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

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

TERENCE FAIRCHILD,

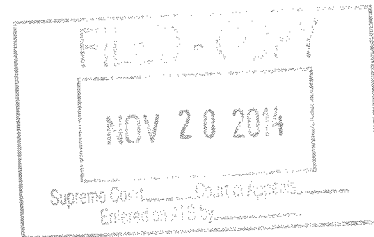
Claimant/Appellant,

v.

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

Defendants/Respondents.

SUPREME COURT NO. 42237



OPENING BRIEF OF APPELLANT FAIRCHILD

APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

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STATEMENT OF CASE

NATURE OF CASE

This is an appeal from the Industrial Commission's decision denying Appellant Terence Fairchild's (hereafter Fairchild) claim for disability benefits in excess of his permanent physical impairment rating.

COURSE OF PROCEEDINGS

A hearing was held before all three Commissioners and post-hearing depositions were taken. The Commission's Findings of Fact and Conclusions of Law and Order was filed on June 7, 2013. The Commission denied Fairchild's claim for disability benefits in excess of his permanent impairment rating finding that he had not suffered any accident related limitations or restrictions. Fairchild sought Reconsideration of the Commission's Order. All briefing of the parties on the issues was completed on August 5, 2013. The Commission's Order Denying Reconsideration was filed on May 12, 2014 and this Appeal was timely filed on June 20, 2014.

STATEMENT OF FACTS

Overview

At the time of his industrial accident on November 13, 20014, Fairchild was a sixteen year old boy. Both he and his brother worked from an early age, even playing musical instruments for tips downtown, at the Coeur d'Alene Mall, and at weddings to help their disabled father make ends meet. Tr. April 17, 2012, p. 33, l. 6-8. Fairchild became an accomplished musician, who played in the Coeur d'Alene Symphony and Chamber Orchestra, Spokane Youth Orchestra, and the Spokane Symphony, and had a bright future ahead of him. Tr. April 17, 2012, p. 25-27. Because of Fairchild's musical ability and his family's low income status both

Fairchild and his brother were focused on serving in the military where they would have been able continue their musical education and perform in the military. Id. p. 27-29.

At the time of his industrial accident, Fairchild worked for Kentucky Fried Chicken (KFC) about fifteen hours a week where he cooked and cleaned after school. Tr. April 17, 2012, p. 20. He was paid \$7.16 per hour. Depositions, 3, Dan Brownell, p. 35, l. 11-12. Fairchild was muscular from lifting weights and doing extensive running and bicycle riding. Id. pp. 51, 22.

On November 13, 2004, while he was taking out garbage and cardboard to the KFC dumpster Fairchild slipped and fell. He landed directly on his kneecaps onto a two-inch concrete curb divider. Id. p. 82, 17-25. His injury did not resolve on its own, so on December 15, 2004, he went to an urgent care. He received work restrictions, but KFC would not provide him work within them. Id. p. 29, l. 19-24, p. 54, l. 18-25. Both Fairchild and his brother contributed one-hundred percent of their checks to household expenses. Since KFC did not schedule him to work for the number of hours he had been working and his family needed help keeping food on the table, he left KFC's employment and sought work elsewhere. Id. p. 33.

He tried working at the Target store in Coeur d'Alene. He was hired as a cashier but he had to perform other functions, such as stocking, that required him to kneel. He could not kneel because of his injury to his knees and management told him the job was not right for him. Id. p. 32. Fairchild graduated 'early' from high school by taking online course in 2005. Id. pp. 52, 57. Since he could not do construction or laboring jobs because of his knee limitations he finally go at job at McDonalds doing basic cleaning from 11:00 p.m. to 7: a.m. during the summer after graduation. Id. p. 34.

2. APPELLANT FAIRCHILD'S OPENING BRIEF

After graduation he began attending North Idaho College in Coeur d'Alene and he got a job at Carl's Jr. They were helpful and worked around his limitations. He was given a light duty job including delegating work to others. He worked there about two years. Id. pp. 35-36.

During his first year at North Idaho College, his family lost their home. Fairchild and his brother moved together into a duplex and his father moved to Spokane to live with a relative. Subsequently Fairchild met a girl who would become his wife and they moved into an apartment. Id. p. 42-43.

Fairchild attempted to pursue his music career in the military as planned but, despite his musical talent, the Air Force recruiter, after reviewing his medical records told him that he was not eligible. He also attempted, but was not permitted, to participate in the Army ROTC program at North Idaho College because he would not be able to go through boot camp. Later the regular Army recruiter had to also turn him down when he tried to enlist. Id. pp. 37-39, 63.

Fairchild received partial music scholarships after North Idaho College from Idaho and Eastern Washington, but with his young family commitments he could not make it work out financially. Id. p. 64. After he graduated he tried to use his two year associate degree from North Idaho College in music, but his job opportunities were limited to elementary schools and there were no music job openings. Id. pp. 69-71.

He was able to obtain employment at the Center Partners call center where he could sit down and move around from time to time from 2007 until 2009. He was laid off for ninety days and during that time he got a job at Panda Express in Coeur d'Alene. Panda Express accommodated Fairchild's physical limitations by not requiring him to do any lifting and limited him to preparing food and scheduling shifts for others. Id. p. 44-45. After he returned to Center Partners they had a mass layoff in July 2010. He was not able to find a job in Coeur d'Alene so

Fairchild and his young family moved to Vancouver, Washington. Fairchild's mother had an RV in her garage and she let them stay in it. Id. p. 43.

He finally found a job in Vancouver, through a friend, at Office Depot. After a lengthy discussion with management about his limitations because of his knee injury, the manager agreed to hire him for a part-time light duty job. Id. pp. 43, 46. Walking at work affects him because he is not able to walk properly with his knee injury, even while wearing his knee brace. Over the course of 19 months at Office Depot he had to leave work early four times. Id. pp. 47, 48, 51, 79. He earns \$8.95 per hour working part-time approximately 15-30 hours a week. When Fairchild asked Office Depot to increase his hours, they would always tell him that they don't have any full time positions for him. Id. p. 49. He is forced to receive food stamps to feed his family. Id. pp. 77.

Outside of his light duty work activities at Office Depot, Fairchild's activities are very limited. He has to spend most of his time sitting down. It usually takes him an hour to go to sleep because of the burning and sharp pain in his knees which, once he does fall asleep, usually wakes him up. Id. p. 49-50. His right hip, as noted in the medical records and the Functional Capacities Evaluation, continues to worsen as does his right knee. See Defendants' Exhibit 6 Tyco E. Kersten, MD. Since the accident he has lost thirty pounds and five inches of leg mass. Id. p. 50-51.

