

8-21-2014

Fairchild v. Kentucky Fried Chicken Clerk's Record v. 1 Dckt. 42237

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Vn. 1 2 3

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant/Appellant,

v.

KENTUCKY FRIED CHICKEN, Employer,
and IDAHO STATE INSURANCE FUND,
Surety,

Defendants/Respondents.

SUPREME COURT NO. 42237

AGENCY'S RECORD

LAW CLERK

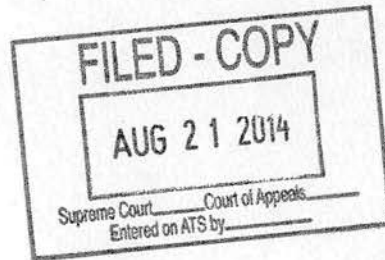
BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

Attorney for Respondent

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-1312



42237

COPY

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant/Appellant,

v.

KENTUCKY FRIED CHICKEN, Employer,
and IDAHO STATE INSURANCE FUND,
Surety,

Defendants/Respondents.

SUPREME COURT NO. 42237

AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

STARR KELSO
PO BOX 1312
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Attorney for Respondent

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-1312

COPY

TABLE OF CONTENTS

EXHIBIT LIST i

WORKERS’ COMPENSATION COMPLAINT, filed February 18, 20051

ANSWER TO COMPLAINT, filed March 9, 20054

AMENDED ANSWER TO COMPLAINT, filed April 7, 20056

WORKERS’ COMPENSATION COMPLAINT, filed November 2, 2009,.....8

ANSWER TO COMPLAINT, filed November 23, 2009.....11

DEFENDANTS’ MOTION IN LIMINE, filed September 2, 201113

DEFENDANTS’ MOTION TO STRIKE AND COMPEL, filed September 2, 201122

DEFENDANTS’ SUPPLEMENTAL AUTHORITY REGARDING PENDING EVIDENTIARY
MOTIONS, filed September 28, 201128

CLAIMANT’S RESPONSE TO DEFENDANTS’ SUPPLEMENTAL AUTHORITY BRIEF
REGARDING EVIDENTIARY ISSUES, filed October 18, 201148

INTERLOCUTORY RULING ON EVIDENTIARY ISSUES, filed November 15, 201157

DEFENDANTS’ MOTION TO COMPEL OR IN THE ALTERNATIVE FOR ORDER
PROHIBITING TESTIMONY OR EVIDENCE FROM DAN BROWNELL,
filed December 23, 201159

AFFIDAVIT OF H. JAMES MAGNUSON IN SUPPORT OF MOTION TO COMPEL OR
PROHIBIT TESTIMONY OR EVIDENCE FROM DAN BROWNELL,
filed December 23, 201161

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL OR PROHIBIT TESTIMONY
OR EVIDENCE FROM DAN BROWNELL, filed December 23, 201165

ORDER ON MOTION TO COMPEL OR IN THE ALTERNATIVE FOR ORDER
PROHIBITING TESTIMONY OR EVIDENCE FROM DAN BROWNELL,
filed January 9, 2012.....74

CLAIMANT’S MOTION FOR EQUITABLE RELIEF REGARDING THE DEPOSITION OF
DOUGLAS CRUM, filed June 29, 201277

AFFIDAVIT OF STARR KELSO REGARDING THE DEPOSITION OF DOUGLAS CRUM, filed June 19, 2012.....	80
AFFIDAVIT OF JACOB STEWARD REGARDING DEPOSITION OF DOUGLAS CRUM, filed June 19, 2012.....	83
DEFENDANTS’ OBJECTION TO MOTION FOR EQUITABLE RELIEF REGARDING THE DEPOSITION OF DOUGLAS CRUM, filed June 22, 2012	85
AFFIDAVIT OF H. JAMES MAGNUSON, filed June 22, 2012.....	87
ORDER ON CLAIMANT’S REQUEST FOR EQUITABLE RELIEF, filed July 19, 2012.....	89
CLAIMANT’S MOTION TO PERMIT FILING OF REBUTTAL EXHIBIT “L” TO THE TESTIMONY OF DOUGLAS CRUM PURSUANT TO RULE 10 (E) (4), filed July 30, 2012.....	93
DEFENDANTS’ OBJECTION TO CLAIMANT’S MOTION TO PERMIT FILING OF REBUTTAL EXHIBIT “L” TO THE TESTIMONY OF DOUGLAS CRUM, filed August 6, 2012.....	97
CLAIMANT’S RESPONSE TO OBJECTION TO PERMIT FILING OF REBUTTAL EXHIBIT “L”, filed August 6, 2012.....	99
ORDER DENYING FILING OF REBUTTAL EXHIBIT “L”, filed August 21, 2012.....	102
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, filed June 7, 2013	105
CLAIMANT’S MOTION FOR RECONSIDERATION, filed June 25, 2013	124
DEFENDANTS’ REPLY REGARDING CLAIMANT’S MOTION FOR RECONSIDERATION, filed July 24, 2013	127
ORDER DENYING RECONSIDERATION, filed May 12, 2014.....	132
NOTICE OF APPEAL, filed June 19, 2014	140
CERTIFICATE OF APPEAL, dated June 20, 2014.....	144
CERTIFICATION OF APPEAL, dated June 20, 2014	145
CERTIFICATION OF RECORD, dated July 18, 2014.....	146
NOTICE OF COMPLETION, dated July 18, 2014.....	147

INDEX

AFFIDAVIT OF H. JAMES MAGNUSON IN SUPPORT OF MOTION TO COMPEL OR PROHIBIT TESTIMONY OR EVIDENCE FROM DAN BROWNELL, filed December 23, 2011	61
AFFIDAVIT OF H. JAMES MAGNUSON, REGARDING MOTION FOR EQUITABLE RELIEF, filed June 22, 2012	87
AFFIDAVIT OF JACOB STEWARD REGARDING THE DEPOSITION OF DOUGLAS CRUM, filed June 19, 2012	83
AFFIDAVIT OF STARR KELSO REGARDING THE DEPOSITION OF DOUGLAS CRUM, filed June 19, 2012.....	80
AMENDED ANSWER TO COMPLAINT, filed April 7, 2005	6
ANSWER TO COMPLAINT, filed March 9, 2005	4
ANSWER TO COMPLAINT, filed November 23, 2009.....	11
CERTIFICATE OF APPEAL, dated June 20, 2014.....	144
CERTIFICATION OF APPEAL, dated June 20, 2014	145
CERTIFICATION OF RECORD, dated July 18, 2014.....	146
CLAIMANT’S MOTION FOR EQUITABLE RELIEF REGARDING THE DEPOSITION OF DOUGLAS CRUM, filed June 29, 2012.....	77
CLAIMANT’S MOTION FOR RECONSIDERATION, filed June 25, 2013	124
CLAIMANT’S MOTION TO PERMIT FILING OF REBUTTAL EXHIBIT “L” TO THE TESTIMONY OF DOUGLAS CRUM PURSUANT TO RULE 10 (E) (4), filed July 30, 2012.....	93
CLAIMANT’S RESPONSE TO DEFENDANTS’ SUPPLEMENTAL AUTHORITY BRIEF REGARDING EVIDENTIARY ISSUES, filed October 18, 2011	48
CLAIMANT’S RESPONSE TO OBJECTION TO PERMIT FILING OF REBUTTAL EXHIBIT “L”, filed August 6, 2012.....	99
DEFENDANTS’ MOTION IN LIMINE, filed September 2, 2011	13

DEFENDANTS’ MOTION TO COMPEL OR IN THE ALTERNATIVE FOR ORDER PROHIBITING TESTIMONY OR EVIDENCE FROM DAN BROWNELL, filed December 23, 2011	59
DEFENDANTS’ MOTION TO STRIKE AND COMPEL, filed September 2, 2011	22
DEFENDANTS’ OBJECTION TO CLAIMANT’S MOTION TO PERMIT FILING OF REBUTTAL EXHIBIT “L” TO THE TESTIMONY OF DOUGLAS CRUM, filed August 6, 2012.....	97
DEFENDANTS’ OBJECTION TO MOTION FOR EQUITABLE RELIEF REGARDING THE DEPOSITION OF DOUGLAS CRUM, filed June 22, 2012	85
DEFENDANTS’ REPLY REGARDING CLAIMANT’S MOTION FOR RECONSIDERATION, filed July 24, 2013	127
DEFENDANTS’ SUPPLEMENTAL AUTHORITY REGARDING PENDING EVIDENTIARY MOTIONS, filed September 28, 2011	28
EXHIBIT LIST	i
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, filed June 7, 2013	105
INTERLOCUTORY RULING ON EVIDENTIARY ISSUES, filed November 15, 2011	57
MEMORANDUM IN SUPPORT OF MOTION TO COMPEL OR PROHIBIT TESTIMONY OR EVIDENCE FROM DAN BROWNELL, filed December 23, 2011	65
NOTICE OF APPEAL, filed June 19, 2014	140
NOTICE OF COMPLETION, dated July 18, 2014.....	147
ORDER DENYING FILING OF REBUTTAL EXHIBIT “L”, filed August 21, 2012.....	102
ORDER DENYING RECONSIDERATION, filed May 12, 2014.....	132
ORDER ON CLAIMANT’S REQUEST FOR EQUITABLE RELIEF, filed July 19, 2012.....	89
ORDER ON MOTION TO COMPEL OR IN THE ALTERNATIVE FOR ORDER PROHIBITING TESTIMONY OR EVIDENCE FROM DAN BROWNELL, filed January 9, 2012.....	74
WORKERS’ COMPENSATION COMPLAINT, filed February 18, 2005	1
WORKERS’ COMPENSATION COMPLAINT, filed November 2, 2009,.....	8

EXHIBITS LIST

Reporter's Transcripts:

Reporter's Transcripts taken September 7, 2011 and April 17, 2012 will be lodged with the Supreme Court.

Claimant's Exhibits:

- A. Medical Excepts: "What is Patellofemoral Syndrome?"
- B. Mark Bengston, MPT – Pinnacle Physical Therapy, Functional Capacity Evaluation
- C. William F. Sims, MD, records
- D. After Hours Care medical records
- E. Lakewood Physical Therapy records / North Idaho Physical Therapy
- F. MCN report (Dr. Pace and Dr. Wray: 9/20/2007)
- G. MCN report (Dr. Pace: 9/16/2010)
- H. John M. McNulty, MD, report
- I. Dan W. Brownell Employability Report, 9/5/2011
- J. Kelso August 29, 2010 letter to Dr. John M. McNulty
- K. Daniel W. Brownell's Curriculum Vitae

Defendants' Exhibits:

- 1. Medical records of William R. Pace, III, MD
- 2. Medical records of William R. Pace, III, MD, and Linda Wray, MD
- 3. Medical records of Howard Brinton, MD
- 4. Medical records of Kootenai Medical Center
- 5. Medical records of William F. Sims, MD
- 6. Medical records of Tycho E. Kersten, MD
- 7. Medical records of Roger C. Horan, MD
- 8. Physical therapy records
- 9. Deposition transcript of Terrence Fairchild taken April 19, 2005
- 10. Deposition transcript of Terrence Fairchild taken July 22, 2010
- 11. Benefit breakdown
- 12. Curriculum Vitae of William R. Pace, III, MD, F.A.A.O.S.
- 13. Vocation report of Douglas N. Crum, C.D.M.S.
- 14. Curriculum Vitae of Douglas N. Crum, C.D.M.S.

Depositions:

1. John McNulty, MD, taken May 15, 2012
2. Mark Bengtson, MPT, taken May 15, 2012
3. Dan Brownell, taken May 15, 2012
4. Douglas Crum, taken May 29, 2012
5. William R. Pace, III, MD, taken June 18, 2012

Additional Documents:

1. Claimant's Opening Brief, filed October 9, 2012
2. Defendants' Brief, filed October 29, 2012
3. Claimant's Reply Brief, filed November 2, 2012
4. Claimant's Brief in Support of his Motion for Reconsideration, filed June 25, 2013
5. Claimant's Response Brief regarding his Motion for Reconsideration, filed August 5, 2013

WORKER'S COMPENSATION COMPLAINT
INDUSTRIAL COMMISSION NO:

04-526113

Claimant: TERENCE FAIRCHILD %Starr Kelso PO Box 1312 Coeur d'Alene, ID 83816-1312 Telephone Number: (208) 765-3260		Claimant's Attorney: STARR KELSO Attorney at Law PO Box 1312 Coeur d'Alene, ID 83816-1312	
Employer's Name And Address (at time of injury): KENTUCKY FRIED CHICKEN 218 East Appleway Coeur d'Alene, ID 83814		Worker's Compensation Insurance Carrier's (Not Adjustor's) Name And Address: STATE INSURANCE FUND PO Box 83720 Boise, ID 83720-0044	
CLAIMANT'S SS#: [REDACTED]	CLAIMANT'S BIRTHDATE: [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE: 11-13-04	
STATE AND COUNTY IN WHICH INJURY OCCURRED: Kootenai County, Idaho		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$7.16 hour, PURSUANT TO §72-419, <u>IDAHO CODE</u>	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED): Slipped and fell on knees.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE: Injury to both knees.			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME: Medical; TTD's; PPI; Attorney fees.			
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER: 11-13-04		TO WHOM YOU GAVE NOTICE: Treasha Beitz	
HOW NOTICE WAS GIVEN: X ORAL ____ X WRITTEN ____ OTHER, PLEASE SPECIFY ____			
ISSUE OR ISSUES INVOLVED: Medical, TTD, PPI benefits; Idaho Code §72-804 fees and costs.			
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF YES, PLEASE STATE WHY: No.			
NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C. 1002			

RECEIVED
 INDUSTRIAL COMMISSION
 2005 FEB 18 10:32 AM

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

After Hours Urgent Care Clinic, 700 Ironwood Drive, Ste. 170E, Coeur d'Alene, ID

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown
WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? Unknown
WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. YES NO

DATE: 2/16/05 SIGNATURE OF CLAIMANT OR ATTORNEY: *Stanley*

**PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS**

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT?

DATE OF DEATH:

RELATION OF DECEASED TO CLAIMANT:

WAS CLAIMANT DEPENDENT ON DECEASED:
 YES NO

DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT:
 YES NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of February, 2005, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

**KENTUCKY FRIED CHICKEN
218 East Appleyway
Coeur d'Alene, ID 83814**

SURETY'S NAME AND ADDRESS

**STATE INSURANCE FUND
PO Box 83720
Boise, ID 83720-0044**

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail

I HAVE NOT SERVED A COPY OF THE COMPLAINT ON ANYONE

M. Galusci

Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, PO Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

**ANSWER TO COMPLAINT
I.C. NO. 04-526113**

CLAIMANT'S NAME AND ADDRESS Terence Fairchild c/o Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816-1312	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Starr Kelso Attorney at Law P. O. Box 1312 Coeur d'Alene, ID 83816-1312
EMPLOYER'S NAME AND ADDRESS Kentucky Fried Chicken 218 East Appleway Coeur d'Alene, ID 83814	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund 1215 W. State Street Boise ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) H. James Magnuson, Attorney PO Box 2288 Coeur d'Alene ID 83816-2288	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

- The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	
X	
X	
	X
	N/A
X	
	N/A
	X
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly entirely by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$137.44.
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

None.

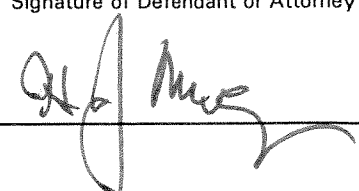
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 2005 MAR -9 A 9:50

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
2. Defendants allege Claimant's condition is attributable in whole or in part to a preexisting injury, infirmity, or condition.
3. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury.
4. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? If SO, PLEASE STATE.		
No.		
Dated		
March <u>7</u> , 2005		
Signature of Defendant or Attorney		
		
Amount of Compensation Paid to Date		
PPD	TTD	Medical
-0-	-0-	\$2,116.48

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of March, 2005, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

EMPLOYER AND SURETY'S NAME AND ADDRESS

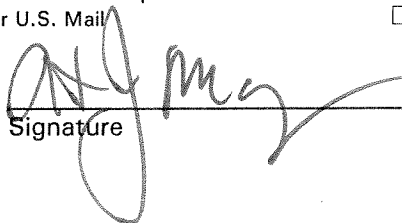
INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable)

Terence Fairchild
 c/o Starr Kelso
 P. O. Box 1312
 Coeur d'Alene, ID 83816-1312

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail


 Signature

AMENDED ANSWER TO COMPLAINT
I.C. NO. 04-526113

CLAIMANT'S NAME AND ADDRESS Terence Fairchild c/o Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816-1312	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Starr Kelso Attorney at Law P. O. Box 1312 Coeur d'Alene, ID 83816-1312
EMPLOYER'S NAME AND ADDRESS Kentucky Fried Chicken 218 East Appleway Coeur d'Alene, ID 83814	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund 1215 W. State Street Boise ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) H. James Magnuson, Attorney PO Box 2288 Coeur d'Alene ID 83816-2288	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

- The above-named employer or employer/surety responds to Claimant's Complaint by stating:
 The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
	X
X	
X	
	X
	N/A
	X
	N/A
	X
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly entirely by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$137.44.
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

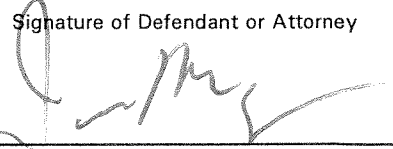
None.

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
2. Defendants allege Claimant's condition is attributable in whole or in part to a preexisting injury, infirmity, or condition.
3. Defendants deny that Claimant's condition is a result of an accident arising out of and in the course of his employment and, therefore, deny that he is entitled to any benefits.
4. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury.
5. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? If SO, PLEASE STATE. No.		
Amount of Compensation Paid to Date		Dated
PPD	TTD	Signature of Defendant or Attorney
	Medical	
-0-	-0-	April <u>5</u> , 2005
	\$2,116.48	

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of April, 2005, I caused to be served a true and correct copy of the foregoing Amended Answer upon:

CLAIMANT'S NAME AND ADDRESS

EMPLOYER AND SURETY'S NAME AND ADDRESS

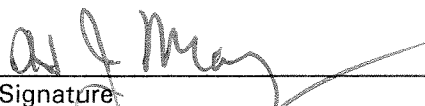
INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable)

Terence Fairchild
c/o Starr Kelso
P. O. Box 1312
Coeur d'Alene, ID 83816-1312

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail


Signature

Answer--Page 2 of 2

SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

WORKERS' COMPENSATION COMPLAINT

CLAIMANT'S (INJURED WORKER) NAME, ADDRESS, AND TELEPHONE NUMBER Terence Fairchild c/o Starr Kelso, Attorney P.O. Box 1312 Coeur d'Alene, Idaho 83816		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER Starr Kelso P.O. Box 1312 Coeur d'Alene, Idaho 83816 Tel: 208-765-3260	
EMPLOYER'S NAME AND ADDRESS (at time of injury) Kentucky Fried Chicken 218 East Appleway Coeur d'Alene, Idaho 83814		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS State Insurance Fund P.O. Box 83720 Boise, Idaho 83720-0044	
CLAIMANT'S SOCIAL SECURITY NO. 538-11-9581	CLAIMANT'S BIRTHDATE 5-22-83	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE 11-13-04	
STATE AND COUNTY IN WHICH INJURY OCCURRED Kootenai, County		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$ 7.16 p hr , PURSUANT TO IDAHO CODE § 72-419	

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

slipped and fell on knees

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

injury to both knees

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

Impairment and disability

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER 11-13-04	TO WHOM NOTICE WAS GIVEN Treasha Beitz
--	---

HOW NOTICE WAS GIVEN: ORAL WRITTEN OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED

- 1. Impairment
- 2. Disability

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? YES NO IF SO, PLEASE STATE WHY.

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002

FILED
NOV - 12 2009
INDUSTRIAL DIVISION

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

William F. Sims
Coeur d'Alene, Idaho

Dr. Brinton
Coeur d'Alene, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$ unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$ unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. YES NO

DATE

November 2, 2009

SIGNATURE OF CLAIMANT OR ATTORNEY: 

TYPE OR PRINT NAME: Starr Kelso

**PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS**

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION TO DECEASED CLAIMANT
WAS FILING PARTY DEPENDENT ON DECEASED? <input type="checkbox"/> YES <input type="checkbox"/> NO	DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT? <input type="checkbox"/> YES <input type="checkbox"/> NO	

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of Nov, 2009, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

Kentucky Fried Chicken

218 East Appleyway

Coeur d'Alene, Idaho

SURETY'S NAME AND ADDRESS

State Insurance Fund

P.O. Box 83720

Boise, Idaho 83720-0044

via: personal service of process

regular U.S. Mail

via: personal service of process

regular U.S. Mail



Signature

Starr Kelso

Print or Type Name

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

INDUSTRIAL COMMISSION
PO BOX 83720
BOISE, ID 83720-0041

Patient Name: Terence Fairchild
Birth Date: _____
Address: _____
Phone Number: _____
SSN or Case Number: _____

Medical Record Number: _____	
<input type="checkbox"/> Pick up Copies	<input type="checkbox"/> Fax Copies
<input type="checkbox"/> Mail Copies	
ID Confirmed by: _____	

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City State Zip Code

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- Discharge Summary
- History & Physical Exam
- Consultation Reports
- Operative Reports
- Lab
- Pathology
- Radiology Reports
- Entire Record
- Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- AIDS or HIV
- Psychiatric or Mental Health Information
- Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Signature of Patient 12/5/08
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act Date

Signature of Witness Title Date

APPENDIX III

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

IC1003 (Rev. 11/91)

ANSWER TO COMPLAINT
I.C. NO. 04-526113

CLAIMANT'S NAME AND ADDRESS Terence Fairchild c/o Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Starr Kelso P. O. Box 1312 Coeur d'Alene, ID 83816
EMPLOYER'S NAME AND ADDRESS Kentucky Fried Chicken 218 East Appleway Coeur d'Alene, ID 83814	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund 1215 W. State Street Boise ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) H. James Magnuson, Attorney PO Box 2288 Coeur d'Alene ID 83816-2288	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

The above-named employer or employer/surety responds to Claimant's Complaint by stating:

The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	
X	
X	
	X
	N/A
X	
	N/A
	X
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly entirely by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$137.44
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

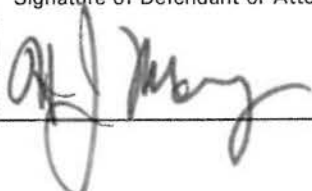
10. What benefits, if any, do you concede are due Claimant?

