accident of October 31, 2006.

Findings, Conclusions and Order (R. p. 80).

> In the final analysis the only support in the record for a finding that Claimant's functional abilities were permanently impacted by the accident of October 31, 2006 is found in the testimony of Claimant herself.

Findings, Conclusions and Order, (R. p. 80).

4. AN IMPAIRMENT RATING DOES NOT ENTITLE A CLAIMANT TO A DISABILITY RATING.

Essential to the Claimant's argument in her brief, is that since the Commission found the Claimant had a 2% whole person impairment rating based upon Dr. Stevens' Independent Medical Evaluation, that the Claimant is therefore entitled to a disability over and above impairment. Nowhere in the Idaho Code, nor in the decisions of the Industrial Commission, nor the Supreme Court is there a basis for that argument. It is the Claimant who bears the burden of proof in establishing disability in excess of impairment. *McCabe v. Jo-Ann Stores, Inc.*, 145 Idaho 91 (2007); *Bennett v. Clark Hereford Ranch*, 106 Idaho 438 (1984).

The AMA Guides to Evaluation of Impairment, Fifth Edition recognize "[a]n impaired individual may or may not have a disability." AMA Guides, 5th Ed., p. 3. In addition the Guides recognize that the whole person impairment rating is an estimate of the impact on the individual's overall ability to perform activities of daily living, but specifically excludes work

activity from impairment calculations. AMA Guides to Evaluation of Permanent Impairment, Fifth Edition, p. 4.

In the present case, the Claimant has failed to demonstrate that she suffers any disability as a direct result of the 2006 industrial accident and supplemental fusion. Moreover, a permanent impairment rating is not to be used as a direct determinate of work disability. The AMA Guides, 5th Ed. state the following:

> As a result, impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition Philosophy, Purpose, and Appropriate Use of the Guides, p. 5.

5. THE CLAIMANT IS NOT TOTALLY AND PERMANENTLY DISABLED AND THE ISIF HAS NO LIABILITY.

There are four requirements that must be met in order for a Claimant to establish ISIF liability under Idaho Code §72-332(1):

There must be a pre-existing impairment; and

- the impairment must be manifest; and
- the impairment must constitute a subjective hindrance to employment; and
- the impairment must combine with the subsequent injury to cause total disability.

A party seeking to establish liability against the ISIF pursuant to Idaho Code §72-332 carries the burden of proof. *Boley v. State, Industrial Special Indemnity Fund,* 130 Idaho 278 (1997). For the ISIF to be liable, the combined effects of both the pre-existing impairment and

the subsequent injury or occupational disease must render the employee totally and permanently disabled. *Bybee v. State of Idaho Industrial Special Indemnity Fund*, 129 Idaho 76 (1996).

The Claimant's brief spends time re-arguing the issue of total and permanent disability pursuant to the Odd-Lot Doctrine, and takes issue with many of the findings of the Commission. In summary, the Commission found that the Claimant could perform sedentary and light work, which comprise approximately two-thirds of the jobs in the national labor market. The Claimant's own expert, Mr. Bengston testified in his post-hearing deposition on the Claimant's ability to perform sedentary and light work on a full time basis based upon the results of his FCE:

> That's the actual performance that she provided during the FCE. The category that she fit into, according to the U.S. Department of Labor standards, is the light category based upon her physical abilities and keeping in mind the limitations that I observed. She did demonstrate some ability slightly above the light physical demand category. Collectively the whole test when summarized did not support her falling into a medium level physical demand category. However she did satisfy all of the requirements of light physical demand level work.

Mark Bengston Post-Hearing Deposition, pp. 37-38.

The evidence before the Commission is that the Claimant can perform sedentary and light work on a forty hour per week full time basis, even if she is limited to overhead work on a rare basis.

In addition, the Claimant provided childcare for her three grandchildren, including a newborn, on a full time basis for approximately ten months, which demonstrates that the Claimant retains significant physical abilities. The Claimant worked 40 hours per week for the Idaho Child Care Program for 10 months. (Hrg. Tr. p. 178).

In addition, the Claimant did not perform any job search from 2007, when she left SVL Analytical, until late 2011, shortly before the hearing. (Hrg. Tr. p. 177). The only work search Claimant did was perfunctory and done shortly before hearing.

Finally, the Claimant continues to misinterpret the results of the SkillTRAN analysis and the testimony of Dr. Nancy Collins. The Claimant asserts in her Brief that Dr. Collins testified that due to Claimant's restrictions, she would lose access to 90% of her time of injury labor market, Dr. Collins testified to nothing of the sort. In fact, Dr. Collins testified extensively that the Claimant's expert, Dan Brownell, skewered the SkillTRAN results by adjusting for reaching in all directions. The SkillTRAN computer program cannot differentiate between reaching straight ahead with overhead reaching. As Dr. Collins testified, if you adjust for all reaching, you lose over 90% of the jobs in the labor market since most jobs involve some use of the hands. (Dr. Nancy Collins' Deposition, pp. 49-50).

