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# Green v. Green Appellant's Brief Dckt. 42782

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**ROY GREEN,**

Claimant/Respondent,

vs.

**ROY GREEN, dba ST. JOES SALVAGE  
LOGGING, Employer, and TRAVELERS  
INDEMNITY COMPANY, Surety,**

Defendants/Respondents,

and

**STATE OF IDAHO, INDUSTRIAL  
SPECIAL INDEMNITY FUND,**

Defendant/Appellant.

**SUPREME COURT NO. 42782**

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**APPELLANT'S BRIEF**

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Appeal from the Industrial Commission, State of Idaho

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Thomas P. Baskin, Chairman, Presiding

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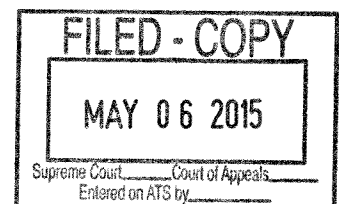
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The State of Idaho, Industrial Special Indemnity Fund ("ISIF") submits its Appellant's brief as follows:

I.

**FACTS AND PROCEDURAL HISTORY**

On July 3, 2006, Claimant was working alone when he was struck on his hardhat by a falling tree. Claimant's employee had previously cut the tree that hit Claimant, but left it standing. The draft created by a tree Claimant had just fallen apparently knocked the standing tree loose and Claimant ran into it. A nearby stump prevented the tree from crushing Claimant. When he came to, Claimant wriggled out from under the tree. His legs were tingling and numb. He couldn't lift his chainsaw. He made his way to his pickup and drank a soda. When he tried to walk, he knew he had seriously injured himself. "I was clumsy and my legs were like - - it was like, I'm done." (TR, pp. 102-103.) Claimant drove to the emergency department at Benewah Community Hospital in St. Maries.

Following care and treatment by other physicians, and an IME by Dr. Stevens at Surety's behest, Mr. Green returned to see Dr. Dirks. Mr. Green had previously seen Dr. Dirks in 2004.

Dr. Dirks and his nurse practitioner first saw Claimant regarding this injury on September 18, 2006. Claimant reported long-standing pain and numbness in his right heel, for which he was taking Neurontin, as well as details concerning his industrial accident. He had some neck and elbow pain, and back pain, and he had problems with his left leg. Dr. Dirks' nurse practitioner diagnosed neck pain without radiculopathy ("He does have a disc bulge at C5-6, but this does not seem to be clinically significant

with ciprofloxacin. On April 17, 2007, Dr. Dirks referred Claimant for physical therapy. On May 17, Dr. Dirks reported Claimant was doing fine in regard to his back, but he still had "complaints of leg pain from before and he has low back pain." JE-103. On exam, Claimant had good leg strength and was walking. Also, "He has right-sided neck pain that goes into the right arm and makes it feel like jelly:" with right deltoid, triceps, and biceps weakness on exam.

Dr. Dirks ordered a new cervical spine MRI, performed on May 23, 2007. The images demonstrated motion; however, the radiologist reported they revealed bony changes at C3-4, C4-5, and C5-6, as well as "moderate narrowing of the bilateral C3-C4 neuroforamen and moderate narrowing of the C5-C6 right neural foramen." JE-104. On June 7, 2007, Claimant continued to have pain in his neck and down his right arm "since his accident." JE-106. Claimant explained that previously, when he had neck pain, he could alleviate it by lying on a rolled-up towel. After his 2006 industrial injury, however, this procedure provided no relief. "If I lay on that towel now with stenosis, or whatever is going on in there now, I can't - - everything goes numb." 2007 Cl. Dep., pp. 26-27.

Upon review of the latest MRI, Dr. Dirks opined Claimant's neck and right arm complaints were the result of a "right, greater than left, radicular component correlating with a C5-6 disk bulge on the right." JE-110. Dr. Dirks recommended an anterior cervical discectomy and fusion at C5-6 with plating and cadaver bone. He attributed the need for surgery to the 2006 industrial injury.