None.

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.
1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
 2. Defendants allege Claimant's condition is attributable in whole or in part to a preexisting injury, infirmity, or condition.
 3. Defendants deny that Claimant's condition is a result of an accident arising out of and in the course of his employment and, therefore, deny that he is entitled to any benefits.
 4. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury.
 5. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO				
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
No.				
Amount of Compensation Paid to Date		Dated November 20, 2009	Signature of Defendant or Attorney 	
PPD	TTD			Medical
-0-	-0-			\$9,233.83

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2009, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

Terence Fairchild
 c/o Starr Kelso
 P. O. Box 1312
 Coeur d'Alene, ID 83816

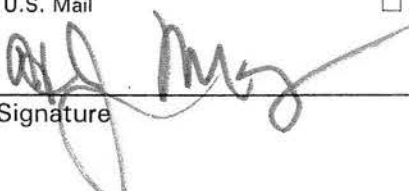
EMPLOYER AND SURETY'S NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable)

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail



 Signature

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P. O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I. C. No. 04-526113

MOTION IN LIMINE

RECEIVED
INDUSTRIAL COMMISSION
SEP 2 10 12 05

COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and move to limit and exclude any evidence in this proceeding relating to impairment, disability or any other issue that has not been provided to Defendants either in response to Defendants' outstanding discovery requests or pursuant to the requirements of JRP Rule 10.E. This Motion is made on the grounds that Claimant served nonresponsive discovery requests dated August 26, 2011, and a Rule 10 Compliance and Notice of Service dated August 26, 2011, copies of which are attached hereto as **Exhibits A** and **B**, respectively.

The Supplemental Answers to Interrogatories provide no responsive information but simply indicate that Claimant may develop some evidence at an unknown time in the future. JRP Rule 10.C states, "Unless good cause is shown to the contrary at least 10 days prior to the hearing, each party shall serve on the parties complete, legible and accurate copies of all exhibits to be offered into evidence at the hearing. . . ."


This claim is nearly seven years old. Claimant can show no reason and has failed to offer any cause justifying his failure to disclose exhibits or testimony more than 10 days prior to the hearing.

Claimant is under obligation under IRCP Rule 26(e)(1) to seasonally supplement responses regarding certain matters including the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of the testimony.

Claimant's implied evidence to be developed or discovered as referred to in Supplemental Answers to Interrogatories is not compliant with and in violation of both IRCP Rule 26(e) and JRP Rule 10.C.1.

Defendants pray that the Commission enter an order excluding and limiting any evidence at hearing that has not been previously provided to Defendants as a proper response to Defendants' outstanding discovery requests and in violation of JRP Rule 10.

DATED this 31 day of August, 2011.

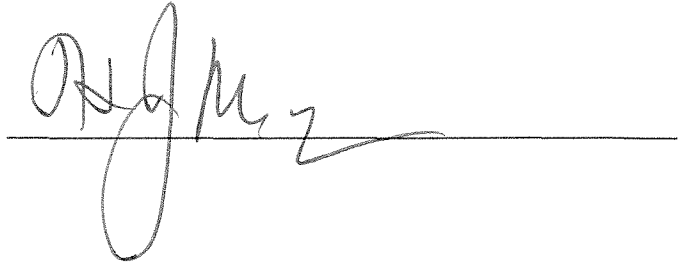


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent as indicated on the 31 day of August, 2011, to:

Starr Kelso
P. O. Box 1312
Coeur d'Alene, ID 83816-1312
VIA U.S. MAIL

A handwritten signature in black ink, appearing to read "Starr Kelso", is written over a horizontal line.

STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
)
 Employer,)
 and,)
)
 STATE INSURANCE FUND,)
)
)
 Surety,)
 Defendants.)

**I.C. NO. 04-525439
04-526113**

**SUPPLEMENTAL ANSWERS TO
INTERROGATORIES**

TO: DEFENDANTS, and their attorney of record, H. James Magnuson.

COMES NOW, Claimant and does hereby supplements his answers Defendants' Interrogatories as follows:

INTERROGATORY NO. 9: Do you allege that as a result of the accident alleged in the Workers' Compensation Complaint you have sustained a permanent physical impairment? If so, please state the name and address of all practitioners of the healing arts who have rendered opinions concerning the degree of permanent impairment from which you claim to suffer, specify the substance of said opinion(s), and specify what, if any, physical limitations said practitioner(s) would impose upon you.

ANSWER: Yes. Claimant will be receiving an impairment rating prior to the hearing. It has

1 SUPPLEMENTAL RESPONSES TO INTERROGATORIES

EXHIBIT A

been not be done by the date of these answers due to the expense, Claimant's lack of money to pay for one, and the belief that the matter should settle.

INTERROGATORY NO. 12: State whether you have ever been evaluated by, or received training or job placement assistance through any type of vocational rehabilitation program. If so, state when the same occurred, the jurisdiction in which you obtained said training and job placement assistance, and the nature of courses pursued or assistance received under each of said programs.

ANSWER: Dan Brownell is performing a job placement and labor market survey based upon the functional capacities evaluation.

INTERROGATORY NO. 13: Please state the names, addresses, and telephone numbers of all witnesses you intend to call at the hearing of the cause, and with respect to each witnesses so identified, please state the subject matter and general nature of the facts to which he or she is expected to testify.

ANSWER: The physician providing the impairment rating.

INTERROGATORY NO. 14: Have you, your attorney, or any person, firm, or corporation acting on your behalf, consulted or engaged any experts in connection with litigation? If so, please state their names and addresses, and for each, please state the following: his or her qualifications; the subject matter on which he or she is expected to testify; and the substance of the facts, conclusions, and opinions to which he or she is expected to testify

ANSWER: The information regarding the physician providing the impairment rating will be forwarded once the exam is completed.

INTERROGATORY NO. 15: Please identify and describe each exhibit which you intend to introduce or utilize at the time of the trial of the above action.

ANSWER: At the present time it is anticipated that the physician will not prepare a report and instead testify as to his impairment ratings and the basis therefore by post hearing deposition.

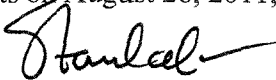
2 SUPPLEMENTAL RESPONSES TO INTERROGATORIES

DATED this 26th day of August, 2011.



Starr Kelso, Attorney for Mr. Fairchild

CERTIFICATE OF SERVICE: I certify that a copy was faxed to H. James Magnuson, attorney for Defendants on August 26, 2011, at 666-1700.



Starr Kelso

COPY

STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
)
 Employer,)
 and,)
)
 STATE INSURANCE FUND,)
)
)
 Surety,)
 Defendants.)

**I.C. NO. 04-525439
04-526113**

**RULE 10 COMPLIANCE
AND NOTICE OF SERVICE**

COMES NOW, Claimant and pursuant to Rule 10 submits this Rule 10 Disclosure.

WITNESSES:

1. Claimant
2. Dan Brownell
3. The deposition of the physician providing Claimant's impairment rating for each of his knees will be taken by post hearing deposition. The rating evaluation will take place prior to the date of the hearing.

EXHIBITS:

Note: These medical records have already been provided to Defendants. A copy will be provided at the hearing to Defendants and the Referee in the following listed order.

1. After Hours Care
2. Kootenai Medical Center

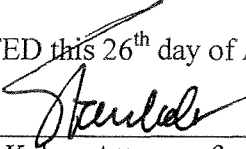
1 RULE 10 COMPLIANCE AND NOTICE OF SERVICE

EXHIBIT B

3. William Sims, M.D.

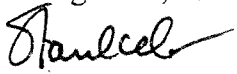
4. Pinnacle Physical Therapy

DATED this 26th day of August, 2011.



Starr Kelso, Attorney for Mr. Fairchild

CERTIFICATE OF SERVICE: I certify that a copy was faxed to H. James Magnuson, attorney for Defendants on August 26, 2011, at 666-1700.



Starr Kelso

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P. O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I. C. No. 04-526113

MOTION TO STRIKE AND COMPEL

FILED

INDUSTRIAL COMMISSION

COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and move to strike Claimant's Supplemental Answers to Interrogatories and compel full and complete answers to Defendants' discovery requests.

This Motion is made on the grounds that Claimant served Supplemental Answers to Interrogatories dated August 26, 2011, a copy of which are attached hereto as **Exhibit A**. Claimant's Answers to Interrogatories No. 9, 11, 13, 14 and 15 provide ambiguous statements that are nonresponsive to the discovery requests. The responses state in essence that Claimant is

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
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Coeur d'Alene, Idaho 83816
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Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
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Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I. C. No. 04-526113

MOTION TO STRIKE AND COMPEL

RECEIVED
INDUSTRIAL COMMISSION
SEP 26 2011
MOTION TO STRIKE AND COMPEL

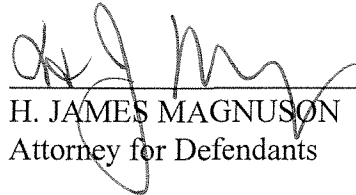
COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and move to strike Claimant's Supplemental Answers to Interrogatories and compel full and complete answers to Defendants' discovery requests.

This Motion is made on the grounds that Claimant served Supplemental Answers to Interrogatories dated August 26, 2011, a copy of which are attached hereto as **Exhibit A**. Claimant's Answers to Interrogatories No. 9, 11, 13, 14 and 15 provide ambiguous statements that are nonresponsive to the discovery requests. The responses state in essence that Claimant is

going to get an impairment rating sometime in the unknown future by an unknown physician. An individual named Dan Brownell is performing a job placement and labor market survey based upon a functional capacity evaluation. There are no facts responsive to the interrogatories.

The Defendants are entitled to full and complete responses to discovery requests. As such, the Supplemental Answers to Interrogatories should be stricken and an order entered compelling full and complete responses to Defendants' discovery requests and absent such compliance, Claimant shall be prohibited from attempting to introduce nondisclosed facts as evidence at any hearing.

DATED this 31 day of August, 2011.

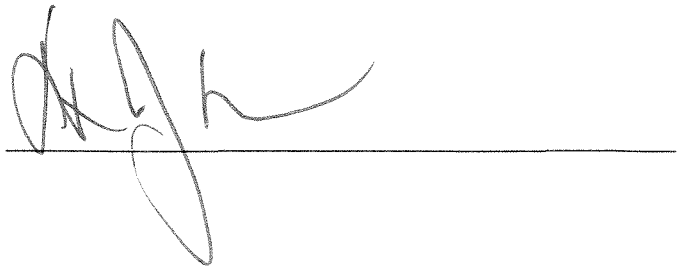


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

31 I hereby certify that a true and correct copy of the foregoing was sent as indicated on the 31 day of August, 2011, to:

Starr Kelso
P. O. Box 1312
Coeur d'Alene, ID 83816-1312
VIA U.S. MAIL



STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
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 Surety,)
 Defendants.)

**I.C. NO. 04-525439
04-526113**

**SUPPLEMENTAL ANSWERS TO
INTERROGATORIES**

TO: DEFENDANTS, and their attorney of record, H. James Magnuson.

COMES NOW, Claimant and does hereby supplements his answers Defendants' Interrogatories as follows:

INTERROGATORY NO. 9: Do you allege that as a result of the accident alleged in the Workers' Compensation Complaint you have sustained a permanent physical impairment? If so, please state the name and address of all practitioners of the healing arts who have rendered opinions concerning the degree of permanent impairment from which you claim to suffer, specify the substance of said opinion(s), and specify what, if any, physical limitations said practitioner(s) would impose upon you.

ANSWER: Yes. Claimant will be receiving an impairment rating prior to the hearing. It has

1 SUPPLEMENTAL RESPONSES TO INTERROGATORIES

EXHIBIT A

been not be done by the date of these answers due to the expense, Claimant's lack of money to pay for one, and the belief that the matter should settle.

INTERROGATORY NO. 12: State whether you have ever been evaluated by, or received training or job placement assistance through any type of vocational rehabilitation program. If so, state when the same occurred, the jurisdiction in which you obtained said training and job placement assistance, and the nature of courses pursued or assistance received under each of said programs.

ANSWER: Dan Brownell is performing a job placement and labor market survey based upon the functional capacities evaluation.

INTERROGATORY NO. 13: Please state the names, addresses, and telephone numbers of all witnesses you intend to call at the hearing of the cause, and with respect to each witnesses so identified, please state the subject matter and general nature of the facts to which he or she is expected to testify.

ANSWER: The physician providing the impairment rating.

INTERROGATORY NO. 14: Have you, your attorney, or any person, firm, or corporation acting on your behalf, consulted or engaged any experts in connection with litigation? If so, please state their names and addresses, and for each, please state the following: his or her qualifications; the subject matter on which he or she is expected to testify; and the substance of the facts, conclusions, and opinions to which he or she is expected to testify

ANSWER: The information regarding the physician providing the impairment rating will be forwarded once the exam is completed.

INTERROGATORY NO. 15: Please identify and describe each exhibit which you intend to introduce or utilize at the time of the trial of the above action.

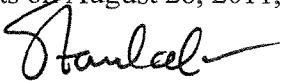
ANSWER: At the present time it is anticipated that the physician will not prepare a report and instead testify as to his impairment ratings and the basis therefore by post hearing deposition.

DATED this 26th day of August, 2011.



Starr Kelso, Attorney for Mr. Fairchild

CERTIFICATE OF SERVICE: I certify that a copy was faxed to H. James Magnuson, attorney for Defendants on August 26, 2011, at 666-1700.



Starr Kelso

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P. O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I.C. NO. 04-526113

**SUPPLEMENTAL AUTHORITY
REGARDING PENDING
EVIDENTIARY MOTIONS**

FILED
SEP 28 2011
INDUSTRIAL COMMISSION

COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and submit authority regarding pending evidentiary motions.

At hearing Defendants objected to Claimant's proposed exhibits on a number of grounds. One such ground was that the exhibits were not disclosed or served pursuant to JRP Rule 10 until the day prior to the hearing despite being responsive to outstanding discovery requests which had

H. JAMES MAGNUSON
Attorney at Law
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Coeur d'Alene, Idaho 83816
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Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
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Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I.C. NO. 04-526113

**SUPPLEMENTAL AUTHORITY
REGARDING PENDING
EVIDENTIARY MOTIONS**

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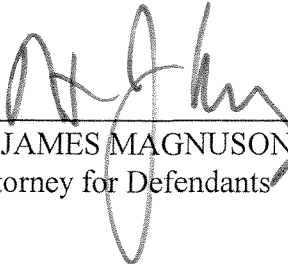
COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and submit authority regarding pending evidentiary motions.

At hearing Defendants objected to Claimant's proposed exhibits on a number of grounds. One such ground was that the exhibits were not disclosed or served pursuant to JRP Rule 10 until the day prior to the hearing despite being responsive to outstanding discovery requests which had

not been seasonally supplemented. Claimant had no grounds to make an argument for admission of the Dr. McNulty IME under JRP Rule 10.C.2.

Attached hereto is *Wilson v. Beehive Homes and ISHR*, 2011 IIC 0050.1 decided by the Industrial Commission on August 4, 2011. In *Wilson* claimant and defendant offered certain exhibits not served on the opposing party within the time required pursuant to JRP Rule 10. Referee Donahue and the Commission sustained the objection pursuant to JRP Rule 10. *Wilson* is authority for sustaining Defendants' JRP Rule 10 objections herein.

DATED this 28 day of September, 2011.

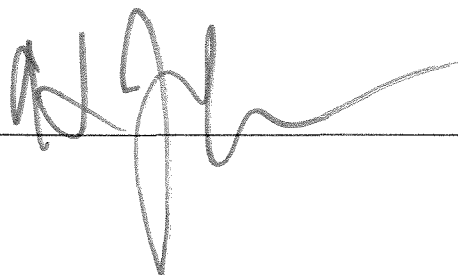


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent by first-class, prepaid mail on the 28 day of September, 2011, to:

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



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Justin Lee Wilson, Claimant
Beehive Homes, Employer
ISHR, Surety
08/04/2011
2009-030624 - 2011 IIC 0050

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d'Alene on March 4, 2011. Starr Kelso represented Claimant. Beehive Homes, a corporate entity, was not represented at hearing by counsel, but its president, Gary Ghramm was present. Christopher P. Graham represented ISHR/InfiniSource (hereinafter ISHR). The parties presented oral and documentary evidence. The parties submitted briefs. The case came under advisement on June 15, 2011. It is now ready for decision.

ISSUES

The issues to be resolved according to the amended notice of hearing and as added by the parties at hearing are:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;
2. Whether Beehive Homes, ISHR or both are Claimant's employer(s);
3. Whether and to what extent Claimant is entitled to:
 - a. Temporary disability benefits, and
 - b. Medical care benefits;
4. Whether Claimant is entitled to an award of attorney fees under Idaho Code § 72-210; and
5. Whether Claimant is entitled to an award of attorney fees under Idaho Code § 72-804.

Other issues are reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his low back while lifting and moving a nursing home patient. He has been unable to work since. Neither Beehive Homes ("Beehive") nor ISHR carried workers' compensation insurance on the date of the accident and an award of attorney fees under Section 210 is appropriate. Their actions in denying and delaying payments for his claim were unreasonable and an award of attorney fees under Section 804 is appropriate as well.

Defendants contend Claimant was not involved in an accident. He is not entitled to benefits.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, Claimant's mother and co-worker Katherine Reheiser-Buckley, ISHR HR director Rick Whatley, co-workers Penny Vandaveer, Jeannie Breckenridge, and Charlene Leona Hoffman; and of John Gerald McManus, M.D.
2. Claimant's Exhibits A through N; and
3. Defendants' Exhibits 1 through 6.

Additional potential exhibits – A number of additional exhibits were marked at hearing: Claimant's P, Q and R, and Defendant's 7 and 8. None of these exhibits were served on the opposing party within the time required prior to hearing pursuant to Judicial Rules of Practice and Procedure (J.R.P.) 10. Concerning Claimant's Exhibit P, the record appears to reflect that this exhibit was offered, and admitted without objection (*See*, Hrg. Tr. p. 175/2-8). However, following review of page 175 of the Hearing Transcript, which also includes brief discussion of Exhibit Q, there is uncertainty in the mind of the Referee as to whether, at the end of the day, the status of Exhibit P was made clear to the parties. Although Exhibit P is considered by the Referee in this decision, that document ultimately has little to no bearing on the outcome of this case. Claimant's Exhibit Q was marked, but never offered. (*See*, Hrg. Tr. p. 175/9-17). Claimant's Exhibit R was marked, offered, and admitted without objection. (*See*, Hrg. Tr. pp. 189/23-190/1). However, immediately after acceding to the admission of Exhibit R, Defendant's counsel retracted his agreement to the admission of the exhibit and interposed a Rule 10 objection, which the Referee sustained. The Referee has not considered Claimant's Exhibits Q and R in this proceeding. Defendant's Exhibits 7.1 and 7.2 were marked, but never offered as exhibits. (*See*, Hrg. Tr. p. 203/5-9). Defendant's Exhibit 8 was marked, offered and objected to. The Referee sustained the objection pursuant to JRP 10. (*See*, Hrg. Tr. p.196/4-17). The Referee has not considered Exhibits 7 or 8 in deciding this matter.

At hearing, Claimant objected to the use in cross-examination of the exhibits marked as Defendant's 7, which were not admitted to the record. (*See*, Hrg. Tr. pp. 103-104.) The Referee reserved ruling at that time, but overruled Claimant's objection after due consideration at a post-hearing telephone conference. Also at hearing, Claimant objected to the testimony of Dr. McManus who was called to testify as an expert without prior notice from Defendants. Here too, the Referee reserved ruling until after due consideration. Although expert medical witnesses are usually called to testify via post-hearing deposition with appropriate notice, there is, of course, no restriction from such live testimony at hearing. Claimant's objection was overruled at the post-hearing telephone conference. The record was held open to allow Claimant full opportunity to complete cross-examination post-hearing or to call rebuttal witnesses post-hearing. At the post-hearing telephone conference, Claimant declined both. Therefore, because Claimant did not send discovery requests to Defendants and because J.R.P. Rule 10 does not expressly require the identification of such witnesses at hearing, Claimant's objection of Dr. McManus' testimony is overruled.

