2-23-2015

# Fairchild v. Kentucky Fried Chicken Appellant's Reply Brief Dckt. 42237

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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# REPLY BRIEF OF APPELLANT FAIRCHILD

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APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

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THOMAS P. BASKIN, CHAIRMAN

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## REPLY ARGUMENT

### Fairchild should have been awarded disability benefits in excess of his permanent impairment rating

After finding that Fairchild's accident-related injury entitled him to a PPI rating, it was err for the Commission to then find that Fairchild suffered no permanent disability because he did not have any accident-related limitations or restrictions.

Three treating orthopedic physicians examined Fairchild. All of these physicians, Drs. Sims, Kersten and McNulty diagnosed Fairchild as having suffered a right partial PCL injury as a result of his industrial accident. One physician, Dr. Pace, was hired by the Surety/Employer to conduct I.C. § 72-433 examinations of Fairchild.[1] He was the only physician to opine that Fairchild's "accident only caused contusions and resulted in no PPI." R. p. 117.

The Commission pointedly rejected, Dr. Pace's "emperor's new clothes" analysis of why his opinion was correct and the opinions of Drs. Sims, Kersten, and McNulty and the radiologist, Dr. Zarlingo, were wrong. The Commission stated:

> "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 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 no other physician in this case expressed similar doubts." R. pp. 117-18 ¶¶ 33, 34.[2]

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[1] The Commission commonly refers to these type of examinations, which a claimant is required to undergo pursuant to I.C. § 72-433 at the demand of an employer/surety, as "IMEs" ("independent" medical examinations). The statute does not identify these examinations as "independent". After undergoing this type of examination, the claimant is not even provided a copy of the report by the examining physician. The claimant must obtain a copy from the employer/surety. There have been numerous investigations into these examinations over the years. One example is the investigative report of N. R. Kleinfield, Exams of Injured Workers Fuel Mutual Mistrust, published in The New York Times on March 31, 2009. It can be reviewed at http://www.nytimes.com/2009/04/01/nyregion/01comp.html?pagewanted=1&_r=0. In short, these examinations are not "independent."

[2] Appendix A-1.

The Commission found that Fairchild suffered a "right partial PCL injury" as opined by Drs. Sims, Kersten and Dr. McNulty. R. p. 117-18, ¶¶ 34-35. Both Dr. Sims and Dr. McNulty opined that Fairchild suffered a permanent impairment.[3]

On January 29, 2007, Dr. Sims characterized Fairchild's right knee laxity as "mild" and opined it was "approximate grade 2."[4] October 3, 2007, the Surety's adjuster sent Dr. Sims' a copy of Dr. Pace's September 20, 2007, report. Dr. Sims was asked to reply 'Yes' and 'No' as to whether he agreed with Dr. Pace's findings.

Dr. Sims' reply to the 'mark-the-box' questions from the Surety's adjuster, was:

"__, Yes, I agree with the findings.

X No, I do not agree with the findings. (Include report identifying your concerns.)."

Dr. Sims then wrote:

> "Ms. Kelsch—This pt. does have increased laxity on ®knee post. Draw 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." R. Claimant's Exhibits, Dr. Sims, p. 002.[5]

Dr. McNulty conducted an evaluation (rating) of permanent impairment of Fairchild on August 31, 2011. At the time of his impairment evaluation, Dr. McNulty testified that at the time of his evaluation he had the benefit of the report of Mark Bengtson, MPT, which detailed the test results of the Functional Capacities Evaluation that he conducted on Fairchild on April 23, 2009.[6] Dr. McNulty, consistent with Dr. Sims, opined Fairchild's laxity was a "grade 2 symptom complex." He characterized Fairchild's right knee laxity as "moderate". Utilizing the

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[3] Dr. Kersten only saw Fairchild for a second opinion and was not asked to provide a permanent impairment rating.
[4] Appendix A-2.
[5] Appendix A-3.
[6] Appendix A-4. R, Depositions #1 Dr. McNulty, pp. 9-10.

*AMA Guides to Evaluation of Permanent Impairment*, Fifth Edition, Dr. McNulty opined that Fairchild had suffered a seven percent (7%) permanent impairment.[7]

I.C. § 72-422 defines "Permanent Impairment" as being "any anatomic or functional abnormality or loss." I.C. § 72-424 defines "Permanent impairment evaluation [rating]."

> "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members."

The Commission, as it did in this case, routinely relies on the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition (2011) for guidance when determining the appropriate percentage of impairment rating for a person.[8] The AMA Guides requirements for an award of an impairment rating are consistent with I.C. § 72-424.

> "If an impairment does not interfere with an ADL [activities of daily living], it is not ratable. If it does interfere, it qualifies for an impairment rating." *Understanding the AMA GUIDES in Workers' Compensation*, §5.02 [A], Fifth Edition (2011).[9]

Under the *AMA Guides,* ADLs include "self-care, communications, physical activity, sensory functions, unspecialized hand activity, travel, sexual function and sleep." *Id.*

The Commission adopted Dr. Sims' three percent (3%) permanent impairment rating.[10] The Commission then turned to the question of whether or not Fairchild suffered any permanent disability. I.C. § 72-425 provides:

> "Permanent disability evaluation.—"Evaluation (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 as provided in section 72-430 Idaho Code."

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[7] Appendix 5.
[8] The Commission may use an earlier or a later Edition depending upon the facts of the case.
[9] Appendix 6.
[10] R. p. 119 ¶ 39.