Medical Care and Opinions

Fairchild was referred from urgent care to Dr. Sims, a Coeur d'Alene orthopedic surgeon. On January 29, 2007, Dr. Sims recommended that Fairchild utilize a "functional brace" on his right knee. Claimant's Exhibits C, William F. Sims, MD, p. 7. On April 30, 2007, Fairchild was seen by orthopedic surgeon Tycho E. Kersten, M.D. for a second opinion. Dr. Kersten diagnosed

a “partial tear right knee PCL with Grade II injury pattern.” He stated that “He certainly does have some laxity.” He also recommended “further workup” for his right hip. He also stated that if Fairchild “were willing to take the risks of surgery” it could be considered. Defendants’ Exhibits 6, Tycho E. Kersten, MD.

On September 20, 2007, the SIF had Fairchild undergo an Idaho Code § 72-433 examination by Drs. Pace and Wray. They reported to the SIF that he did not need any further treatment, had suffered no impairment, and had no restrictions. Claimant’s Exhibits, F, MCN Report (Dr. Pace and Dr. Wray7: 9/20/2007), p. 6-8. The SIF asked Dr. Sims if he agreed with these SIF’s physicians report. On October 8, 2007, Dr. Sims responded to an inquiry form sent by the SIF by checking it: “(X) No, I do not agree with the findings [of Dr. Pace].” Claimant’s Exhibit C. William F. Sims, MD, p. 2. Dr. Sims, in a handwritten note to the SIF on that same form, opined that Fairchild does have increased laxity in his right knee (partial PCL injury) and according to “Table 17.33 AMA Guides to PPI this is consistent with a 3% whole person impairment rating-re mild cruciate ligament laxity.” Id.

On April 23, 2009, Fairchild underwent a Functional Capacities Evaluation (FCE) by Mark Bengtson, MPT, who is a licensed physical therapist in Idaho and Washington. The FCE results confirmed Fairchild’s right ligamentous laxity and likely chronic PCL instability. Mr. Bengtson opined that Fairchild should limit his standing/walking to occasional levels with a maximum of 50% of an 8 hour day. Claimant’s Exhibits B. Mark Bengtson, MPT, p. 3-4.

On September 16, 2010, SIF had Dr. Pace conduct another Idaho Code § 72-433 examination of Fairchild. He advised SIF that his opinion had not changed. Despite Dr. Pace’s statement that it was a little difficult for him to accept the Mr. Bengtson’s test results and concerns, he informed the SIF:

“I think his knee complaints are real.”

Dr. Pace’s disagreement was not that Fairchild had real pain and limitations. His disagreement with the other physicians was with regard to the diagnosis of Fairchild’s condition. He felt the diagnosis was bilateral patellofemoral pain syndrome. He did not believe any further medical care was required. Significantly, in the context of this appeal, Dr. Pace specifically informed the SIF that Fairchild had limitations and restrictions due to his knee condition:

“[Fairchild] might need some very specific limitations were he given a job that required a lot of stair climbing, ladder climbing, sprinting, or jumping. However in his current [part-time limited duty] job at Office Depot he should not require any specific restrictions.”

Claimant’s Exhibits, G, MCN report (Dr. Pace 9/16/2010), p. 5-7.

Four years after Dr. Sims described Fairchild’s laxity in his PCL, on August 31, 2011, Dr. John M. McNulty examined Fairchild. He stated he agreed with Dr. Sims’s assessment that Fairchild has a posterior cruciate ligament injury to his right knee. Dr. McNulty identified a significant difference in laxity between his right and left knees. He opined, at that time four years after Dr. Sims, that the condition of Fairchild’s right knee laxity would worsen over time and that at that time the condition of his laxity was consistent with a 7% whole person impairment rating. Dr. McNulty also prescribed “continued use of his [right knee] brace.” Claimant’s Exhibits H, p. 1. Dr. McNulty also testified that the only disagreement he had with the FCE’s test results was he felt he could stand or walk 75-80%, instead of the 50% stated in the FCE. Depositions 1, John McNulty, MD, p. 7. Dr. McNulty further testified that Fairchild’s brace stabilized his knee when walking at low speeds. Id. p. 10.

ISSUES PRESENTED ON APPEAL

1. Whether the Commission's finding that Fairchild suffered no accident related limitations or restrictions is supported by substantial competent evidence?
2. Whether the Commission's finding that Fairchild failed to prove that he is entitled to permanent disability in excess of impairment is supported by substantial and competent evidence?
3. Whether the Commission's finding that Fairchild lacked credibility is supported by substantial and competent evidence and erred by requiring him to introduce supporting evidence even when his testimony is not contradicted?

STANDARD OF REVIEW

The Court exercises free review over the Commission's legal conclusions and in so doing it is to liberally construe the provisions of the worker's compensation law in favor of the employee, in order to serve the humane purposes for which the law was promulgated. However, the Court limits our review to determining whether the correctly denied benefits after it applied the law to the relevant facts. *Clark v. Shari's Management Corporation*, 155 Idaho 576, 314 P.3d 631, 634 (2013). The Commission's findings of fact will not be disturbed so long as they are supported by substantial and competent evidence. *Id.*, Idaho Code § 72-732. *Vawter v. United Parcel Serv., Inc.*, 155 Idaho 903, 906-07, 318 P.3d 893, 896-97 (2014). "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Matter of Wilson*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).

ARGUMENT

The Commission's finding that Fairchild suffered no accident related limitations or restrictions is not supported by substantial competent evidence.¹

The Commission found that Fairchild suffered a right partial PCL (posterior cruciate ligament) injury to his right knee as a result of his industrial accident. R. p. 118 ¶ 35. At different times, post-accident, Fairchild was evaluated by five physicians including four orthopedic surgeons. Three of the surgeons (Drs. Sims, Kersten, and McNulty) opined that Fairchild suffered "laxity" in his right knee PCL. R. p. 117 ¶ 32. The opinion of the Surety's Idaho Code § 72-433 examining physician, Dr. Pace, that all three of the other orthopedic surgeons misdiagnosed Fairchild's condition, was rejected by the Commission. R. p. 117-18 ¶ 34.

Idaho Code § 72-422 defines "permanent impairment" as "any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved.

Idaho Code § 72-422 provides:

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

The Commission utilizes the AMA Guides, as a matter of practice because the Guides are the recognized authority in the area of impairment rating, to convert the "permanent impairment" into a percentage ("rating").² The AMA Guides 5th Edition, utilized in this case by both Dr.

¹ "There are no limitations or restrictions associated with the injury as diagnosed by Dr. Sims." R. p. 138.

² See Appendix 'A', *Dursteler v. Basic American Foods, Inc.*, I.C. 99-021419, Order Denying Reconsideration, p. 2.

Sims and the Commission defines permanent impairment as “A loss, loss of use, or derangement of any body part, organ system, organ function.”³

On December 13, 2005, Dr. Sims recorded in his chart notes that Fairchild had not been able to return to his prior level of function.⁴ Thereafter, on January 29, 2007, Dr. Sims recorded that it was “reasonable” for Fairchild’s to require the use of a “functional brace” on his right knee.⁵ The Commission adopted Dr. Sims’s medical appraisal that Fairchild had right knee PCL laxity that, without elaboration, he characterized as “mild.” R. p. 118-19 ¶ 37. The Commission also adopted Dr. Sims’s permanent impairment evaluation of “3% whole person rating for mild laxity.” R. p. 118-19 ¶ 37.