Having examined the evidence, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. Claimant worked at the Beehive Homes facility (hereinafter, "Beehive Facility" to distinguish the place of business from the similarly named corporate entity, which entity is hereinafter referred to as "Beehive"). Beehive Facility provides assisted living and nursing care to residents needing varied levels of care. Beehive Facility is comprised of four buildings designated "Courtyard 1", "Courtyard 2", "Courtyard 3" and "Courtyard 4". Claimant initially worked at Beehive Facility as a one-on-one caregiver for two months. Claimant left Beehive Facility to work elsewhere for another employer. After several months, Claimant was rehired to work at Beehive Facility near the end of October 2008.

2. "Terry" (last name unknown) a vice-president, personally hired him. Claimant was hired with the expectation of working full-time, averaging 40-hour weeks. Claimant earned \$8.50 per hour because his "med certification" had lapsed. He anticipated receiving \$9.75 per hour upon recertification.

3. In late 2008 - early 2009, Penny Vandaveer was a "house manager", supervising Courtyard 2. In about October 2008, Claimant began working the night shift in Courtyard 2. By mid-November 2008, Claimant expressed a preference for other work and his duties were changed to working primarily Courtyards 3 and 4. Employees were sometimes scheduled to work other Courtyards than their primary assignments as needed.

4. At some point in time prior to November 16, 2008, Beehive had an arrangement with a professional employer organization ("PEO") known as PayCheck Connection, LLC.

5. On or about November 16, 2008, Beehive entered into an arrangement with a successor professional employer organization, ISHR. Rick Whatley testified that under the terms of this agreement, Beehive would assume responsibility for acquiring Idaho workers' compensation coverage. However, Whatley, and apparently Beehive, were mistaken in believing that Beehive had workers' compensation coverage under its prior arrangement with Paycheck Connection, LLC, effective through the end of December 2008. In fact, as of November 16, 2008, neither Beehive nor ISHR had coverage under the workers' compensation laws of the State of Idaho. Mr. Whatley testified that sometime in mid December 2008, it was discovered by ISHR that Beehive did not have coverage. Before the parties could obtain coverage on behalf of Beehive, the subject accident occurred on December 20, 2008.

6. The record does not contain the November 16, 2008 agreement between ISHR and Beehive, which purportedly creates the PEO arrangement. However, Mr. Whatley gave his assurance that such an agreement does exist and is in his keeping.

7. The day before Thanksgiving 2008, Claimant was arrested for a DUI. He missed about two weeks' work in late November into early December 2008. Payroll records show that Claimant worked: 15 hours in the 11/16-11/30 pay period; 28.25 hours in the 12/01-12/15 pay period; 69.5 hours in the 12/16-12/30 pay period; and 12.5 hours in the 12/31-1/15 pay period. His incarceration also meant he missed the certification class which would have increased his wage. It was not offered again before he stopped working at Beehive Facility.

8. On December 20, 2008, Claimant lifted a resident whose "legs buckled." With the sudden increase in weight, Claimant felt "a shock or a sharp pain" in his back and right shoulder. He deposited the resident into a wheelchair. He immediately found another caregiver with medication dispensing privileges and obtained some ibuprofen for himself.

9. Claimant testified that he then reported the incident to supervisor Penny Vandaveer. She handed Claimant a blank incident report form and instructed Claimant to rest and ice his shoulder, which he did. After about 45 minutes, he resumed work for a length of time, then he rested with heat on his back. Claimant did not seek medical treatment that day. On the date of the incident, RN Karen Rutland lived above Courtyard 2. Ms. Vandaveer lived above Courtyard 4.

10. Ms. Vandaveer had no recollection of Claimant working Courtyard 2 in December 2008. Nevertheless, she confirmed that a time card indicated he worked Courtyard 2 on December 20, 2008 from 6:30 a.m. to 3:00 p.m.

11. At hearing, Ms. Vandaveer had no recollection of the incident or surrounding events. Although Mr. Whatley testified he or Chris Ott conducted an investigation which included follow-up with Ms. Vandaveer, no document shows either person contacted Ms. Vandaveer in December 2008 or early 2009 to investigate this incident. Ms. Vandaveer testified she was unaware an incident had been alleged until about one week before hearing.

12. Claimant's mother, Katherine Reheiser-Buckley, worked as a nurse at Beehive Facility on the date of the incident. She was a supervisor to Claimant. All nurses are supervisors of caregivers.

13. Claimant's Exhibit A-1 is an incident/accident report form. Beehive Facility uses it for mishaps regardless of whether a resident or a staff member is hurt. Claimant completed his name, identifying data, and the date, time, and location of the alleged incident. He wrote a description of how the incident occurred.

14. Claimant's mother completed the portions identifying the department involved, Claimant's job title, treatment offered, and that at 7:30 p.m. the incident was reported to Penny Vandaveer who was "present." Here, "present" means Ms. Vandaveer was on shift, not that she actually witnessed the incident.

15. The record fails to expressly identify the date on which either Claimant or his mother completed their portions of the incident report.

16. ISHR received notice of the incident that same day or perhaps the next, December 20 or 21, 2008. ISHR did not file a Form 1 with the Commission, ever. ISHR did not send Claimant notice that his claim had been accepted or denied.

17. Claimant was unable to work his next shift and called in sick. When he did return to work, he was unable to lift a resident because of pain. A supervisor sent him for treatment.

18. He first visited a physician on December 23, 2008 when he went to the North Idaho After Hours Urgent Care. Completing a medical history form on that date, he identified December 20 as the date of the incident. Other potential dates recorded for the incident are inaccurate.

19. A Dr. Caldwell examined Claimant and diagnosed a right rotator cuff injury. He prescribed physical therapy, provided medication, imposed temporary restrictions, and allowed a return to light duty.

20. Claimant was terminated on January 5, 2009. Claimant was told he was being fired for being late to work on January 4, 2009.

21. Claimant next sought medical treatment on January 7, 2009. A Dr. Chisholm examined him.

22. Claimant first attended physical therapy on February 16, 2009. The record summarizes Claimant's description of his right shoulder pain and low back pain with right leg radiculopathy. Claimant received physical therapy again on February 20, 2009. The bills for these treatments, amounting to \$365.61 were still unpaid as of February 18, 2011, two years later.

23. Claimant's symptoms continued, but he was unable to get authorization for more treatment from either Beehive or ISHR. Lakewood Physical Therapy refused to treat him further without cash payment because the bill for the first two visits had been declined.

24. On November 10, 2009, Claimant visited Kirk Hjeltness, M.D. Dr. Hjeltness examined Claimant and referred him back to Kootenai Medical Center.

25. On November 12, 2009, Claimant sought treatment with Michael Ludwig, M.D., at Kootenai Medical Center. Dr. Ludwig examined him and diagnosed chronic right scapular pain. He re-ordered physical therapy.

26. After some treatment, on December 16, 2009, Dr. Ludwig noted, "it is otherwise safe clinically to progress to full lifting." He prescribed continued physical therapy.

27. Dr. Ludwig pronounced Claimant at MMI as of January 7, 2010. He allowed only two more physical therapy appointments. The KMC physical therapy bills for the winter of 2009-2010 remained unpaid as of August 7, 2010 and totaled 634.11. Despite the fact that Claimant had been in contact with ISHR and given ISHR information to the KMC physical therapy facility, his physical therapy was cut off because bills had been declined.

28. As of February 18, 2011, Kootenai Medical Center bills in the amount of \$5,965.69 had not been paid and had been turned over to a debt collector. Two items in that total, one for \$3,577.27 and one for \$387.22, for dates of service March 7 and July 14, 2009, respectively, were probably unrelated to the lifting incident at Beehive Facility. Claimant testified that he had been beaten in an unrelated altercation. The record does not show corresponding medical records. Therefore, the amount claimed related to the industrial incident would be \$2,001.20.

29. Defendants' exhibit 2 identifies certain medical benefit payments made by ISHR, but does not indicate the dates on which such payments were made. ISHR is aware of additional pharmaceutical bills undocumented in this record and has made payments on those.

30. Defendants admit, and certification by Commission Employer Compliance Department Manager Christi L. Simon confirms, that neither Beehive nor ISHR carried workers' compensation insurance in December 2008.

31. Claimant believed he was employed by Beehive. However, his W2 for 2008 was issued by InfiniSource LLC. InfiniSource LLC is synonymous with ISHR. At the time of hearing, at least one other witness believed she was also employed by Beehive. During cross-examination of Claimant, ISHR produced a document, apparently signed by Claimant, acknowledging that ISHR was Claimant's employer. Although Claimant's paychecks were issued by InfiniSource, when he formerly worked at Beehive Facility Claimant's paychecks were issued by PayCheck Connection and he then believed he was employed by Beehive.

32. ISHR has taken the position that it, not Beehive, was Claimant's employer. Upon cross-examination, ISHR's representative, Mr. Whatley, claimed a "co-employer" relationship between Beehive and ISHR vis-à-vis Claimant.

33. ISHR asserts without documentary evidence that its contract with Beehive required Beehive to secure workers' compensation insurance. Nevertheless, Mr. Whatley confirmed that an injured employee was contractually required to report a workers' compensation injury to ISHR, not Beehive.

34. Claimant has not worked since January 5, 2009. He applied for two other caregiver positions in 2009 but was not hired because he remained physically unable to lift residents. He also applied at various fast food and other places of employment at which he thought he might be able to do the work. In June 2009 he began attending classes in business administration at North Idaho College to retrain himself for less physically demanding jobs. He attempted to return to Beehive Facility in June or July 2009 but was told he would not be rehired. The person he spoke with at Beehive Facility told Claimant he was not entitled to any benefits because he had been fired. She referred him to the Industrial Commission and to ISHR for further information. About October 2009 he contacted the Industrial Commission and discovered no bills had been paid. A Commission employee at the Coeur d'Alene field office informed Claimant that being fired did not preclude him from filing a claim for benefits and helped him do so.

35. About November 2009 he contacted ISHR and the person he spoke with told him that ISHR would "take care" of the outstanding medical bills. Beginning about that time, ISHR began keeping e-mails from one or more agents of ISHR to Claimant, via his attorney, which essentially attempt to place the burden on Claimant to collect and forward evidence of unpaid bills. They further accuse Claimant of being unavailable or uncooperative with ISHR's alleged attempts to pay Claimant's compensable medical bills.

36. Mr. Whatley testified that he and another ISHR representative, Chris Ott, spoke with Claimant by telephone and were involved in assuring Claimant received benefits due him as early as late December 2008. Nevertheless, the November 2009 e-mails are the first written documentation of record that ISHR actively assisted Claimant in obtaining benefits. Other evidence of record shows that medical providers refused to continue to treat Claimant and told Claimant their bills had been declined by ISHR.

37. John Gerald McManus, M.D., reviewed the medical records which were made exhibits in this matter. He did not examine Claimant. He concluded that Claimant's condition was not severe, largely based upon Claimant's failure to follow-up with physical therapy and to seek medical treatment between February and November 2009. He was unaware that ISHR had sabotaged Claimant's attempts to obtain medical treatment. Dr. McManus voiced additional opinions.

DISCUSSION AND FURTHER FINDINGS OF FACT

38. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally construed in favor of a claimant, conflicting evidence need not be. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 316, 834 P.2d 878 (1992).

Accident and Injury

39. "'Accident' means an unexpected, undesigned, and unlooked for mishap, or untoward event, . . . which can be reasonably located as to time when and place where it occurred, causing an injury." Idaho Code 72-102(18)(b). Where the injury can be reasonably located in time and place, an accident may be found to have occurred. *See, Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005); *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983). In both *Page* and *Wynn*, the injury was immediately apparent. Both claimants felt immediate pain – Ms. Page felt knee pain as she arose from a seated position and Mr. Wynn felt back pain as the equipment he was operating bounced. Here, Claimant felt immediate right shoulder pain as he lifted a resident.

40. Here, despite Mr. Whatley's claim that ISHR "never denied" Claimant's claim. Defendants deny an accident occurred. ISHR's post-hearing brief argues Claimant is not credible and the accident never happened, based largely upon the absence of recollection of certain co-workers and some inconsistent check-marks and circles on a report form as to whether the accident occurred in the a.m. or p.m.

41. Claimant suffers from a brain injury after a prior motor vehicle accident. He exhibits some minor confusion about dates, although he appears to remember events without much confusion. The minor inconsistencies about the date and time of the accident do not undercut Claimant's credibility. Moreover, Mr. Whatley testified ISHR received notice of the accident on December 20, the date it happened, or the next day. ISHR's focus on other reported dates in December -- the 23rd, 26th, 28th -- are not persuasive. These merely underscore Claimant's prior brain injury.

42. The event described by Claimant did involve a mishap or untoward event. A compensable accident occurred.

Causation

43. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not required. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).
44. ISHR called Dr. McManus to testify as an expert witness without providing any notice that he had been retained or could be expected to testify. As a result, Dr. McManus sat outside the hearing room for essentially the entire day before being called to testify. The Referee was unaware of his presence.
45. This Referee and the Commission respect and value the role of physicians in the workers' compensation process as well as the physicians who provide care and/or testimony. It is unfortunate that the Commission was not notified prior to hearing of his anticipated testimony.
46. The opinions of the treating physicians as reflected in the medical records in evidence establish that Claimant suffered an injury caused by the accident. Dr. McManus's records review is entitled to little weight because Defendants' failure or refusal to provide Claimant with reasonable and necessary medical care resulted in an incomplete medical record for Dr. McManus to review. This finding implies no disrespect to Dr. McManus, but rather to the basis Defendants provided him when asking him to form opinions.

Who is Responsible for Securing Workers' Compensation Insurance?

47. ISHR admits it is Claimant's employer and responsible for paying Claimant's benefits. Nevertheless, it asserts Beehive was responsible for obtaining workers' compensation insurance. Mr. Whatley repeatedly referred to Defendants as "co-employers." ISHR posits that as a Utah domiciled corporation it could not obtain a policy through the State Insurance Fund. ISHR's position is contrary to the common experience of the Commission. Idaho allows PEOs options in how to secure workers' compensation policies; the goal is to get Idaho's workers insured. From the evidence adduced at hearing, the Referee concludes that the relationship between ISHR and Beehive is best described as a professional employer organization (PEO) arrangement, as contemplated at Idaho Code § 44-2401, *et seq.* The evidence establishes that ISHR meets the definition of a professional employer under Idaho Code § 44-2403. As well, ISHR established a professional employer arrangement with Beehive, who meets the definition of "client" under Idaho Code § 44-2403(3). Finally, testimony of Whatley establishes that ISHR had an arrangement with Claimant, such that Claimant qualifies as an "assigned worker" pursuant to Idaho Code § 44-2403(2).

48. Mr. Whatley testified to the existence of a written agreement of the type contemplated by Idaho Code § 44-2405, which defines the rights and obligations of the parties, including, *inter alia*, who, as between ISHR and Beehive, had the obligation to secure Idaho workers' compensation coverage.

49. In connection with the obligation of ISHR and/or Beehive, to obtain the workers' compensation coverage required under Idaho law, reference must also be made to the provisions of Idaho Code § 72-103, which treats the obligations of parties to PEO arrangements to obtain workers' compensation coverage. That section, adopted in 1997, provides as follows:

TEMPORARY AND PROFESSIONAL EMPLOYERS.

(1) So long as the temporary or professional employer, or work site employer, has worker's compensation insurance covering an injured worker, or is a qualified self-insurer covering an injured worker under this title:

(a) The work site employer shall have all of the protections and immunities granted any other employer by this title and shall not be regarded as a third party under section 72-223, Idaho Code.

(b) The temporary or professional employer shall have all of the protections and immunities granted any other employer by this title and shall not be regarded as a third party under section 72-223, Idaho Code, if it exercised the right of control sufficient to be an employer as defined in section 72-102, Idaho Code, and insures its worker's compensation liability accordingly.

(2) Whenever the parties to a temporary or professional employer arrangement contemplated by subsection (1) of this section comply with that subsection, no penalties under the worker's compensation law for being uninsured shall apply to the temporary or professional employer, or the work site employer, and no violation of any provision of title 41, Idaho Code, shall occur.

(3) Whenever there is a temporary or professional employer arrangement as contemplated by subsection (1) of this section, the parties to such arrangement shall have the option to determine for themselves, in writing, whether the temporary or professional employer or the work site employer will be the party to secure liability as required by section 72-301, Idaho Code, and the party so obligated to secure such liability may do so in any manner permitted by this title. In the event that the parties to such an arrangement do not exercise the option provided in this subsection, the obligation to secure such liability shall be with the temporary or professional employer.

50. Essentially, Idaho Code § 72-103 enables the existence of PEO arrangements by recognizing that when it comes to the obligation to obtain workers' compensation insurance, both the PEO and the worksite employer are able to enjoy the protections afforded by the provisions of the workers' compensation laws so long as one of them obtains the requisite coverage for the workers in their employ. Idaho Code § 72-103(3) specifies that as between the PEO and the worksite employer, the parties may make an election "in writing" as to whether it shall be the PEO or the worksite employer who shall obtain the requisite coverage. Importantly, in the absence of such a written agreement, the statute assumes that it is the responsibility of the PEO, in this case ISHR, to obtain the requisite policy of workers' compensation insurance. Here, it is the position of ISHR that Beehive (the worksite employer) assumed the contractual obligation to secure the requisite coverage. Whatley asserts that this requirement is delineated in the November 16, 2008, contract which was in his possession, or accessible by him, as of the date of hearing. Inexplicably, the original of that agreement was not produced and is not in evidence. Although there was no testimony to gainsay the averments of Mr. Whatley concerning the parties' agreement¹, Idaho Code § 72-102(3) clearly specifies that the agreement concerning who shall be responsibility to obtain workers' compensation coverage shall be in writing. The best evidence of the terms of the agreement, and specifically, whether the agreement placed responsibility for the procurement of coverage with Beehive, is the agreement itself. (*See*, IRE, 1002). The record does not reflect the existence of circumstances that would excuse the production of the original agreement. (*See*, IRE, 1004). Finally, the nature of the agreement cannot be proved by the testimony of Mr. Whatley, since that testimony is offered by Defendants in support of their case, not against it. (*See*, IRE, 1007). The Referee recognizes that the Commission is not bound to strictly apply the rules of evidence in deciding disputed matters. However, it deems proof of the contents of the ISHR/Beehive agreement to be important to the resolution of this case, such as to require the production of the agreement. Also, it is worth noting that although the legislature allowed an election to be made, it required that election to be reduced to writing in order to be effective. In summary, per Idaho Code § 72-103, the contents of the purported agreement between ISHR and Beehive are central to determining whether an appropriate election was made that Beehive is the entity charged with obtaining workers' compensation insurance effective November 19, 2008.

¹ Interestingly, Exhibit P, the agreement between ISHR and Claimant, contains the following provision concerning responsibility for workers' compensation coverage:

7. Employee acknowledges and understands that ISHR will be responsible for payroll, withholding, and timely payment of all applicable employer and employee statutory employment taxes and insurance. These include social security, state unemployment, disability (where applicable) and workers' compensation.

While this language is not necessarily inconsistent with Whatley's testimony, it equally supports a conclusion that as between ISHR and Beehive, ISHR was designated to obtain the policy.

Absent such proof, Idaho Code § 72-103 makes it clear that the default is that the PEO, in this case, ISHR, is the entity obligated to have in place a policy of workers' compensation insurance covering Claimant as of the date of the subject accident.

Medical Care Benefits

51. Entitlement to medical care benefits is the heart of the Idaho Workers' Compensation Law. Without medical care, injured workers' conditions may linger and fester. Idaho statutes expressly require employers to pay for medical care reasonably required by a treating physician. Idaho Code § 72-432 *et. seq.*

52. ISHR systematically and effectively prevented Claimant from obtaining medical care required by treating physicians. Despite ISHR's insistence that it paid every bill it received, some bills went unpaid for two or more years and some bills remain unpaid.

53. Claimant is entitled to full payment of all related medical bills to the date of hearing.

54. Further, ISHR's actions leave Claimant and the Referee without the ability to determine whether and to what extent Claimant's current and future condition related to the accident may need medical care. Claimant is entitled to future medical care as reasonably required by a physician.

Temporary Disability Benefits

55. Idaho Code § 72-408 provides that income benefits for total and partial disability are paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C. P. Clare and Company, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, an injured worker is entitled to temporary disability benefits unless and until such evidence is presented that the worker has been released for light duty work *and* that (1) the former employer has made a reasonable and legitimate offer of employment to the worker who is capable of performing such a job under the terms of a light work release and which employment is likely to continue throughout the period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of a light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

56. Claimant's testimony that he was hired on a full-time basis is credible and persuasive. Ms. Vandaveer's testimony corroborates that Claimant was hired for the night shift. His hourly wage was \$8.50. Claimant was given work restrictions on December 23, 2008. He was terminated from employment while still in a period of recovery. Thus, Claimant is entitled to temporary disability benefits unless and until evidence is presented which shows he has been released to light duty and his employer has made a reasonable and legitimate offer of employment that is likely to continue throughout the period of recovery, or it is shown that employment is available in the general labor market.

57. Claimant testified that when he returned to work with his restrictions there "really wasn't anything for me to do as far as light duty." He did residents' fingernails and basically hung out with the residents and pampered them during his eight-hour shift. He continued to show up for work, but his light duty work consisted of creating tasks to fill his time. Defendants did not present Claimant with viable light duty work, nor did they prove that employment was available to Claimant in the general labor market. The Referee finds that no reasonable and legitimate offer of employment was made to Claimant. Further, Defendants put on no proof that employment consistent with Claimant's limitations was likely to continue through his period of recovery.