Fairchild and the Surety/Employer each presented post-hearing deposition testimony of a vocational expert. Their respective opinions commenced from strikingly different premises. The Commission noted that Fairchild's expert witness, Dan W. Brownell, "based his rating on the limitations detailed in the FCE as well as the non-medical factor of Claimant's limited education." The Commission noted that the Surety/Employer's expert, Doug Crum, based his opinion of no disability rating on his belief that "no medical doctor has imposed restrictions on claimant or adopted the conclusions of the FCE." R. p. 120 ¶ 41.[11] In its analysis, the Commission mistakenly failed to note that Dr. McNulty's testimony identifying Fairchild's accident-related limitations and restrictions. It stated:

> "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. R. p. 121¶ 43.[12]

Fairchild's Brief in support of his Motion for Reconsideration highlighted the Commission's error in finding that "Dr. McNulty did not assign any limitations or restrictions [suffered as a result of his industrial injury]." R. Additional Documents No. 4, p. 2. Dr. McNulty specifically testified during his post-hearing deposition that, prior to his PPI rating examination of Fairchild, he had reviewed Mr. Bengtson's Functional Capacities Evaluation. Dr. McNulty testified that he agreed with FCE testing results, except that he felt that Fairchild could stand and walk a little longer, during an eight hour work day than reflected in the FCE. Dr. McNulty testified that this his stand/walk time opinion was slightly different than the FCE test results

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[11] Appendix A-7.
[12] Appendix A-8.

because it was based upon his observation of Fairchild walking while he was wearing his knee brace."[13]

The Commission's Order Denying Reconsideration addressing Fairchild's highlighting its failure to acknowledge that Dr. McNulty testified that he agreed with the FCE test results (except for the percentage of time that Fairchild could walk/stand while wearing his knee brace) stated had correctly noted that Dr. McNulty did not identify any limitations and restrictions—in his written evaluation. The Commission further responded by quoting Dr. McNulty's testimony that he was in agreement with the FCE. However, instead of undertaking an analysis of Fairchild's limitations and restrictions, upon which Mr. Brownell based his disability opinions, the Commission emphasized with italics the portion of Dr. McNulty' testimony, in the same paragraph, that characterized Fairchild as having "*moderate instability*" in his right knee and his opinion that Fairchild should be in a "*lighter duty [job] category*".

Despite the fact that Dr. Sims and Dr. McNulty's both opined Fairchild had grade 2 laxity, the Commission distinguished these two physician's opinions based upon their use of different terms, "moderate" and "mild", to characterize Fairchild's accident-related knee laxity. The Commission's decision failed to mention the fact that the fifth edition of the *AMA Guides* "recognizes that an individual's condition is dynamic" and that "over time there may be some expected change." As a result, the Commission discounted the accident-related limitations and restrictions that Dr. McNulty's identified in his testimony stating that "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."[14]

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[13] Appendix A-4.

[14] Appendix A-9. R. p. 119 ¶38. *Understanding The AMA GUIDES in Workers' Compensation*, Fifth Edition (2011) § 5.03 [B].

In its decision the Commission stated:

> "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 contusions and resulted in no PPI." R. p. 117 ¶ 32.[15]

Inexplicably, after Fairchild had highlighted Dr. McNulty's testimony identified accident-related limitations and restrictions in his Motion for Reconsideration, the Commission stated in its Order Denying Reconsideration that Dr. Sims, by his handwritten note, implicitly agreed with Dr. Pace that Fairchild had no accident-related limitations or restrictions. The Commission stated that it arrived at this conclusion because Dr. Sims' handwritten note to the Surety's adjuster, immediately below his "X" denoting that he disagreed with Dr. Pace's findings, "[specifically set forth and] noted the findings [of Dr. Pace] with which he disagreed. The lack of limitations and restrictions was not one of them." R. p. 138.[16]

**Dr. Sims' hand-written note is unequivocally contrary to the Commission's interpretation that Dr. Sims agreed with Dr. Pace's opinion that Fairchild did not suffer accident-related limitations or restrictions.**

Dr. Sims' hand-written note, setting forth the basis for his PPI percentage rating, is completely inconsistent with Dr. Pace's report. Dr. Sim's handwritten note specifically states that:

> "[Fairchild] *does have increased laxity* in his ® knee [and] "this is consistent with a 3% whole person impairment rating – re "mild cruciate ligament laxity."[17] (Emphasis added).

The Commission summarized Dr. Pace's opinion on laxity as follows:

> "Dr. Pace "observed *no laxity* during his two examinations." R. p. 117 ¶ 34.[18] (Emphasis added).

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[15] Appendix A-10.
[16] Appendix A-11.
[17] Appendix A-3.
[18] Appendix A-12.

The existence of "laxity", regardless of whether it is characterized as "mild" or "moderate", in Fairchild's right knee was the accident-related injury that was the basis for the limitations and restrictions, required for a PPI rating, upon which Dr. Sims' specifically based his opinion that Fairchild suffered a PPI and rated it. The specific wording of Dr. Sims' hand-written note, "consistent with a 3% whole person impairment rating – "mild cruciate ligament laxity", is directly contrary to Dr. Pace's opinion that Fairchild did not have any laxity in his right knee. Dr. Sims could not have been in agreement with Dr. Pace's determination that Fairchild did not have any limitations or restrictions because, by definition, the PPI rating that Dr. Sims opined requires the existence of accident-related limitations and restrictions. In Fairchild's case, it was the laxity in his cruciate ligament that resulted in the required limitations and restrictions that permitted Dr. Sims to opinion the PPI rating, that was adopted by the Commission.