By definition the Commission’s adoption of Dr. Sims’s opinions that Fairchild suffered a partial PCL (posterior cruciate ligament) injury to his right knee and had suffered a 3% whole person permanent impairment, Fairchild suffered from physical limitations and restrictions. Pursuant to Idaho Code § 72-422 and the AMA Guides 5th Edition, the fact that the Commission found that Fairchild suffered an accident-related “anatomic or functional abnormality or loss” that affects his “personal efficiency in the activities of daily living” means that Fairchild suffered accident-related limitations and restrictions. It was a clear contradiction therefore for the Commission to also find that Fairchild did not suffer accident-related limitations or restrictions. By definition the finding that Fairchild suffered an impairment precludes a contrary finding that he did not suffer any accident-related limitations or restrictions. While the Commission could have evaluated Fairchild’s accident-related limitations or restrictions in the context of his disability, which it did not do because of its contrary finding, it cannot find that Fairchild

³ See Appendix ‘B’, AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition; Understanding the AMA GUIDES in Workers’ Compensation, Fifth Edition (2011).

⁴ Claimant’s Exhibits C, William F. Sims, MD, p. 17.

⁵ Id. p. 7.

suffered a permanent impairment that is entitled to a percentage rating, and then find that he did not suffer any accident-related limitation or restrictions. There is no substantial and competent evidence to support the Commission's finding that Fairchild suffered no accident-related limitations or restrictions associated.

ARGUMENT

The Commission's finding that Fairchild failed to prove that he is entitled to permanent disability in excess of impairment is not supported by substantial and competent evidence.

The Commission's initial err, finding that Fairchild had no accident-related limitations or restrictions associated with his right partial PCL injury to his right knee after finding he suffered a permanent impairment, triggered a cascading effect that led to the Commission erroneously analyze Fairchild's disability in excess of impairment.

The two vocational witnesses that analyzed Fairchild's disability approached their respective opinions from two distinctly opposite perspectives. Fairchild's vocational expert, Mr. Dan W. Brownell, undertook his analysis of Fairchild's disability in excess of impairment from the perspective that Fairchild had suffered accident-related limitations and restrictions. His primary basis his understanding of Fairchild's limitations or restrictions was the Functional Capacity Evaluation (FCE) results. As Mr. Brownell testified he utilized the FCE results because:

“I have to look at the most objective real life information that I can find in order to establish how functional the person would be on the job. In my opinion the functional capacities evaluation is the most important of most documents because that is a real life testing situation. The majority of doctors I have worked with. Also appreciate, respect and refer to FCE's. And it's information that I can use to truly put some rubber on the road in the job placement process...It [an FCE] is a direct line on how they could and would perform on the job.” Depositions 3, Dan Brownell,

p. 8, l. 11-25-p. 9, l. 1.

The Employer/Surety's witness, Mr. Crum, disregarded the FCE results. He did so because he relied upon Dr. Pace's statement that, although Fairchild had specific limitations and restrictions which he attributed to a condition the Commission held he had erroneously diagnosed, Fairchild did not have any restrictions associated with the accident. Mr. Crum also misstated that Dr. Sims had reviewed the FCE, which he didn't because he was done after the last time he was involved, and did not give any permanent restrictions. Depositions 4, Douglas Crum, p. 10, l. 19-p. 11, l. 16. Also, despite Dr. McNulty's testimony that he agreed with the FCE, except that he would increase Fairchild's walking with a brace time, Mr. Crum took the position that Dr. McNulty had not mentioned any opinion regarding the FCE. Id. p. 11, l. 17-20. From this erroneous perspective Mr. Crum testified that he did not even engage in a labor market access evaluation because "there weren't any restrictions to work with." Id. p. 10, l. 13-15. From that perspective, and the lack of any job access evaluation, Mr. Crum testified that there was no basis to conclude Fairchild sustained any loss of earnings due to his injury. Id. P. 10, l. 5-7.

The Commission, after having erred in its conclusion that Fairchild had no limitations or restrictions, adopted the opinion of Mr. Crum, even after Fairchild's reconsideration brief identified the errs of Mr. Crum's report and testimony. In its Order Denying Reconsideration, the Commission still stuck to relying on Mr. Crum's fundamentally erroneous opinion as its basis:

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

Idaho Code § 72-425 provides that the “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:

- (1) The medical factor of permanent impairment (I.C. § 72-422), and
- (2) Pertinent non-medical factors of nature of the physical disablement, disfigurement, cumulative effect of multiple injuries, occupation, age, diminished ability to compete in an open labor market, and other facts as provided in I.C. § 72-430.

The Commission erred when it discarded its permanent impairment finding and stated “neither Dr. Sims *nor any other* medical doctor who evaluated Claimant assigned permanent restrictions to Claimant.” (emphasis added) R. p. 121 ¶ 43. As a result, the Commission’s decision failed to properly address the impact of Fairchild’s permanent impairment (e.g. an “anatomic or functional abnormality or loss” that affects his “personal efficiency in the activities of daily living”) and how it had a huge negative impact on Fairchild’s current and future ability to obtain employment.

A limitation or restriction suffered by an injured worker may, or may not, be of the nature and type that directly affects the injured worker’s ability to engage in gainful activity. The question that must be addressed is whether, and if so the extent, the limitation or restriction affects a specific worker’s ability to engage in gainful activity. The answer to this question depends upon variables unique to the specific injured worker such as the type of limitation or restriction and the nature and physical requirements of the worker’s specific job and other jobs in the worker’s labor market. For example, if an injured worker’s education, training and work history is in the field of “keyboarding” an anatomic or functional loss of the ability lift or walk or stand would not likely affect the worker’s ability to engage in gainful employment. On the other hand a worker who is employed at a labor intensive job that requires long periods of standing,

walking, and lifting substantial weight suffers an anatomic or functional loss in knee function, the worker will more than likely suffer a decrease in ability to access employment. Dr. Pace, the Employer/Surety's examining physician, acknowledged in his testimony that Fairchild's condition was aggravated by "basically any activities done with the knee flexed". Depositions, William R. Pace III, MD, p. p. 36, l. 1-8.