58. He is entitled to temporary total disability benefits from the day following the accident, December 21, 2008, through January 7, 2010, the date Dr. Ludwig pronounced Claimant at MMI. Whether Claimant is entitled to temporary disability benefits beyond that date will be dependent upon physicians' opinions after he has had a full opportunity to be examined to determine whether future medical treatment is reasonable and necessary.

59. The foregoing paragraph is limited only to the extent that Claimant may have been paid for wages for hours worked, if any, between the date of the accident and the date he was terminated from employment. If such payment for wages is reliably documented by Defendants, appropriate temporary partial disability payments, instead of temporary total disability payments, are due for those dates.

60. Thus, Claimant is entitled to temporary disability benefits as follows:

DATES	RATE	TOTAL TTD DUE
12/21-12/31/08	278.10	\$ 437.01
01/01-12/31/09	286.20	14,923.29
01/01-01/07/10	289.35	289.35
TOTAL		\$ 15,649.65

§ 72-210 Penalty and Attorney Fees

61. Defendants admit workers' compensation insurance was not in effect in December 2008 at the time of the accident. Idaho Code § 72-210 requires a payment of 10% of the total amount of compensation, plus costs and attorney fees be awarded. Here, compensation includes both medical care benefits and temporary disability benefits.

§ 72-804 Attorney Fees

62. Defendants unreasonably denied or delayed Claimant's receipt of benefits due him. Under Idaho Code § 72-804, attorney fees are awardable regarding all issues decided herein on an independent basis from Idaho Code § 72-210. Moreover, ISHR unreasonably failed in its continuing duty to evaluate this claim. Despite the admission of ISHR's representative that he received notice of the accident on or the day after it occurred, ISHR continued to question the date of the accident and assert it never occurred. Defendants failed to offer credible evidence that a genuine investigation was conducted shortly after the accident. Mr. Whatley is sufficiently experienced and sophisticated to have known an investigation should be documented, rather than making the bare assertion at hearing that it occurred. ISHR's defense at hearing consisted largely of unproven general statements which were unsupported by detailed documentation and often were inconsistent and self-contradictory. Multiple independent bases of Defendants' conduct meet the standard for an award of attorney fees under Idaho Code § 72-804.

63. This decision does not address whether attorney fees are appropriate for the issues reserved.

CONCLUSIONS OF LAW

1. ISHR is a Professional Employer Organization. Beehive is a worksite employer. ISHR and Beehive entered into a PEO arrangement in November 2008.
2. In the absence of persuasive evidence that an election under Idaho Code § 72-103(3) was made, ISHR was obligated to obtain a policy of Workers' Compensation Insurance covering Claimant as of the date of injury:
3. Claimant suffered a compensable accident/injury on or about December 20, 2008;
4. Claimant is entitled to the following Workers' Compensation benefits payable by ISHR:
 - a. In addition to medical benefits paid to date by ISHR, Claimant is entitled to recover 100% of the invoiced amount of unpaid medical expenses related to treatment of the compensable injury incurred to the date of this decision. Further, ISHR shall provide such future medical care as Claimant may be entitled to pursuant to Idaho Code § 72-432;

- b. Claimant is entitled to temporary disability benefits from December 21, 2008 through January 7, 2010, inclusive, in the amount of \$15,649.65; ISHR may be entitled to credit for wages paid, if any, for work performed from December 21, 2008 through January 4, 2009;
- c. Claimant is entitled to the penalty of 10% and costs under Idaho Code § 72-210 for the failure of ISHR to secure workers' compensation insurance;
- d. Claimant is entitled to reasonable attorney fees under Idaho Code § 72-804 or § 72-210 or both.
- e. Additional issues are reserved, including permanent impairment and disability.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

* * * * *

ORDER

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. ISHR is a Professional Employer Organization. Beehive is a worksite employer. ISHR and Beehive entered into a PEO arrangement in November 2008.
2. In the absence of persuasive evidence that an election under Idaho Code § 72-103(3) was made, ISHR was obligated to obtain a policy of Workers' Compensation Insurance covering Claimant as of the date of injury;

3. Claimant suffered a compensable accident/injury on or about December 20, 2008;
4. Claimant is entitled to the following Workers' Compensation benefits payable by ISHR:
 - a. In addition to medical benefits paid to date by ISHR, Claimant is entitled to recover 100% of the invoiced amount of unpaid medical expenses related to treatment of the compensable injury incurred to the date of this decision. Further, ISHR shall provide such future medical care as Claimant may be entitled to pursuant to Idaho Code § 72-432;
 - b. Claimant is entitled to temporary disability benefits from December 21, 2008 through January 7, 2010, inclusive, in the amount of \$15,649.65; ISHR may be entitled to credit for wages paid, if any, for work performed from December 21, 2008 through January 4, 2009;
 - c. Claimant is entitled to the penalty of 10% and costs under Idaho Code § 72-210 for the failure of ISHR to secure workers' compensation insurance;
 - d. Claimant is entitled to reasonable attorney fees under Idaho Code § 72-804 or § 72-210 or both.
 - e. Additional issues are reserved, including permanent impairment and disability.
5. Claimant is entitled to attorney fees as provided for by Idaho Code § 72-210 and § 72-804. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney's fees.

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

DATED this 4th day of August, 2011.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman
/s/ Thomas P. Baskin, Commissioner
/s/ R. D. Maynard, Commissioner

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Telephone: (208) 765-3260
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Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
 Employer,)
 and,)
)
 STATE INSURANCE FUND,)
)
)
 Surety,)
 Defendants.)

I.C. NO. 04-526113

**CLAIMANT'S RESPONSE
TO DEFENDANTS' SUPPLEMENTAL
AUTHORITY BRIEF REGARDING
EVIDENTIARY ISSUES**

FILED
OCT 18 2011
INDUSTRIAL COMMISSION

COMES NOW, Claimant and responds to Defendants' supplemental authority regarding pending evidentiary issues.

WILSON IS NOT AUTHORITY FOR DEFENDANTS' ARGUMENT

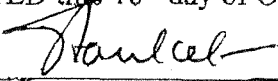
Attached hereto as Exhibit A is a true and correct copy of the relevant portion of the actual hearing transcript from *Wilson*. As can be seen the proposed exhibits in *Wilson*, one for Claimant and one for Defendant ISHR, were offered and excluded because they were *in existence before* the time of the Rule 10 compliance. This is not the same situation presented by a medical record prepared and delivered after the Rule 10 time. The ICJRP&P Rule 10 C. 2 allows medical records discovered in good faith and due diligence less than ten days before hearing to be admitted into evidence.

1 CLAIMANT'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL ARGUMENT ON EVIDENTIARY ISSUES

Additionally as reflected by the Rule 10 Compliance paragraph 3 attached hereto as Exhibit B, Defendants were informed that Claimant was being seen by a physician to provide an impairment evaluation. At that time as reflected by the Supplemental Responses to Interrogatories attached hereto as Exhibit C in relevant part it was not even anticipated that the physician would prepare a report but would instead testify by post-hearing deposition. When a report was nonetheless received, in consideration of fairness, it was sent to Defendants' counsel. There is no requirement that all preparation for hearing cease ten days prior to hearing. Defendant SIF often has expert witnesses, especially labor market expert witnesses, continue their work past the Rule 10 filing date.


The Claimant offered numerous alternative manners for Defendants to avoid any perceived surprise, and as counsel recalls so did the Referee, but Defendants declined these offered alternative approaches. As was further pointed out, there is already an impairment rating by another physician in the record and any determination of impairment between the two will be included in any disability in excess of impairment determination by the Industrial Commission and given this fact, in conjunction with Defendants declining any offered alternative to erase any of their professed but unfounded concerns, they have no basis to claim that the chart note report should not be included in evidence. Finally, the deposition of Dr. McNulty will be taken and any inquiry Defendants may have regarding the impairment rating can be reviewed with him during his deposition.

DATED this 18th day of October, 2011.



Starr Kelso, Attorney for Mr. Fairchild

CERTIFICATE OF SERVICE: I certify that a copy was faxed to H. James Magnuson, attorney for Defendants on October 18, 2011, at 666-1700.



Starr Kelso

2 CLAIMANT'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL ARGUMENT ON EVIDENTIARY ISSUES

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

COPY

JUSTIN LEE WILSON,)	
)	IC 2009-030624
Claimant,)	
)	
v.)	
)	
BEEHIVE HOMES,)	Employer,
)	
and)	
)	
ISHR,)	Employer,
)	
)	Defendants.
)	

TRANSCRIPT OF HEARING
 AT COEUR D'ALENE, IDAHO
 MARCH 4, 2011

HEARING OFFICER: REFEREE DOUGLAS A. DONOHUE

REPORTED BY:

ROBIN E. REASON, RDR, CRR, CSR
Notary Public



Coeur d'Alene, Idaho
 Northern Offices
 208.765.1700
 1.800.879.1700

Spokane, Washington
 509.455.4515
 1.800.879.1700
 www.mmcourt.com


Boise, Idaho
 Southern Offices
 208.345.9611
 1.800.234.9611

Exh A-1

1 compensation insurance policy to cover all persons
 2 employed, whether co-employees, on their site in
 3 Coeur d'Alene, Idaho.
 4 A It's a longer question -- or a longer answer
 5 than that. But yes. The short answer is yes.
 6 Q Did you advise Beehive Homes that it's a
 7 misdemeanor in the State of Idaho to have employees and
 8 not have workers' compensation insurance coverage for
 9 them?
 10 A There would have been no reason to tell them
 11 that. And no, we did not. We were of the understanding
 12 that a policy was in place.
 13 Q When did InfiniSource become, to use your
 14 phrase, co-employer of Mr. Wilson?
 15 A When did we become a co-employer?
 16 Q What date. Yes.
 17 A I believe it was November 19th of 2008. I
 18 believe that's when they signed this agreement.
 19 Q Do you have in your possession any written
 20 document with Beehive Homes where Beehive Homes
 21 acknowledges that it's their obligation to carry
 22 workers' compensation insurance on co-employees as of
 23 the date that Mr. Wilson became an employee?
 24 A In my possession now?
 25 Q In your whole office records.

1 Its obligation to do so.
 2 A Once again, I'll answer the same way. We were
 3 not concerned about who was paying the bill. We wanted
 4 to make sure it was taken care of. Our primary concern
 5 was for Mr. Wilson.
 6 Q Your primary concern was for Mr. Wilson.
 7 Your primary concern for Mr. Wilson directly
 8 led to him having his physical therapy in January of
 9 2009 terminated for non-payment?
 10 A Is that a question?
 11 Q Yes. "Yes" or "no."
 12 A I can't answer that. I don't know the
 13 circumstances. There is nothing that has been presented
 14 to us that we have not paid.
 15 Q Was InfiniSource aware that in January of 2009
 16 Mr. Wilson was supposed to be seeing a physical
 17 therapist?
 18 A Yes.
 19 Q How about February of 2009?
 20 I'm not going to -- I mean there's a date
 21 2/20/09 that he went to physical therapy.
 22 A Okay.
 23 Q So I'm presuming you'd be aware of that also.
 24 A I'd have to look at my notes.
 25 Q Okay. Well, look at your notes.

1 A I'm sure we do, yes.
 2 Q You're sure of that?
 3 A I'm absolutely positive we do.
 4 Q So would it be a fair statement you would be
 5 absolutely sure that Beehive Homes was aware as of the
 6 end of November 2008 it had to have its own workers'
 7 compensation insurance policy.
 8 A They were of the understanding that a policy
 9 was in place, as were we. And we were in the process of
 10 getting a new policy in place at that moment. So yes.
 11 MR. KELSO: Read the question back.
 12 (The Reporter read the pending question.)
 13 MR. KELSO: Q "Yes" or "no"?
 14 A I don't know.
 15 Q Did InfiniSource at any time represent to
 16 Beehive Homes that it carried the workers' compensation
 17 insurance on co-employees such as Mr. Wilson beginning
 18 in late November 2008 and continuing on?
 19 A No.
 20 Q Is InfiniSource in business to make money?
 21 A Yes.
 22 Q I'm still unclear why InfiniSource, as an
 23 entity in business to make money, would pay the medical
 24 bill for Mr. Wilson incurred at North Idaho Family
 25 Physicians on 12/23/08 or any other time when it wasn't

1 A Yes.
 2 MR. KELSO: I'd like to review his notes that he's
 3 just looked at. 
 4 REFEREE DONOHUE: Okay. Shall we take a break?
 5 MR. KELSO: Yes.
 6 (There was a recess.)
 7 REFEREE DONOHUE: We're back on the record.
 8 Mr. Whatley, you're still under oath.
 9 MR. KELSO: I need to get a copy of these two pages
 10 made.
 11 REFEREE DONOHUE: Go ahead.
 12 Not quite back on the record.
 13 (Discussion off the record.)
 14 MR. KELSO: Can we have that marked?
 15 REFEREE DONOHUE: What are we at? R? R.
 16 MR. KELSO: Q Showing you a copy of what's been
 17 marked for identification as Exhibit R --
 18 A Okay.
 19 Q -- Is that a copy of your notes --
 20 A Is that just two pages?
 21 Q -- that you're referring to?
 22 A Yes.
 23 MR. KELSO: Move to admit R.
 24 REFEREE DONOHUE: R? Any objection?
 25 MR. GRAHAM: No.

EXH A-2

1 REFEREE DONOHUE: No objection. R comes in.
 2 MR. GRAHAM: I have an objection. Yes.
 3 REFEREE DONOHUE: Oh, you do have an objection.
 4 Go ahead then.
 5 The objection is sustained because this isn't
 6 part of the Rule 10 and it's produced late. So it can't
 7 come in. You can use it for examining the witness. But
 8 it doesn't come in.
 9 MR. KELSO: Okay.
 10 Q I just want to go through -- now, these
 11 indicate Chris Ott's notes. Are those your working
 12 notes also then?
 13 A These are Chris's and actually my notes that
 14 I -- we dictated together in the conversations that we
 15 had with Mr. Wilson and each other.
 16 Q And is what you're referring to today during
 17 your testimony; is that correct?
 18 A Part of it, yes.
 19 Q When was this prepared?
 20 A It had to have been before January of last
 21 year. Chris left the firm January of 2010.
 22 Q Now, this -- your notes, they -- isn't it true
 23 that they indicate on 12/23/08 Infnisource received an
 24 incident report from Beehive Homes on Justin Wilson's
 25 injury, date of -- DOI 12/20/08; is that correct?

1 at the end of January 2010.
 2 Q Okay. It indicates, "Justin was terminated
 3 from Beehive Homes on 1/5/09 for multiple attendance
 4 issues not relating to his injury"; is that correct?
 5 A That's what it indicates, correct.
 6 Q Doesn't say anything in there about lack of a
 7 certificate, does it?
 8 A Not in this note, no.
 9 Q This notes that you're referring to contains no
 10 recordation or statement or reference to Penny Vandaveer
 11 stating that Justin's accident didn't happen on December
 12 20th, 2008, does it?
 13 A It does not.
 14 MR. KELSO: That's all I've got.
 15 REFEREE DONOHUE: I have three or four details that
 16 I need to be clear on --
 17 THE WITNESS: Sure.
 18 REFEREE DONOHUE: -- to a greater or lesser extent,
 19 Essentially your company replaced PayCheck
 20 Connection in November of '08.
 21 THE WITNESS: Correct.
 22 REFEREE DONOHUE: The services that you provide
 23 Beehive Homes are related to personnel and payroll.
 24 THE WITNESS: Human resource support, yes.
 25 REFEREE DONOHUE: Okay. Is every person employed at

1 A That is correct.
 2 Q And isn't it correct that it states "Justin
 3 injured his right shoulder while he was lifting a
 4 resident from his wheelchair"; is that correct?
 5 MR. GRAHAM: The document speaks for itself.
 6 REFEREE DONOHUE: It can't. It's not an exhibit.
 7 MR. KELSO: If you want to stipulate --
 8 MR. GRAHAM: That's fine.
 9 MR. KELSO: Okay.
 10 THE WITNESS: That is correct.
 11 MR. KELSO: Q It states, does it not, that
 12 "Resident's legs went out, causing Justin's right
 13 shoulder to be tweaked"?
 14 A That is correct.
 15 Q Okay. And then "Justin went to North Idaho
 16 Family Physicians on 12/23/08 for evaluation"; is that
 17 correct?
 18 A That is correct.
 19 Q "And he was released to return to work
 20 effective 12/23/08 with some restrictions and referred
 21 for physical therapy"; correct?
 22 A Correct.
 23 Q This report that was prepared prior to January
 24 of '10 --
 25 A It could have been January of 2010. She left

1 Beehive Homes an ISHR employee?
 2 THE WITNESS: Not now.
 3 REFEREE DONOHUE: Were they in December of '08?
 4 THE WITNESS: Yes.
 5 REFEREE DONOHUE: Mr. Gary Ghramm here is not an
 6 ISHR employee, is he? Or is he?
 7 THE WITNESS: Yes, he is.
 8 REFEREE DONOHUE: He is. This Misty Roop then also
 9 is.
 10 THE WITNESS: She was, yes.
 11 REFEREE DONOHUE: At that time.
 12 THE WITNESS: Yes.
 13 REFEREE DONOHUE: When you took over, for lack of a
 14 better word, for PayCheck Connection, did ISHR inquire
 15 about the employee history for each employee before they
 16 had them sign the document that made them an employee?
 17 THE WITNESS: No, we did not.
 18 REFEREE DONOHUE: If an employee had been formerly
 19 classified by PayCheck Connection or Beehive as a
 20 full-time employee, was it within ISHR's discretion to
 21 redesignate them as a part-time employee?
 22 THE WITNESS: No. Our designation is solely based
 23 on the information that we receive for new hire
 24 documents.
 25 REFEREE DONOHUE: So the information you have about



1 Mr. Wilson being a part-time employee is based only
 2 after the date that he signed the contract that is
 3 Exhibit P.
 4 THE WITNESS: P. Yes.
 5 REFEREE DONOHUE: So whether he was a full-time
 6 employee before, the fact that he was in jail for a
 7 couple weeks means that his hours were less, means that
 8 you designated him a part-time employee?
 9 THE WITNESS: No. We did not designate him that.
 10 He was designated that on his documentation that was
 11 submitted to us.
 12 REFEREE DONOHUE: Okay. So you -- so it was then
 13 relying upon the employee history. Beehive Homes told
 14 you he was part-time, or PayCheck Connection, or
 15 somebody did.
 16 THE WITNESS: Yes. When the -- we have -- would you
 17 like me to explain?
 18 REFEREE DONOHUE: Please. Yes.
 19 THE WITNESS: When we sign a new client, all of the
 20 documentation -- we have the new hire documentation
 21 which specifically indicates whether or not -- what
 22 their wage is, what their job classification is, what
 23 their -- whether they're part-time or full-time, with
 24 benefits, without benefits, things like that. He was
 25 designated as a part-time employee without benefits.

1 for one second.
 2 REFEREE DONOHUE: Sure.
 3 (There was a recess.)
 4 MR. GRAHAM: I guess maybe mark that as --
 5 REFEREE DONOHUE: S.
 6 MR. GRAHAM: We move for admission of Defendants'
 7 Exhibit 8.
 8 REFEREE DONOHUE: Objection?
 9 MR. KELSO: Well, I almost feel compelled.
 10 REFEREE DONOHUE: Yes. Sustained. Because it
 11 doesn't meet with our Rule 10 compliance.
 12 It wasn't submitted to you in the Rule 10
 13 compliance, was it?
 14 MR. KELSO: No. It also exceeds the scope of cross.
 15 REFEREE DONOHUE: No, I don't think it does.
 16 But in any case, it's excluded because it
 17 wasn't part of the Rule 10 submission.
 18 MR. GRAHAM: Okay. You know, that's fine. No
 19 redirect.
 20 REFEREE DONOHUE: None?
 21 MR. GRAHAM: No.
 22 REFEREE DONOHUE: Okay. Next witness.
 23 MR. GRAHAM: We have to go grab them.
 24 REFEREE DONOHUE: Please.
 25 ///

1 REFEREE DONOHUE: Is it the intention of Beehive and
 2 ISHR then to make everything the same for the new
 3 employee as it was before as to pay and benefits and
 4 classification and everything so it's essentially a
 5 seamless changeover?
 6 THE WITNESS: It's not always that clear.
 7 REFEREE DONOHUE: Okay. As it applies to
 8 Mr. Wilson, was there anything that was not seamless?
 9 THE WITNESS: I don't -- I don't know. I don't know
 10 what his situation was prior to us.
 11 REFEREE DONOHUE: Now, I'm not sure I heard you
 12 correctly. Did you say that you've never had a work
 13 comp claim before this one?
 14 THE WITNESS: We've never had one that we've had to
 15 deal with like this. All of our clients have always
 16 been covered.
 17 REFEREE DONOHUE: You have other Idaho clients then,
 18 I take it.
 19 THE WITNESS: We do.
 20 REFEREE DONOHUE: And do each of them get their own
 21 work comp insurance?
 22 THE WITNESS: Yes, they do.
 23 REFEREE DONOHUE: That's the details I needed.
 24 Redirect?
 25 MR. GRAHAM: Yes. We can take just a brief break

1 PENNY LEE VANDAVEER,
 2 having been first duly sworn, was
 3 examined and testified as follows:
 4
 5 DIRECT EXAMINATION
 6 BY MR. GRAHAM:
 7 Q Good afternoon.
 8 Could you please state your full name for the
 9 record.
 10 A Penny Lee Vandaveer.
 11 Q And, Ms. Vandaveer, were you employed at the
 12 Beehive Homes assisted-care facility in late 2008/early
 13 2009?
 14 A Yes.
 15 Q You're no longer employed there; correct?
 16 A I have gone back as of a week ago just to help
 17 with certain things. And that's how -- well, they've
 18 always known where I worked. I work with -- at Legacy
 19 with other people from the same church. And they had
 20 been at Legacy.
 21 Q When did you leave more formal employment with
 22 them? Was it in 2009?
 23 A Beehive?
 24 Q Yes.
 25 A Yes.