On July 16, 2007, Claimant underwent cervical fusion surgery, at C5-6, with Dr. Dirks. A week later, Claimant sought stronger pain medication from Dr. Dirks for



3. T12-L1 fusion;
4. Preexisting multi-level cervical and lumbar disc disease and spinal degeneration.

The case was set for hearing in August of 2012. The Amended Notice of Hearing set forth the issues to be heard and decided by the Commission. Notably for this appeal, the issues included:

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
2. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
  - c. Permanent partial impairment (PPI);
  - d. Permanent partial disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine; and
  - e. Attorney fees;
3. Whether Claimant is totally and permanently disabled;
4. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code §72-406 is appropriate;
5. Whether the Industrial Special Indemnity Fund is liable under Idaho Code §72-332; and
6. Apportionment under the Carey formula.

The case was heard by Referee Rinda Just, who retired prior to issuing recommended findings and conclusion. The case was taken over by the full

3. Whether the Commission erred in relieving Employer/Surety from its failure to prove the elements of ISIF liability, which such issues were clearly noticed for hearing.

4. Whether the Commission's finding that Claimant's thoracic spine condition "combined with" the industrial injuries to render Claimant totally and permanently disabled is supported by substantial and competent evidence.

5. Whether the Commission erred in concluding as a matter of law that Claimant suffered from a permanent pre-existing physical impairment within the meaning of I.C. § 72-332(2) when no physician had assigned an impairment rating prior to the hearing for Claimant's thoracic spine condition.

6. Whether the Commission erred in applying the Carey Formula when at hearing there was no evidence of any impairment rating for Claimant's thoracic spine condition.

### III.

#### ARGUMENT

##### A. Introduction.

This is a worker's compensation case involving the ISIF. The preliminary decision of the Commission was styled "Findings of Fact, Conclusions of Law and Order" and was filed January 29, 2014. (R. pp.66-181).

One of the statutory elements necessary to establish ISIF liability is that a Claimant must suffer from a permanent pre-existing physical impairment. I.C. §72-332. It must then also be shown that such pre-existing condition qualified for an impairment rating---a medical appraisal of the nature and extent of such physical impairment. I.C.

The ISIF respectfully submits that the Commission erred in retaining jurisdiction to fill in the lack of requisite evidence by a *sua sponte* method under the facts and circumstances of this case. The ISIF further submits that to the extent the Industrial Commission possessed discretion to retain jurisdiction, that such discretion was abused. Additionally, the ISIF maintains that the decision to retain jurisdiction *sua sponte* was an attempt at some equitable result—a realm in which the Commission cannot operate,<sup>1</sup> — and was made in violation of all legal standards governing the Commission’s discretion to retain jurisdiction.

The preliminary and interlocutory decision entered January 29, 2014 was followed up by the “Order on ISIF Liability” filed November 26, 2014 (R. pp.200-207). In this Order the Commission found a numerical rating for the pre-existing thoracic spine condition and proceeded to apply the *Carey* formula to apportion liability between the Surety and the ISIF. The ISIF appeals from both decisions.

Prior to the Order of November 26, 2014, the ISIF filed its “Brief on Retained Jurisdiction” (R. Additional Documents #6). The ISIF argued, inter alia, that (1) the interlocutory order to retain jurisdiction was entered in error and was an abuse of discretion; (2) there was not substantial competent evidence to support the finding of combination under I.C. §72-332; and (3) the *sua sponte* attempt to relieve the surety from its failure of proof on a noticed issue worked a “manifest injustice” upon the ISIF.

The ISIF argued that the interlocutory *sua sponte* decision to retain jurisdiction should be revisited and rescinded as improvidently granted. This was done for the

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<sup>1</sup> *Deon v. H&J Inc., Liberty Northwest and ISIF*, 157 Idaho 665, 339 P.3d 550 (2014). The court did not delve into the issue of whether some variant of judicial estoppel obtains in worker’s compensation cases, but did observe: “that the Commission derives its authority solely from statutory law and does not have the ability to operate in the equitable realm.”

so *sua sponte* to keep the record open for any additional evidence or other issues.

Following the completion of the post-hearing depositions, the Employer/Surety made no motion to the Commission requesting that it retain jurisdiction. When all of the facts were fully submitted, and the record completed, the Employer/Surety had not, at any time, requested that the Commission retain jurisdiction in order that “justice” be achieved.