There is no basis upon which the Commission could determine that Dr. Sims' hand-written response to the adjuster for the Surety that supports its finding that:

> "There are no limitations or restrictions associated with the injury as diagnosed by Dr. Sims. It was therefore not error for the Commission to rely on the vocational opinion of Mr. Crum, which was based on the conclusion that Claimant suffered no accident-related limitations or restrictions." R. p. 138.[19]

Dr. Sims did not testify and there is nothing set forth in any of his transcribed and written notations that can be interpreted to mean that Dr. Sims agreed with Dr. Pace's report in *any* regard.[20] Dr. Sims' determination that Fairchild qualified for a PPI percentage rating, which by

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[19] Appendix A-11.

[20] Appendix A-13. *See* the Commission's decision in *Corgatelli v. Steel West, IC 2005-501771* (Filed July 26, 2012), p. 20 ¶ 44, whereat the Commission discusses that it is not appropriate to imply meaning from written notes. "However, Dr. Simon was not examined about this statement at the time of his deposition, and it is not entirely clear that his intentions in making this statement are as described by the ISIF."

definition required a finding that Fairchild suffered permanent accident-related physical limitations and restrictions, is unequivocally contrary to Dr. Pace's findings and opinion. The record is devoid of any evidence from which it can be inferred that Dr. Sims agreed with Dr. Pace's finding that Fairchild suffered no limitations or restrictions.

It is so axiomatic that a PPI rating cannot be awarded in the absence of accident-related limitations and restriction Fairchild's undersigned counsel could only locate one Commission decision in which it specifically addressed the fundamental error of finding that a PPI exists in in the absence of any accident-related limitations or restrictions. In *Reaves v. Spears Manufacturing Company, Inc.,* IC 99-027839/03-010637 (Filed September 6, 2005) the Commission adopted the Referee's following analysis:

> "There is a dissonance created when a doctor opines PPI exists without any physical limitations or restrictions. By definition, PPI is based upon anatomic functional abnormality which affects a person's activities." *Reaves* at p. 9 ¶ 38.[21]

The Commission's adoption of Dr. Sims' PPI rating and its subsequent finding that Fairchild suffered no accident-related limitations or restrictions, is not supported by substantial competent evidence, statute or case law.

## ATTORNEY FEES

### The Employer/Surety should not be awarded attorney fees.

Respondents assert that they are entitled to attorney fees on appeal. In *Lewies v. Fremont County*, 156 Idaho 449, 454, 328 P.3d 429, 434 (2014 Op. No. 46, Filed June 17, 2014), the Court held that Idaho Appellate Rule 11.2 is to be construed in the same manner as Idaho Rule of

[21] Appendix 14.

Civil Procedure 11(a)(1).[22] *Lewies* sets forth a comprehensive review of the interrelationship of I.A.R. 11.2 and IRCP Rule 11.1. The Court concluded that the two rules should be similarly interpreted because they contain identical wording.

Thus, pursuant to both rules, the signature of the attorney or party on a document constitutes two substantive certifications which must each be accurate in order to comply with the rules. Both rules are to be construed in an objective manner. If either certification is not accurate, the document would be signed in violation of the rule. *Lewies,* 156 Idaho at 453. The Court characterized the two substantive certifications as the "frivolous filings" clause and the "improper purpose" clause.

**The "frivolous filings" clause.**

This certificate requires that the signature of an attorney on any pleading, motion or other paper constitutes a representation that "to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." This certification is an objective evaluation of the knowledge of the signing attorney by an objective 'reasonableness' standard. The standard of review is "reasonableness under the circumstances, and a duty to make a reasonable inquiry prior to filing an action." *Id.* at 453.

In deciding whether or not an appeal was warranted, Fairchild's undersigned attorney was tasked with attempting to investigate whether or not it is possible to reconcile the Commission's decision that Fairchild suffered a three percent (3%) whole person PPI rating and then determine that he was not entitled to an award of permanent disability because he did not

[22] Appendix A-15. It appears that the *Lewies* decision may have been cited in subsequent decisions of the Court as "*Flying A Ranch, Inc. v. Bd. Of County Commissioners for Fremont County,* 156 Idaho 449, 454, 328 P.3d 429, 434 (2014 Op. No. 46, filed June 17, 2014)."

suffer any accident-related limitations or restrictions. Despite extensive research of Commission decisions and the Court's opinions during the thirty-six (36) days between the Commission's decision and the filing of this appeal, Fairchild's undersigned attorney was not able to reconcile the Commission's decision. The two findings are not reconcilable. It is equally as inappropriate for the Commission to award a PPI rating but then determine that there is no permanent disability because the claimant has no limitations or restrictions, as it was for the physician in *Reaves v. Spears Manufacturing Company, Inc.,* IC 99-027839/03-010637 (Filed September 6, 2005) to opine that a PPI rating was appropriate when he also opined the claimant had no limitations and restrictions. The Commission's erroneous determinations that Fairchild suffered a PPI but no accident-related limitations or restrictions are not the same as a finding that a claimant's accident-related limitations and restrictions negatively affect a claimant's ADLs but not his ability to access jobs.

The Commission did not undertake an evaluation of whether the limitations and restrictions identified by Dr. McNulty and the FCE negatively affected Fairchild's ability to access jobs, as Fairchild's expert vocational witness, Dan W. Brownell did in his report and testimony. Instead the Commission specifically stated, in its Order Denying Reconsideration, "It was therefore *not error for the Commission to rely on the vocational opinion of Mr. Crum, which was based on the conclusion of Mr. Crum, which was based on the conclusion that Claimant suffered no accident-related limitations or restrictions.*"[23] (Emphasis added).