The record directly conflicts with the Commission's finding that Fairchild suffered no accident-related limitations or restrictions. Not only did Dr. Sims rate Fairchild's permanent impairment, which as discussed above inherently requires the existence of limitations or restrictions, but Dr. Sims also reported that it was "reasonable" for Fairchild to wear a knee brace because of his PCL's laxity. Fairchild's Brief in Support of His Motion for Reconsideration directed the Commission's attention to the fact that Dr. McNulty had in fact assigned permanent restrictions too. Dr. McNulty, stated that he felt Fairchild could walk and stand for a bit longer time documented by the FCE but he clarified that this was while wearing, and due to, his brace. He testified that he agreed in all other respects with the Functional Capacity Evaluation. *See* Additional Documents, Claimant's Brief in Support of His Motion for Reconsideration, p. 3. Even Dr. Pace, Respondents examining physician whose diagnosis was completely rejected, specifically placed restrictions on Fairchild performing jobs that required stair and ladder climbing, sprinting, or jumping. *See* Claimant's Exhibit G, MCN Report (Dr. Pace: 9/16/2010), at p. 6, ¶ 6. The fact that Dr. Sims recommended Fairchild utilize a functional knee brace, Dr. McNulty endorsed the all the FCE results except for his ability to walk and stand while wearing his knee brace, and the fact that the specific restrictions that Dr. Pace identified (but attributed to a disregarded condition diagnosis) were also specifically identified in the FCE results,

completely reveals that the Commission's finding that the FCE was not substantial and competent evidence that Fairchild suffered limitations or restrictions is erroneous. R. p. 121 ¶ 44.

The Commission's decision failed to consider that an impairment is more than just a method to determine a percentage of the whole person for the purposes of determining statutory impairment benefits. If the Commission had acknowledged that an impairment inherently establishes the existence of an "anatomic or functional abnormality or loss" that affected Fairchild's "personal efficiency in the activities of daily living" it could not rely on Mr. Crum's vocational opinion because it was clearly based on his assessment of "no accident-related limitations or restrictions." The Commission's finding that Fairchild produced no persuasive evidence that his "impairment impeded his ability to compete in the labor market" was, as noted in its Order Denying Reconsideration was completely and totally based upon Mr. Crum's assertion that there were no accident-related limitations or restrictions. R. p. 121 ¶ 44.

Despite the fact that Fairchild's reconsideration brief directed the Commission to the fact that Dr. McNulty had in fact placed permanent restrictions on Fairchild consistent with the FCE and the fact that even Dr. Pace believed Fairchild's knee complaints to be real and identified specific limitations and restrictions, the Commission's Order Denying Reconsideration insisted that it "is true that Dr. McNulty did not assign limitations or restrictions." The Commission only acknowledged Dr. McNulty's limitations and restrictions while it was attempting to discredit them by distinguishing, without any foundational medical analysis or testimony, Dr. Sims's opinion that the laxity was "mild" whereas Dr. McNulty's opinion was that the laxity was "moderate." R. p. 136-37. In discrediting Dr. McNulty's opinion of "moderate" laxity because of the fact that it was given in 2011 whereas Dr. Sims's opinion was given in 2007. In doing so, the Commission failed to acknowledge the fact that Dr. McNulty provided a medical basis for

his determination of “moderate”. He explained that Fairchild’s “posterior cruciate ligament would worsen over time.” *See* Depositions, John McNulty, MD, taken May 15, 2012, p. 7. L. 22-24. It also failed to acknowledge the fact that while an impairment rating is given when a physician considers a condition to be “considered stable or nonprogressive at the time of the evaluation,” that the giving of an impairment rating does not mean that the rated condition will not worsen over time. *See* Idaho Code § 72-422. Dr. McNulty specifically explained that Fairchild’s laxity would be expected to increase. The Commission erred in finding that Dr. Sims’s rating was more “credible” in 2007 because it “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.” R. p. 119, ¶ 38.

The Commission in addressing Fairchild’s reconsideration brief inexplicably continued to assert that “Dr. Pace concluded that Claimant did not require any limitations or restrictions.” Dr. Pace’s September 16, 2010, report is clearly to the contrary. Claimant’s Exhibit G MCN Report (Dr. Pace: 9/16/2010), p. 6 ¶ 6. The fact that Dr. Pace’s identified limitations or restrictions was based on what the Commission determined was an erroneous diagnosis of Fairchild’s condition does not negate the limitations or restrictions he specifically identified. Indeed, Dr. Pace confirmed that an accurate assessment of impairment does not require an accurate diagnosis. Depositions 5, William R. Pace, III, MD, p. 50, l. 11. In other words, the stair climbing, ladder climbing, sprinting or jumping limitations and restrictions that Dr. Pace specifically identified were not dependent upon his diagnosis being correct. Fairchild had these limitations, limitations that he had never had before the accident, regardless of the diagnosis.

The nature of the Commission’s decision on Fairchild’s motion for reconsideration appears, in large part, to be an inexplicable effort to support its unsupportable finding that

Fairchild had no accident-related limitations or restrictions. Dr. Sims at least implicitly acknowledged Fairchild's limitations and restrictions when he concurred that it was reasonable for Fairchild to wear a brace. The Commission's assertion, that Dr. Sims's cryptic handwritten note only disagreed with Dr. Pace on the issue of the existence of an impairment as proof that Dr. Sims did not believe Fairchild had limitations and restrictions, is contrary to, and dispelled by, the fact that Dr. Pace specifically identified Fairchild's limitations and restrictions; he just attributed them to a condition that the Commission had rejected. R. p. 138.

Using the logic in the Commission's decision, since Dr. Sims did not specifically state in his cryptic handwritten note that he disagreed with the limitations and restrictions of stair climbing, ladder climbing, sprinting or jumping limitations and restrictions that Dr. Pace specifically identified, he agreed with the limitations and restrictions. Therefore, using the Commission's own logic, the Commission's finding in its Order Denying Reconsideration that Dr. Sims "did not assign any limitations or restrictions" is erroneous. R. p. 138.

The Commission's initial decision and then its Order Denying Reconsideration were made in total reliance upon Mr. Crum's vocational opinion which, as discussed above, is simply not supportable. Despite the fact that Mr. Crum's report clearly reflects that he was aware that Dr. Pace stated that Fairchild "might need some very specific limitations were he given a job that required a lot of stair climbing, ladder climbing, sprinting or jumping" and despite Dr. McNulty's almost complete agreement with the FCE, he refused back-off from the foundation of his opinion that Fairchild had no limitations or restrictions. See Depositions 4 Douglas Crum, p. 10, l. 11-15, p. 13, l. 22-25, p. 15, l. 17-24 and Defendants Exhibits 13.

In somewhat of an analytical twist, the Commission even turned to Dr. Pace's opinion that Fairchild did not have any laxity, which the Commission had previously rejected, in an

attempt to support its finding of no limitations or restrictions. *See* R. p. 117-18 ¶ 34, p. 137-38. The Commission chose to ignore the fact that, despite Dr. Pace's diagnostic disagreements with the four other physicians, three orthopedic surgeons and a licensed physical therapist, Dr. Pace unequivocally expressed opinions were that Fairchild's "knee complaints are real" and that Fairchild "might need some very specific limitations were he given a job that required stair climbing, ladder climbing, sprinting, or jumping. *See* Claimant's Exhibit G, MCN Report (Dr. Pace: 9/16/2010), at p. 6, ¶ 6. In short, even though Dr. Pace diagnosis was disregarded, because it conflicted with the four other physician's, the Commission chose to ignore the fact that Dr. Pace specifically identified permanent limitations and restrictions that Fairchild had as a result of the condition of his knee. Dr. Pace does not not provide any support for the Commission's finding that Fairchild did not suffer any accident-related limitations or restrictions because his diagnosis of Fairchild's condition was found by it to be wrong and because he specifically identified limitations or restrictions that Fairchild had as a result of his knee condition.

