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Fairchild v. Kentucky Fried Chicken Respondent's Brief Dckt. 42237

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TERENCE FAIRCHILD, Claimant/Appellant, v. KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, Defendants/Respondents.	SUPREME COURT NO. 42237

RESPONDENTS' BRIEF

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Appeal from
the Idaho Industrial Commission of the State of Idaho

Chairman Thomas P. Baskin Presiding

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STATEMENT OF THE CASE

NATURE OF THE CASE:

This is a worker's compensation case relating to an industrial accident and injury of November 13, 2004, first filed on behalf of Terence Fairchild on February 18, 2005.

COURSE OF PROCEEDINGS:

The Industrial Commission assigned this matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on September 23, 2011. The hearing was continued due to illness of Claimant's counsel.

On February 29, 2012, the matter was assigned to the Commissioners who conducted a hearing on April 17, 2012, on the issues of:

1. Whether and to what extent Claimant is entitled to permanent partial impairment benefits;

2. Whether and to what extent Claimant is entitled to permanent partial disability benefits; and

3. Whether apportionment pursuant to Idaho Code §72-406 is appropriate.

On June 7, 2013, the Commission entered Findings of Fact, Conclusions of Law and Order concluding that:

1. Claimant has proven that he suffered a partial PCL injury as a result of his industrial accident.

2. Claimant has proven that he is entitled to 3% whole person PPI.

3. Claimant has failed to prove that he is entitled to permanent disability in excess of impairment.

4. The issue of Idaho Code §72-406 apportionment is moot.

5. Pursuant to Idaho Code §72-718, this decision is final and conclusive as to all issues adjudicated.

Claimant filed a Motion for Reconsideration on June 25, 2013, asking for reconsideration on the issue of disability, arguing that the Commission's conclusions are based upon a flawed vocational opinion by Douglas Crum. Claimant also disputed the Commission's finding on Claimant's credibility. On May 12, 2014, the Commission entered an Order Denying Reconsideration reiterating that it found the medical opinions of Williams Sims, M.D., Claimant's treating physician, more persuasive than other medical opinions as he was most familiar with Claimant's condition. It further found that there were no limitations or restrictions associated with the injury as diagnosed by Dr. Sims and therefore it is not in error for the Commission to rely on a vocational opinion of Mr. Crum, which was based, in part, on the conclusion that Claimant suffered no accident relating to limitations or restrictions.

STATEMENT OF FACTS:

The Commission made the following findings of fact:

Background:

1. Claimant was born on [redacted] and was 23 years old at the time of the 2012 hearing. He is married with three children and currently resides in Vancouver, Washington. Prior to moving to Vancouver, Claimant lived in Coeur d'Alene, where he grew up. Claimant is a skilled musician who began playing the viola at the age of five. He also plays the violin and the piano. As a teenager, Claimant played in local quartets, orchestras, and symphonies. He testified that he planned to join the United States Air Force orchestra after high school in order to obtain financial assistance for higher education. Claimant ultimately hoped to attend the San Francisco Conservatory of Music.

2. In addition to music, Claimant enjoyed athletic activities. He was an avid runner and weight lifter, and possibly participated in football.[2] He also worked part-time in high school, first as a lifeguard and later at Dairy Queen. At the time of his accident, Claimant was a cook for Employer, earning $7.15 per hour and working 15 hours per week. His duties included food preparation and kitchen clean-up.

Accident and Medical Treatment

3. On November 13, 2004, Claimant was carrying garbage out to a dumpster when he slipped on ice and fell on a concrete barrier, striking his knees. The impact caused Claimant's knees to bleed. He went inside to bandage his knees and inform his supervisor of the accident. His father picked him up at the end of his shift.

4. Claimant did not immediately seek medical treatment for his injuries, but on December 16, 2004, he presented to Howard N. Brinton, M.D., at the After Hours Care Clinic in Coeur d'Alene. Claimant complained of ongoing knee pain, "particularly in the anterior aspect of his knees just below his knee caps." D.E. 3, p. 41. Claimant stated that he had never had similar pain before. Dr. Brinton examined Claimant and diagnosed patellofemoral pain following bilateral patella

2 It is unclear from the record whether Claimant actually participated in organized sports. At the 2012 hearing, he testified that he played football, but during his deposition on April 19, 2005, he testified that he was not on any sports team.

contusions. Dr. Brinton prescribed knee braces and stretching exercises, as well as Naprosyn and ice. He advised Claimant that he should avoid running, jumping, and "duress" bending, stooping, and kneeling. *Id.*

5. Claimant followed up with Dr. Brinton on December 23, 2004. Claimant continued to suffer pain in both knees, despite the use of braces. Dr. Brinton prescribed physical therapy, which failed to alleviate Claimant's symptoms.

6. On January 6, 2005, Claimant returned to Dr. Brinton. Testing revealed "pain with medial structure, joint loading, particularly posterior aspect." D.E. 3, p. 38. Dr. Brinton suspected internal derangement involving the left medial meniscus posterior horn. He ordered an MRI of the left knee, which was performed on January 11, 2005. The MRI revealed that the meniscus was intact. Claimant's cruciate ligaments, anterior and posterior, also appeared to be intact.

7. Dr. Brinton reviewed the MRI scan with an orthopedist, Dr. Adam Olscamp, who stated that Claimant's treatment should consist of ambulation as tolerated. Dr. Brinton continued Claimant on physical therapy and anti-inflammatory medication. At the request of Claimant's father, Dr. Brinton referred Claimant to William F. Sims, M.D., for a second opinion.