Two days after the Commission entered its final order, this Court issued its opinion in *Deon v. H & J Inc. and ISIF*, 157 Idaho 665, 339 P.3d 550 (2014). The court considered another *sua sponte* “result” by the Commission after applying a legal theory not raised by the parties and deciding an issue which had not been noticed or presented before the Commission. The court in *Deon* held and stated that:

“As demonstrated by our decisions in *Sales* and *Heitz*, this Court takes a dim view of fact-finding tribunals raising defenses or theories *sua sponte*. Theories and defenses should be determined by the parties, not the tribunal. Just as in *Sales*, where we held it was error for the district court to raise an affirmative defense not raised by the parties, the Commission erred here in raising collateral estoppel, which was never raised by Employer/Surety before the Commission invited briefing on the issue. Although Employer/Surety may not have known the complete substance of the ISIF agreement, there is no question it knew ISIF had settled with Deon and therefore knew ISIF had accepted some level of liability to Deon. Despite this knowledge, either intentionally or by oversight, Employer/Surety chose not to raise estoppel theories as a defense to Deon's claim. In *Heitz*, we held that a party is bound by the theory upon which it tries its case. We cannot speak to the reasons Employer/Surety failed to assert estoppel, but just as in *Sales* and *Heitz*, Employer/Surety is held to that choice. The Commission cannot raise the defense of collateral estoppel for Employer/Surety even if it felt Employer/Surety would have prevailed had it chosen to raise the issue. Our system works best when the parties devise their own litigation strategies.”

Id at p. 674.

abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation.”

In the landmark decision of the Idaho Supreme Court in the case of *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), the court had before it conflicting decisions of the Idaho Industrial Commission reaching different results in apportioning liability between the Employer/Surety and the ISIF in the three cases. The court made it clear in its decision that a uniform rule of law in applying the statute needed to be imposed in cases involving the ISIF in order to achieve consistency and clarity for the parties and the Commission. In crafting that judicial solution, which has been “black letter law” in all ISIF cases before this Commission for over 30 years, the court stated:

We believe that the appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment. Thus, in the instant case, Mr. Carey's preexisting impairment was 10% of the whole man, and his physical impairment from the accident is an additional 40%, resulting in a 50% impairment. Claimant is 100% disabled, by virtue of the odd-lot doctrine, so an additional 50% nonmedical factors, over and above the 50% physical impairment, need to be allocated between the employer/surety and the fund. The fund is therefore responsible for 10/50, or 4/5 (80%) [sic], of the nonmedical portion of disability, and the employer is liable for 40/50, or 4/5 (80%), of the nonmedical factors. In accord are ***Northwest Carriers v. Industrial Comm'n***, 639 P.2d 183 (Utah 1981); and ***Desbian v. Key Milling Co., Inc.***, 588 P.2d 482 (Kan. 1979). The Utah Supreme Court explained this proration method in the ***Northwest Carriers*** case, *supra*, 639 P.2d at 141-142:

parties notice of the issues to be decided in any given case. As in *Vawter*, the issue of apportionment under the *Carey* formula was clearly set forth in the Amended Notice of Hearing in this case. Furthermore, the parties were on notice that the Commission would hear evidence regarding and presumably determine all factual and legal issues related to apportionment, including application of the *Carey* formula. As the court further noted in *Vawter*, supra, "evaluation of permanent impairment is conducted through a rating analysis, expressed as a percentage." (*Id.* p.7) Yet despite being clearly noticed as an issue in this case, and despite the decision in *Carey*, supra, predicating apportionment upon numerical impairment ratings, and despite the representation of Employer/Surety by experienced counsel, the Commission has relieved the Employer/Surety from its failure to present any impairment rating regarding the Claimant's pre-existing thoracic spine condition. If the Employer/Surety, having notice of the issue, having notice of the elements of proof required, and yet fails to present evidence on such issues, is to be relieved of such failure by the concept of "retained jurisdiction", then in what conceivable case would retained jurisdiction not likewise be applicable to insulate and protect Employer/Surety from its own failure of proof? Why in this case should the Industrial Commission relieve Employer/Surety of the certain consequences of its failure to present the requisite proof? Why should the Industrial Commission give to the Employer/Surety a second opportunity, under the notion of retained jurisdiction, to adduce the very "evaluation of permanent impairment" that was required under the noticed issues for hearing and extant law? The Commission in its preliminary decision indicated that it is doing so from the demands of justice.

knowledge of lay persons. *Id.* p.758. The court further held that: “An agency ‘may not use its specialized knowledge as a substitute for evidence presented at a hearing’”. *Id.* 761. The court held that, in making findings of fact, the Commission must take an independent role as an adjudicator, must listen to the testimony of experts, and must render an impartial decision based upon the evidence in the record and the law... *Id.* 761.