This appeal was filed because Fairchild's undersigned attorney believes that the Commission's award of a PPI rating to Fairchild is not reconcilable with the Commissions determination that he did not suffer any accident-related limitations or restrictions and thus no

[23] Appendix A-11.

permanent disability. It is respectfully submitted that this appeal is well grounded in fact and is warranted by existing law.

**The "improper purpose" clause.**

This certificate tests whether the signing attorney filed the appeal for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Lewies*, 328 P.3d at 433.

At the time of his accident Fairchild was sixteen years of age and working fifteen hours a week after school to help his disabled father make ends meet. The industrial injury turned Fairchild's ambitions and prospects in life and work upside down. Tr. April 17, 2012, p. 20, p. 33, l. 6-8.

It is respectfully submitted, that this appeal was not filed to harass or to cause unnecessary delay or needless increase in the cost of litigation. Fairchild has suffered all, if not more, permanent disability in excess of impairment than the percentage opined by vocational expert Mr. Brownell. The opinion of Respondents' vocational expert which was based in part on Fairchild being able, as an adult, to perform the same part-time minimum wage work he was performing as a sixteen (16) year old, is difficult to comprehend.

Fairchild's accident-related limitations and restrictions, education and personal circumstances confine him to light duty dead end jobs for the rest of his life. The sole purpose for filing this appeal was to seek the Court's review and reversal of the Commission's determination that Fairchild, despite suffering limitations and restrictions which established his award of a PPI rating, PPI rating did not suffer any permanent disability because he suffered no accident-related limitations or restrictions. It is respectfully submitted that this appeal was not filed for any improper purpose.

## CONCLUSION

It is respectfully requested that the Court reverse the Commission's decision and remand this case to the Commission with directions to award Fairchild disability benefits in excess of his permanent impairment rating equal to the unrebutted opinion of Dan W. Brownell. Employer/Surety should not be awarded attorney fees.

Respectfully submitted this 20th day of February, 2015.

Starr Kelso, Attorney for Mr. Fairchild

## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing were served on the attorney for the Respondents Employer/Surety by regular U.S. Mail, postage prepaid thereon, on the 20th day of February, 2015, as follows:

H. James Magnuson
Attorney at Law
P.O. Box 2288
Coeur d'Alene, Idaho 83816

Starr Kelso

# APPENDIX

*v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

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 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**

36. Permanent impairment is any anatomic or functional abnormality or loss after maximum medical improvement has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. Evaluation (rating) of permanent impairment is a medical appraisal of the nature and extent of the injury as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only; the Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

37. Two PPI ratings for Claimant's PCL injury are in the record. In 2007, Dr. Sims

PATIENT NAME: Terence Fairchild
DOS: 01/29/2007
DOB: [redacted]

SUBJECTIVE: Mr. Fairchild is an 18-year-old male who I have seen in the past with right knee posterior cruciate ligament injury. The patient was first seen in March of 2005. He has gone back to lifting weights as well as cycling. He reports that when he tries to run he feels significant pressure within his knee. He complains of no subjective sense of instability. He denies mechanical symptoms. Nonetheless, he feels as though his knee swells up when he puts significant stress on it such as running. He has undergone a prior corticosteroid injection, which helped for approximately three weeks. He explains that he used to run a marathon a week in the past and now is unable to run for any distances at all secondary to this pressure-type sensation and swelling that he continues to have. The patient denies history of recurrent injury in the interim since his last visit.

Past medical, past surgical, past family, and social history is reviewed and noted.

REVIEW OF SYSTEMS: Is noted to be negative on all accounts.

OBJECTIVE: Examination reveals a normal-appearing male. Affect is appropriate. Directed examination of the right lower extremity reveals no abnormal skin or sweat patterns. A palpable dorsalis pedis pulse is present. Range of motion is noted to be from full extension to greater than 125 degrees of flexion. No effusion is present. 1+à Lachman's is noted. There is no increased laxity to varus or valgus stress in 30 degrees of flexion; on posterior drawer exam, there is approximate grade 2 findings with external rotation of the foot, which improves to 1+ findings with internal rotation of the foot. The tibia sits just anterior to the distal portions of the femoral condyles. There is a mild medial and lateral joint line tenderness to palpation present.

ASSESSMENT: Right knee posterior cruciate ligament injury.

RECOMMENDATIONS: The patient's condition was discussed with him. I explained to Mr. Fairchild that I believe he in fact does have a posterior cruciate ligament injury. This has been discussed with him in the past. I explained to him that with the amount of laxity he has I did not believe a PCL reconstruction would improve his condition. I explained to him that this is somewhat debatable. Again, as I have mentioned in the past, I think it is reasonable that he get a second opinion as I did not have any operative solutions at this point that I could reliably improve his condition with. We also discussed the possibility of a functional brace, which I think is reasonable. Given his wishes to return as well, we discussed the importance of quadriceps and rehab as the secondary stabilizer to PCL insufficiency.

William F. Sims, M.D.
WFS/rct

cc: Workman's Compensation

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Idaho State Insurance Fund

# STATE INSURANCE FUND

October 3, 2007

ORTHOPEDIC SURGERY & SPORTS MEDICINE CLINIC LLC
850 IRONWOOD DR STE 202
COEUR D ALENE ID 83814

Vendor #: 1007115

Re: Claim Number: 200419898 A /01
Claimant: TERENCE FAIRCHILD
Employer: KA OF CDA INC
Injury Date: 11/13/2004

Enclosed are the results from the panel/independent medical evaluation for TERENCE FAIRCHILD. Please review the evaluation and indicate below whether you agree or disagree with the findings.

Thank you for your assistance in this matter. If you have any questions, please contact this office.