8. Claimant presented to Dr. Sims, an orthopedic surgeon, on March 1, 2005. After examining Claimant and reviewing his medical records, Dr. Sims suspected that Claimant had a partial PCL injury in his right knee. Dr. Sims recommended an MRI of the right knee, but Claimant apparently did not follow up on the recommendation. He did not return to Dr. Sims until nine months later, on December 13, 2005. Because of Claimant's persistent pain, Dr. Sims recommended MRI evaluations of both knees. These were performed on January 3, 2006. Radiologist Monte F. Zarlingo, M.D., recorded his findings for the right knee:

> The anterior cruciate ligament is intact. The posterior cruciate ligament demonstrates a focal area of signal hyperintensity within its distal fibers, which appears to saturate with fat saturation of uncertain significance. This may represent focal fat imbibed within the fibers. This could be the result of prior trauma and is of uncertain significance. The posterior cruciate ligament remains congruent. No evidence of an acute tear is seen.

D.E. 5, p. 61. The left knee MRI revealed no cartilage injury.

9. Claimant presented to Dr. Sims for follow-up on March 3, 2006. He reported that he continued to experience pain in both knees, but the right knee was more painful. Dr. Sims examined Claimant and reviewed the MRI results. Dr. Sims noted that Claimant's right knee MRI showed evidence of a PCL injury, and that this was consistent with an observed increase in laxity in Claimant's right knee. Dr. Sims diagnosed a partial right knee PCL injury and recommended a corticosteroid injection. Claimant agreed to undergo the procedure.

10. On March 31, 2006, Claimant reported to Dr. Sims that he experienced some relief from the injection, but his symptoms had returned. Dr. Sims discussed further treatment with Claimant but warned that an operative intervention would not likely be beneficial:

> I explained to him that...a reconstructive effort may return somebody to grade 2 laxity findings, which he presently has or slightly better.

D.E. 5, p. 56. After this appointment, Claimant did not return to Dr. Sims for almost a year.

11. On January 29, 2007, Claimant presented to Dr. Sims for evaluation. Claimant reported that he had returned to lifting weights and was also cycling. However, when he attempted to run, he felt "significant pressure" in his right knee. On examination, Dr. Sims found "approximate grade 2 [laxity] findings with external rotation of the foot, which improves to 1+ findings with internal rotation of the foot." D.E. 5, p. 55. Dr. Sims reiterated his belief that while Claimant had a right PCL injury, his laxity findings indicated that operative reconstruction would not improve his condition. Dr. Sims recognized that his opinion on surgery was "somewhat debatable" and said a second opinion would be reasonable. *Id.*

12. On April 30, 2007, Claimant presented to Tycho E. Kersten, M.D., for a second opinion regarding surgery. After examining Claimant, Dr. Kersten concurred with Dr. Sims's diagnosis of a partial PCL injury, noting, "[Claimant] certainly does have some laxity." D.E. 6, p. 72. He also agreed that surgery would not be beneficial to Claimant:

> In the big picture, I think surgery is unlikely to change his symptoms and his condition much, and, as such, I would be in agreement with Dr. Sims that conservative treatment is the treatment of choice here....

With regards to the PCL surgery, surgery is a big deal with a low likelihood of being able to improve on his current stability/instability pattern....[Surgery] is unlikely to reliably improve his condition.
Id.

13. On September 20, 2007, Claimant underwent an independent medical examination (IME) with William R. Pace III, M.D., an orthopedic surgeon, and Linda Wray, M.D., a neurologist.[3] Dr. Pace reviewed Claimant's medical records, including the MRIs, and performed an examination of Claimant. He noted that Claimant walked with a normal gait. No laxity was observed. Dr. Pace found that Claimant was medically stable and had sustained no PPI. Dr. Pace declined to place any restrictions or limitations on Claimant.

14. After receiving the IME report, Surety forwarded it to Dr. Sims and asked if he agreed with the findings. Dr. Sims indicated that he did not:

> The [patient] does have increased laxity on [right] knee [posterior] drawer exam (partial PCL injury) -- According to table 17.33 AMA Guides to PPI, this is consistent with a 3% whole person impairment rating -- re "mild cruciate ligament laxity."

D.E. 5, p. 50. Surety then asked Dr. Pace to respond to Dr. Sims's opinion. Dr. Pace stated that his own opinion remained unchanged, as he observed no laxity on his examination of Claimant.

15. On April 23, 2009, Claimant underwent a functional capacity evaluation (FCE) performed by Mark Bengtson, M.P.T. Mr. Bengtson observed laxity consistent with a chronic PCL injury. Mr. Bengtson concluded that Claimant had "significant limitations" in walking, stair and ladder climbing, and weight bearing tolerance during prolonged ambulation. C.E. B, p. 3. He believed that Claimant would have difficulty performing work in medium or heavy duty jobs that required walking or standing more than 50% of the time. He noted that Claimant was capable of light duty work with standing and walking up to 50% of an eight-hour work day. However, he also noted that Claimant's walking and prolonged ambulation limitations were not permanent and could be improved in physical therapy.

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3 Dr. Wray examined Claimant for an alleged injury unrelated to this claim.

16. On June 29, 2010, Claimant's counsel sent the FCE report to Dr. Sims. Counsel indicated that Claimant was seeking Surety approval for an appointment with Dr. Sims, but in a response sent on July 13, 2010, Dr. Sims wrote that it would be in Claimant's "best interest" to be seen by another physician. D.E. 5, p. 48.

17. On September 16, 2010, Dr. Pace saw Claimant for a second IME. He reviewed Claimant's medical records again, as well as the FCE. He also conducted a physical examination. Claimant reported that he continued to suffer from dull bilateral knee pain, with occasional sharp pains under his right kneecap. On examination, Dr. Pace observed no laxity. He reported that his opinion remained the same. He wrote:

> I believe Mr. Fairchild's current complaints are consistent with bilateral patellofemoral pain syndrome. This is common in young adults. There is no good curative treatment for it. Quadriceps strengthening exercises could be helpful. The [FCE's] comments regarding the "desperate need for a comprehensive lumbopelvic femoral balancing and strengthening program" are a little bit difficult for me to accept. This gentleman seems to be reasonably fit. He is working without any specific restrictions. I think his knee complaints are real. They may be minimally related to the slip and fall incident in 2004, but I would not consider that incident to be the major contributing cause to his present complaints.
>
> As in 2007, I failed to find any evidence in support of a diagnosis of a posterior cruciate ligament injury in the right knee. I think this is sort of a case of "the emperor's clothes" and I doubt the [FCE] came up with this diagnosis on a blind basis, but probably read it in the documentation. Certainly there is nothing on the MRI to support the diagnosis and, as I pointed out previously, even if there were a partial posterior cruciate ligament injury in 2004, it would have resolved by now. It is probably also worth nothing that I find it difficult to work out a mechanism of injury to the posterior cruciate ligament that would be caused by a slip and fall forward on an icy surface. The injury described is much more consistent with contusions to the patellae than with an injury to either cruciate ligament.