In this case, the Industrial Commission entered as a conclusion of law the following:

287. The Commission concludes that Claimant is likely entitled to an impairment rating referable to the T12-L1 fusion and residuals. However, the record altogether fails to establish what that impairment rating might be. (R. p.167)

In so doing, the Industrial Commission proceeded to a legal conclusion that the Claimant was “likely entitled to an impairment rating referable to the T12-L1 fusion and residuals.” However, the statute clearly provides that an appropriate impairment rating is “a medical appraisal”. There was “no medical appraisal” in this record. Despite such lack of evidence, the Commission evidently concluded that such a medical appraisal was likely and therefore retained jurisdiction. The conclusion is inescapable that the Commission in this case intended a certain result: ISIF liability. Under the court’s decision in *Mazzone* and other cases, the only way the Commission could reach such a result was to retain jurisdiction and allow the Employer/Surety after-the-fact to obtain the evidence which the Commission believed was likely. The conclusion that Claimant was entitled to an impairment rating, and the necessary finding upon which such conclusion must be based, is completely lacking in this record. There was no medical evidence offered at any stage in this proceeding prior to the *sua sponte* order retaining jurisdiction

“A trial court does not abuse its discretion if it (1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason.” *Johannsen v. Utterbeck*, 146 Idaho 423, 429, 196 P.3d 341, 347 (2008). *Martin v. Smith*, 154 Idaho 161, 163, 296 P.3d 367, 369 (2013).

It is illuminating to review this Court’s cases regarding retained jurisdiction in worker’s compensation proceedings. In so doing, it is clear that retained jurisdiction is not available to relieve a surety from failing to present evidence on a threshold legal issue noticed for hearing.

In the pre-1971 code decision of *Watkins v. Cavanagh and State Insurance Fund* 61 Idaho 720, 107 P.2d 155 (1940) the Claimant suffered injury caused by a pump falling onto his chest which led to traumatic pneumonia and a complication of phlebitis. The Industrial Accident Board determined that the Claimant had suffered from a 10% impairment rating of the loss of the leg. There was an issue on appeal regarding the failure of the board to award partial temporary disability from the period January 20, 1938 to June 28, 1938. This was due to the fact that the Claimant overlooked submitting any evidence as to his average weekly wage during that 6 month period of time. The court held and stated that:

In *Feuling v. Farmers’ Co-operative Ditch Co.*, 54 Idaho 326, 334, 31 P.2d 683 this court held:

“When a claimant has failed or overlooked submitting evidence to establish the amount of compensation to which he is entitled, and there is no question but that he is entitled to [61 Idaho 726] compensation, then it is the duty of the Board to call attention to such failure and see to it that whatever evidence is available to establish such fact is presented, and then make the necessary findings of fact.”

*Id* at 157.



The *Watkins* and *Feuling* cases were cited by the court in *Hartman* as supporting the notion of retained jurisdiction before the Industrial Commission. It is significant to note that in neither case did the Commission, on its own, or in the exercise of its discretion, retain jurisdiction. Rather, the court remanded the cases back to the Board to take additional evidence to protect the claimant and to make determination of the claimant's actual wages. In both cases the court clearly held and stated that the concept of taking new evidence after the Board's decision was only necessary to protect the claimant and that the Worker's Compensation Law and Board practice was to "be liberally construed for the benefit of those whom it is intended to protect."

In another pre 1971 code case *Brooks v. Duncan*, 96 Idaho 579, 532 P.2d 921 (1975), Claimant was injured when a loader rolled over him, crushing his pelvis. Claimant was found entitled to benefits and the Board ordered employer to pay medical expenses to the date of hearing (October 13, 1967) plus total temporary disability payments for a 9 month period. The Board in its rulings of law retained jurisdiction "to hear and determine upon appropriate supplemental pleadings from any party in interest" other pending issues. Some five years later, claimant wrote a letter to the Industrial Commission inquiring about the possibility of further benefits and in 1972 he filed a formal application for a hearing asking that the medical expenses for his second operation be paid. The Commission evidently assumed jurisdiction of the matter under its prior order reserving jurisdiction, but then held the claim was barred by the statute of limitations. The Supreme Court reversed and held that the claim for additional medical benefits was not barred by the statute of limitations and neither was the claim for total temporary disability as a result of the second operation. The court did not discuss the

thereby keeping open the issue of disability for the industrial injury. On petition for rehearing filed by Browning Ferris, the Commission deleted any reference to retained jurisdiction and adhered to the impairment and disability the Commission previously made. A second appeal was taken by claimant, contending that the Commission erred on reconsideration in its refusal to retain jurisdiction.