Exh A - 4

STARR KELSO
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Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
)
 Employer,)
 and,)
)
 STATE INSURANCE FUND,)
)
)
 Surety,)
 Defendants.)

**I.C. NO. 04-525439
04-526113**

**RULE 10 COMPLIANCE
AND NOTICE OF SERVICE**

COMES NOW, Claimant and pursuant to Rule 10 submits this Rule 10 Disclosure.

WITNESSES:

- 1. Claimant
- 2. Dan Brownell
- 3. The deposition of the physician providing Claimant's impairment rating for each of his knees will be taken by post hearing deposition. The rating evaluation will take place prior to the date of the hearing.

EXHIBITS:

Note: These medical records have already been provided to Defendants. A copy will be provided at the hearing to Defendants and the Referee in the following listed order.

- 1. After Hours Care
- 2. Kootenai Medical Center

1 RULE 10 COMPLIANCE AND NOTICE OF SERVICE

Ex B-1

3. William Sims, M.D.

4. Pinnacle Physical Therapy

DATED this 26th day of August, 2011.

Starr Kelso, Attorney for Mr. Fairchild

CERTIFICATE OF SERVICE: I certify that a copy was faxed to H. James Magnuson, attorney for Defendants on August 26, 2011, at 666-1700.

Starr Kelso

2 RULE 10 COMPLIANCE AND NOTICE OF SERVICE

Exh B-2

been not be done by the date of these answers due to the expense, Claimant's lack of money to pay for one, and the belief that the matter should settle.

INTERROGATORY NO. 12: State whether you have ever been evaluated by, or received training or job placement assistance through any type of vocational rehabilitation program. If so, state when the same occurred, the jurisdiction in which you obtained said training and job placement assistance, and the nature of courses pursued or assistance received under each of said programs.

ANSWER: Dan Brownell is performing a job placement and labor market survey based upon the functional capacities evaluation.

INTERROGATORY NO. 13: Please state the names, addresses, and telephone numbers of all witnesses you intend to call at the hearing of the cause, and with respect to each witnesses so identified, please state the subject matter and general nature of the facts to which he or she is expected to testify.

ANSWER: The physician providing the impairment rating.

INTERROGATORY NO. 14: Have you, your attorney, or any person, firm, or corporation acting on your behalf, consulted or engaged any experts in connection with litigation? If so, please state their names and addresses, and for each, please state the following: his or her qualifications; the subject matter on which he or she is expected to testify; and the substance of the facts, conclusions, and opinions to which he or she is expected to testify

(*)

ANSWER: The information regarding the physician providing the impairment rating will be forwarded once the exam is completed.

INTERROGATORY NO. 15: Please identify and describe each exhibit which you intend to introduce or utilize at the time of the trial of the above action.

(*)

ANSWER: At the present time it is anticipated that the physician will not prepare a report and instead testify as to his impairment ratings and the basis therefore by post hearing deposition.

2 SUPPLEMENTAL RESPONSES TO INTERROGATORIES

Exh C

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRENCE FAIRCHILD,)
)
 Claimant,)
)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
)
 _____)

IC 2004-526113

INTERLOCUTORY RULING
ON EVIDENTIARY ISSUES

FILED

NOV 15 2011

INDUSTRIAL COMMISSION

A hearing in the above-entitled matter was conducted in Coeur d' Alene on September 7, 2011. Before, at, and after the hearing, Defendants objected to any testimony or report of Dan Brownell, and testimony and report of Dr. McNulty regarding a PPI rating for Claimant on the ground of late disclosure. Due to unforeseen circumstances, the hearing had to be adjourned before any witnesses were called.

On September 2, 2011, Defendants filed a Motion in Limine seeking to exclude any evidence regarding Claimant's PPI or PPD as being untimely pursuant to JRP 10, or not being fully disclosed in discovery responses pursuant to IRCP 26(e)(1). Claimant did not respond. Defendants renewed their objections at hearing. On September 28, 2011, Defendants filed their Supplemental Authority Regarding Pending Evidentiary Motions. On October 18, 2011, Claimant filed Claimant's Response to Defendant's Supplemental Authority Brief Regarding Evidentiary Issues.

The hearing had to be adjourned due to unforeseeable circumstances, thus rendering any late disclosure issues moot. Claimant is not "gaming the system" here. Any prejudice that may have befallen Defendants is cured in that they now have time to prepare for the alleged late disclosure of the proposed evidence.

Based on the foregoing, Defendant's Motion in Limine is **DENIED**.

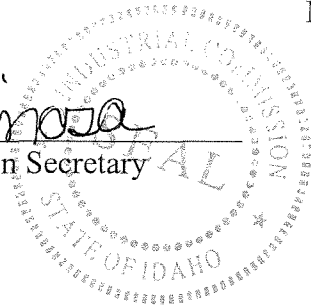
INDUSTRIAL COMMISSION



Michael E. Powers, Referee

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2011, a true and correct copy of the foregoing **INTERLOCUTORY RULING ON EVIDENTIARY ISSUES** was served by regular United States mail upon each of the following persons:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

H. JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816



ge

INTERLOCUTORY RULING ON EVIDENTIARY ISSUES - 2

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P.O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Fax: (208) 666-1700
ISB #02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I.C. NO. 04-526113

**MOTION TO COMPEL OR IN THE
ALTERNATIVE FOR ORDER
PROHIBITING TESTIMONY OR
EVIDENCE FROM DAN BROWNELL**

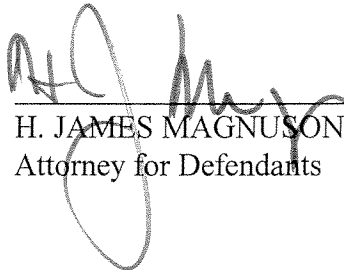
2011 DEC 23 A 11:27
RECEIVED
INDUSTRIAL COMMISSION

COMES NOW, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE
FUND, Surety, Defendants herein, by and through H. James Magnuson, their attorney of record,
and move the Industrial Commission for an order compelling Claimant to interview with Doug
Crum, Defendants' vocational consultant, at a reasonable time and place.

In the alternative, Defendants move for an order prohibiting testimony or evidence from Dan Brownell, Claimant's vocational consultant, or any other vocational consultant/expert as a part of Claimant's case.

This motion is supported by the affidavit of H. James Magnuson and memorandum in support filed contemporaneously herewith.

DATED this 21 day of December, 2011.

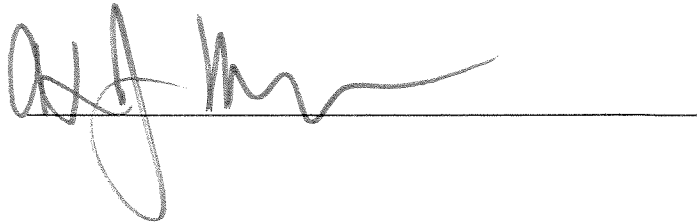


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was sent by first-class, prepaid mail on the 21 day of December, 2011, to:

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



H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P.O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Fax: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I.C. NO. 04-526113

**AFFIDAVIT OF H. JAMES MAGNUSON
IN SUPPORT OF MOTION TO
COMPEL OR PROHIBIT TESTIMONY
OR EVIDENCE FROM DAN
BROWNELL**

RECEIVED
INDUSTRIAL COMMISSION
2011 DEC 23 A 11:27

STATE OF IDAHO)
 :SS.
County of Kootenai)

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

1. I am attorney for Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, in connection with this matter. I make this Affidavit on my personal knowledge and belief.

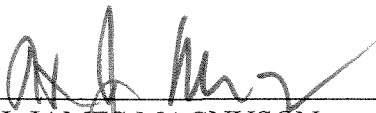
2. As a part of this litigation, Claimant has indicated that he will call Dan Brownell as a vocational expert. Thereafter Defendants retained vocational consultant Doug Crum for expert analysis and testimony.

3. Doug Crum requested to interview Claimant. Claimant has refused to meet with Doug Crum unless the Commission enters an order requiring him to do so. See **Exhibit A** hereto, correspondence to the undersigned from Starr Kelso, Claimant's attorney, of December 16, 2011.

4. Defendants are entitled to prepare an adequate defense for an issue raised by Claimant. Claimant claims he has impairment, which Defendants dispute. Claimant is using Dan Brownell as a vocational expert and is anticipated to call Dan Brownell for a vocational opinion. Defendants are entitled to rebut such testimony with vocational expert testimony with adequate factual foundation, which includes an interview of Claimant.

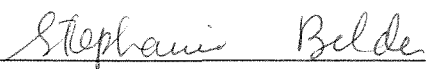
FURTHER AFFIANT SAYETH NAUGHT.

DATED this 21 day of December, 2011.



H. JAMES MAGNUSON
Attorney for Defendants

SUBSCRIBED AND SWORN to before me this 21st day of December, 2011.



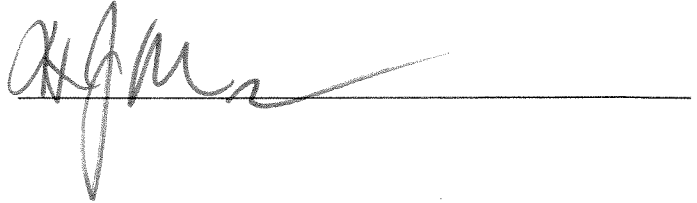
Notary Public for Idaho
Residing at Coeur d'Alene
Commission Expires: 3/8/2016



CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was sent by first-class, prepaid mail on the 21 day of December, 2011, to:

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



KELSO LAW OFFICE

1621 N. THIRD STREET, SUITE 600
POST OFFICE BOX 1312
COEUR D' ALENE, ID 83816-1312
Telephone :(208)765-3260
Facsimile :(208)664-6261
E-Mail : starr.kelso@frontier.com

STARR KELSO
Attorney at Law

≈

"There are evil men, and they are to be feared. However, the greatest evil we all face
today is the indifference of good men!"

December 16, 2011

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

RE: Terence Fairchild v. Kentucky Fried Chicken/SIF
I.C. No. 04-526113

Dear Jim:

I received a call from Doug Crum requesting to interview Terry. The pending hearing is the continuation of the earlier hearing that was continued to my personal health condition, despite the protestations of Defendants. During the course of the hearing, and prior to the continuance, the Defendants represented that they would not be presenting testimony from a vocational rehabilitation expert.

Terry will not voluntarily meet with Mr. Crum unless an order from Referee Powers is entered requiring him to do so. If Referee Powers enters an order the interview should be by telephone conference call in which Dan Brownell is able to listen in on. If that is not suitable for Mr. Crum's purposes the interview will have to be held at my office and Terry's travel expenses from Tacoma will have to be paid and he will have to be reimbursed for lost wages as a result of the travel time. The payment of travel expenses and lost wages will have to be received two weeks in advance of the interview. If that is not acceptable the interview will have to take place in Tacoma at a reasonably convenient time and location for both Terry and Dan Brownell. Also, in that case, the Defendants will have to advance the travel costs, and professional fee of Dan Brownell to attend the interview, two weeks in advance of the interview.

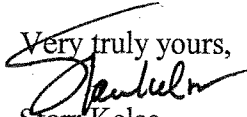
Very truly yours,

Starr Kelso
Attorney at Law

EXHIBIT A

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P.O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Fax: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I.C. NO. 04-526113

**MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL OR PROHIBIT
TESTIMONY OR EVIDENCE FROM
DAN BROWNELL**

RECEIVED
INDUSTRIAL COMMISSION
2011 DEC 23 A 11: 27

COMES NOW, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, Defendants herein, by and through H. James Magnuson, their attorney of record, and submit their Memorandum in Support of Motion to Compel or Prohibit Testimony or Evidence from Dan Brownell.

Defendants filed a Motion to Compel seeking alternatively an order compelling Claimant to meet with and participate in an interview with Doug Crum, Defendants' vocational consultant or an order prohibiting testimony or evidence from Dan Brownell. Claimant has refused an interview unless the Commission enters an order requiring him to do so. In addition, Claimant

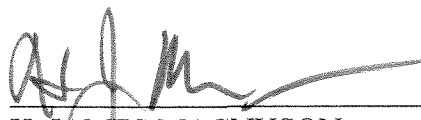
has requested expenses, wages, travel costs and the professional fee of Claimant's vocational expert to attend the interview. There is no statutory authority for what Claimant is requesting. *See*, Affidavit of H. James Magnuson.

Defendants have a right to develop and present their case. The Industrial Commission has addressed this issue before. In *Lunde v. Litehouse Foods, Inc., et al.*, IC 2003-007916, 2006-011474 and 2007-001737, a copy of which is attached, the Commission issued an order requiring Claimant to attend and participate in a face-to-face vocational interview at a mutually agreeable time to the parties but not later than 30 days from the Commission's order. Further, Claimant's counsel's attendance at the interview was allowed but not chargeable to the Defendants. *Lunde* is authority for Defendants' motion. Of note, the Commission wrote:

Loathe as the Referee is to issue an order compelling Claimant to meet with Mr. Jordan, she is equally loathe to allow Claimant's counsel to dictate how the Defendants may develop and present their case. A workers' compensation adjudicatory proceeding is not a buffet, where a claimant gets to pick and choose among a *smorgasbord* of medical and vocational experts, refusing those not to her taste, and choosing only the ones who suit her predilections.

The corollary to this principle is that if Defendants' vocational expert cannot interview Claimant, Claimant cannot offer vocational testimony from his vocational expert.

DATED this 21 day of December, 2011.

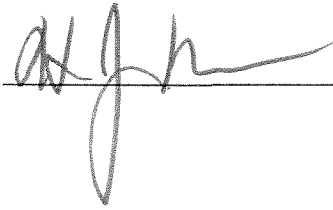


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was sent by first-class, prepaid mail on the 21 day of December, 2011, to:

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



RECEIVED
NOV 03 2009

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO
MOFFATT, THOMAS, BARRETT
ROCK & FIELDS, CHTD.

VALERICA N. LUNDE,)
)
 Claimant,)
)
 v.)
)
 LITEHOUSE FOODS, INC.,)
)
 Employer,)
)
 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY)
)
 Surety,)
 Defendants.)

IC 2003-007916
 2006-011474
 2007-001737

ORDER GRANTING
 MOTION TO COMPEL

FILED
 NOV - 2 2009
 INDUSTRIAL COMMISSION

On October 8, 2009, Defendants filed their Motion to Compel (Motion), together with an Affidavit and a Memorandum in Support. The gravamen of Defendants' Motion centers on a dispute concerning Defendants' vocational expert. During the course of preparing this matter for hearing, Defendants retained the services of William C. Jordan, a vocational rehabilitation expert. In late August 2009, Mr. Jordan made several attempts to contact Claimant's counsel via telephone to set up an interview with Claimant, but without success. Mr. Jordan then wrote a letter to Claimant's counsel seeking to schedule a vocational interview. In early September 2009, counsel for Claimant advised Defendants *via* letter that due to a previous incident, Mr. Jordan was not welcome in Counsel's office, and Counsel would not permit Mr. Jordan to interview any of Counsel's clients for purposes of conducting a vocational assessment without an order from the Industrial Commission. The letter further stated that in the event the Commission

68

issued such an order, Mr. Jordan would be assessed Counsel's hourly fee for attending the vocational interview.

In his Motion and supporting documentation, Counsel for Defendants analogized the conduct of a vocational assessment to the conduct of an IME examination pursuant to Idaho Code § 72-433. Defendants argued that the purposes of Idaho Code § 72-433 were consonant with the purposes of state and federal rules of civil procedure governing independent medical examinations and which some federal courts had extended to the conduct of independent vocational assessments. Counsel also cited to the decision of Referee Robert D. Barclay in the matter of *Randell v. Nestle Brands Foodservice Co., et. al.*, IC 92-797685, 98-010193 (Idaho Industrial Commission, December 6, 2001) for the proposition that a defense vocational assessment was a proper method of discovery under the Commission's rules.

Defendants asked the Commission to order Claimant to participate in an interview with Mr. Jordan for purposes of conducting a vocational assessment. Defendants further asserted that Claimant's failure to participate in the vocational assessment as required by a Commission order could lead to sanctions pursuant to Rule 16, J.R.P., including a suspension of benefits, and a stay in the proceedings. Finally, Defendants ask the Commission to exclude the testimony of Claimant's vocational expert at hearing if Defendants are unable to obtain relevant and probative vocational evidence because of Claimant's refusal to participate.

Claimant filed her Response to Motion to Compel (Response) on October 26, 2009. Claimant averred that she had responded to written interrogatories, and had appeared and testified at a deposition both of which offered an opportunity for Defendants to seek vocational information, but that no questions eliciting vocational information were asked. Defendants ^{clarified} further argued that there is no statute or rule in the Idaho workers' compensation scheme that

authorizes the Commission to order a Claimant to participate in a vocational assessment. In fact, argues Claimant, a vocational assessment is merely an attempt to conduct discovery regarding the Claimant's case via a means not authorized by the statute and rules. Claimant concludes by noting:

. . . Claimant has not refused to be interviewed by ANY vocational expert of Defendants. The refusal is ONLY applicable to Mr. Jordan. If the Defendants will do one of the following [sic] an interview with Claimant will be permitted, as a courtesy and not because it is required, even though interrogatories have already been submitted and answered and even though Claimant's deposition has already been taken.

1. Defendants agree to pay the regular hourly rate of Claimant's counsel for the time that will be spent sitting in on the interview between Mr. Jordan and Claimant; OR
2. Schedule the interview of Claimant with a different vocational expert witness. In such case there will be no fee charged and Counsel may or may not be present during the full extent of the interview.

Response, pp. 3-4 (emphasis in original.)

The Referee heard argument on the motion during a telephone conference on October 30, 2009. Both parties had the opportunity to comment on or add to the arguments and citations submitted in the pleadings.

In reaching her decision on the issue before her, the Referee makes the following observations:

1. Claimant's reluctance to participate in a vocational assessment rests on two entirely different bases. The over-arching basis is a strictly legal one: There is no statute or rule that requires a claimant to participate in a vocational assessment, which at bottom constitutes nothing other than an attempt to discover information by the use of a method not permitted by the statutes or rules. The corollary of this argument is that absent a statutory provision requiring a Claimant to participate in a vocational assessment, the Commission lacks authority to order

ORDER GRANTING MOTION TO COMPEL - 3

participation. The second basis of Claimant's reluctance is an on-going animosity between Claimant's counsel and Mr. Jordan.

2. The Claimant's stated willingness to participate in a vocational assessment without restrictions and at no cost with *any* vocational rehabilitation expert *other than Mr. Jordan*, suggests to the Referee that it is the personal enmity between Claimant's counsel and Mr. Jordan that brings us to this pass.

3. As the Referee advised the parties during the telephone hearing, she is loathe to have to issue an order compelling Claimant to participate in a face-to-face interview with *any* vocational expert. Defendants are entitled to prepare a defense, and in matters where disability is an issue, both parties often retain vocational experts to prepare an analysis and opinion on the disability issue. Parties are fully cognizant that this vocational evidence will be offered into evidence, and be considered by the Referee in making findings and conclusions on the disability issue. Workers' compensation practitioners, whether they work primarily for claimants or defendants, have, for many years, worked together within the existing statutory and regulatory scheme to allow vocational experts retained by the defense an opportunity to meet directly with a claimant, with or without claimant's counsel in attendance.

4. Loathe as the Referee is to issue an order compelling Claimant to meet with Mr. Jordan, she is equally loathe to allow Claimant's counsel to dictate how the Defendants may develop and present their case. A workers' compensation adjudicatory proceeding is not a buffet, where a claimant gets to pick and choose among a *smorgasbord* of medical and vocational experts, refusing those not to her taste, and choosing only the ones who suit her predilections.

The Referee, having had an opportunity to study the pleadings, memoranda, and affidavit, and having listened to the arguments of the parties, and having reviewed the relevant case law, statutes, and rules, enters the following Order:

1. Claimant shall attend and participate fully in a face-to-face vocational interview with Mr. Jordan at a time and place mutually agreeable to the parties, but not later than thirty days from the date of this Order;

2. Claimant's counsel may choose whether or not to attend the interview. If Counsel feels that his presence is necessary to protect his client's interests, his attendance shall be considered a part of his duty of representing Claimant, and shall not be chargeable to Defendants.

DATED this 4 day of November, 2009.