D.E. 1, p. 5. Dr. Pace opined that he would not put any restrictions on Claimant, as he "looked carefully at the functional capacities evaluation and failed to see the

basis for restricting this man to light industrial work with limited standing." *Id.* at 6.

18. On August 31, 2011, John M. McNulty, M.D., examined Claimant at his request. Dr. McNulty recorded Claimant's complaints as bilateral knee pain, right more than left, with difficulty going up and down stairs. Dr. McNulty agreed with Dr. Sims that Claimant suffered a PCL injury; however, Dr. McNulty opined that Claimant's laxity was moderate, rather than mild, and that Claimant was entitled to 7% PPI under the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition. Dr. McNulty did not assign any limitations or restrictions.

Post-Accident Employment

19. After his accident in 2004, Claimant worked his next two scheduled shifts but was terminated by Employer soon after. Claimant's testimony regarding his separation from Employer is contradictory. At his deposition on April 19, 2005, Claimant testified that he skipped his third post-accident shift to play at a concert with the Coeur d'Alene Symphony. When Claimant's supervisor called to ask where he was, Claimant replied that his "knees hurt and [he] would rather play the concert" than go to work; after this, he was discharged. D.E. 9, p. 97. In contrast, at hearing, Claimant testified that he worked for several weeks after the accident, but was discharged because of his post-accident physical limitations:

> They would not work with my limitations. They didn't really comply to not being able to lift or not being able to move quickly to their standards or to their customer demand...I did ask them just to find -- maybe if I can just stay on register all day or do some light cleaning up for them. But they ultimately found that there was nothing that I could do in the company that would benefit them. So I -- my employment was ended after they found no use for me.

Hearing Tr. 29-30.

20. Claimant testified that after leaving Employer, he attempted to work at Target but was unable to handle the position's physical demands. He then attained a night job cleaning at McDonald's. Upon graduating high school in 2005, Claimant enrolled at North Idaho College to study music. He testified that he was unable to follow through on his plan to join the Air Force because a recruiter looked over his medical records and told Claimant that he would not qualify physically.

21. While in college, Claimant worked at Carl's Jr. as a shift manager, earning $9.00-9.60 per hour. He left the job after two years due to a conflict with a former co-worker.

22. Claimant graduated in 2007 with an associate's degree in music education. He testified that he wanted to pursue an advanced degree at the University of Idaho or Eastern Washington University but was unable to afford it.

23. Claimant began to work at Center Partners, a call center, where he handled customer service calls for various companies. He worked there from 2007 until July 2010,[4] when he was laid off.

24. Unable to find work in Coeur d'Alene, Claimant moved to Vancouver, Washington, where he secured a position with Home Depot. At the time of hearing, Claimant was still with Home Depot, earning $8.95 per hour and working anywhere from 15 to 30 hours per week.

25. While he lived in Coeur d'Alene, Claimant was able to supplement his income through musical performances; he belonged to a quartet that would play at events such as weddings. Claimant testified that his injury has not affected his ability to play; however, he does not have the connections in Vancouver that he did in Coeur d'Alene and has struggled to find music-related employment. He unsuccessfully looked for work as an elementary school music teacher. He would need an advanced degree to teach music at a middle school, high school, or college. Claimant testified that he would like to continue his education but is currently focused on supporting his family.

Vocational Opinions

26. Claimant retained Dan Brownell, a vocational rehabilitation consultant, to provide an opinion on the extent of Claimant's permanent disability. Mr. Brownell interviewed Claimant and reviewed his medical records and FCE. Mr. Brownell opined that Claimant sustained 28% or greater PPD based on his physical limitations as well as his limited education.

27. Defendants retained Douglas Crum, also a vocational rehabilitation consultant, to opine on the extent of Claimant's permanent disability. After interviewing

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4 In 2009, Claimant left Center Partners after he violated the company's attendance policy. He was eligible for rehire and returned after a few months. During the interim, he worked at Panda Express.

Claimant and reviewing his records, including the FCE, Mr. Crum concluded that Claimant sustained no permanent disability in excess of impairment. He explained that none of Claimant's doctors assigned permanent restrictions or indicated that the FCE was an accurate representation of Claimant's physical abilities. Furthermore, Claimant has earned a higher wage in his post-injury positions than he did at his time-of-injury position and therefore has suffered no appreciable wage loss. According to Mr. Crum, Claimant's post-injury jobs are consistent with his age and level of education.

Credibility

28. Having reviewed the record and observed Claimant at hearing, the Commissioners find that Claimant is not a credible witness. His hearing testimony differed from his prior statements in depositions, interviews, and appointments with medical providers. As mentioned above, he told strikingly different stories regarding his separation from Employer. He was also inconsistent about his involvement in organized sports and his academic achievements. At deposition, he testified that in college, he was a "great" student who earned As and Bs; to Mr. Crum, he stated that he was an average student in both high school and college, graduating at North Idaho College with a 2.5 GPA. *See* D.E. 10, p. 111; D.E. 13, p. 135. Claimant also appears to be prone to exaggeration. He boasted to Dr. Sims that, prior to his injury, he ran twenty miles per day. *See* D.E. 5, p. 68. (At hearing, this changed to the far more plausible five miles per day; *see* Hearing Tr. 23.) He insists that he used to be able to leg press 1,375 pounds. Hearing Tr. 23. It is difficult for the Commission to credit such extraordinary athletic feats to an adolescent who attended school full-time, worked part-time, and was heavily involved in music. Having considered all of the above, the Commission regards Claimant's testimony as suspect where it is not supported by other evidence in the record.