The court in *Reynolds II* (113 Idaho 965, 751 P.2d 113 (1988)) discussed the appropriate process for the Commission to address impairment and disability in a case where the claimant's condition was certain to deteriorate in the future. The court noted that in such a case the Commission could retain jurisdiction or it could utilize "another possible approach" set forth in Idaho Code §72-425. Of course that statute allows the Commission to determine disability in light of a claimant's "present and probable future ability to engage in gainful activity..." Therefore the court remanded the case to the Commission and suggested that §72-425 be utilized to determine disability with a view toward probable future reductions in claimant's ability to be gainfully employed.

Clearly, to the extent that *Reynolds I or II* support the notion of retained jurisdiction in a Commission case, they do so only in order to protect the claimant and the claimant's entitlement to future benefits. Interplay between Justices Bakes and Bistline and their concurring opinions (a feature common in many worker's comp cases in those years) discuss the utility of the retained jurisdiction concept. Justice Bakes noted that "our prior cases have indicated a preference for making final determinations of permanent disability, rather than retaining jurisdiction." *Id.* at 119. Justice Bistline launched into a review of the cases and added the following in his concurring opinion:

"As for the case now at hand, and the tendered guidance on remand per the opinion for the Court and per the separate opinion

claimant's partial disability award to 59% of the whole man. Following the Commission decision, the claimant appealed to the Supreme Court contending that the Commission should have retained jurisdiction over issues pertaining to future medical benefits. The Commission refused to do so. On appeal, the Supreme Court noted the applicable legal standard whereby the Commission may properly retain jurisdiction:

"In *Reynolds*, this Court stated: "In a situation where the claimant's impairment is progressive and, therefore, cannot adequately be determined for purposes of establishing a permanent disability rating, it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the claimant's condition is nonprogressive." However, under I.C. § 72-425, the Commission is allowed to make an appraisal of an "injured employee's present and probable future ability to engage in gainful activity" and base its evaluation rating upon that appraisal. See *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988). In arriving at its disability rating of fifty-nine percent in this case, the Commission considered the possibility of future surgery to repair the total arthroplasty. Consequently, we conclude that the Industrial Commission did not err in entering a final award without retaining jurisdiction."

*Id.* at 804.

Thus, the court articulated the appropriate standard determining whether or not the Commission committed error in refusing to retain jurisdiction. The standard was whether the Commission had properly evaluated claimant's disability under Idaho Code §72-425. In utilizing Idaho Code §72-425, the Commission correctly refused to retain jurisdiction as to any issue of future disability. The holding of this case demonstrates that the concept of "justice" toward a surety is not even properly attributable to retained jurisdiction. The concept of manifest injustice arises under Idaho Code §72-719(3) and has nothing whatsoever to do with the concept of retained jurisdiction to benefit a claimant by way of future consideration of increased disability. Since the Commission had determined disability under §72-425, there was no legal basis under which the

case. The case merely stands for the proposition that retained jurisdiction is appropriate on issues of future determination of claimant's entitlement to impairment benefits and/or disability benefits. The doctrine is of no avail to a surety who fails to present evidence at the hearing on a noticed issue.

In *Burke v. EG & G/Morrison-Knudsen Co.*, 126 Idaho 413, 885 P.2d 372 (1994) the Commission determined the claimant's percentage of permanent physical impairment and declined to award any disability beyond impairment. The Commission in its order declined to retain jurisdiction with respect to permanent future disability. The court on appeal held that the Commission applied the correct legal standard in determining impairment and disability and that the Commission applied the correct legal standard in declining to retain jurisdiction. The court reiterated that the appropriate legal standard to be applied in ruling on a request that the Commission retain jurisdiction is as follows:

"In a situation where the claimant's impairment is progressive and, therefore, cannot adequately be determined for purposes of establishing a permanent disability rating, it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the claimant's condition is non-progressive."