INDUSTRIAL COMMISSION


Rinda Just, Referee

ATTEST:



Assistant Commission Secretary

ORDER GRANTING MOTION TO COMPEL - 5

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of November, 2009 a true and correct copy of **ORDER GRANTING MOTION TO COMPEL** was served by regular United States mail upon each of the following persons:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

MARK C PETERSON
MOFFATT, THOMAS ET AL
PO BOX 829
BOISE ID 83701

djb

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 Defendants.)
 _____)

FILED
 JAN 10 9 2012
 INDUSTRIAL COMMISSION
 IC 2004-526113

**ORDER ON MOTION TO COMPEL
 OR IN THE ALTERNATIVE
 FOR ORDER PROHIBITING
 TESTIMONY OR EVIDENCE
 FROM DAN BROWNELL**

On December 23, 2011, Defendants filed a Motion to Compel Or In The Alternative For Order Prohibiting Testimony or Evidence from Dan Brownell (Motion). Claimant has neither responded to Defendants’ motion nor filed a motion for a protective order, so the Referee must rely upon Defendants’ affidavit to determine Claimant’s situation.

Defendants seek an order requiring Claimant to meet with their vocational expert, Doug Crum. Claimant has apparently refused unless Defendants obtain an order requiring him to do so and adhere to certain conditions, including paying Claimant’s way from Tacoma to Coeur d’Alene and back again, pay his lost wages, etc.

Alternatively, Defendants seek an order prohibiting any evidence presented by Claimant’s vocational expert in the event Claimant does not meet and cooperate with Mr. Crum.

Defendants cite an Industrial Commission case, *Lunde v. Litehouse Foods, Inc.* filed

November 2, 2009, in support of their position. While interesting, *Lunde* is readily distinguishable, in that Claimant's counsel disliked the vocational expert involved to such an extent that he would not even let him in his office; however, Claimant's counsel would not object to his client's meeting with another expert. The Referee concluded that Claimant should not be allowed to dictate the direction of the defense, and issued an order requiring the claimant to meet with the defense vocational expert.

It appears that Claimant's reluctance to meet with Mr. Crum centers mainly on finances. While this is a legitimate concern, Defendants' right to prepare their case is also significant, particularly given that Claimant has already retained and met with his own vocational expert, presumably to develop evidence to be used in support of his claims at a hearing.

Notwithstanding many opportunities to order a claimant to meet with a defense vocational expert, this Referee has never done so. Had the legislature intended such orders to issue, it could easily have crafted a statute similar to Idaho Code § 72-433 regarding independent medical evaluations. However, allowing a claimant, for any reason, to rely upon evidence to prove his case, the foundations of which he will not allow Defendants an equal opportunity to investigate and rebut, would work an irreparable injustice.


Therefore, it is hereby ORDERED that:

1. Defendants' motion to compel Claimant to meet with Mr. Crum is DENIED; and
2. Defendants' motion to exclude Claimant's vocational expert evidence is CONDITIONALLY GRANTED, upon satisfaction of the following requirements:

- a. Defendants must tender, in a reasonably timely manner, to Claimant reasonable travel, lodging and per diem expenses related to meeting with Mr. Crum; and
- b. Claimant must then continue to refuse to meet with Mr. Crum.


DATED this 9th day of January, 2012.

INDUSTRIAL COMMISSION


 Michael E. Powers, Referee

ATTEST:


 Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2012, a true and correct copy of the foregoing **ORDER ON MOTION TO COMPEL OR IN THE ALTERNATIVE FOR ORDER PROHIBITING TESTIMONY OR EVIDENCE FROM DAN BROWNELL** was served by regular United States mail upon each of the following persons:

STARR KELSO
 PO BOX 1312
 COEUR D'ALENE ID 83816-1312

H. JAMES MAGNUSON
 PO BOX 2288
 COEUR D'ALENE ID 83816



gc

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRENCE FAIRCHILD,
Claimant

: I.C. No. 2004-526113

vs.

MOTION FOR EQUITABLE
RELIEF REGARDING THE
DEPOSITION OF
DOUGLAS CRUM

KENTUCKY FRIED CHICKEN,
Employer,

:

and

STATE INSURANCE FUND,
Surety,
Defendants.

:

:

INDUSTRIAL COMMISSION
JUN 19 2012
FILED

COMES NOW the Claimant by and through his attorney, Starr Kelso, and respectfully moves the Industrial Commission for equitable relief regarding the deposition of Douglas Crum that was, apparently, taken in the absence of Claimant's counsel due to counsel's illness.

The facts are more fully set forth in the affidavits of Jacob Stewart and Starr Kelso filed herewith. In essence due to counsel's being in the emergency room the evening before, and believed early morning hours of, May 29, 2012, and taking a 'sleeping pill' counsel was not able to attend the Douglas Crum deposition on May 29th. Defendants' counsel was informed of the situation but he apparently proceeded with the deposition despite notice and the absence of Claimant's counsel. Claimant's counsel has not received a copy of a transcript of the testimony of Douglas Crum but Claimant's counsel was informed today that a 'notice of lodging' of Mr. Crum's deposition was received on or about the day counsel was released from the hospital and five days before returning to the office on a limited basis.

1 MOTION FOR EQUITABLE RELIEF REGARDING THE DEPOSITION OF
DOUGLAS CRUM

It is necessary for proper representation of Claimant, and fundamental Due Process principles, that his counsel be present at the deposition of witnesses. This is especially true with regard to witnesses such as Douglas Crum who are retained as expert witnesses to render opinions on behalf of the Defendants.

It is moved that the Commission enter an Order as follows:

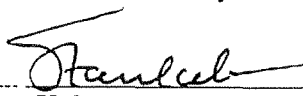
1. Requiring Defendants to provide Claimant's counsel with a copy of the transcript of the deposition of Douglas Crum in this matter;
2. Permitting Claimant's counsel a period of seven (7) work days, from his receipt, to review the deposition of Douglas Crum to determine whether or not he believes that the assertion of post-deposition objections to questions and testimony at the deposition and follow-up questioning of Douglas Crum by him will adequately protect Claimant's interests.
3. If Claimant's counsel determines that post-hearing objections and follow-up questioning will adequately protect Claimant's interests that the post-deposition objections be allowed to be asserted for ruling upon by the Industrial Commission and that the follow-up deposition of Douglas Crum be scheduled and held at a reasonable time either in person in Coeur d'Alene or by telephone conference call.
4. If Claimant's counsel determines that follow-up questioning will not adequately protect Claimant's interests, because of the presence of testimony that should have been, and would have been, objected to if counsel had been present, that Claimant's counsel file a motion in limine seeking to keep the deposition out of evidence. The motion shall be accompanied with a memorandum of law within twenty-one (21) days of his receipt of the deposition that sets forth counsel's objection(s) and basis therefor.
5. If a motion in limine is filed, and granted, that Defendants be permitted to reschedule and retake the deposition of Douglas Crum at a reasonable date and time in Coeur d'Alene so that both Claimant's and Defendants' counsel may be present and participate.
6. If the motion in limine is filed, but not granted, that Claimant be permitted to assert post-deposition objections for ruling on by the Industrial Commission

2 MOTION FOR EQUITABLE RELIEF REGARDING THE DEPOSITION OF
DOUGLAS CRUM

and to schedule the follow-up deposition of Douglas Crum to be scheduled and held at a reasonable time either in person in Coeur d'Alene or by telephone conference call.


- 7. That the court reporter's fees for attendance, transcribing, and copies for any follow-up deposition questioning or a new deposition be paid by Defendants just as would have been the case if Claimant's counsel had been able to attend the deposition as originally scheduled.

DATED this 18th day of June, 2012.



 Starr Kelso

CERTIFICATE OF SERVICE: a copy of the foregoing was faxed on the 18th day of June, 2012, to H. James Magnuson, attorney for Defendants at 666-1700.



 Starr Kelso

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRENCE FAIRCHILD, : I.C. No. 2004-526113
Claimant

vs.

KENTUCKY FRIED CHICKEN, : AFFIDAVIT OF
Employer, : STARR KELSO REGARDING THE
DEPOSITION OF DOUGLAS CRUM

and

STATE INSURANCE FUND, :
Surety,
Defendants.

STATE OF IDAHO)
ss.
County of Kootenai)

FILED
JUN 19 2012
INDUSTRIAL COMMISSION

STARR KELSO, being first duly sworn upon oath hereby states as follows:

1. I am the attorney for the above named Claimant, Terrence Fairchild in this matter;
2. I am over the age of 18 years, competent to testify, and make this statement based upon my personal knowledge;
3. That the deposition of Douglas Crum was scheduled by Defendants in this matter for May 29, 2012 at 11:00 o'clock, a.m.
4. That on May 28, 2012, I became ill and ultimately was seen at the Kootenai Medical Center emergency room late that evening and it is believed early morning of May 29th.

5. At the emergency room I was given various medications including 'sleeping pills'.
6. My son, Matt Kelso, who is an employee of Kelso Law Office was present at the emergency room with me. I thought that I had asked Matt Kelso at the emergency room to contact Defendants' counsel and advise him of the situation and the deposition of Douglas Crum would have to be rescheduled. I was apparently mistaken and only thought I needed to do so.
7. After being released from the emergency room I was directed to schedule an appointment with my family physician and I recall nothing further on May 29th.
8. I underwent further testing over the next few days through June 1, 2012. After a CT scan on June 1st I underwent surgery projected to take 38 minutes that due to complications lasted 2 ½ hours commencing at approximately 5:00 o'clock p.m. The undersigned returned to the office, part time on June 11, 2012.
9. On June 15th while attempting to evaluate what 'critical' matters were scheduled for the 'calendar' for June 18th through June 22nd the undersigned noted the deposition of a Dr. Pace scheduled by Defendants in this matter for June 18th. Upon observing this deposition the undersigned inquired as to what day the Douglas Crum deposition was scheduled. Jacob Stewart advised me that he had contacted Defendants' counsel, as set forth in his affidavit filed herewith, but that he was informed by Defendants' counsel that he was proceeding with the deposition. Matt Kelso also advised me that he told me this occurred but I have no recollection of being so informed.
10. I have not yet been provided a copy of a transcript of the Douglas Crum.
11. Based on over thirty years (30) of practice before the Industrial Commission it is my opinion that it is critical to fundamental principles of Due Process and fair hearings for any party's counsel to be present at all depositions and that this is especially true in the case of testimonial depositions of a party's expert witness retained to provide opinions.

12. If I am provided a copy of the transcript of the deposition of Douglas Crum I will review it to determine whether or not I believe that follow-up questioning will be sufficient to protect Claimant's interests in this matter.

DATED this 18th day of June, 2012.

Starr Kelso
Starr Kelso

SUBSCRIBED AND SWORN to before me the undersigned Notary Public on this 18th day of June, 2012.

Matt Kelso
NOTARY PUBLIC FOR IDAHO
Residing at Coeur d'Alene, Idaho
My Commission expires: 3/28/2015



CERTIFICATE OF SERVICE: a copy of the foregoing was faxed on the 18th day of June, 2012, to H. James Magnuson, attorney for Defendants at 666-1700.

Starr Kelso
Starr Kelso

STARR KELSO
Attorney at Law #2445
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRENCE FAIRCHILD,
Claimant

: I.C. No. 2004-526113

vs.

KENTUCKY FRIED CHICKEN,
Employer,

AFFIDAVIT OF
OF JACOB STEWARD REGARDING
DEPOSITION OF DOUGLAS CRUM

and

STATE INSURANCE FUND,
Surety,
Defendants.

:

FILED
JUN 19 2012

_____:

INDUSTRIAL COMMISSION

STATE OF IDAHO)

ss.

County of Kootenai)

JACOB STEWART, being first duly sworn upon oath hereby states as follows:

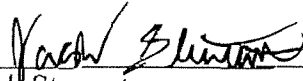
1. I am currently an assistant for Starr Kelso at Kelso Law Office. I was also an assistant on May 29, 2012 for Kelso Law Office.
2. I am over the age of 18 years, competent to testify, and make this statement based upon my personal knowledge;
3. On Tuesday, May 29, 2012, I learned from Matt Kelso who also works at the Kelso Law Office as an advanced workers' compensation specialist that Starr Kelso was ill and recovering from being at the Kootenai Medical Center's emergency room.
4. At approximately 10 o'clock a.m. on May 29th Matt Kelso and I discussed that we had not heard from Starr Kelso that morning. We determined that we

1 AFFIDAVIT OF JACOB STEWART REGARDING DOUGLAS CRUM
DEPOSITION

needed to call H. James Magnuson because the Douglas Crum deposition was scheduled for 11 o'clock a.m. on the 29th.

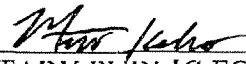
- 5. I telephoned Mr. Magnuson and spoke to him personally. I told him that Starr Kelso had been in the emergency room during the night, he is ill, and he will not be able to make it to the deposition. I apologized for the late notice but informed him that the deposition would need to be cancelled.
- 6. I was told by Mr. Magnuson that he did not want to cancel the Douglas Crum deposition because he had flown up from Boise for it. Mr. Magnuson stated that he would go ahead and question Mr. Crum without Starr and that Starr could question him at a later date.

DATED this 18th day of June, 2012.

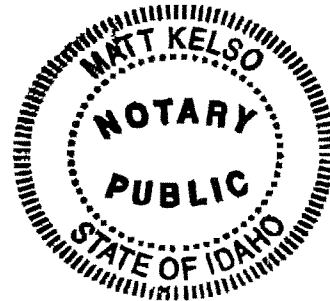


 Jacob Stewart


SUBSCRIBED AND SWORN to before me the undersigned Notary Public on this 18th day of June, 2012.



 NOTARY PUBLIC FOR IDAHO
 Residing at Coeur d'Alene, Idaho
 My Commission expires: 3/28/2014



CERTIFICATE OF SERVICE: a copy of the foregoing was faxed on the 18th day of June, 2012, to H. James Magnuson, attorney for Defendants 666-1700. at P.O. Box 2288, Coeur d'Alene, Idaho 83816 and 666-1700.



 Starr Kelso

2 AFFIDAVIT OF JACOB STEWART REGARDING DOUGLAS CRUM DEPOSITION

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P. O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I. C. No. 04-526113

**OBJECTION TO MOTION FOR
EQUITABLE RELIEF REGARDING
THE DEPOSITION OF DOUGLAS
CRUM**

2012 JUN 22 A 10:57
RECEIVED
INDUSTRIAL COMMISSION

COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and object and reply to Claimant's Motion for Equitable Relief Regarding the Deposition of Douglas Crum. This objection and response is supported by the Affidavit of H. James Magnuson filed contemporaneously herewith.

The deposition of Douglas Crum, Defendants' vocational expert, was noticed by agreement between the parties for May 29, 2012, at 11:00 a.m. Pacific Standard time. Crum traveled to Coeur d'Alene the previous evening at the expense of Defendants to be in Coeur

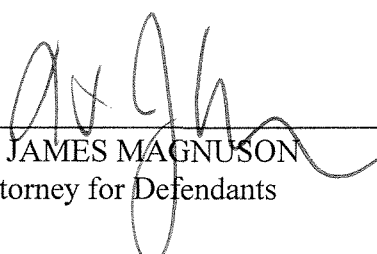
d'Alene to testify as scheduled. The deposition occurred as scheduled and the transcript speaks for itself.

Defendants were made aware less than an hour before the scheduled deposition while Mr. Crum was in Coeur d'Alene to testify that Claimant's attorney, Starr Kelso, had gone to the emergency room the night before. Defendants were unaware as to whether Claimant's counsel would appear for the deposition. This is reflected in the transcript of the deposition. Transcript Deposition of Douglas Crum at 4.

Defendants have no objection if Claimant wants to continue the deposition for cross-examination of Mr. Crum provided it is done so at Claimant's expense, either telephonically or live. *Id.*

It is unclear what the legal basis is for Claimant's "Equitable Relief" motion. The Industrial Commission is a creature of statute. As such, its authority is limited to legal matters and has no equity jurisdiction.

DATED this 20 day of June, 2012.

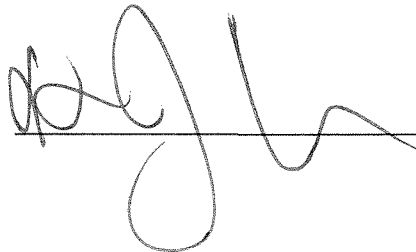


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent by first-class, prepaid mail on the 20 day of June, 2012, to:

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



H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P.O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Fax: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,
Claimant,

vs.

KENTUCKY FRIED CHICKEN,
Employer,

STATE INSURANCE FUND,
Surety,
Defendants.

I.C. NO. 04-526113

AFFIDAVIT OF H. JAMES MAGNUSON

RECEIVED
INDUSTRIAL COMMISSION
2012 JUN 22 A 10:58

STATE OF IDAHO)
):ss.
County of Kootenai)

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

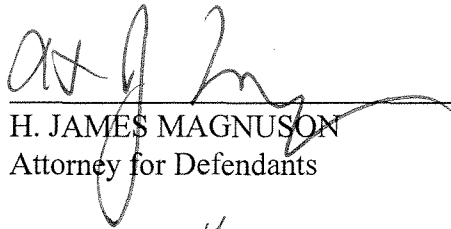
1. I am attorney for the Defendants and have personal knowledge of the facts and circumstances set forth herein.
2. Sometime after 10:00 a.m. on May 29, 2012, I received a call from Jacob, who I had previously met and knew to man the front desk at Starr Kelso's office. Jacob advised me that

Starr Kelso had gone to the emergency room the night before and had not shown up for work. He did not know what the status was as to Starr Kelso. I advise Jacob that Douglas Crum was here for his 11:00 deposition. At that time I was assuming that it would proceed unless something else occurred. At that time, it was not clear that Kelso was not working that day. It was not clear Kelso could not attend the deposition. There was no conversation about cancelling the deposition. Nothing more was heard from Jacob or anyone at Kelso's law office and the deposition proceeded as scheduled.

3. On June 18, 2012, I received correspondence from Starr Kelso requesting a copy of the deposition transcript of Douglas Crum. I transmitted to him a copy on June 20, 2012.

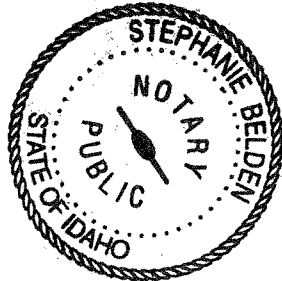
FURTHER AFFIANT SAYETH NAUGHT.

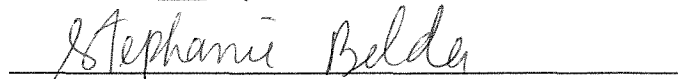
DATED this 20 day of June, 2012.



H. JAMES MAGNUSON
Attorney for Defendants

SUBSCRIBED AND SWORN to before me this 20th day of June, 2012.



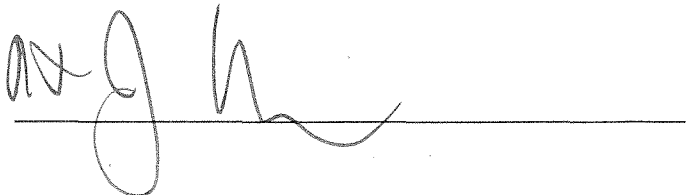


Notary Public for Idaho
Residing at Coeur d'Alene
Commission Expires: 3/8/2016

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was sent by first-class, prepaid mail on the 20 day of June, 2012, to:

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



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

v.

KENTUCKY FRIED CHICKEN,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2004-526113

ORDER ON CLAIMANT'S REQUEST
FOR EQUITABLE RELIEF

FILED
JUL 19 2012
INDUSTRIAL COMMISSION

On June 19, 2012, Claimant filed a motion for equitable relief regarding the deposition of Douglas Crum, because, due to sudden illness, Claimant's counsel was unable to attend said deposition. Defendants proceeded with the deposition in the absence of Claimant's counsel. Claimant requests that the Commission order the following: (1) Defendants should provide Claimant with a copy of the transcript of Mr. Crum's deposition; (2) Claimant should be permitted seven work days to review Mr. Crum's deposition to identify any potential objections to the deposition and whether follow-up questioning of Mr. Crum is necessary to protect Claimant's interest; (3) If Claimant finds post-deposition objections and additional questioning of Mr. Crum necessary, Claimant shall be allowed a follow-up deposition of Mr. Crum in Coeur d'Alene via telephone or in-person; (4) If Claimant's counsel determines that follow-up questioning will not adequately protect Claimant's interests, he will file a motion in limine to exclude the deposition from evidence; (5) Claimant's counsel argues that if his potential motion

in limine is filed and granted, Defendants should reschedule and retake Mr. Crum's deposition with both parties' participation; (6) If Claimant's potential motion in limine is not filed, Claimant asserts the right to object post-hearing for ruling on by the Commission, and to schedule a follow-up deposition of Mr. Crum; and (7) Finally, Claimant requests that Defendants pay for any costs associated with a follow-up deposition.

Claimant attached the affidavit of Jacob Stewart, an assistant to Claimant's counsel, in support of his request to vacate Mr. Crum's deposition. Mr. Stewart states that he learned that Mr. Kelso was ill on the morning of May 29, 2011, and contacted Defense counsel at 10 a.m. with a request to vacate the 11 a.m. deposition with Mr. Crum. Mr. Stewart stated that Defense counsel declined the request to cancel Mr. Crum's deposition because Crum had flown from Boise to attend the matter, and suggested that Claimant's counsel could question Mr. Crum at a later date.