DISCUSSION AND FURTHER FINDINGS

Causation

30. Causation was not an issue noticed for hearing, but the arguments of the parties have made it necessary to address. Claimant contends that he is entitled to PPI for a PCL injury. Defendants dispute that Claimant suffered a PCL injury. Dr. Pace, the IME physician, believes that Claimant suffered only contusions as a result of the accident, and that his current symptoms are consistent with an

unrelated condition, patellofemoral pain syndrome.[5] In order to address the issue of PPI, we must first determine the nature of the injury Claimant suffered as a result of the accident.

32. Dr. Sims did not testify in this case, but it is clear from his records that he believed Claimant suffered a PCL injury as a result of the accident. Dr. Sims expressly disagreed with Dr. Pace's IME opinion, which stated that the accident caused only contusions and resulted in no PPI. Dr. Kersten also diagnosed a PCL injury, though he did not specifically opine on causation. Dr. McNulty agreed with Dr. Sims that Claimant suffered a PCL injury as a result of the accident. Dr. Sims, Dr. McNulty, and Dr. Kersten all noted findings on examination that were consistent with a PCL injury, notably laxity. Mr. Bengtson also observed laxity consistent with a partial PCL injury.

33. Dr. Pace, who conducted two IMEs, is the only physician who did not diagnose a PCL injury. He described the concurring diagnoses of his peers as a case of the "emperor's new clothes," in which later physicians pretended to see an injury that a prior doctor diagnosed. Dr. Pace avers that Claimant's MRIs revealed no evidence of a PCL injury. This would seem to ignore the interpretation of Dr. Zarlingo, the radiologist, who noted abnormalities in Claimant's PCL and stated that they could be the result of "prior trauma." *See* ¶ 8 above. Dr. Zarlingo did not clarify what he meant by prior trauma, but Dr. Sims believed the MRI was consistent with an accident-related PCL injury. (The MRI was taken more than one year after Claimant's accident, and Claimant had no pre-accident history of knee trauma.)

34. Dr. Pace essentially disputes the PCL diagnosis for two reasons. First, he observed no laxity during his two examinations; second, he does not believe that a frontal impact on the knees, of the sort suffered by Claimant, would cause an injury to a posterior ligament. We find neither of these reasons persuasive. What Dr. Pace observed in two examinations of Claimant does not outweigh what Dr. Sims observed in almost two years of treatment. Dr. Pace hypothesized that Dr. Sims, Dr. Kersten, and Dr. McNulty all mistook Claimant's recurvatum, a knee deformity, for laxity, and that this explains their findings on examination, but we have difficulty believing that three doctors would make the same mistake. As for Dr. Pace's doubts about the mechanism of Claimant's injury, we note that

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5 In his hearing exhibits, Claimant included excerpts about patellofemoral pain syndrome and how it may be caused by trauma. However, no doctor in this case has opined that Claimant suffered patellofemoral pain syndrome as a result of his industrial accident; there is therefore no need to address this condition.

no other physician in this case expressed similar doubts. Dr. McNulty stated in his report that the "mechanism of injury, which would be a direct blow to the anterior tibia with posteriorly directed forces, is consistent with injury" to the PCL. C.E.H. Dr. Sims, the physician most familiar with Claimant's knee condition, suspected a PCL injury after Claimant's first appointment and confirmed it after studying Claimant's right knee MRI. We find the diagnosis of Dr. Sims, which Dr. Kersten and Dr. McNulty agreed with, convincing.

35. Claimant suffered a right partial PCL injury as a result of his industrial accident.

PPI

37. Two PPI ratings for Claimant's PCL injury are in the record. In 2007, Dr. Sims assigned a 3% whole person rating for mild laxity. In 2011, Dr. McNulty assigned a 7% whole person rating for moderate laxity. Both ratings were based on the AMA *Guides to the Evaluation of Permanent Impairment*, 5th Edition.

38. Dr. Sims's rating was contemporaneous in time to the finding that Claimant was medically stable, whereas Dr. McNulty's rating was based on an examination conducted several years later. Dr. Sims's rating was also based on his knowledge as Claimant's treating physician, whereas Dr. McNulty's rating was based on a single examination. We find Dr. Sims's rating to be more credible.

39. Claimant is entitled to 3% whole person PPI for his PCL injury.

Permanent Disability

41. Two vocational opinions have been offered in this case. Mr. Brownell, at Claimant's request, analyzed the Coeur d'Alene labor market[6] and opined that Claimant suffered 28% or greater PPD as a result of the accident. Mr. Brownell based his rating on the limitations detailed in the FCE as well as on the nonmedical factor of Claimant's limited education. Mr. Crum, at Defendants' request, also conducted a disability analysis. Mr. Crum pointed out that no medical doctor has imposed restrictions on Claimant or adopted the conclusions of the FCE. Furthermore, Claimant has suffered no wage loss, as every one of his post-accident positions has paid a higher wage than his time-of-injury position. Finally, Mr. Crum stated that Claimant's employment history is consistent with

6 The analysis should have been for the labor market in Vancouver, Claimant's time-of-hearing place of residence. *See Davaz v. Priest River Glass*, 125 Idaho 333, 870 P.2d 1292 (1994).

someone of his age and level of educational attainment. Mr. Crum concluded that Claimant suffered no disability in excess of impairment.

42. Claimant argues that some consideration should be paid to the fact that he was injured when he was in high school. It would be unreasonable, argues Claimant, to assume that he would have continued working in minimum wage jobs throughout his entire career and therefore has experienced no wage loss. Claimant dwells on his lost Air Force opportunity and how much his future has changed because his injury prevented him from joining the armed forces. Yet it would be speculative to conclude that, absent his knee injury, Claimant would have been accepted into the Air Force, much less that he would have succeeded in his plan of military service. We note that we have no evidence, other than Claimant's word, that he was found to be physically ineligible for military service; and, as held above, Claimant is not a credible witness. We note, too, that the loss of one employment opportunity does not necessarily equate to an appreciable loss of labor market access.