*(Id. at p.416, citation omitted)*

The impact of this decision is, consistent with the other cited cases, that the legal standard allowing the Commission to retain jurisdiction is: it is confined to a determination of changes in a claimant's condition and/or future disability.

Retained jurisdiction does not lie for purposes of relieving a surety from its failure to present testimony and proof sufficient to apportion liability to the ISIF.

Industrial Commission erred in failing to retain jurisdiction. The Supreme Court once again cited to *Reynolds II* for the proposition that it would be appropriate for the Commission to retain jurisdiction in the case, but that there was another possible approach that the Commission may utilize which is set forth in Idaho Code §72-425. Because the Commission had proceeded to determine claimant's disability appropriately under §72-425, there was no basis upon which to retain jurisdiction and the Commission correctly determined they would not do so. The court found no error in the Commission's decision and no abuse of discretion. Again, the concept of retained jurisdiction was noted to be available in a case where the Commission was not able to determine the claimant's extent of disability. In the pending case, the Commission proceeded under §72-425 to determine that Mr. Green is totally and permanently disabled. Having done so, the legal standards in Idaho governing retained jurisdiction are fully satisfied and there is no basis for the Commission to retain jurisdiction on other issues.

In *Lorca-Merono v. Yokes Washington Foods, Inc. and ISIF*, 137 Idaho 446, 50 P.3d 461 (2002) there was yet another appeal by a claimant contending that the Commission should have retained jurisdiction to evaluate future impairments and disabilities. The claimant contended that the Commission should have retained jurisdiction over the case until she received future medical treatments and achieved an MMI status. The court, again citing to the legal standard adopted in *Reynolds II*, noted that retained jurisdiction would not be available because the Commission had determined that the claimant was MMI and that impairments were non-progressive.

referee or examiner, to whom the matter has been assigned, shall make such inquires and investigations as may be deemed necessary." As stated in *Hagler*, "none of our opinions in recent years have had occasion to remind the Commission of the inherent powers it possesses." 118 Idaho at 599, 798 P.2d at 58. Although, in this case, it is not the Industrial Commission we have to remind, but instead the parties practicing before it.

In this case, the Industrial Commission found that Hartman appeared to be entitled to compensation. Apparently, the Industrial Commission felt that Hartman either failed to present or overlooked submitting evidence regarding apportionment between the Appellants. Clearly, the Industrial Commission has authority to request that Hartman present adequate evidence on this issue."

*Id.* at 143.

The above quoted portion of the court's dicta is illuminating. The initial paragraph notes only that retained jurisdiction from the older cases of *Watkins* and *Feuling* pertained to a situation where a claimant has failed or overlooked submitting evidence to establish the amount of compensation.

Likewise, the final paragraph of the above quoted dicta demonstrates that the Supreme Court perceived the issue on retained jurisdiction to relate to the claimant's (Hartman) entitlement to compensation. The court's analysis demonstrates that the court perceived the issue as being that Hartman either failed to present or overlooked submitting evidence regarding apportionment. The court then noted that the Industrial Commission could retain jurisdiction to request that Hartman present evidence on this issue so as to support the claimant's entitlement to benefits.

In no case involving retained jurisdiction has the Industrial Commission or the Idaho Supreme Court allowed retained jurisdiction where the issue did not relate to a claimant's entitlement to benefits, and in particular to a claimant's entitlement to future disability outside of an Idaho Code §72-425 analysis. The Commission's reliance on

Rehearing Denied October 29, 2014) The second prong of the *Corgatelli* decision dealt with the Employer/Surety's burden of proof in seeking to invoke the liability of ISIF under the "but for" standard. This issue is entirely separate from the notion of retained jurisdiction. This issue is predicated upon a finding entered without substantial competent evidence and a conclusion thereon reached in violation of *Corgatelli* and *Hope*.