Of course, the Claimant does not have a restriction against all reaching, but is restricted to overhead reaching on a rare basis. As the Industrial Commission noted in its Order Denying Reconsideration:

> As we pointed out in our original decision, we believe the reliance on the results of the SkillTRAN analysis is misplaced. Claimant has restrictions against engaging in overhead reaching on a more than occasional basis. She has no restrictions against other types of reaching that might be required in other types of employment. However, because of the way data is collected by the US Department of Labor, the SkillTRAN system is incapable of applying Claimant's specific restriction to the data base of jobs: SkillTRAN only allows the evaluator to screen out jobs that involve upper extremity reaching generally without the ability to fine tune for a specific type of prohibited reaching.

Truthan Deposition 68/25-74-15.

The commission went on:

> Most of the jobs in the work place require upper extremity reaching of some type. Withdrawing jobs that require some type of reaching from Claimant's labor market results, results in a loss of up to 90% of the labor market. However, using SkillTRAN in this fashion would remove from Claimant's labor market any number of jobs (how many, we do not know) that she is actually capable of performing per Mr. Bengston.

Order Denying Reconsideration, (R. p. 97).

The Claimant has not demonstrated that she is totally and permanently disabled pursuant to the Odd-Lot Doctrine. The evidence in this case from both the functional capacity evaluation and from Dr. Larson is that the Claimant is employable in sedentary and light employment on a forty hour a week, full time basis. There is no medical evidence in the record from any source that indicates that the Claimant cannot perform work at a sedentary or light level. As the ISIF vocational expert, Dr. Nancy Collins testified over sixty percent of the jobs in the labor market are sedentary and light positions. (Dr. Nancy Collins' Deposition, p. 39). Sedentary and light jobs are available in both the Coeur d'Alene and Kellogg labor markets.

An employee may prove total disability under the Odd-Lot Doctrine in one of three ways:

1. By showing that he has attempted other types of employment without success;
2. By showing that he, or vocational counselors or employment agencies on his behalf, have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable employment would be futile.

Hamilton v. Ted Beemus Logging & Construction, 127 Idaho 221 (1995).

In the present case, the evidence is actually that the Claimant returned to employment after the industrial accident as a child care worker and did so with success. The Claimant qualified to perform child care work under the ICCP program run by the State of Idaho. This was not an informal arrangement or a temporary arrangement between the Claimant and her daughter. The ICCP program actually paid the Claimant a salary of approximately $1,200 per month. (Hrg. Tr. p. 177). Moreover, the Claimant was required to provide child care on a forty hour per week basis. The evidence is that the Claimant successfully performed that job, but that it was terminated due to her daughter's incarceration. That is direct evidence that the Claimant is not totally and permanently disabled, and as Dr. Collins noted, child care work is considered a medium strength employment. (Dr. Nancy Collins' Deposition, p. 55). There is no reason the Claimant cannot obtain a position in Kellogg as a child care worker.

The second method for demonstrating Odd-Lot disability is an actual search for work either through vocational counselors and employment agencies, or directly, and not having work available. There is no evidence in the record that the Industrial Commission Rehabilitation Division or the Department of Employment searched for work for the Claimant. The testimony concerning Claimant's employment search is vague. The Claimant, in two pre-hearing depositions and her interrogatory responses, indicates that she had not yet applied for any jobs. (Hrg. Tr. p. 177). The Claimant testified to only a few job contacts shortly before the hearing, five years after the industrial accident.

At the hearing, the Claimant testified that while she talked to people about jobs she did not actually fill out any job applications. (Hrg. Tr., p. 173) When questioned on cross-examination at hearing she answered as follows:

> Q. Okay. So from 2007, when you left SVL, until late 2011, you didn't even contact anybody, did you, for employment?
>
> A. No because I was working for ICCP.

(Hrg. Tr., p. 177).

The evidence in this case is that the Claimant made no attempt either directly, through the ICRD office or through the Department of Employment to look for work from 2007 until late 2011. At the time of hearing, the Claimant was not seeking employment because she continued to have custody of her three young grandchildren. (Hrg. Tr. p. 182).

The third method available for proving Odd-Lot disability is evidence that a work search would be futile. Dr. Nancy Collins, who testified on behalf of the ISIF, testified that in her opinion, a work search would not be futile in either the Kellogg or Coeur d'Alene labor markets for the Claimant. The medical evidence in this case indicates that the Claimant can return to full time employment on a sedentary or light basis. Moreover, the Claimant actually performed a medium level job of child care successfully for ten months post accident. The testimony of Dan Brownell concerning the Claimant's employability is not credible.