43. While injuries at a young age can effect an individual's ability to compete in the labor market in the future, Claimant has not provided evidence that his permanent impairment has resulted in a diminished ability to compete in an open labor market. As Mr. Crum stated, neither Dr. Sims nor any other medical doctor who evaluated Claimant assigned permanent physical restrictions to Claimant. Even Dr. McNulty, who examined Claimant more than two years after the FCE, failed to impose restrictions. The only limitations or restrictions in the record are those from the FCE, a one-time evaluation, performed several years after the accident, which acknowledged that Claimant's limitations were not necessarily permanent, and which failed to affirmatively connect the limitations to the industrial accident. Given these facts, we find that the FCE is not substantial, competent evidence that Claimant suffered limitations or restrictions as a result of his impairment.

44. As there is no persuasive evidence in the record that Claimant's impairment has impeded his ability to compete in the labor market, we find that Claimant failed to prove that he sustained disability in excess of impairment. Claimant has thus failed to show that he is entitled to PPD.

R., pp. 107-121.

II.

RESTATED ISSUES PRESENTED ON APPEAL

1. Whether the Commission's finding that there is no persuasive evidence in the record that Claimant's impairment has impeded his ability to compete in the labor market is supported by substantial competent evidence.

2. Whether the Commission's finding that Claimant failed to prove that he is entitled to permanent disability in excess of impairment is supported by substantial competent evidence.

3. Whether the Commission's finding that Claimant lacked credibility is clearly erroneous. If so, whether the evidence relied on by the Commission constitutes substantial competent evidence.

III.

WHETHER RESPONDENTS ARE ENTITLED TO ATTORNEY'S FEES ON APPEAL

Respondents claim entitlement to attorney fees on appeal pursuant to I.A.R. 11.2, which directs the Court to award expenses, including attorney fees, incurred because of an appeal not reasonably grounded in fact or law and filed for an improper purpose. *Shriner v. Rausch*, 141 Idaho 228, 232, 108 P.3d 375, 379 (2005). Attorney fees are awardable under I.A.R. Rule 11.2 when a party requesting them proves (1) the other party's arguments are not well-grounded in fact, warranted by existing law, or made in good faith, and (2) the claims for an improper

purpose, such as unnecessary delay or increase in the cost of litigation. *Frank v. Bunker Hill Co.*, 142 Idaho 126, 132, 124 P.3d 1002, 1008 (2005).

IV.

STANDARD OF REVIEW

"The terms of Idaho's workers' compensation statute are liberally construed in favor of the employee. However, conflicting facts need not be construed liberally in favor of the worker." *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 755, 302 P.3d 718, 723 (2013).

In reviewing decisions by the Commission, "This Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence." *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 140, 254 P.3d, 36, 41 (2011) (citing I.C. § 72-732)). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *McNulty v. Sinclair Oil Corp.*, 152 Idaho 582, 584-85, 272 P.3d 554, 556-57 (2012) (quoting *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003)). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). The Court does not re-weigh the evidence, and "[t]he Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous." *Knowlton*, 151 Idaho at 140,

254 P.3d at 41. All facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Zapata*, 132 Idaho at 515, 975 P.2d at 1180.

V.

ARGUMENT

A. Whether the Commission's finding that there is no persuasive evidence in the record that Claimant's impairment has impeded his ability to compete in the labor market is supported by substantial competent evidence.

In this particular worker's compensation proceeding as in many dealing with the issue of extent of permanent disability, if any, there is conflicting medical and vocational evidence. The usual medical roles are treating physicians, physicians who have rendered an independent medical evaluation requested by the claimant and physicians who have rendered independent medical evaluation requested by the surety. There is usually a vocational expert who testifies on behalf of the claimant and a vocational expert who testifies on behalf of the defendants.

The medical evidence in the record is somewhat conflicting. The Commission first directed its analysis as to the nature and extent of the work injury.

Claimant first sought medical treatment regarding his knee with Howard N. Brinton, M.D., on December 16, 2004. After a thorough examination by Dr. Brinton, Dr. Brinton indicated his impression was, "Patella femoral pain following contusion to the patellas bilaterally." Def. Ex. 3 at 041. Claimant followed up on December 23, 2004, and on January 6, 2005, Dr. Brinton suspected possible internal derangement involving the left medial meniscus

posterior horn and ordered an MRI of the left knee. *Id.* at 038. Claimant underwent an MRI of the left knee on January 11, 2005. *Id.* at 033. Claimant returned to Dr. Brinton on January 13, 2005. Dr. Brinton noted that the radiologist thought the MRI findings may represent a stress fracture. Dr. Brinton discussed the case with Adam Olscamp, M.D., orthopedist, who reviewed the MRI and felt this was not intrachorticular and he couldn't definitely say this was caused by the original injury. At that time the patient's father requested a second opinion with Dr. Olscamp or Dr. Sims. *Id.* at 031. Dr. Brinton referred Claimant to an orthopedist. *Id.* at 029. Subsequently Claimant was seen for a headache with Dr. Brinton on July 21, 2005. The only other medical record generated by Dr. Brinton was on October 11, 2007, when he indicated that he agreed with the IME of William W. Pace III, M.D., orthopedic surgery, and Linda Wray, M.D., neurology, of September 20, 2007. *Id.* at 025.