Sincerely,

Jeanne Kelsch

Jeanne Kelsch
Claims
208/332-2412

Enclosure

---

_____ Yes, I agree with the findings.

☒ ~~No~~, I do not agree with the ~~findings~~. (Include report identifying your concerns.)

Physician's Signature: _____ Date: 10/31/07

Ms. Kelsch – The pt. does have increased laxity on the Post. 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 "full concert ligament laxity"

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BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD, )
Claimant, )
)
vs ) I.C. No. 2004-526113
KENTUCKY FRIED CHICKEN, )
Employer, )
and )
)
STATE INSURANCE FUND, )
Defendants. )

DEPOSITION OF JOHN McNULTY, M.D.

The deposition of JOHN McNULTY, M.D., a witness in the above-entitled cause, taken before Gary E. Heston, Certified Shorthand Reporter and Notary Public in and for Kootenai County, Idaho, at St. Maries, Idaho, on the 15th day of May, 2012, commencing at 4:10 p.m., pursuant to the Idaho Rules of Civil Procedure.



DEPOSITION TAKEN AT THE INSTANCE OF THE CLAIMANT

APPEARANCES:

KELSO LAW OFFICE
1621 North Third Street, Suite 600
Coeur d'Alene, Idaho 83816-1312
For the Claimant
BY: Starr Kelso

MAGNUSON LAW OFFICE
1250 Northwood Center Court, Ste. A
Coeur d'Alene, ID 83816
For the Defendants
BY: H. James Magnuson

Reported by: Gary E. Heston, CSR
Idaho CSR #19
Washington CSR #HE-ST-OG-E613D6

*** Notes ***



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(NO EXHIBITS TO THIS DEPOSITION)



MR. KELSO: Let the record reflect that this is the date, time and place for taking the post hearing deposition of Dr. John M. McNulty.

JOHN McNULTY, M.D., being first duly sworn by the Notary was examined and testified as follows:

EXAMINATION

BY MR. KELSO:

Q. And Doctor, will you state your name for the record please.

A. John Michael McNulty.

Q. And could you give us a brief outline of your education and training.

A. I had my college degree at Columbia University. I also did my medical school at Columbia University, College of Physicians and Surgeons. I did my general surgery residency in New York City, St. Vincents Hospital and my orthopedic residency in New York City as well.

Q. And where did you start practicing medicine on a private basis?

A. Started private practice in Williston, North Dakota, in 1990. Practiced there until October of 98. And since November of 98 in St. Maries and

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A. Two plus is a rough estimate. Maybe 5 to 10 millimeters is the rough. It is an estimate. I didn't have an exact science. If we had a definite question about Mr. Fairchild's -- the amount of laxity he has, there is a device called a KT 1000. And that could be administered to him. And it has more accurate measurements than people do by hand.

Q. I note that Mr. Bengtson performed at -- thought it was like at a 1+, give or take. What's the difference between a 1+ and a 2?

A. 1+ would be mild. 2+ is moderate and 3+ would be severe.

Q. And when you saw him you observed -- or indicate that he demonstrates to have a normal appearing gait.

A. Yes.

Q. That would be different than the comments by Mr. Bengtson. Do you have any reason to attribute that?

A. Yes. And I did see him almost -- was it nine months ago or so. I believe he brought his brace with him. I went through my report and I did not comment on that. And my recollection is that he had his brace with him. And I observed from walking with his brace -- I'm not a hundred percent certain

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of that, but that's what I recall. I mentioned about him using his brace up in the -- I believe the first paragraph there -- for work.

Q. And what does the brace do to impact a gait?

A. The brace will stabilize his knee. So without the brace he's going to have some movement. And just exaggerating, the two bones are going to move more than they should. The brace at low speeds, such as walking, the brace does stabilize the knee and limit the amount of excursion that is going on.

Q. And you utilized any other tests or evaluations that you performed in identifying the laxity. Is there any other test --

A. Also mention mentioned that he has a posterior sag in his knee with full extension. So I hold the leg up by the toes and see if there is any difference between the right and the left. And that little sag there would indicate the tibia is going back forwards -- rather backwards in relationship to the femur more than on the opposite side. So that's just another test to see if he has the posterior cruciate ligament injury.

Q. And I wasn't following. How do you visualize the posterior --

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A. Well, you would just observe one side to the other. So for instance, you had two things lined up, well, they look level. If you look from the side there is a little sag on the leg on one side compared to the other at the joint. That's how you would assess that.

Q. Is that standing or sitting down?

A. No, he is lying down.

Q. Okay.

A. He is lying down and I lift the leg. So his muscle force -- I'm doing all the work.

Q. And you reviewed the MRI on the computer apparently.

A. I did. And I guess -- I reviewed the MRI, again prior to this evaluation. And there is nothing I could definitely pinpoint as his ligament being definitely torn. One of the images there, it's indistinct, which may lead to -- suggestive of some injury. But I could not definitely pinpoint anything that said yeah, it's completely torn.

Q. Okay. So the fact that it doesn't show a complete tear, does that impact your evaluation here?

A. No. The clinical assessment is very important. And my clinical assessment was in line

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with Dr. Sims and Dr. Kirsten. And I am confident with a reasonable degree of medical certainty he does have a PCL injury.

Q. That would be my next question. Your opinions in your report of 8/31/2011, those opinions are to a reasonable degree of medical probability.

A. Yes.

MR. KELSO: That's all I have got

CROSS EXAMINATION

BY MR. MAGNUSON:

Q. Can I take a look at your file, Doctor?

A. Sure.

(Off the record)

MR. MAGNUSON: Let's go back on the record.