Defense counsel submitted an affidavit substantially confirming the averments of Mr. Stewart, except in one respect. Mr. Magnuson states that there was no discussion of a request to vacate the deposition. Rather, the substance of the discussion was that Mr. Kelso's office was unsure of Mr. Kelso's status or intentions concerning the deposition. After not hearing anything additional from Mr. Stewart or Claimant's counsel, Mr. Magnuson proceeded with the deposition as scheduled.

Defense counsel provided Claimant's counsel with a copy of Mr. Crum's deposition on June 20, 2012. Defense counsel is also agreeable to allowing Mr. Kelso to cross examine Mr. Crum at Claimant's expense.

After reviewing the submissions from the parties, the Commission finds many of Claimant's requests are either moot or not ripe for decision from the Commission. First, Defense

counsel provided Claimant with a copy of Mr. Crum's deposition on June 20, 2012. Claimant has since had more than his requested seven (7) days to formulate his legal strategy regarding objections to the deposition. Claimant has not filed any motions in limine regarding the lodging of Mr. Crum's deposition, and the Commission will not entertain hypothetical motions.

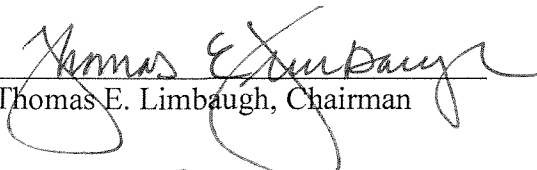
Nothing precludes Claimant's counsel from scheduling an additional deposition with Mr. Crum, if Claimant's counsel feels his absence may have jeopardized his client's interests. The Commission agrees that the cost of any further examination is appropriately borne by Claimant. Although the occurrence of Mr. Kelso's medical emergency was evidently unforeseen, it is equally understandable that Defendants were anxious to depose Mr. Crum after having flown him in from Boise and putting him up for the night. Further the affidavits do not establish that Mr. Magnuson was aware that Mr. Kelso would not be in attendance, until after the deposition commenced. Claimant is entitled to cross-examine Mr. Crum, at his own expense, and to pose any objections he deems appropriate to the direct examination of Mr. Crum by Mr. Magnuson.

Claimant's motion for equitable relief is DENIED.

IT IS SO ORDERED.

DATED this 19th day of July, 2012.

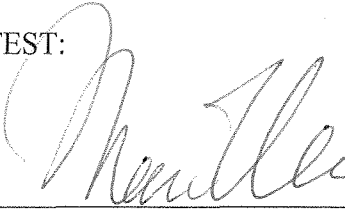
INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R. D. Maynard, Commissioner

ATTEST:



Assistant Commission Secretary



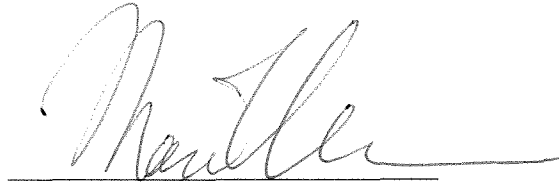
CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 2012 a true and correct copy of **Order on Claimant's Request for Equitable Relief** was served VIA FACSIMILE upon each of the following persons:

STARR KELSO
FAX 208-664-6261

H JAMES MAGNUSON
FAX 208-666-1700

cs-m



STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
 Employer,)
 and,)
)
 STATE INSURANCE FUND,)
)
)
 Surety,)
 Defendants.)

I.C. NO. 2004-526113

**MOTION TO PERMIT FILING
OF REBUTTAL EXHIBIT "L" TO THE
TESTIMONY OF DOUGLAS CRUM
PURSUANT TO RULE 10 (E) (4)**

FILED

JUL 30 2012

INDUSTRIAL COMMISSION

COMES NOW the Claimant and hereby moves the Commission for its Order permitting the filing of rebuttal evidence to the deposition testimony of Douglas Crum pursuant to Rule 14 (E)(4). The evidence sought to be admitted is the attached letter of Claimant's counsel to Defendants' counsel dated April 5, 2012 which is attached hereto as Exhibit "L". It is relevant as a result of the new matter that arose as a result of the Defendants' deposition of Douglas Crum.

The basis of this motion is that when Claimant's counsel was provided a copy of Mr. Crum's report, Defendants' Exhibit 13, it was apparent that Mr. Crum was not aware that Dr. John McNulty had considered the functional capacities evaluation report of Mark Bengtson, MPT. On the day Claimant's counsel's receipt of Defendants' Exhibit 13, Claimant's counsel

wrote to Defendant's counsel and advised him that Dr. McNulty had in fact reviewed and considered the FCE report. Defendant's counsel was advised that Claimant's Exhibits would include a letter to Dr. McNulty that provided a copy of the FCE to him. It is Claimant's Exhibit J. He was also advised that Dr. McNulty's deposition would be taken to clarify his position regarding the FCE evaluation. Claimant's counsel also advised Defendant's counsel in the letter that he would have no objection to Mr. Crum being provided the information regarding Dr. McNulty's position on the FCE physical limitations and Defendants obtaining a supplemental report from Mr. Crum that took Dr. McNulty's position on the FCE into consideration, even after the Rule 10 filing deadline. At his deposition, even though notice of Dr. McNulty's consideration of the FCE had been provided to Defendant's counsel, and Dr. McNulty's deposition had been taken clarifying his position on the FCE, Mr. Crum did not reference Dr. McNulty's position on the FCE and he continued to maintain his earlier position in his report that no physician had commented on Claimant's physical restrictions.

The letter is relevant rebuttal evidence in that it documents notice of Dr. McNulty's position regarding the FCE and it provided Defendants with the opportunity to have Mr. Crum consider it in his analysis. As stated in the letter it is not Claimant's counsel's style to 'wait in ambush' for a witness by withholding information that goes to the heart of the opinion of the witness even though, to some extent, it might be to Claimant's advantage to do so.

The Commission, in making its decision in this matter and considering the differing opinions of Claimant's expert Dan Brownell and Defendant's expert Douglas Crum, should be aware that Dr. McNulty's opinion of Claimant's physical limitations as determined by the FCE was obtained, Defendants were notified of that fact, Defendants were given the opportunity to

2 MOTION TO PERMIT FILING OF REBUTTAL EXHIBIT TO TESTIMONY OF DOUGLAS CRUM

have Mr. Crum consider his report, and that either the information was not passed on to Mr. Crum or he chose to not consider it.

DATED this 30th day of July, 2012.



Starr Kelso
Attorney for Claimant

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2012, a true and correct copy of the foregoing **MOTION** was served by fax upon the following:

II. JAMES MAGNUSON
Attorney at Law
666-1700



Starr Kelso

3 MOTION TO PERMIT FILING OF REBUTTAL EXHIBIT TO TESTIMONY OF DOUGLAS CRUM

KELSO LAW OFFICE

STARR KELSO

Attorney at Law

≈

"There are evil men, and they are to be feared. However, the greatest evil we all face today is the indifference of good men!"

1621 N. THIRD STREET, SUITE 600
POST OFFICE BOX 1312
COEUR D' ALENE, ID 83816-1312
Telephone: (208)765-3260
Facsimile: (208)664-6261
E-Mail: starr.kelso@frontier.com

MATT KELSO
Certified Workers' Compensation Specialist
Advanced Level

April 5, 2012

H. James Magnuson
Attorney at Law
Via Fax: 666-1700

RE: Fairchild v. Kentucky Fried Chicken/SIF
I.C. No. 04-526113
Douglas M Crum Report—April 1, 2012

Dear Jim:

I just received in the mail today, and actually first saw it at a little after 5:00 p.m. today, Mr. Crum's report. I glanced at the front page and the last couple of pages. When I did so I noticed that Doug was apparently not provided a copy of Dr. McNulty's 8-31-2011, report. While frankly I don't recall much from the last hearing, I do recall a comment by Referee Powers (I believe it was with regard to post-hearing depositions but again I am not sure) acknowledging that there were two impairment ratings in the exhibits/record. One would be from Dr. Sims and the other one would be from Dr. McNulty. I also noticed a comment of Doug's contained in his Disability Analysis, page 15 of 16 of his report, that no physician has indicated that the FCE represents Mr. Fairchild's level of permanent function. I had not intended to introduce my letter to Dr. McNulty into evidence but, given this comment by Doug, I am providing a Supplemental Rule 10 and serving notice of the taking of Dr. McNulty's post-hearing deposition.

My reason for identifying these matters is that it is not my style to 'wait in ambush' at hearing or in briefing and raise them. While this letter could result in my client losing an 'advantage' I believe that expert witnesses, to the extent possible, should be able to give their respective opinions based upon all the facts and cross examination should address their respective opinions based on all the facts. I have no objection to you providing this information to Doug and obtaining a supplemental report from him, even after the technical Rule 10 deadline. All that I ask is that if Doug does a supplemental report that I receive a copy of it as soon as it is available.

Very truly yours,

SK
Starr Kelso
Attorney at Law

EXH. "L"

H. JAMES MAGNUSON
Attorney at Law
1250 Northwood Center Court
P. O. Box 2288
Coeur d'Alene, Idaho 83816
Telephone: (208) 666-1596
Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I. C. No. 04-526113

**OBJECTION TO CLAIMANT'S
MOTION TO PERMIT FILING OF
REBUTTAL EXHIBIT "L" TO THE
TESTIMONY OF DOUGLAS CRUM**

RECEIVED
INDUSTRIAL COMMISSION
2012 AUG -6 P 12:09


COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and object to the Motion pursuant to Rule 14(E)(4). This is made on the following grounds:

1. Rule 14(E)(4) does not exist;
2. There is no foundation for the proposed exhibit;
3. The proposed exhibit is hearsay; and

4. The proposed exhibit lacks relevance and any probative value.

Claimant's Motion to Permit Filing of Rebuttal Exhibit "L" should be denied.

DATED this 3 day of August, 2012.

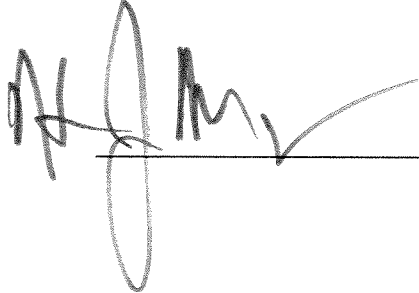


H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent by first-class, prepaid mail on the 3 day of August, 2012, to:

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



STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
 Claimant,)
 v.)
)
 KENTUCKY FRIED CHICKEN,)
)
 Employer,)
 and,)
)
 STATE INSURANCE FUND,)
)
)
 Surety,)
 Defendants.)

I.C. NO. 2004-526113

**RESPONSE TO OBJECTION
TO PERMIT FILING OF
REBUTTAL EXHIBIT "L"**

FILED
AUG -6 2012
INDUSTRIAL COMMISSION

COMES NOW Claimant and responds to Defendants' Objection to Motion to Permit Filing of Rebuttal Exhibit "L".

The heading of the Motion correctly identifies Rule 10 (E) (4), the basis of the motion. The body of the motion contains a typographical error. Rebuttal is addresscd in Rule 10 (E) (4).

The foundational reason for the Exhibit is that Defendants' witness, Mr. Crum, was given the opportunity, before his report was submitted as an Exhibit and before his testimony, to reconsider his report/testimony with the correct information that Dr. McNulty had reviewed the FCE conducted by Mark Bengtson. MPT, and agreed with it in rendering his opinions. In his

deposition, Dr. McNulty agreed with the FCE other than increasing the walking and standing limitations to 75 to 80 percent of an 8 hour day instead of the 50% found by Mr. Bengtson.


As noted in the proposed Exhibit L, and in the Motion, Claimant's counsel did not wish to 'ambush' Mr. Crum's opinion, based upon his erroneous understanding set forth in his report, that no physician had commented on the FCE. This letter documents that Claimant expressly gave Defendants the opportunity to have Mr. Crum consider the fact, contrary to his report, that a physician had commented on the FCE.

The correspondence, Exhibit L, should be permitted as a rebuttal exhibit to Mr. Crum's report and testimony. It documents that a good faith effort was made by Claimant to permit Mr. Crum to have all available information to finalize his report and for any subsequent testimony. Defendants chose to not tell Mr. Crum that, contrary to his written report, Dr. McNulty had in fact commented on the FCE of Claimant or that Mr. Crum chose to disregard the FCE physical restrictions and continue to incorrectly assert that no physician had commented on the FCE.

With regards to Defendants' assertion of 'hearsay' it is noted that the Industrial Commission is not bound by Idaho's civil rules of procedure. It should also be noted that Defendants have not asserted, by affidavit or otherwise, that the proposed rebuttal Exhibit "L" is not accurate, is not true and correct, or that it was not received by Defendants.

Exhibit L should be admitted for the purpose of reflecting that Mr. Crum knew, or should have known, contrary to his statement in his report (Defendants' Exhibit 13), that a physician (Dr. McNulty) did in fact favorably comment on the FCE of Claimant.

DATED this 6th day of August, 2012.



Starr Kelso
Attorney for Claimant

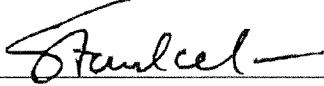
2 RESPONSE TO OBJECTION TO PERMIT FILING OF REBUTTAL EXHIBIT

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August, 2012, a true and correct copy of the foregoing RESPONSE was served by fax upon the following:

II. JAMES MAGNUSON, Attorney

Fax No.: 666-1700



3 RESPONSE TO OBJECTION TO PERMIT FILING OF REBUTTAL EXHIBIT

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

v.

KENTUCKY FRIED CHICKEN,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2004-526113

ORDER DENYING FILING OF
REBUTTAL EXHIBIT "L"

FILED
AUG 21 2012
INDUSTRIAL COMMISSION

On July 30, 2012, Claimant filed a motion to permit rebuttal evidence to the deposition of Douglas Crum under Rule 14(E)(4). Claimant desires to include his counsel's April 5, 2012 letter to Defendants' counsel as proposed Exhibit "L". The proposed exhibit comments on weaknesses in Mr. Crum's report and suggests methods to remedy the situation. Claimant's counsel argues that it is not his style to "wait in ambush" at hearing, and that he wishes to allow Mr. Crum the opportunity to correct his report.

On August 6, 2012, Defendants filed an objection to the filing of the proposed Exhibit L. Defendants argue that (1) Rule 14(E)(4) does not exist; (2) there is no foundation for the proposed exhibit; (3) the proposed exhibit is hearsay; and (4) the proposed exhibit lacks relevance and any probative value.

On August 6, 2012, Claimant filed a response to Defendants' objection. Claimant clarifies that he intended to file his motion under Rule 10 (E)(4), and his earlier citation was a

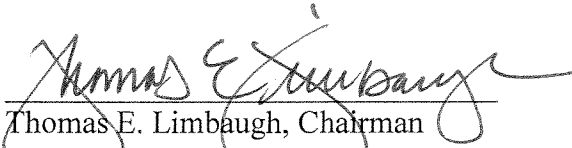
typographical error. Claimant argues that the proposed exhibit shows that Mr. Crum was given the opportunity to reconsider his report and testimony with the correct information. Claimant also contends that proposed Exhibit "L" shows a good faith effort from Claimant to allow Mr. Crum all available evidence.

While the Commission appreciates Claimant's Counsel's efforts to assure that Mr. Crum's opinion is one informed by an accurate foundation, we believe that the proposed Exhibit "L" is largely argument—argument of a sort better incorporated in Claimant's brief. After reviewing the submissions from the parties, the Commission declines to admit the proposed Exhibit "L" into evidence.

Claimant's motion to file Rebuttal Exhibit "L" is DENIED. IT IS SO ORDERED.

DATED this 21st day of August, 2012.

INDUSTRIAL COMMISSION

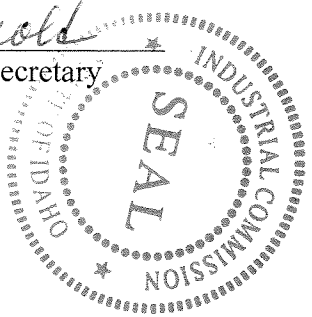

Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R. D. Maynard, Commissioner

ATTEST:


Assistant Commission Secretary



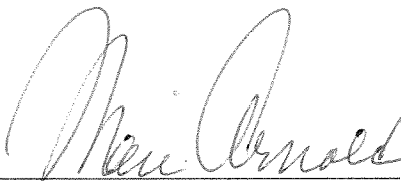
CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2012 a true and correct copy of **ORDER DENYING FILING OF REBUTTAL EXHIBIT "L"** was served VIA FACSIMILE upon each of the following persons:

STARR KELSO
FAX 208-664-6261

H JAMES MAGNUSON
FAX 208-666-1700

cs-m



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

v.

KENTUCKY FRIED CHICKEN,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2004-526113

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

FILED

JUN -7 2013

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene on September 23, 2011. Claimant was present and represented by Starr Kelso of Coeur d'Alene. Defendants were represented by H. James Magnuson, also of Coeur d'Alene. The hearing was continued due to the illness of Claimant's counsel.

On February 29, 2012, the matter was reassigned to the Commissioners, who conducted a hearing on April 17, 2012. Mr. Kelso represented Claimant, who was present. Mr. Magnuson represented Defendants. The parties presented oral and documentary evidence, and post-hearing briefs were submitted.¹ The matter came under advisement on November 5, 2012. It is now ready for decision.

ISSUES

As agreed upon at hearing, the issues to be decided by the Commission are:

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

¹ Defendants attached certain documents to their brief that have not been admitted into the record as evidence. The Commission did not consider these documents in arriving at its findings of fact and conclusions of law.

(PPI) benefits;

2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits; and
3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered a work-related accident on November 13, 2004, when he slipped on ice and struck his knees on a concrete barrier. Claimant alleges that as a result of the accident, he suffered a posterior cruciate ligament (PCL) injury, resulting in 7% whole person PPI, as well as PPD that “substantially” exceeds 28%.

Defendants reply that Claimant suffered no permanent impairment as a result of his industrial accident. Defendants dispute that Claimant suffered a PCL injury and contend that Claimant’s present knee symptoms are likely the result of patellofemoral pain syndrome, which was not caused by the industrial accident. Alternatively, if Claimant is entitled to PPI, he has failed to demonstrate disability in excess of impairment.

EVIDENCE CONSIDERED

The record in the instant case includes the following:

1. The testimony of Claimant taken at the April 17, 2012 hearing;
2. Claimant’s Exhibits A-K, admitted at the April 17, 2012 hearing;
3. Defendants’ Exhibits 1-14, admitted at the April 17, 2012 hearing;
4. The post-hearing deposition testimony of Mark Bengtson, M.P.T.; Dan Brownell; Douglas N. Crum; John M. McNulty, M.D.; and William R. Pace III, M.D.; and
5. The Industrial Commission legal file pertaining to this claim.

All pending objections are overruled.

After having considered the above evidence and the arguments of the parties, the

Commissioners issue the following findings of fact and conclusions of law.

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

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.

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 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

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

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.

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

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.

opine on the extent of Claimant's permanent disability. After interviewing 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

29. The provisions of the Idaho workers' compensation law are to be liberally construed in favor the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which the law serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

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.

31. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). The claimant is required to establish a probable, not merely possible, connection between cause and effect to support his contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-561, 511 P.2d 1334, 1336-1337 (1973). Medical evidence need not take the form of oral opinion testimony in order to be substantial and competent evidence of causation. *Jones*

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.

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

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*,

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 market⁶ 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.

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.

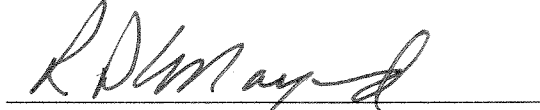
IT IS SO ORDERED.

DATED this 7th day of June, 2013.

INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman





R.D. Maynard, Commissioner



Thomas E. Limbaugh, Commissioner

ATTEST




Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

H JAMES MAGNUSON
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COEUR D'ALENE ID 83816

eb

Kenna Andrews

STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
Claimant,)
v.)
)
KENTUCKY FRIED CHICKEN,)
Employer,)
and,)
)
STATE INSURANCE FUND,)
)
)
Surety,)
Defendants.)

I.C. NO. 2004-526113

CLAIMANT'S MOTION FOR RECONSIDERATION


INDUSTRIAL COMMISSION

JUN 25 2013

FILED

COMES NOW the Claimant Fairchild by and through his attorney, Starr Kelso, and hereby respectfully moves the Commission to reconsider its decision in this matter. This motion is based upon the factual findings and/or legal conclusions with which the Claimant takes issue as fully set forth in the Claimant's Brief in Support of Motion for Reconsideration filed herewith.

DATED this 21st day of June, 2013.



Starr Kelso, Attorney for Claimant Fairchild

1. CLAIMANT'S MOTION FOR RECONSIDERATION

STARR KELSO
Attorney at Law: #2445
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Telephone: (208) 765-3260
Fax: (208) 664-6261

ORIGINAL

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,)
)
Claimant,)
v.)
)
KENTUCKY FRIED CHICKEN,)
Employer,)
and,)
)
STATE INSURANCE FUND,)
)
Surety,)
Defendants.)
_____)


I.C. NO. 2004-526113

CLAIMANT'S MOTION FOR RECONSIDERATION

RECEIVED
INDUSTRIAL COMMISSION
2013 JUN 27 A 11:32

COMES NOW the Claimant Fairchild by and through his attorney, Starr Kelso, and hereby respectfully moves the Commission to reconsider its decision in this matter. This motion is based upon the factual findings and/or legal conclusions with which the Claimant takes issue as fully set forth in the Claimant's Brief in Support of Motion for Reconsideration filed herewith.