William F. Sims, M.D., orthopedist, first saw Claimant on March 1, 2005. At that time Claimant had complaints of bilateral knee pain, left greater than right. Def. Ex. 5 at 068. Dr. Sims' assessment was (1) persistent bilateral knee pain following a slip and fall at work, left greater than right; and (2) probable right knee partial posterior cruciate ligament injury. *Id.* at 070. Dr. Sims explained to Claimant that he could not find any evidence of ligamentous injury to the left knee. He had reviewed the MRI and could not find any evidence of a meniscal pathology. Dr. Sims recommended an MRI of the right knee. Claimant returned to see Dr. Sims on December 13, 2005. *Id.* at 065. Claimant did not have the MRI as Dr. Sims suggested. Dr. Sims again recommended an MRI of the right knee. Claimant underwent MRIs of the right and left

knees on January 3, 2006. Claimant returned to see Dr. Sims on March 3, 2006. He was scheduled to see him on January 31, 2006, but apparently that did not happen. Dr. Sims recommended a diagnostic corticosteroid injection of the right knee and proceeded with that. *Id.* at 057. Subsequently Claimant saw Dr. Sims on March 31, 2006. At that time Dr. Sims did not have any further recommendations regarding operative intervention and discussed the possibility of a second opinion. Claimant again returned to see Dr. Sims on January 29, 2007. At that time he reported he had gone back to lifting weights as well as cycling. *Id.* at 055. Claimant reported that the corticosteroid injection helped for approximately three weeks. Claimant also reported he used to run a marathon a week and is now unable to run for any distances at all. *Id.* at 055. Dr. Sims indicated that he believed Claimant has a posterior cruciate ligament injury and that with the amount of laxity he has, Dr. Sims did not believe a PCL reconstruction would improve his condition. Dr. Sims again suggested a second opinion. *Id.*

Claimant saw Tycho E. Kersten, M.D., for a second opinion on April 30, 2007, an orthopedist in Spokane. Dr. Kersten's assessment was:

> Partial tear right knee PCL with a Grade II injury pattern. He certainly does have some laxity. In the big picture, I think surgery is unlikely to change his symptoms and his condition much and, as such, I would be in agreement with Dr. Sims that conservative treatment is the treatment of choice here.

Def. Ex. 6 at 072.

On August 9, 2007, Dr. Sims recommended an IME. Def. Ex. 5 at 052. On October 3, 2007, Dr. Sims, after reviewing the IME report of September 20, 2007, by William R.

Pace III, M.D., orthopedic surgery, and Linda Wray, M.D., neurology, stated that Claimant does have increased laxity on the posterior drawer exam (partial PCL injury) which is consistent with a 3% whole person impairment rating. *Id.* at 050.

Dr. Sims was contacted by Claimant on June 29, 2010, and provided with a copy of the Mark Bengtson functional capacity evaluation ("FCE"). Claimant's counsel was requesting an appointment with Dr. Sims. Dr. Sims replied on July 13, 2010, stating, "I received your letter dated June 29, 2010 regarding Mr. Fairchild. I feel it would be in Mr. Fairchild's best interest to be seen by another physician for an independent medical evaluation." *Id.* at 048.

Drs. Pace and Wray did an independent medical evaluation of Claimant on September 30, 2007, relating to the injury at hand here as well as a prior injury of October 12, 2004, which is not the subject of these proceedings. Dr. Wray was the neurologist who addressed Claimant's October 12, 2004, head injury unrelated to this action. The IME doctors felt Claimant was stable regarding the knee injury and recommended no further treatment. In addition, they stated he has no permanent impairment as a result of the contusions to his knee of November 13, 2004. Def. Ex. 2 at 019. Further, they indicated that based on objective findings, they would place no restrictions on Claimant. *Id.* at 020. Subsequently Dr. Pace was contacted by the Surety regarding Dr. Sims' disagreement on the impairment issue. *Id.* at 012. Dr. Pace replied on October 18, 2007, "Partial posterior cruciate ligament injuries typically resolve completely with conservative treatment. They behave very differently from complete or partial anterior cruciate ligaments. There is no laxity on my exam." (Emphasis supplied.) *Id.* at 011.

Claimant underwent a second IME with William Pace III, M.D., on September 16, 2010. Dr. Pace was provided with updated medical records including the Bengtson FCE. Def. Ex. 1 at 002. Dr. Pace noted the 2007 MRI showed no injury to the ligaments or the menisci. The posterior cruciate ligaments in both knees appear clean. *Id.* at 002. Dr. Pace had also noted that Claimant had complained of anterior knee pain with the posterior drawer test on the right but there was no instability noted with the anterior or posterior drawer testing in either knee. Dr. Pace further stated:

> Based on those findings, I felt he was fixed and stable without any ratable impairment. Dr. Sims disagreed and made reference to the table in the guides that assigned whole person impairment for posterior cruciate ligament laxity. His diagnosis of posterior cruciate ligament laxity was apparently based upon physical examination findings. I responded with my opinion, which is that partial cruciate ligament injuries, if in fact one occurred, generally resolve completely.

Id. at 002-003. Dr. Pace concluded:

> My opinion in this case remains unchanged. I believe Mr. Fairchild's current complaints are consistent with bilateral patellofemoral pain syndrome. This is common in young adults. There is no good curative treatment for it. Quadriceps strengthening exercises could be helpful. The physical therapist's comments regarding the "desperate need for a comprehensive lumbopelvic femoral balancing and strengthening program" are a little bit difficult for me to accept. This gentleman seems to be reasonably fit. He is working without any specific restrictions. I think his knee complaints are real. They may be minimally related to the slip and fall incident in 2004, but I would not consider that incident to be the major contributing cause to his present complaints.
>
> As in 2007, I failed to find any evidence in support of a diagnosis of a posterior cruciate ligament injury in the right knee. I think this is sort of a case of "the emperor's clothes" and I doubt the physical therapist came up with this diagnosis on a blind basis, but probably read it in the documentation. Certainly there is nothing on the MRI to support the diagnosis and, as I pointed out previously, even if there were a partial posterior cruciate ligament injury in 2004, it would have

> resolved by now. It is probably also worth noting that I find it difficult to work out a mechanism of injury to the posterior cruciate ligament that would be caused by a slip and forward fall on an icy surface. The injury described is much more consistent with contusions to the patellae than with an injury to either cruciate ligament.[1]

Def. Ex. 1 at 005

Dr. Pace stated his diagnosis is bilateral patellofemoral pain syndrome and that more probably than not the single incident in 2004 was not the cause of his current problems with his patellofemoral joints. He further stated that Claimant was at maximum improvement in 2007 and remains so. He found no ratable impairment. Contrary to what Claimant states in his brief at page 8, Dr. Pace stated, "I would not place any restrictions on Mr. Fairchild." *Id.* at 006. Dr. Pace noted he carefully reviewed the FCE and failed to see the basis for restricting Claimant to light industrial work with limited standing. *Id.* at 006.