This court explained the "but for" standard and held that the Industrial Commission had failed to correctly apply the "but for" test. The court held that the Commission erred in failure to apply the correct but for test and stated that:

"Our review of the Commission's decision reveals that the Commission failed to use the "but for" test to determine whether Steel West satisfied the "combined effects" requirement in Idaho Code section 72-332(1). Instead of the "but for" test, Commission examined whether *Corgatelli*'s preexisting impairment from his 1994 injury and his 2005 injury together "necessitated" the 2009 L2-5 fusion. By inferring that *Corgatelli* would not have needed the 2009 fusion from L2 to L5 had he not suffered his 1994 injury, the Commission erroneously reasoned that *Corgatelli*'s total and permanent disability after the fusion was the result of the combined effects of his two injuries. Put another way, the Commission erred by determining that *Corgatelli* was totally and permanently disabled due to the combined effects of the two injuries solely because the combined effects of the two injuries may have influenced the scope of the unsuccessful fusion."

*Id.* at p. 301.

It is evident that the Commission in the pending case has engaged in the same error. The pertinent conclusion is as follows:

300. Therefore, per Drs. Ganz and McNulty, the fact that Claimant has a pre-existing T12-L-1 fusion increases the risk that he will have further problems from the L3-5 fusion unless he observes certain prophylactic limitations/restrictions. We believe this demonstrates that Claimant's pre-existing thoracic spine condition does combine with the effects of the work accident to contribute to Claimant's total and permanent disability.

*State, Indus. Special Indem. Fund*, 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996)). In other words, the party "seeking to invoke the liability of ISIF" has the burden of proof to meet the requirements under Idaho Code section 72-332(1). See *Garcia v. JR. Simplot Co.*, 115 Idaho 966, 970, 772 P.2d 173, 177 (1989), *overruled on other grounds*, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 169, 786 P.2d 557, 560 (1990).

The ISIF challenges the Commission's factual findings and legal analysis on the fourth requirement as it relates to Green's pre-existing T12- L1 fusion, the "combined with" requirement. The thoracic surgery at T12-L1 was the only pre-existing impairment that the commission found to satisfy the four requirements of I.C. § 72-332(1) and impose liability upon the ISIF. The evidence in this case does not does not support a finding that the T12-L1 2003 surgery combined with the July 2006 industrial accident to render Green totally disabled.

To satisfy the fourth requirement in Idaho Code section 72-332(1), "the 'but for' standard is the appropriate test to determine whether the total permanent disability is the result of the combined effects of the preexisting condition and the work-related injury." *Garcia v. J.R. Simplot Co.*, 115 Idaho at 970, 772 P.2d at 177 (1989). The Supreme Court has reiterated the "but for" standard in subsequent cases and it is the controlling test for the "combining effects" requirement. *Eckhart v. State, Indus. Special Indem. Fund*, 133 Idaho 260, 264, 985 P.2d 685, 689 (1999); *Bybee*, 129 Idaho at 81, 921 P.2d at 1205; *Selzler v. State, Indus. Special Indem. Fund*, 124 Idaho 144, 146, 857 P.2d 623, 625 (1993). The "but for" test requires a showing by the party invoking liability that the claimant would not have been totally and permanently disabled but for the preexisting impairment. *Garcia, supra*.



2006 accident. Since there was no medical testimony that the Claimant would have been totally and permanently disabled but for the thoracic fusion, there is no basis for the Commission's findings that the fourth requirement of I.C. § 72-332(1) the "combined with" requirement has been satisfied. The Commission held:

Therefore, per Drs. Ganz and McNulty, the fact that Claimant has a pre-existing T12-L1 fusion increases the risk that he will have further problems from the L3-5 fusion unless he observes certain prophylactic limitations/restrictions. We believe this demonstrates that Claimant's pre-existing thoracic spine condition does combine with the effects of the work accident to contribute to Claimant's total and permanent disability.

R. p. 107.

The issue however, is not whether there is an increased risk of a future problem at the vertebrae between the T12-L1 fusion and the L3-5 fusion; the issue is whether Green would not have been totally and permanently disabled but for the pre-existing thoracic fusion. There was no evidence that Green was totally and permanently disabled due to the combined effects of the prior thoracic fusion and the cervical fusion and two-level lumbar fusion caused by the 2006 accident. The "but for" test has not been met.

The Supreme Court further elucidated the burden of proof in a "but for" case in *Hope v. Industrial Special Indemnity Fund*, 157 Idaho \_\_\_\_, 338 P.3d 546 (2014), Opinion No. 102 (September 24, 2014) (Justices J. Jones and W. Jones, dissenting).