DATED this 25th day of June, 2013.


Starr Kelso, Attorney for Claimant Fairchild

CERTIFICATE OF SERVICE: I certify that a copy of the foregoing was mailed, postage prepaid thereon to the Attorney for Defendants on the 28 day of June, 2013, as follow:

H. James Magnuson

Attorney at Law

Via Fax: 666-1700

Starr Kelso
Starr Kelso

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Facsimile: (208) 666-1700
ISB # 02480

Attorney for Defendants

2013 JUL 24 A 9:39
RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Employer,

STATE INSURANCE FUND,

Surety,
Defendants.

I. C. No. 04-526113

**DEFENDANTS' REPLY REGARDING
CLAIMANT'S MOTION FOR
RECONSIDERATION**

COMES NOW, Defendants, KENTUCKY FRIED CHICKEN, Employer, and STATE INSURANCE FUND, Surety, by and through H. James Magnuson, their attorney of record, and reply to Claimant's Motion for Reconsideration.

LEGAL STANDARDS

In *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005), the Supreme Court discussed the standards applicable to motions for reconsideration. It noted that, "any party may move for reconsideration of hearing" of a decision. I.C. §§72-718. The statute permitting a party

to request reconsideration or rehearing does not obligate the Commission to grant such requests. *See, id.* In that sense, the statute functions similarly to I.R.C.P. 11(a)(2)(B) and I.R.C.P. 7(b)(3)(D) which provide for motions for reconsideration without mandating that such requests be granted.

The Supreme Court noted:

It is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented. Although *Curtis* presented a very detailed brief in support of her motion she did not produce any new law or evidence to necessitate a rehearing or reconsideration.

Id. at 388.

On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. *Davison v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code §72-718. *See, Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (*citing Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to reweigh evidence and arguments during the reconsideration simply because the case was not resolved in a party's favor.

CLAIMANT'S POSITION

Claimant's brief is devoted almost entirely to challenging factual findings of the Commission which the Commission found based upon the evidence. Claimant presents nothing new factually or legally. The argument is merely a rehashing of evidence previously presented.

1. FOFCOL at p.17, ¶43 is based upon substantial competent evidence previously considered by the Commission. Claimant disputes the Commission's finding contending Dr. McNulty imposed restrictions. In reading Dr. McNulty's IME of August 31, 2011,

Dr. McNulty states several opinions. Dr. McNulty does not affirmatively state Claimant has restrictions or limitations caused by the work accident. Claimant's Exhibit H. The focus of Dr. McNulty's evaluation was solely impairment. Depo. of McNulty, p. 6, ll. 17-18. Dr. McNulty does recommend strengthening exercises to increase quadriceps strength to enhance stability of the knee. This is the same recommendation of William Sims, M.D., on January 29, 2007. Def. Ex. 5 at 055. A physical therapy recommendation is not a permanent medical restriction or limitation. Doug Crum was correct testifying that from a review of the various physicians' medical records, he found no limitations or restrictions from a vocational perspective that arose out of the work injury. Claimant's treating physician, Dr. Sims, offered none.

2. Claimant rehashes his disability argument. Claimant reargues the weight and credibility of the Mark Bengtson FCE. Claimant ignores the fact that the FCE was a snapshot of what Claimant did that day. Bengtson does not offer an opinion as to the causation of Claimant's conditions. Defendants contend he is not competent to so opine. The Commission considered this evidence as well as Bengtson's finding that Claimant's walking and prolonged ambulation limitation were not permanent and could be improved in physical therapy. FOFCOL, p. 7, ¶15; Claimant Ex. B at 003.

3. Claimant contends the labor market analysis is incorrect. The Commission correctly noted, based upon the fact that Claimant had been working in Vancouver, Washington, for approximately nine months prior to the Commission hearing, that the disability analysis should have utilized the labor market in Vancouver, the Claimant's place of residence at the time of the hearing. *Davaz v. Priest River Glass*, 125 Idaho 333, 870 P.2d 1292 (1994). The Commission considered two vocational opinions. The opinion of Doug Crum is more persuasive as his thorough analysis is based upon assumptions supported by the evidence. The labor market argument is academic as Claimant has no medical restrictions or limitations from the 2004 accident.

4. Claimant presents no new reasons why the Commission finding that the FCE is not substantial competent evidence that Claimant suffered limitations or restrictions as a result of his impairment. Claimant's argument is that there is no evidence that Claimant had any physical limitations to his right knee prior to the accident, therefore the Commission should assume that the findings of the FCE relate to sequella from the 2004 accident. Claimant's argument is not

logical. Proof of the absence of a condition preexisting an incident is not proof an incident caused a condition. Such rationale is speculative and without logical basis. Claimant's burden is different, as he has an affirmative burden to prove disability in excess of impairment. The burden of establishing permanent disability is upon claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

5. Claimant presents nothing new regarding Claimant's credibility or the evidentiary value thereof. The Commission thoroughly reviewed Claimant's hearing testimony, and from two prehearing depositions. The Commission had an opportunity to observe Claimant. Its determination as to Claimant's credibility is based upon the totality of the evidence and is well-supported.

ARGUMENT

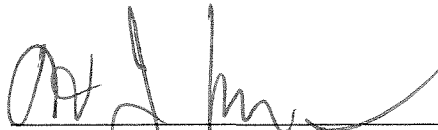
The Commission reviewed the evidence, found facts supported by substantial competent evidence and made conclusions of law based upon the facts. The issues for litigation were vetted in the hearing briefs filed by the parties. Claimant has presented nothing new for reconsideration. Claimant's argument is an attempt at a second bite of the apple, which is not the function of a motion for reconsideration.

CONCLUSION

The Commission considered the evidence. Its Findings of Fact, Conclusions of Law and Order are supported by the evidence. Claimant has proffered nothing for reconsideration. Claimant's motion for reconsideration should be denied.

WHEREFORE, Defendants pray that the Motion for Reconsideration be denied.

DATED this 22 day of July, 2013.



H. JAMES MAGNUSON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent by first-class, prepaid mail on the 23 of July, 2013, to:

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

S. Belde

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant,

v.

KENTUCKY FRIED CHICKEN,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2004-526113

ORDER DENYING
RECONSIDERATION

FILED

MAY 12 2014

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's June 7, 2013 decision in the above-captioned case. In the decision, the Commission found that 1) Claimant suffered a partial posterior cruciate ligament (PCL) injury as a result of his industrial accident; 2) Claimant is entitled to 3% whole person permanent partial impairment (PPI); and 3) Claimant failed to prove that he is entitled to disability in excess of impairment. Claimant asks for reconsideration on the issue of disability. He argues that the Commission's conclusion was based on a flawed vocational opinion by Douglas Crum. Claimant also disputes the Commission's finding on his credibility.

Defendants reply that the Commission's findings and conclusions are well-supported by the record, and that Claimant is essentially rehashing arguments that have already been made. Defendants request that the motion be denied.

A decision of the Commission, in the absence of fraud, shall be final and conclusive as to

all matters adjudicated, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must “present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented.” *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because the case was not resolved in the party’s favor.

On reconsideration, the Commission will examine the evidence in the case and determine whether the evidence presented supports the legal conclusions in the decision. However, the Commission is not compelled to make findings of fact during reconsideration. *Davidson v. H.H. Keim*, 110 Idaho 758, 718 P.2d 1196 (1986).

A.

Credibility

The Commission has considered Claimant’s arguments concerning the finding that Claimant did not present as a credible witness. We see no reason to disturb that finding on reconsideration, as it is fully supported by the record, notwithstanding Claimant’s attempts to explain away a number of inconsistencies noted by the Commission in the original decision.

For example, Claimant argues that his hearing testimony concerning how he came to leave his position with Employer is not inconsistent with his testimony at deposition. Claimant’s industrial accident occurred on November 13, 2004. At the time of his April 19, 2005 deposition, he testified that he only worked two additional shifts following the accident. During his third scheduled shift, Claimant did not go to work. Instead, he decided to play at a concert, but evidently did not notify Employer of this decision:

CLAIMANT: [I] received a call from Damien asking where I was.
And I told him that I’m sorry my knees hurt and that I would rather

play the concert instead of going to work because at a concert you just sit, I guess, and play. And it's a lot easier to sit and play than it is to cook chicken and haul around 40-pound boxes of chicken all day. Well, I guess it wouldn't be all day. But it was just a lot easier to go to the concert than work.

MR. MAGNUSON: And who did you talk to from KFC?

CLAIMANT: Damien.

MR. MAGNUSON: Did you have any conversations about getting rescheduled for further work or anything like that?

CLAIMANT: No, I did not. I just remember going. And I had wrote down my next schedule. I think it was Sunday or Tuesday. I'm pretty sure it was Tuesday that I was scheduled next to work. But I went in. And I'd noticed that my name was not on the schedule. So I asked someone about it. I can't remember who I asked. But they said usually that means that you're terminated.

So then I called about four days later to see when my next days on the schedule was or if there was a mistake on the schedule. And I was talking to Treasha about it on that phone call that I was just describing. And I was told to bring in my clothes and to bring in any other business that I had from KFC.

MR. MAGNUSON: What concert did you go to?

CLAIMANT: It was the — I play in the Coeur d'Alene Symphony.

D.E. 9, pp. 96-97.

When Claimant returned to the workplace for what he thought was his next-scheduled shift, he found that he was not on the schedule, and he was never placed on any future schedules. He was eventually asked to return any of Employer's property in his possession to Employer. This testimony stands in marked contrast to Claimant's testimony at the April 17, 2012 hearing, in which he gave another version of how his employment came to an end:

MR. KELSO: After the accident, okay, were you able to continue on in your job at KFC?

CLAIMANT: 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. So I was able to do some light duties. And 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 ended after they found no use for me.

Hearing Tr. 29-30.

Contrary to Claimant's assertions, there is considerable disagreement between the two versions of how his employment ended. In 2005, he testified that without notifying Employer, he failed to show up for a scheduled shift; Employer appears to have treated Claimant as though he quit his job. In 2012, however, Claimant testified that his employment ended because Employer could not or would not accommodate his injury-related limitations. It is difficult to reconcile these conflicting accounts. For that reason and the other reasons set forth in ¶ 28 of the decision, the Commission will abide by its finding on Claimant's credibility.

B.

Disability

Claimant challenges several findings related to the disability issue. First, he argues that the Commission was incorrect in stating that “neither Dr. Sims nor any other medical doctor who evaluated Claimant assigned permanent physical restrictions to Claimant.” *See Fairchild v. Kentucky Fried Chicken*, 2013 IIC 0044.12 (June 7, 2013). Claimant alleges that Dr. McNulty, who evaluated Claimant for permanent impairment, did, in fact, impose restrictions. Second, Claimant argues that the functional capacity evaluation (FCE), which was performed by Mark Bengtson, M.P.T., in 2009, was an accurate reflection of Claimant's post-accident limitations. Finally, Claimant argues that the Commission erred in relying on the disability evaluation of Douglas Crum, because Mr. Crum's evaluation failed to take the FCE into account and was thus

flawed.¹ Defendants reply that Dr. McNulty did not, contrary to Claimant's assertions, impose restrictions; they further argue that the FCE, as a one-day "snapshot" of Claimant's condition, was not a reliable indicator of Claimant's injury-related limitations. *See* Defendants' Reply, p. 3.

It is true that Dr. McNulty did not assign limitations or restrictions in his initial PPI evaluation of Claimant. *See* C.E. H. However, at his deposition, Dr. McNulty was asked by Claimant's counsel for his opinion on the FCE:

Q. And in the course of doing the impairment rating, you indicated you had a copy of the functional capacities evaluation.

A. Yes.

Q. By Mark Bengtson?

A. Yes.

Q. And you reviewed that before your examination of Mr. Fairchild.

A. Yes.

Q. Was there anything about Mr. Bengtson's functional capacity evaluation that you have a disagreement with?

A. I guess my single evaluation of Mr. Terence I would think he would be able to stand and walk for a little more than Mr. Bengtson mentioned. He only has a maximum 50 percent of an eight hour day. I think he can probably I would say 75 or 80 percent stand and walk in an eight hour day. I think the light duty assessment is fairly reasonable. *My evaluation noted he had moderate instability of his posterior cruciate ligament. And over time that with strenuous activities that's probably going to even loosen up a little more. So that's why I think he should be in a lighter duty category.*

McNulty Depo. 6-7, ll. 25, 1-24 (emphasis added).

¹ Claimant also argues that the appropriate labor market for his disability evaluation would be Coeur d'Alene instead of Vancouver, Washington. We do not address this argument, because the Commission, having found no disability, did not base any of its conclusions on a labor market finding.

Thus, Dr. McNulty based his opinion that light duty was appropriate for Claimant on the understanding that Claimant suffered moderate laxity as a result of his industrial injury. However, the Commission did not find Dr. McNulty's opinion that Claimant suffered moderate laxity persuasive. The Commission was more persuaded by the opinion of Dr. Sims, Claimant's treating physician:

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.

Fairchild, 2013 IIC at 0044.11.

In this case, there were significant differences in the medical opinions regarding the nature and extent of Claimant's industrial injury. Dr. Sims, who treated Claimant in several appointments from 2005 to 2007, diagnosed a partial PCL injury with mild laxity. Dr. Kersten, who was solicited for a second opinion in April 2007, concurred with Dr. Sims's diagnosis. Dr. Pace, who conducted an IME in September 2007, observed no PCL injury and no laxity, and assigned no permanent impairment. Mr. Bengtson, the physical therapist who performed the FCE in 2009, observed that Claimant likely had "chronic PCL instability." C.E. B, p. 3. Dr. Pace, conducting a second IME in September 2010, once again found no PCL injury or laxity; he diagnosed Claimant with patellofemoral pain syndrome, and specifically noted that he saw no basis for the limitations or restrictions recommended in the FCE: "I looked carefully at the

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.

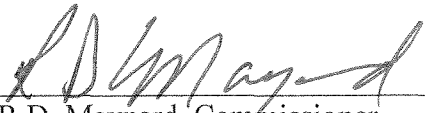
Based on the foregoing analysis, IT IS HEREBY ORDERED that Claimant’s motion for reconsideration is DENIED.

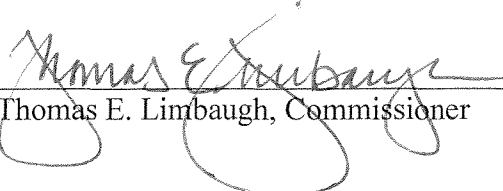
DATED this 12th day of May, 2014.

INDUSTRIAL COMMISSION



Thomas P. Baskin, Chairman


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2014, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States mail upon each of the following:

STARR KELSO
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Fax: 208-664-6261

ORIGINAL

Attorney for Terence Fairchild

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Appellant/Claimant,

vs.

KENTUCKY FRIED CHICKEN,

Respondent/Employer,
and

STATE INSURANCE FUND,

Respondent/Surety,

I.C. NO. 2004-526113

NOTICE OF APPEAL

RECEIVED
INDUSTRIAL COMMISSION
MAY 19 2 00

TO: THE ABOVE NAMED RESPONDENTS KENTUCKY FRIED CHICKEN, STATE INSURANCE FUND, AND YOUR ATTORNEYS H. JAMES MAGNUSON

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Terence Fairchild, appeals from the Findings of Fact, Conclusions of Law and Order entered by the State of Idaho Industrial Commission on June 7, 2013, and the Order Denying Reconsideration entered by the State of Idaho Industrial Commission on May 12, 2014.
2. The Appellant has the right to appeal to the Idaho Supreme Court and the said Findings of Fact, Conclusions of Law and Order and said Order Denying Reconsideration because they are appealable orders under and pursuant to Idaho Appellate Rule 11 (d).

1. NOTICE OF APPEAL

3. Preliminary statement of the issues on appeal:

(a) After first determining the Claimant suffered a 3% whole person permanent partial impairment for his PCL injury to his right knee, the Industrial Commission erred in holding that the Claimant did not suffer limitations or restrictions as a result of his impairment.

(b) The Commission's findings of fact are not supported by substantial competent evidence.

4. No order has been issued sealing all or a part of the record.

5. (a) Is a reporter's transcript requested?

A copy of the hearing transcript was prepared prior to the original briefing. As a result it is anticipated that the hearing transcript should be contained in and become a part of the requested record on appeal. If it is not, one is requested. A standard transcript of the hearing is requested. It was transcribed prior to briefing in this matter and thus it can be contained in the record on appeal as an Exhibit.

6. It is requested that the Record on appeal include:

(a) All original or amended complaints and answers.

(b) All Exhibits admitted into evidence and all Exhibits offered but not admitted.

(c) All affidavits considered by the Industrial Commission.

(d) All post-hearing depositions taken by all parties.

(e) All motions and briefs/memorandums including but not limited to Claimant's Opening and Reply Briefs and each of the Defendants' Briefs.

(f) The Industrial Commission's Findings of Fact, Conclusions of Law, and Order.

(g) Claimant's Motion for Reconsideration and all briefs filed in support or opposition to the Motion for Reconsideration.

(h) The Industrial Commission's Order Denying Reconsideration.

7. I certify:

(a) A copy of this Notice of Appeal has not been served on a court reporter because the hearing transcript in this matter was previously prepared for consideration of the Industrial Commission and should be a part of the Record on Appeal. If not, a Notice of Appeal will be served on the court reporter.

(b) The clerk of the Idaho Industrial Commission has not been paid an estimated fee for preparation of the reporter's transcript because the reporter was previously paid for the transcript which should be a part of the Record on Appeal. If not, upon notice from the Industrial Commission, the estimated fee will be paid.

(c) The estimated fee for preparation of the Idaho Industrial Commission's clerk's Record has been paid.

(d) The appellate filing fee has been paid.

(e) Service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 18th day of June, 2014.



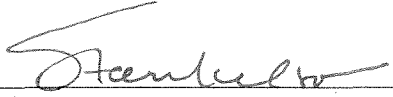
Starr Kelso, Attorney for Appellant/Claimant Fairchild

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed by regular U.S.

Mail, postage prepaid thereon, on the 18th day of June, 2014, to:

H. James Magnuson
Attorney at Law
P.O. Box 2288
Coeur d'Alene, Idaho 83816
Attorney for Respondent Employer/Surety



Starr Kelso

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant-Appellant,

v.

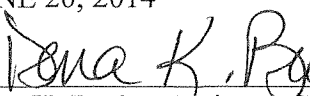
KENTUCKY FRIED CHICKEN, Employer, and
IDAHO STATE INSURANCE FUND, Surety,

Defendants-Respondents.

SUPREME COURT NO. _____

**CERTIFICATE OF APPEAL
OF TERENCE FAIRCHILD**

Appeal From: Industrial Commission Chairman Thomas P. Baskin presiding.
Case Number: IC 2004-526113
Order Appealed from: FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER ENTERED JUNE 7, 2013; AND ORDER DENYING
RECONSIDERATION ENTERED MAY 12, 2014
Attorney for Appellant: STARR KELSO
P.O. BOX 1312
COEUR D'ALENE, ID 83816-1312
Attorney for Respondents: H. JAMES MAGNUSON
P.O. BOX 2288
COEUR D'ALENE, ID 83814
Appealed By: TERENCE FAIRCHILD, Claimant
Appealed Against: KENTUCKY FRIED CHICKEN and
IDAHO STATE INSURANCE FUND, Defendants
Notice of Appeal Filed: JUNE 19, 2014
Appellate Fee Paid: \$109.00
Name of Reporter: NEIL COOLEY, CSR
816 SHERMAN #7
COEUR D'ALENE, ID 83814
Transcript Requested: The entire standard transcript has been requested.
The standard transcript has been prepared and
is on file with the Industrial Commission.
Dated: JUNE 20, 2014


Dena K. Burke, Assistant Commission Secretary



CERTIFICATE OF APPEAL OF TERENCE FAIRCHILD


CERTIFICATION

I, DENA K. BURKE, the undersigned Assistant Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the **NOTICE OF APPEAL FILED JUNE 19, 2014; THE COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ENTERED JUNE 7, 2013; AND ORDER DENYING RECONSIDERATION ENTERED MAY 12, 2014**, herein, and the whole thereof, in IC case number 2004-526113 for TERENCE FAIRCHILD.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 20TH day of JUNE, 2014.



Dena K. Burke
Assistant Commission Secretary



CERTIFICATION

CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 42237 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 18th day of July, 2014.

Kenna Andrus
Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

Claimant-Appellant,

v.

KENTUCKY FRIED CHICKEN, Employer,
and IDAHO STATE INSURANCE FUND,
Surety,

Defendants-Respondents.

SUPREME COURT NO. 42237

NOTICE OF COMPLETION

TO: STEPHEN W. KENYON, Clerk of the Courts;
STARR KELSO for the Appellant; and
H. JAMES MAGNUSON for the Respondents.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Attorney for Appellant:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

Attorney for Respondents:

H JAMES MAGNUSON
PO BOX 2288
COEUR D'ALENE ID 83816-1312

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions.

NOTICE OF COMPLETION (TERENCE FAIRCHILD - 42237) - 1

In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 18th day of July, 2014.

Keena Andrews
Assistant Commission Secretary