Claimant saw John McNulty, M.D., for an IME on August 31, 2011. Claimant's Ex. H. Dr. McNulty reviewed the MRI and noted a definite posterior cruciate ligament injury was not seen. Nevertheless he believed that Claimant has a posterior cruciate ligament injury to his right knee noting moderate laxity of the right knee. He gave Claimant a 7% whole person impairment and recommended strengthening exercises. *Id.* Of note is that Dr. McNulty did not give Claimant any restrictions or limitations.

1 This is consistent with Dr. Brinton's original diagnosis of December 16, 2004. Def. Ex. 3 at 041.

Mark Bengtson, at the request of Claimant's attorney, did a WorkWell Functional Capacity Evaluation, the FCE, on April 23, 2009. The only objective test that Bengtson performed on the right knee of significance to him was:

> The manual posterior drawer test was of significance to me in comparison to the drawer test, posterior drawer test on the left lower extremity, which is important to compare both. Some individuals have generally lax loose joints and they are equivalent bilaterally. His, in my opinion, was slightly lax and graded at a 1+ degree of laxity in the posterior drawer test on the right when compared to the same test on the left leg.

Depo. of Bengtson, p. 30, l. 24 – 31, l. 7. Bengtson performed multiple other tests on the right knee that were significant for no findings. He performed the same tests on the left knee that were significant for no clinical findings. *Id.* at 31.

The history Bengtson worked with was limited to what was relayed by Claimant and medical records from Dr. Sims of March 1, 2005, and January 29, 2007. *Id.* at 26. Bengtson's FCE was a measure of what Claimant performed that day, nothing more, nothing less. Bengtson offered no opinion or suggestion as to what might be the underlying source for medical cause of the FCE findings.

In summary, evidence considered by the Commission included that Claimant had no work related impairment – Dr. Pace; that Claimant had 3% whole person impairment from the work injury – Dr. Sims; and Claimant had a 7% whole person impairment – Dr. McNulty. Dr. Pace found Claimant had no permanent restrictions or limitations. Dr. McNulty did not give Claimant permanent restrictions or limitations although he concurred with the Bengtson FCE. Bengtson offered no opinion as to the cause of his findings. Dr. Sims did not give Claimant permanent

restrictions or limitations when he gave his impairment rating. The fact that Dr. Sims prescribed a brace during treatment is not evidence of a permanent restriction. *Id.*, p. 55. Dr. Sims also stressed the importance of quadriceps and rehab as the secondary stabilizer to PCL insufficiency.

Relying on the impairment of Dr. Sims is substantial competent evidence, particularly since he was Claimant's treating orthopedic surgeon at the time shortly after the occurrence of the injury. Relying on lack of evidence in light of opinions of Dr. Pace, Dr. Sims and the lack of other evidence that Claimant had permanent restrictions caused by the work injury supports the Commission's findings that Claimant's impairment did not impede his ability to compete in the labor market.

The conclusions of vocational experts are based upon foundational facts. Douglas N. Crum, CDMS, prepared a report of April 1, 2012, which was an evaluation of factors that might lead to a finding of permanent partial disability. Def. Ex. 13. Crum noted that, "... no physician has issued any permanent restrictions associated with the industrial injury to Mr. Fairchild's bilateral knees. Similarly, no physician has indicated that the FCE represents Mr. Fairchild's level of permanent physical function." *Id.* at 136. Consequently he concluded there is no basis to determine that Claimant sustained a loss of labor market access. Crum noted regarding the comments by Dr. Pace as to avoiding a lot of stair climbing, ladder climbing, sprinting or jumping activities that Claimant has never performed those activities in any of his prior job duties nor was required to do so. *Id.* at 136. Crum also concluded that Claimant did not sustain nor will sustain any measurable loss in wage earning capacity, noting

Claimant is earning a wage that is higher than his time of injury wage, and Claimant has earned more at every job he has held since the time of injury. *Id.* at 137. As such, Crum concluded Claimant has not sustained any permanent partial disability in excess of a permanent partial impairment rating. *Id.* at 137.

Dan Brownell prepared a preliminary summary report of employability at Claimant's request. Claimant Exhibit I. Brownell's report mistakenly states Claimant was making $7.16 an hour working 40 hours a week. *Id.* at 001. Brownell reviewed a portion of the medical records, which apparently did not include reports from Dr. Brinton, the 2010 report from Dr. Pace and other medical records. Brownell relied on the FCE of Mark Bengtson and subjective information from Claimant indicating he needed sedentary employment. Brownell opined, "After a detailed analysis I have determined and opine that the Claimant has a 28% PPD inclusive of impairment." *Id.* at 004. Brownell did nothing to explain what the detailed analysis is or foundation for this conclusion. He doesn't reconcile the light duty category referred to by Bengtson, which Brownell relies upon, with his reference that Claimant is limited to sedentary work. Brownell states that in forming his opinion he relied on the FCE but mainly Dr. McNulty's impairment. Depo. of Brownell at 21, ll. 16-21. Dr. McNulty, in his report, does not address restrictions or limitations. Brownell did not explain how he can divine a restriction or limitation from Dr. McNulty's impairment or report. It is simply not there.

The Commission found, based upon substantial evidence, that Claimant had no permanent restrictions. As such, it found the opinions of Crum persuasive.