Q. Doctor, do you know what else is in your file?

A. I believe there is a physical therapy record. There is something from Dr. Horen about headaches. There were some other things that I didn't think were pertinent.

Q. Dr. Kirsten's records.

A. I don't recall that. I think I got that from one of the -- from one of these.

Q. Okay. Do you have the records from Dr. Chavez?

*** Notes ***

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Benewah Community Hospital
St. Maries Family Medicine
229 S. 7th Street
St. Maries, ID 83861
(208) 245-5551
www.bchmed.org

FAIRCHILD, TERENCE DOB: [redacted]
DOS: 08/31/2011

SUBJECTIVE: Mr. Fairchild is a 23-year-old, right-hand-dominant male who sustained an injury while working as a cook for Kentucky Fried Chicken on 11/13/2004. He states he was carrying two 50 pound boxes of chicken into the store when he slipped and fell, landing on both knees. He states he had immediate pain and stopped working after the injury. He went home and was limping afterwards. He sought medical attention after the injury and was referred to Dr. Sims. Dr. Sims evaluated him and felt he had a posterior cruciate ligament injury. An MRI was obtained, which essentially showed a bone contusion. The posterior cruciate ligament injury was on the right knee and he was treated initially with physical therapy and later a brace. He continued to have symptoms and a second MRI was obtained. However, a definite posterior cruciate ligament injury was not seen on the MRI. Mr. Fairchild has not received any recent treatment.
He complains of pain in both knees, but to a greater degree on the right. The pain is present mostly medially. He has difficulty going up and down stairs. He describes a sliding sensation in his right knee, which is consistent with instability. At work he wears his brace. He states he is no longer able to run because of swelling and discomfort in his knee.
PAST MEDICAL HISTORY: Notable for no prior injury to either knee.
PHYSICAL EXAM: Demonstrates Mr. Fairchild to have a normal-appearing gait. Both right and left knees have no effusion. Posterior drawer test with the foot in external rotation is 2+ on the right and negative on the left. With internal rotation, the posterior drawer test does not change appreciably. There is a slight posterior sag of the tibia in relationship to the femur with the knee in full extension when comparing the right knee to the left. Lachman test appears negative. The medial and lateral collateral ligaments are intact to varus and valgus stress testing. McMurray test is also negative. Apprehension test of the patella on the right is negative as well. Dorsalis pedis pulse is 1+. Sensation to light touch is intact in the right lower extremity. He has 5/5 right knee flexion and extension strength against resistance.
RADIOGRAPHS: His MRI was reviewed via computer, and a definite posterior cruciate ligament injury was not seen.
ASSESSMENT/PLAN: I agree with Dr. Sims' assessment that Mr. Fairchild does have a posterior cruciate ligament injury to his right knee. There is significant difference when comparing the right and left knees. In my opinion, he has moderate laxity with grade 2 testing. Using the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition, his symptom complex falls into moderate cruciate or collateral ligament injury with a 7% whole-person impairment. He has no prior history of knee problems and that impairment would be directly attributable to his work-related injury. Of note, the mechanism of injury, which would be a direct blow to the anterior tibia with posteriorly directed forces, is consistent with injury to the posterior cruciate ligament.
In my opinion, Mr. Fairchild's knee condition does not warrant posterior cruciate ligament reconstructive surgery. Continued use of his brace is appropriate for him. He should also engage in strengthening exercises to increase his quadriceps strength to enhance the stability of his knee.
John M. McNulty, MD
JMM:nw/ml

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ASPEN PUBLISHERS

# Understanding the *AMA Guides* in Workers' Compensation

**Fifth Edition**

*by Steven Babitsky, Esq., and James J. Mangraviti, Jr., Esq.*

The American Medical Association's *Guides to the Evaluation of Permanent Impairment* (or *AMA Guides*) is mandated for use in many workers' compensation systems. The *AMA Guides* are now in their sixth edition, and various states are using either the third, fourth, fifth, or sixth edition of the *Guides*. Because the editions of the *AMA Guides* are always complex, not sufficiently comprehensive, and contain many often-litigated provisions, the authors of *Understanding the AMA Guides in Workers' Compensation* provide counsel with specific and practical advice for any workers' compensation matter involving the *AMA Guides*.

## Highlights of the Fifth Edition

The fifth edition of *Understanding the AMA Guides in Workers' Compensation* provides up-to-date coverage of the following:

- A concise legal synopsis of the key features and areas of common dispute in the fourth, fifth, and sixth editions of the *AMA Guides* (see Chapters 4, 5, and 6)
- Suggested cross-examination approaches under the fourth, fifth, and sixth editions of the *AMA Guides* (see Chapters 4, 5, and 6)
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- Analysis of the substantial case law on the *AMA Guides* with emphasis on the issues facing the practitioner, including:

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fifth edition does contain a number of errors that are to be corrected in the second printing.

Readers are advised, "It is strongly recommended that physicians use this latest edition, the fifth edition, when rating impairment."[4] This is similar to the statement in the fourth edition that "[t]he AMA strongly discourages the use of any but the most recent edition of the *Guides*."[5] It is probable some physicians and *AMA Guides* users were unaware of the availability of the fifth edition for some time. State statutes that deal with the *AMA Guides* may or may not specify which edition to use and how they are to be used. Several jurisdictions stipulate use of a specific edition of the *AMA Guides,* and they undoubtedly analyzed the fifth edition to determine its impact before adopting it as the basis for rating impairment.