Mr. Brownell was the only vocational witness who based his disability opinion and disability percentage rating "on the limitations detailed in the FCE as well as on the non-medical factor of Claimant's limited education." R. p. 120, ¶ 41. Mr. Brownell has thirty-five (35) years of in-depth and hands-on work experience actually placing injured workers in jobs. The majority of Mr. Brownell's vocational experience placing injured workers was spent over twenty-nine years as Industrial Commission Vocational Rehabilitation Consultant. Mr. Brownells' report and his testimony, based upon extensive knowledge of, and investigation in to, Fairchild's labor market restrictions, regardless of whether Coeur d'Alene or Vancouver due to the nature of his limitations and restrictions, stand uncontradicted regarding Fairchild's disability of twenty-eight

percent (28%) of the whole person, including the impairment rating. Depositions 3, p. 22, l. 19-20.

Once the Commission contradicted its finding that Fairchild suffered a permanent impairment, adopted Dr. Sims's impairment rating by finding that Fairchild had absolutely no accident related limitations or restrictions, its entire decision making process took a wrong turn. Its finding that Fairchild did not suffer any disability in excess of his permanent impairment is not supported by substantial and competent evidence.

Mr. Brownell's undisputed report and testimony, which took into account Fairchild's limitations or restrictions and was based upon extensive labor market knowledge and research, is the only substantial and competent evidence in the record regarding Fairchild's disability in excess of permanent impairment. Fairchild's capacity for gainful employment has without question been drastically reduced by his accident-related limitations and restrictions when taken in conjunction with his nonmedical factors. The only other evidence, which was offered by Mr. Crum, specifically failed to take into account Fairchild's limitations or restrictions and did not involve any labor market analysis. Mr. Crum disregarded the FCE, failed to acknowledge Dr. McNulty's agreement with the FCE with the caveat regarding walking and standing if he were wearing his knee brace, and also failed to consider Dr. Pace's specifically identified limitations or restrictions. Mr. Brownell's opinions are the only substantial and competent evidence in the record regarding Fairchild's disability in excess of impairment.

ARGUMENT

The Commission's finding that Fairchild is not credible is not supported by substantial and competent evidence and its requirement of supporting evidence, even when his testimony is not contradicted, was err.

An issue regarding credibility involves both “observational credibility” as well as “substantive credibility.” *Painter v. Potlatch Corp.* 138 Idaho 309, 63 P.3d 435 (2002). In this case the three Commissioners were present at the hearing. The Commission’s Findings of Fact, Conclusions of Law and Order found that Fairchild was not a credible witness. R. p. 115 ¶ 28. This finding was apparently based upon “substantive credibility” because the Commission’s decisions contain no references to matters in Fairchild’s testimony before them that would fall within “observational credibility.” Fairchild’s reconsideration brief disposed of virtually all of the perceived bases the Commission’s finding of a lack of “substantive credibility. Additional Documents 4, pp. 12-15. See Appendix ‘C’. The only substantive conflict that the Commission identified initially that it clung to in its Order Denying Reconsideration had to do with the manner in which Fairchild left the employment of KFC in 2005. R. p. 133-135. Not only did the clarification in Fairchild’s reconsideration brief remove any inconsistency, but if there was inconsistency, it must be remembered that there were six intervening years between the time Fairchild left the employ of KFC and the hearing in this matter. Also, how a fifteen hour per week job as a sixteen year old came to an end is not relevant to any issue in this matter. Regardless, Fairchild’s testimony with regard to his leaving KFC, while not identical to, was consistent with, and, perhaps most significantly, was not relevant to any issue presented for resolution at the hearing. The Commission’s credibility determination boiled down to its essence appears to have been based upon the Commission Members’ personal subjective views that it was difficult for them to believe, without any evidence to contradict Fairchild testimony, that “an adolescent who attended school full-time, worked part-time, and was heavily involved in music” could not have lifted weights and run to the degree Fairchild did. R. p. 115 ¶ 28. Such perception does not, by itself, is not substantial and competent evidence in support of the Commission’s

conclusion that Fairchild was not credible. *See Knowlton v. Wood River-Medical Center*, 151 Idaho 135, 254 P.3d 36, 46 (2011). There was no substantive evidence that Fairchild's testimony, as clarified regarding weight lifting and running, was not true. Indeed, even if it is presumed, as the Commission did, that Fairchild was not truthful about the facts that were as questionable, none of these facts constitute evidence that Fairchild did not suffer an impairment, suffer limitations or restrictions, has difficulty obtaining work, could not enter the military, or literally anything relevant to his disability in excess of impairment. It was err for the Commission to find Fairchild's testimony as suspect when there is no contradictory evidence in the record, simply because Fairchild did not offer at the hearing and before the Commission's credibility ruling, records or testimonial evidence into the record that would have been cumulative at the time. There is no substantial and competent evidence contradicting Fairchild's testimony, there is no basis for the Commission to not accept his testimony on its face, and there is no substantial and competent evidence to support the Commission's finding that Fairchild is not credible. *See Stevens-McAtee v. Potlatch*, 45 Idaho 325, 336 179 P.3d 288, 299 (2008).

CONCLUSION

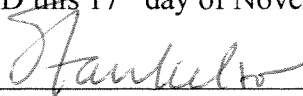
It was fundamentally erroneous to, on the one hand, find that Fairchild suffered an accident-related anatomic or functional loss and permanent impairment resulting in an impairment rating and then, on the other hand, to find that Fairchild did not have any accident-related limitations or restrictions. The only substantial and competent evidence in the record regarding the extent of Fairchild's disability in excess of impairment is the report and testimonial opinions of Dan W. Brownell. Fairchild suffered whole person accident-related disability, inclusive of the three percent (3%) whole person impairment that the Commission found that he suffered as a result of his accident, of twenty-eight percent (28%) of the whole person.

The substantial and competent evidence establishes that Fairchild, a mere sixteen year old working a fifteen hour a week job after school to help his family, had his entire capacity for gainful employment dramatically reduced as a result of his accident-related limitations and restrictions. Fairchild was not able to join the military and, as a result, even pursue a promising career in music. His knee injury precludes him from manual physical labor. Since his accident he has only been able to obtain one full time job at a call center. That job allowed him to sit most of the day. Unfortunately that job ended in a mass layoff. What employment he has been able to find has been from sympathetic employers willing to meet his limitations and restrictions. However, that sympathy only goes so far in today's job market and there is literally no chance for full time work or advancement.