B. Whether the Commission's finding that Claimant failed to prove that he is entitled to permanent disability in excess of impairment is supported by substantial competent evidence.

Claimant has failed to carry the burden proving entitlement to disability in excess of impairment.

The definition of "disability" under worker's compensation law is "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code." Idaho Code §72-102(11). A permanent disability results "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 be reasonably expected." Idaho Code §72-423. A rating of permanent disability is "an appraisal of the injured employee'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." Idaho Code §72-425. Among the pertinent factors are the following:

- The nature of the physical disablement;
- The cumulative effect of multiple injuries;
- The employee's occupation;
- The employee's diminished ability to compete in the labor market within a reasonable geographic area;

• All the personal and economic circumstances of the employee; and

• Other factors deemed relevant by the Commission. Idaho Code §72-430.

The decrease in wage-earning capacity must be "due to injury or occupational disease." Idaho Code §72-102(11). Likewise, disability only results when the claimant's ability to engage in gainful activity is reduced or absent "because of permanent impairment." Idaho Code §72-423. Only after the impairment reduces the claimant's earning capacity do the pertinent nonmedical factors come into play. See Idaho Code §72-102(11).

Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

The Idaho Supreme Court in *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012) stated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code §72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful

activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered.

The persuasive credible evidence is that Claimant has no limitations or restrictions from the work injury and therefore no disability in excess of impairment. He has no loss of earning capacity. This is undisputed. The only indication of a possible limitation in the exhibit record could be found at the Bengtson FCE. There is no medical evidence to connect whatever Bengtson found to the work accident. His report was prepared 4-1/2 years after the accident and several years after Claimant's treating orthopedist found Claimant at maximum medical improvement. There is no evidence in the record that whatever Bengtson found was medically caused by the work accident.

Dr. McNulty did not in his report give Claimant restrictions or opine Claimant has restrictions.

Without a functional limitation, there is no objective way to determine how Claimant's ability to engage in gainful activity is reduced. Claimant has failed to carry his burden as the foundation under Brownell's opinion is not supportable by medical evidence or other evidence of probative value.

Crum's vocational work is detailed and the foundation for his conclusion that Claimant has no disability in excess of impairment is sound.

C. **Whether the Commission's finding that Claimant lacked credibility is clearly erroneous. If so, whether the evidence relied on by the Commission constitutes substantial competent evidence.**

The Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous. *Excell Constr. Inc. v. State, Dep't of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005). This Court will not re-weigh the evidence or consider whether it would have drawn a different conclusion from the evidence presented. *Id.*

With regard to Claimant's credibility, the Commission concluded:

> Having reviewed the record and observed Claimant at hearing, the Commissioners find that Claimant is not a credible witness. His hearing testimony differed from his prior statements in depositions, interviews, and appointments with medical providers. As mentioned above, he told strikingly different stories regarding his separation from Employer. He was also inconsistent about his involvement in organized sports and his academic achievements. At deposition, he testified that in college, he was a "great" student who earned As and Bs; to Mr. Crum, he stated that he was an average student in both high school and college, graduating at North Idaho College with a 2.5 GPA. *See* D.E. 10, p. 111; D.E. 13, p. 135. Claimant also appears to be prone to exaggeration. He boasted to Dr. Sims that, prior to his injury, he rant twenty miles per day. *See* D.E. 5, p. 68. (At hearing, this changed to the far more plausible five miles per day; *see* Hearing Tr. 23.) He insists that he used to be able to leg press 1,375 pounds. Hearing Tr. 23. It is difficult for the Commission to credit such extraordinary athletic feats to an adolescent who attended school full-time, worked part-time, and was heavily involved in music. Having considered all of the above, the Commission regards Claimant's testimony as suspect where it is not supported by other evidence in the record.

"Because this Court gives great deference to the Commission's conclusion regarding credibility and weight of evidence, the only issue before this Court is whether the evidence relied

on by the Commission constitutes substantial and competent evidence." *Knowlton v. Wood River Medical Center*, 151 Idaho 135, 141, 254, P.3d 36 (2011).

Claimant carried the burden of proof on issues of impairment and disability in excess of impairment, if any. The Commission concluded it did not have to take Claimant's testimony as absolute truth when not corroborated by other evidence. In essence, it found that Claimant's testimony nonpersuasive standing by itself to establish a claim for disability in excess of impairment. The Commission's conclusions were supported by substantial competent evidence.

VI.

CONCLUSION

The Industrial Commission findings are based upon substantial and competent evidence.

The Appellant merely asks the Supreme Court to reweigh the evidence.

The Industrial Commission orders must be affirmed.

RESPECTFULLY SUBMITTED this 12 day of January, 2015.

H. JAMES MAGNUSON
Attorney for Defendants/Respondents

AFFIDAVIT OF MAILING

STATE OF IDAHO)
)ss.
County of Kootenai)

H. JAMES MAGNUSON, being first duly sworn on oath, deposes and states as follows:

That I am and at all times hereinafter mentioned was a citizen of the United States and a resident of the State of Idaho, over the age of 21 years, and not a party to this action; that I served the RESPONDENTS' BRIEF in the above-entitled action upon the attorney for the Claimant/Appellant in the above matter as follows:

Starr Kelso
Kelso Law Office
P. O. Box 1312
Coeur d'Alene, ID 83816-1312

by depositing in the United States mail, with postage prepaid, two true copies of said Respondents' Brief on the 13 day of January, 2015, addressed to said attorney as hereinabove set forth.

Further, on said date, the original and seven copies of said Respondents' Brief were sent via prepaid Federal Express, addressed to:

Mr. Stephen W. Kenyon
Clerk of the Supreme Court
451 W. State Street
Boise, ID 83720-0101

SUBSCRIBED AND SWORN to before me this 12 day of January, 2015.

Stephanie Belden
Notary Public for the State of Idaho
Residing in Coeur d'Alene
Commission Expires 3/8/2016

STEPHANIE BELDEN NOTARY PUBLIC STATE OF IDAHO