The Court held and stated that:

We have held on numerous occasions that a claimant must support his worker's compensation claim with medical testimony that has a reasonable degree of medical probability. *Sykes v. C. P. Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980). The medical aspects of workmen's compensation cases mean the cases "depend upon knowledge neither expected nor possessed by

## CONCLUSION

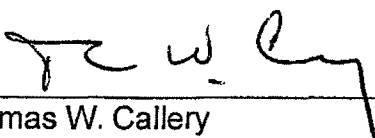
The Industrial Commission erroneously retained jurisdiction in this case to relieve a Surety from its failure to prove its case against the ISIF. To the extent Idaho law affords discretion to the Commission to retain jurisdiction, such discretion was abused in this case. Retained jurisdiction should never be utilized to relieve a Surety from a patent failure to prove its case against the ISIF.

The Industrial Commission also erroneously failed to apply the "but for" test to determine that Claimant's pre-existing thoracic spine condition "combined with" the 2006 industrial injuries to result in total and permanent disability.

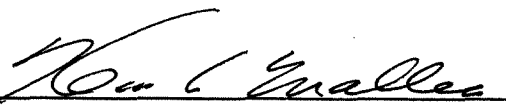
The Commission's decision should be reversed and the ISIF should be dismissed with prejudice from this case. Surety should bear the full liability for Claimant's disability.

Respectfully submitted,

Dated: May 4, 2015

  
\_\_\_\_\_  
Thomas W. Callery  
Attorney for Appellant ISIF

Dated: May 5, 2015

  
\_\_\_\_\_  
Kenneth L. Mallea  
Attorney for Appellant ISIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6<sup>th</sup> day of May, 2015, I served two (2) true and correct copies of the foregoing **APPELLANT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Starr Kelso  
P.O. Box 1312  
Coeur d'Alene, ID 83702  
Telephone: (208) 765-3260  
Facsimile: (208) 664-6261  
*Attorney for Claimant/Respondent*

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile

Eric S. Bailey  
P.O. Box 1007  
Boise, ID 83701  
Telephone: (208) 344-7200  
Facsimile: (208) 344-9670  
*Attorney for Employer/Surety/ Respondent*

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile

  
Kenneth L. Mallea

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RECEIVED

AUG 08 2012

JOBINES, ED, ROUNZEL, S, GALLEY

IC 2006-007698

ROY J. GREEN,

Claimant,

v.

ROY GREEN d.b.a ST. JOE SALVAGE,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Surety,

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND

Defendants.

AMENDED NOTICE OF HEARING

FILED

JUL 31 2012

INDUSTRIAL COMMISSION

Based on the telephone conference conducted by Referee Rinda Just on July 30, 2012, NOTICE IS HEREBY GIVEN that the hearing scheduled for August 21 & 22, 2012, at 9:00 a.m., is hereby AMENDED to hear the following issues:

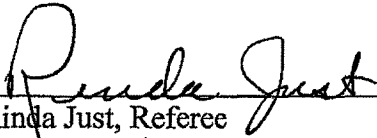
1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury/condition;
2. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
  - c. Permanent partial impairment (PPI);
  - d. Permanent partial disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine; and

AMENDED NOTICE OF HEARING - 1

- e. Attorney fees;
3. Whether Claimant is totally and permanently disabled;
4. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate;
5. Whether the Industrial Special Indemnity Fund is liable under Idaho Code § 72-332;
- and
6. Apportionment under the *Carey* formula.

DATED this 31 day of July, 2012.

INDUSTRIAL COMMISSION

  
Rinda Just, Referee

**CERTIFICATE OF SERVICE**

I hereby certify that on the 31 day of July 2012 a true and correct copy of the **AMENDED NOTICE OF HEARING** was served by United States **Certified Mail** upon each of the following:

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

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701-1007

THOMAS W CALLERY  
PO BOX 854  
LEWISTON ID 83501-0854

and by regular United States mail upon:  
M&M COURT REPORTING SERVICES  
816 SHERMAN AVE #7  
COEUR D'ALENE ID 83814

and by Email transmission:  
annie.frederick@labor.idaho.gov  
Idaho Department of Labor/St. Maries office

kla



**AMENDED NOTICE OF HEARING - 2**