## [A] Impairment in the *AMA Guides*

*Impairment* continues to be defined as "the loss of, loss of use of, or derangement of any body part, system or function."[6] Impairment is no longer defined as a condition that interferes with an individual's ability to perform activities of daily living (ADLs). It may, however, lead to functional limitations or the inability to perform ADLs. If an impairment does not interfere with an ADL, it is not ratable. If it does interfere, it qualifies for an impairment rating. ADLs are specified in Table 1-2, Activities of Daily Living Commonly Measured in Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL) Scales,[7] and include self-care, communications, physical activity, sensory functions, nonspecialized hand activity, travel, sexual function, and sleep. ADLs no longer include social activities, recreational activities, and work.

## [B] Maximum Medical Improvement

Impairment is considered permanent when it reaches *maximum medical improvement* (MMI), meaning the impairment is well-stabilized and unlikely to change substantially in the next year with or without medical treatment. In the fourth edition of the *AMA Guides,* an impairment was also considered permanent if it was unlikely to change by more than 3 percent in the next year. This criterion is omitted from the fifth edition.

The fifth edition compared definitions and interpretations of impairment and disability, including those promulgated by the World Health Organization (1999),

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[4] *Id.* at 2.

[5] AMA, Guides to the Evaluation of Permanent Impairment (4th ed. 1993) (hereinafter *AMA Guides* (4th ed. 1993)) at 5.

[6] *AMA Guides* (5th ed. 2000) at 2.

[7] *Id.* at 4.



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136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

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 non-medical 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 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

[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).

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.

45. Because Claimant has failed to prove his entitlement to PPD, the issue of apportionment pursuant to Idaho Code § 72-406 is moot.

## CONCLUSIONS OF LAW AND ORDER

Based on the foregoing analysis, the undersigned Commissioners conclude 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.

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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**

40. Permanent disability occurs when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental and marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (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. In determining the percentage of permanent disability, consideration should be given to the diminished ability of the afflicted claimant to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee and other factors the Commission may deem relevant. Idaho Code § 72-430. 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 Industries*,

ASPEN PUBLISHERS

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including its effect on function, and identify abilities and limitations to performing activities as listed in Table 1-2"[32] provides an opportunity to challenge many ratings. In addition, it states, "[I]f new diagnoses are discovered, the physician has a medical obligation to inform the requesting party and individual about the condition and recommend further medical assessment."[33] This statement has interesting implications, because it does not establish clear boundaries between an evaluating and consultative role.

### [B] Maximum Medical Improvement

Permanent impairment ratings are performed when the individual is at MMI. The fifth edition recognizes that an individual's condition is dynamic. MMI is defined as the "date from which further recovery or deterioration is not anticipated, although over time there may be some expected change."[34]

### [C] Which Chapter to Use

"Generally, the organ system where the problems originate or where the dysfunction is the greatest is the chapter to be used for evaluating impairment."[35] The fifth edition states that "whenever the same impairment is discussed in different chapters, the *Guides* tries to use consistent impairment ratings across the different organ systems." There are still inconsistencies between chapters. For example, there are significant inconsistencies in the rating of reflex sympathetic dystrophy (RSD), causalgia, and complex regional pain syndrome (CRPS), depending on whether the rating is performed using Chapter 13, "The Central and Peripheral Nervous System," Chapter 16, "The Upper Extremities," or Chapter 18, "Pain."

### [D] Rules for Evaluation

Section 2.5, "Rules for Evaluation," provides key content relating to confidentiality; combining impairment ratings; consistency; interpolation, measurement, and rounding off; pain; using assistive devices in evaluations; adjusting for effects of treatment or lack of treatment; and for changes in impairment from prior ratings. The fifth edition now includes a discussion of confidentiality, specifying

[32] *Id.*
[33] *Id.* at 18.
[34] *Id.* at 19.
[35] *Id.*



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*v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

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

functional capacities evaluation and failed to see the basis for restricting this man to light industrial work with limited standing." D.E. 1, p. 6. Finally, as mentioned above, Dr. McNulty diagnosed a PCL injury with moderate laxity.

These individuals are all medical experts qualified to opine on Claimant's condition, but Dr. Sims and Dr. Pace are the only ones who saw Claimant more than once, and Dr. Sims was the only one who treated Claimant over a period of years. He did not assign any limitations or restrictions. Asked specifically if he agreed or disagreed with Dr. Pace's first IME — in which, among other things, Dr. Pace concluded that Claimant did not require any limitations or restrictions — Dr. Sims noted the findings with which he disagreed. The lack of limitations and restrictions was not one of them. *See* D.E. 5, p. 50.

In considering these conflicting opinions and weighing their credibility, the Commission was persuaded by the diagnosis and opinion of Dr. Sims, who was most familiar with Claimant's condition. There are no limitations or restrictions associated with the injury as diagnosed by Dr. Sims. It was therefore not error for the Commission to rely on the vocational opinion of Mr. Crum, which was based on the conclusion that Claimant suffered no accident-related limitations or restrictions.

Based on the foregoing analysis, IT IS HEREBY ORDERED that Claimant's motion for reconsideration is DENIED.

DATED this 12th day of May, 2014.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

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*v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000).

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**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

GARY R. CORGATELLI,

Claimant,

v.

STEEL WEST, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

**IC 2005-501771**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**Filed July 26, 2012**

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on November 23, 2011. Claimant, Gary Corgatelli, was present in person and represented by Fred Lewis, of Pocatello. Defendants, Steel West, Inc., and State Insurance Fund (Employer/Surety), were represented by Jay Meyers of Pocatello. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul Rippel of Idaho Falls. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 29, 2012. The case is now ready for decision.

limitations imposed on Claimant were of sufficient magnitude to cause him to abandon his time of injury position in favor of a less demanding job. As is not infrequently the case, the real dispute in the instant matter vis-à-vis ISIF liability lies in determining whether or not the preexisting impairment from the 1994 accident in some way "combines with" the effects of the subject accident to cause Claimant's total and permanent disability. For the reasons set forth below, we believe it is clear that it is only as a result of the combined effects of the work accident and the preexisting impairment that Claimant is totally and permanently disabled.