Fairchild literally had his entire working life before him at the time of his accident. In the years since his accident he has had his ability to access jobs limited to those with literally no physical work of any nature. He needs jobs that only require limited mobility and permit him to sit a great deal of the time. Fairchild's accident-related restrictions have left him only the ability to access part-time, minimal wage, type jobs.

In Fairchild's Opening Brief the Commission was asked to consider, to the extent permissible under Idaho law, awarding Fairchild substantial disability benefits even in excess of 28% of the whole person. In Fairchild's Reply Brief the Commission was asked to award him a percentage of disability that would provide him with a reasonable amount of compensation that would meaningfully assist him. It is respectfully requested that the Court reverse the Commission's decision and remand this matter back to the Commission with directions for it to award Fairchild disability in excess of his impairment consistent with the undisputed substantial and competent opinions of Dan W. Brownell.

DATED this 17th day of November, 2014.




Starr Kelso, Attorney for Fairchild

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of Appellant Fairchild's Opening Brief were mailed by regular U.S. Mail, postage prepaid thereon, on the 17th day of November, 2014, to the attorney for the Respondents as follows:

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



Starr Kelso

APPENDIX

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KENNETH DURSTELER,)
)
 Claimant,)
 v.)
)
 BASIC AMERICAN FOODS, INC.,)
)
 Employer,)
 and)
)
 LUMBERMEN'S MUTUAL CASUALTY)
 COMPANY,)
)
 Surety,)
 and)
)
 STATE OF IDAHO, INDUSTRIAL SPECIAL)
 INDEMNITY FUND,)
)
 Defendants.)

IC 99-021419

~~ORDER DENYING~~
~~RECONSIDERATION~~

Filed August 24, 2006

On May 12, 2006, Defendant Industrial Special Indemnity Fund (ISIF) filed a Motion to Reconsider the Idaho Industrial Commission's decision of April 25, 2006, in the above referenced case. Defendants Basic American Foods (Employer) and Lumbermen's Mutual Casualty Company (Surety) filed a response on May 25, 2006. No reply was filed.

In the motion, ISIF asks for reconsideration of the Commission's determination of Claimant's preexisting hearing impairment, the application of the hearing impairment as a subjective hindrance to Claimant, and the application of the law regarding collateral estoppel in relation to Claimant's previous lump sum settlement agreement.

A-1

Employer and Surety argue that Claimant's hearing condition was known prior to hearing and that the evidence clearly supports a finding that Claimant's hearing loss was a subjective hindrance. Employer and Surety also aver that ISIF is incorrect in trying to interpret the prior lump sum settlement agreement as precluding Claimant from arguing against being totally and permanently disabled as a result of his 1997 industrial accident with a prior employer.

First, ISIF requests the Commission to reconsider its determination of preexisting hearing impairment and the Commission's application of Claimant's hearing impairment. Claimant admitted significant hearing loss and there is documentation from audiology testing of significant hearing loss while Claimant was employed with a prior employer. There was adequate medical documentation and substantial evidence in the record to discern that many of Claimant's activities of daily living, including difficulty with communication at home, in restaurants, and in public places, are impacted by his hearing loss.

Those facts were then applied to the *AMA Guides*, 5th ed., resulting in a finding of 8% whole person impairment rating. Claimant's hearing loss was a long-standing condition, which was supported by substantial evidence but not specifically rated. The Commission, as a matter of practice, takes judicial notice of the *AMA Guides*, as they are the recognized authority in the area of impairment rating.

Additionally, the Commission found the opinion of vocational expert Barbara Nelson most persuasive. Nelson commented on Claimant's placement difficulties due to his hearing loss, stating that there were some sedentary to light occupations that Claimant would have been able to do but for his hearing loss. The Commission found that Claimant's hearing loss was a subjective hindrance to his obtaining employment.

ORDER DENYING RECONSIDERATION - 2

A-2

Next, ISIF argues that the Commission should reconsider the application of law regarding collateral estoppel in relation to Claimant's previous lump sum settlement agreement entered into with a previous employer. ISIF requests that the Commission review the same facts and the same arguments that were before it at hearing and when the decision was signed.

The lump sum settlement agreement that Claimant entered into with a prior employer merely acknowledged that in exchange for valuable consideration Claimant relinquished all future benefits to which he might otherwise be entitled as a result of the 1997 injury. The phrase "totally and permanently disability" appears in the lump sum agreement, but the language can hardly be characterized as an assertion that Claimant was totally and permanently disabled as a result of his 1997 accident with a prior employer. There was no binding assertion that Claimant was totally and permanently disabled at the time he entered into the settlement agreement with his prior employer.

Although ISIF disagrees with the Commission's findings and conclusions, the decision of April 25, 2006, in the above referenced case, is supported by substantial evidence in the record and ISIF has presented no persuasive argument to disturb the decision.

Based upon the foregoing reasons, ISIF's Motion to Reconsider is DENIED.

IT IS SO ORDERED.

DATED this 24th day of August _____, 2006.

INDUSTRIAL COMMISSION

/s/ _____
Thomas E. Limbaugh, Chairman

/s/ _____
James F. Kile, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on 24 day of August, 2006, a true and correct copy of the foregoing ORDER DENYING RECONSIDERATION was served by regular United States Mail upon each of the following:

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/s/

American Medical Association
Physicians dedicated to the health of America



Guides

to the Evaluation
of Permanent
Impairment

Fifth Edition

Linda Cocchiarella, MD, MSc, AMA Medical Editor
Gunnar B. J. Andersson, MD, PhD, Senior Medical Editor

AMA
press

R-1

The fifth edition includes most of the common conditions, excluding unusual cases that require individual consideration. Since this edition encompasses the most current criteria and procedures for impairment assessment, it is strongly recommended that physicians use this latest edition, the fifth edition, when rating impairment.

1.2 Impairment, Disability, and Handicap

1.2a Impairment

The *Guides* continues to define impairment as "a loss, loss of use, or derangement of any body part, organ system, or organ function."² This definition of impairment is retained in this edition. A medical impairment can develop from an illness or injury. An impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment. The term *impairment* in the *Guides* refers to **permanent impairment**, which is the focus of the *Guides*.

An impairment can be manifested objectively, for example, by a fracture, and/or subjectively, through fatigue and pain.³ Although the *Guides* emphasizes objective assessment, subjective symptoms are included within the diagnostic criteria. According to the *Guides*, determining whether an injury or illness results in a permanent impairment requires a medical assessment performed by a physician. An impairment may lead to functional limitations or the inability to perform activities of daily living.

Table 1-1, adapted from a report by the AMA Council on Scientific Affairs, lists various definitions of impairment and disability used by four main authorities: the *AMA Guides*, the World Health Organization, the Social Security Administration, and a state workers' compensation statute.⁴ Although a nationally accepted definition for impairment does not exist, the general concept of impairment is similar in the definitions of most organizations. Several terms used in the *AMA* definition, and their application throughout the *Guides*, will be discussed in this chapter and Chapter 2.