Despite the fact the Claimant worked ten months as a child care provider and that there are numerous sedentary and light jobs available in both the Kellogg and Coeur d'Alene labor markets, Mr. Brownell testified that it would be futile for the Claimant to look for work based on

the results from the SkillTRAN analysis which overstated the Claimant's disability due to inputting the wrong information on Claimant's reaching restrictions.

The Claimant in this case was forty-three years of age at the time of the industrial injury in 2006. Almost six years later (at the time of the hearing) the Claimant was still a relatively young woman at forty-nine years of age. While the Claimant cannot return to her position at SVL Analytical, there are a significant number of jobs in her immediate labor market of Kellogg and in Coeur d'Alene, approximately forty miles away, for her to perform.

V. ATTORNEYS FEES SHOULD BE AWARDED TO THE ISIF

The ISIF is entitled to attorneys fees pursuant to I.A.R. 11.2. The ISIF seeks an award of attorneys fees. Under I.A.R. 11.2 fees can be awarded if:

> 1. The other parties' arguments are not well grounded in fact, warranted by existing law, or made in good faith,
>
> 2. The claims were brought for an improper purpose, such as unnecessary delay or increase in the cost of litigation.

Frank v. Bunker Hill Co. 142 Idaho 126, 124 P.3d 1002 (2005).

In this case, the Claimant has essentially attempted to re-argue and re-try this case before the Supreme Court. After a full Industrial Commission hearing and a decision by the Industrial Commission supported by substantial and competent evidence including the testimony of two medical doctors, the Idaho Industrial Commission determined the Claimant had no restrictions or limitations referable to her 2006 industrial accident. Based on that substantial and competent evidence, the Commission ruled that the Claimant was not entitled to any additional disability over and above a 2% impairment.

Without any evidence to support the position that the 2006 Industrial Injury worsened her condition, other than the Claimant's own testimony, this Court is asked again to evaluate the evidence and come to a conclusion different than the Industrial Commission did in both its original decision and its Order Denying Reconsideration.

Moreover, the Claimant has continued in her assertion that she is totally and permanently disabled based in large measure upon the misapplication of the SkillTRAN computer program.

Claimant only has a restriction against overhead reaching, not reaching in all directions. The Claimant has no restrictions against other types of reaching. Since the SkillTRAN program only allows adjustment for reaching generally, it greatly overstates disability when used in this manner.

The owner of the SkillTRAN company, Jeff Truthan, admitted in his deposition that his software could not differentiate between restrictions for overhead reaching and reaching in general. (Truthan Deposition, p. 74). Reluctantly, Mr. Truthan admitted that if you adjusted for only occasional reaching as the Claimant's expert did you remove 90% of jobs that exist in the Dictionary of Occupational Titles. (Truthan Deposition, p. 70). The SkillTRAN literature actually warns against adjusting from frequent to occasional reaching because of a precipitous drop in jobs. (Truthan Deposition, p. 73).

Despite clear testimony concerning the computer model's limitation from the owner himself and despite the Commission's rejection of the SkillTRAN analysis performed by Mr. Brownell the Claimant continues to argue for a finding of total disability based on a flawed and misleading computer model. The Claimant is again asking this Court to re-evaluate evidence

and draw a different conclusion with regard to the vocational testimony when there is substantial and competent evidence that the Claimant can return to sedentary and light work.

The award of attorney fees are appropriate where the Claimant persists in advancing this flawed factual argument before the Idaho Supreme Court.

VI. CONCLUSION

In summary, this is a straightforward case where the Claimant has failed to carry her burden of proof to demonstrate that the industrial accident combined with her pre-existing impairment to render her totally and permanently disabled. Dr. Larson, the Claimant's treating surgeon and the person most directly involved in her treatment, testified that the falling incident of October 31, 2006 did not permanently damage the Claimant's cervical spine. The supplemental fusion surgery performed by Dr. Larson returned the Claimant to the same condition she was in immediately prior to the industrial accident. This was confirmed by Dr. Stevens who awarded the Claimant a 2% upward adjustment based solely on the re-do fusion.

Furthermore, the Claimant cannot establish that she is totally and permanently disabled. After her industrial accident and supplemental fusion, the Claimant successfully worked as a child care provider for ten months. The Claimant has performed no significant work search, and was not in the labor market at the time of the hearing because she had custody of her three young grandchildren.

The court should affirm the Industrial Commission's decision that the Claimant failed to establish total and permanent disability under the Odd-Lot Doctrine and failed to establish the

necessary elements of ISIF liability. Moreover, Pursuant to I.A.R. 11.2 attorney fees should be awarded to the ISIF.

DATED this 19 day of August, 2014.

JONES, BROWER & CALLERY, P.L.L.C.

THOMAS W. CALLERY
Attorney for Defendant ISIF

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of August, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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- ☑ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile transmission to:
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- ☑ U.S. Mail, Postage Prepaid
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