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

45. What we do know is that Claimant is totally and permanently disabled as a consequence of the fact that the L2-5 fusion surgery he endured was less than successful, such that Claimant carries the diagnosis of "failed back syndrome." It is equally clear that Claimant's L2-5 fusion was undertaken because of the L4-5 lesion thought to be related to the January 3, 2005 accident and the multilevel degenerative changes in Claimant's lumbar spine first noted in 1994, and progressing thereafter. In this regard, it is notable that the only injury identified with the January 3, 2005 accident is the L4-5 disc herniation. However, the February 15, 2005 MRI demonstrates severe degenerative changes at levels above and below the L4-5 level. The

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| TAMMY REAVES,<br><br>Claimant,<br>v.<br><br>SPEARS MANUFACTURING COMPANY, INC.,<br><br>Employer,<br>and<br><br>AMERICAN HOME ASSURANCE COMPANY,<br><br>Surety,<br>and<br><br>ZURICH AMERICAN INSURANCE COMPANY,<br><br>Surety,<br>Defendants. | **IC 99-027839**<br>**IC 03-010637**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>Filed<br>September 6, 2005 |

## INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls, Idaho, on September 24, 2004. Jeffrey R. Stoker represented Claimant. Alan K. Hull represented Employer and American Home Assurance Company ("Home"). Mark Peterson represented Employer and Zurich American Insurance Company ("Zurich"). The parties took posthearing depositions and submitted briefs. The case came under advisement on June 1, 2005, and is now ready for decision.

## ISSUES

After due notice and by agreement of the parties, the following issues are to be decided:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment in 2003;



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accident without residual symptoms, limitations, or permanent impairment, Dr. Hanscom opined Claimant sustained 5% PPI, but he imposed no restrictions.

37. Some doctors use the phrases "disc rupture," "herniated disc," and "disc bulge," casually, interchangeably. Here, Dr. Hanscom mentioned a disc rupture. The MRIs provide clear medical evidence of the condition of Claimant's L5-S1 disc before and after the July 2003 accident. Before July 2003, the disc bulged but did not impact the spinal cord or nerve roots, and the annulus was intact. The July 23, 2003, MRI showed the annulus had torn and the nucleus pulposus had extruded.

38. There is a dissonance created when a doctor opines PPI exists without any physical limitations or restrictions. By statutory definition, PPI is based upon anatomic or functional abnormality which affects a person's activities. Idaho Code §§ 72-422, -424. This dissonance combines with Dr. Hanscom's inexact language in describing Claimant's disc condition to lessen the weight afforded his opinion about PPI. Dr. Jones' opinion is persuasive. Claimant suffered no PPI as a result of the 1999 accident. The degenerative aspect of her lower back did not rise to the level of a ratable PPI before the 2003 accident. There is no basis for apportionment.

39. **Temporary disability.** The record establishes that Claimant became medically stable from the 1999 accident on August 28, 2000. She had occasional flare-ups of mechanical back pain associated with her work and other activities through June 2003. Claimant does not assert that benefits for such temporary disability associated with the 1999 accident and flare-ups went unpaid.

40. Claimant suffered compensable temporary disability after the July 2003 accident – and as a result of it – until she became medically stable on May 20, 2004.

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**156 Idaho 449 (Idaho 2014)**

**328 P.3d 429**

**FLYING " A" RANCH, INC., an Idaho corporation; CLEN ATCHLEY; EMMA ATCHLEY; LAURA PICKARD; CLAY PICKARD, GEORGE TY NEDROW; and DAVID TUK NEDROW, Petitioners,**

**v.**

**BOARD OF COUNTY COMMISSIONERS FOR FREMONT COUNTY, IDAHO, a political subdivision of the state of Idaho; RONALD " SKIP" HURT, in his official capacity; and LEROY MILLER, in his official capacity, Respondents,**

**v.**

**KARL H. LEWIES, Real Party in Interest-Appellant.**

**E.C. GWALTNEY, III, and LANA K. VARNEY, Petitioners,**

**v.**

**BOARD OF COUNTY COMMISSIONERS FOR FREMONT COUNTY, a political subdivision of the State of Idaho; RONALD " SKIP" HURT, in his official capacity; and LEROY MILLER, in his official capacity, Respondents,**

**v.**

**KARL H. LEWIES, Real Party in Interest-Appellant**

**Nos. 40987-2013, 41132-2013**

**Supreme Court of Idaho**

**June 17, 2014**

**[328 P.3d 430]** 2014 Opinion No. 46

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for Fremont County. The Hon. Gregory W. Moeller, District Judge.

The judgment of the district court is reversed.

Karl H. Lewies, Rexburg, argued in his own behalf.

Blake G. Hall, Hall Angell & Starnes LLP, Idaho Falls, argued for respondents.

EISMANN, Justice. Chief Justice BURDICK, Justices J. JONES, W. JONES, and HORTON CONCUR.

**OPINION**

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EISMANN, Justice.

**[328 P.3d 431]** This is an appeal out of Fremont County from an award of sanctions against the county prosecuting attorney under Rule 11(a)(1) of the Idaho Rules of Civil Procedure. Because there is no legal basis for the award, we reverse.

**I.**

**Factual Background.**