Loss, loss of use, or derangement implies a change from a normal or "preexisting" state. *Normal* is a range or zone representing healthy functioning and varies with age, gender, and other factors such as environmental conditions. For example, normal heart rate varies between a child and adult and according to whether the person is at rest or exercising. Multiple factors need to be considered when assessing whether a specific or overall function is normal. A normal value can be defined from an individual or population perspective.

When evaluating an individual, a physician has two options: consider the individual's healthy preinjury or preillness state or the condition of the unaffected side as "normal" for the individual if this is known, or compare that individual to a normal value defined by population averages of healthy people. The *Guides* uses both approaches. Accepted population values for conditions such as extremity range-of-motion or lung function are listed in the *Guides*; it is recommended that the physician use those values as detailed in the *Guides* when applicable. In other circumstances, for instance, where population values are not available, the physician should use clinical judgment regarding normal structure and function and estimate what is normal for the individual based on the physician's knowledge or estimate of the individual's preinjury or preillness condition.

ASPEN PUBLISHERS

UNDERSTANDING THE *AMA GUIDES* IN WORKERS' COMPENSATION

Fifth Edition

Steven Babitsky

SEAK, Inc.
Falmouth, Massachusetts

James J. Mangraviti, Jr.

SEAK, Inc.
North Reading, Massachusetts



Wolters Kluwer

Law & Business

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

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

[A] Impairment in the *AMA Guides*

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

[B] Maximum Medical Improvement

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

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

⁴ *Id.* at 2.

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

⁶ *AMA Guides* (5th ed. 2000) at 2.

⁷ *Id.* at 4.

IMPAIRMENT RATING: I refer to the current 5th Addition AMA Guides to the Evaluation of Permanent Impairment. I refer first to figure 15-4 on page 380 and determine that the ROM method of rating is appropriate based upon the fact that she has had more than one cervical surgery and more than one cervical related injury; and also based upon the fact that her imaging reveals more than one level of cervical degenerative disk disease. This method of rating requires the calculation of 3 separate impairment rating components: a diagnosis-based component, a loss of cervical range of motion-based component and a neurologic deficit-based component.

I refer next to table 15-7 on page 404 and determine that her current condition corresponds most closely to category IV-D which yields a 10% whole person impairment; modified upward by category IV-E-1 for her 2nd cervical fusion to yield a total diagnosis-based impairment of 12% of the whole person. The levels of disk degeneration at the other levels are not sufficient to indicate inclusion as an increase in her current impairment rating; or at the least if they are included in both her pre-injury and post-injury ratings, no net change in her impairment will result as far as apportionment. For the purposes of apportionment I determine that her condition prior to the surgery would correspond to category IV-D alone, yielding a 10% whole person impairment.

I next determine her cervical range of motion-based impairment: I refer first to table 15-12 on page 418 and determine that her cervical flexion range yields a 0% impairment and her cervical extension range yields a 0% impairment. I refer next to table 15-13 on page 420 and determine that her right lateral flexion range yields a 0% impairment and her left lateral flexion range also yields a 0% impairment. Referring next to table 15-14 on page 421 I determine that her cervical rotation range yields a 0% impairment. While her cervical ranges of motions are perhaps very slightly reduced, they are not sufficiently reduced to result in an impairment greater than 0% of the whole person (rounded or interpolated).

I note that on careful neurologic examination she exhibited no motor or sensory deficit sufficient to yield a ratable neurologic deficit impairment.

Ms. Sevy's current cervical-related impairment is thus determined by the combination of the component impairments of 12%, 0% and 0% to be 12% of the whole person. Her impairment rating prior to this injury had already been determined above to be 10% of the whole person; thus the increment in her impairment as a result of the injury and subsequent 2nd surgery upon her cervical spine is determined to be 2% of the whole person. That 2% whole person impairment is her apportioned impairment to the date of injury of October 31, 2006.

partial PCL injury caused by his accident and that the Claimant suffered from a right partial PCL injury and at least mild cruciate ligament laxity. (Dr. Sims at Claimant's Exhibit C at p. 002 and Dr. McNulty at Claimant's Exhibit H at p. 001). There is no evidence that the Claimant had any physical limitations to his right knee prior to his accident. The Commission found that the Claimant suffered a right partial PCL injury as a result of his industrial accident. FOFCOL at p. 14, ¶ 35.

The FCE objectively tested and identified the effect of the Claimant's right knee PCL injury on his functional capacities. Mr. Bengtson's report specifically states that the Claimant's *functional limitations noted are consistent with the physical impairments identified in the clinical examination and correspond with the diagnosis of S/P right knee PCL injury and subsequent laxity.* Claimant's Exhibit B at page 002, Consistency of Performance.

The FCE specifically directly connected the Claimant's physical limitations and restrictions as a result of his Claimant's right knee PCL and laxity injury to the injury that three orthopedic physician opined were suffered as a result of his accident.

4. The Claimant is not a credible witness and Claimant's testimony is suspect where it is not supported by other evidence. FOFCOL at p. 11, ¶ 28.

The Commission determined that the Claimant lacked credibility was from its review of the record (substantive credibility) and its observation of the Claimant testifying at hearing (observational credibility). The Commission held that it "regards the Claimant's testimony as suspect where it is not supported by other evidence in the record." FOFCOL p. 11-12 ¶ 28.

The Commission's findings are not supported by substantial competent evidence and the Commission application of its credibility finding was inaccurate in that it required corroborating substantial competent evidence of matters that the Claimant testified on. This is contrary to the well accepted rule that a claimant is not required to prove the negative.

1. **The Commission's finding is not supported by substantial competent evidence.**
 - a. **The Claimant told strikingly different stories regarding his separation from his employer.**

The Claimant's testimony was:

1. "I 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 you are terminated. So then I called about four days later...And I was told to bring in my clothes and to bring in any other business that I had from KFC. Fairchild 4/19/05 depo. p. 30, l. 17—p.31, l. 6.
2. After his injury the Claimant had discussions with his employer's manager. "I discussed with my manager that I could not lift a lot of their—some of their boxes of chicken weighed in excess of a hundred pounds. So it very difficult for me—to let alone maneuver around the store with the grease and chicke blood that was always consistently in the back. So I would be moving slowly...So it was very hard just to keep up with their—their demand." Claimant's testified that his work hours "very quickly diminished...it just diminished until the point where they told me that they couldn't use me anymore because I couldn't capacitate the work that they needed. Hr. T. p. 30, l. 20—p. 31, l. 16.

This testimony is consistent. The hearing testimony merely elaborates on what occurred causing his work hours to be taken away and the resultant construction termination of his job as a result of his Employer not scheduling him to work. Where a Claimant's proffers consistent—though not identical—testimonies, the Court upholds the testimony as having substantive credibility. *Stevens-McAtee v. Potlatch Corp.* 145 Idaho 325, 329, 179 P. 3d 288, 292 (2008).

- b. **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 with a 2.5 GPA.**

The Claimant's testimony was:

1. Claimant's testimony was not that he was a "great student." His testimony was limited to the fact that given the fact that he worked nights while going to NIC that he did great. His testimony, "I did great" was his personal assessment and not a comparison of himself to all other students. He testified that he did not recall his exact scores from it, but I have an associate's degree in music." He was then asked "So, you're like an A, B-type student?" and his answer was "Yeah." Fairchild 4/19/05

depo. p. 25, l. 13-22. This was nothing more than a generalized response to a general question.

2. Mr. Crum testified that the Claimant "estimated that his overall GPA was about 2.5." Crum depo. p. 14, l. 3-6.

There is an enormous difference between a person testifying that 'he', personally in comparison with all other students, was a great student and a person testifying that he did great under his circumstances. Likewise the 2.5 GPA was an "estimate." This testimony is entirely consistent.

- c. **The Claimant is prone to exaggeration. "He boasted to Dr. Sims that, prior to his injury, he ran twenty miles per day. At hearing, this changed to the far more plausible five miles per day.**

The records state:

1. On 3/1/2005 Dr. Sims' dictated chart notes state that "Prior to his injury he reported that "I ran 20 miles a day." Dr. Sims' dictation transcriber was "cdl."
2. On 1/29/2007 Dr. Sims' dictated chart notes state that "He [Fairchild] explains that he used to run a marathon a week in the past..." Dr. Sims' dictation transcriber was "rct."

The Claimant's testimony was:

1. "Just almost on a daily basis as well I'd run at least five miles." Hr. T. p. 23, l. 20-21.

Obviously 20 miles a day is not realistic. That was not his explanation to Dr. Sims or his testimony. A marathon is 26 miles and 385 yards in length. The Claimant ran "almost" on a daily basis. If Claimant ran 5 miles a day 7 days a week that would equal 35 miles a week. Dr. Sims' 1/29/2007 chart note stating that the Claimant "*explains*" to him that the Claimant used to run a marathon *a week* in the past is entirely consistent with running five miles *almost on a daily basis*. It is more consistent to determine that the dictation transcriber did not transcribe correctly or that Dr. Sims misunderstood on March 1, 2005 and that when Dr. Sims questioned the

Claimant on January 29, 2007, that he correctly noted the Claimant's *explanation*—almost 5 miles a day. Finally, there is certainly is no indication that the Claimant "*boasted*."

d. The Claimant insists that he used to be able to leg press 1,375 pounds. It is difficult for the Commission to credit such extraordinary feats to an adolescent who attended school full-time, worked part-time, and was heavily involved in music.

e. The Claimant was inconsistent about his involvement in organized sports.

There is no evidence in the record that the Claimant did not leg press as he testified at Hearing testified to at hearing. With regard to his other testimony the Claimant's testimony was:

1. He had not been involved in any sports since the ninth grade because his Dad would not let him. Fairchild 4/19/2005 depo. at p. 5, l. 18-22.
2. At hearing the Claimant testified that he participated in sports or athletics in high school. He testified that he participated in football and weights.

The Claimant's testimony is entirely consistent. The ninth grade is often included and referred to as being part of 'high school'. The Claimant's testimony was that he lifted weights every day, in class, and ran almost daily. He stated he was an accomplished athlete; "I'd be a constant athlete every day." Hr. T. p. 22, l. 21—p. 22, l. 7. This statement by the Claimant does not state that he won awards for high school athletics. It is a statement that based upon his every day weight lifting and almost daily running five miles that he was an accomplished athlete. The Claimant further testified that prior to the accident, at age 16, he was very muscular and athletic due to his lifestyle of weight training and running. Since the accident he has lost 30 pounds and 5-6 inches of muscle mass. Hr. T. p. 51, l. 13-19.

It is remarkable that that the Commission would label the Claimant's testimony as not credible. The Commission's finding that his running and weight lifting before his accident was not credible, without any other basis asserted than because he attended school full-time, worked

part-time and was heavily involved in music, unprecedented given the lack of any conflicting evidence in the record or even offered by the Defendants.

3. The Commission applied its credibility finding in an incorrect manner.

A perceived lack of credibility of the Claimant comes into the decision making process where there is substantial competent evidence that conflicts with the Claimant's testimony and supports a finding contrary to the testimony of the Claimant. *See Moore v. Moore*, 152 Idaho 245, 269 P.3d 802 (2011). A general lack of credibility finding does not impact the factual determination when, as is discussed above in this case, there is no substantial credible evidence that supports a finding that Claimant's testimony was not true. For example, the Commission held that because there was "no evidence, other than Claimant's word, that he was found to be physically ineligible for military service" and thus this testimony is not credible. The Commission cannot reject unrebutted testimony. With regard to his inability to pursue music through the military because we could not pass a military physical, the Claimant testified to this fact at his deposition taken on July 22, 2010. Fairchild 7/22/2010 depo. p. 8, l. 1—p. 9, l. 7. The Defendants had almost two years before the hearing that was held on April 17, 2012, to gather and present evidence that the Claimant's testimony was not true. It presented no such evidence. Additionally, this testimony was corroborated by Mr. Brownell who testified that the Claimant "would not pass a military physical." Brownell depo. p. 16, l. 8-9.

Claimant's entire claim for disability in excess of impairment is based on his physical limitations as a result of his right knee injury. There is no rebuttal evidence to the Claimant's loss of access. The proof of his disability is the doctors records and testimony, impairment ratings, and the FCE. The Claimant's need for accommodations in all of his post injury light duty jobs, other than Center Partners where he sat and could stand as needed, was not disputed by the

Defendants. The Defendants had a minimum of two years to contact Claimant's post injury employers to attempt to gather information and/or testimony to rebut the Claimant's need for accommodations. They did not present any conflicting evidence in this regard.

MIXED FINDINGS OF FACT/LEGAL CONCLUSION CHALLENGED¹

- 5. 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.**

In evaluating disability in excess of impairment the Commission rejected Mr. Brownell's opinions primarily because he "based his rating on the limitations detailed in the FCE." FOFCOL at p. 16, ¶ 41. The Commission adopted Mr. Crum's opinions because they were based upon his understanding that "no medical doctor has imposed restrictions on Claimant or adopted the conclusions of the FCE" and his understanding was consistent with what the Commission found.

As set forth above, Dr. McNulty *did* impose permanent physical restrictions/limitations on the Claimant to light duty work and he adopted the FCE with only the caveat that he believed the Claimant, two years after the FCE, could walk with a brace on his right knee for about two hours (a total of 6-6.4) longer than the FCE reported (4).

Mr. Crum testified, even though in his deposition he admitted that he had been provided Dr. McNulty's post-hearing testimony prior to his own post-hearing deposition, that Dr. McNulty did not mention any physical restrictions. Crum depo. p. 15, l. 17-24.

Mr. Brownell was the only expert vocational witness to take into consideration the FCE and Dr. McNulty's opinions. With the solid objective foundation of the FCE report, which Dr.

¹ The Commission's statement that the labor market should have been that of Vancouver is addressed above.