9-17-2015

Wilson v. Conagra Foods Lamb Weston Respondent's Brief Dckt. 43058

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMANDA WILSON, Claimant/Appellant, v. CONAGRA FOODS LAMB WESTON, Employer/Respondent, and OLD REPUBLIC INSURANCE CO., Surety/Respondent,	)	**SUPREME COURT NO. 43058**

RESPONDENTS' (EMPLOYER/SURETY) RESPONSE BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERED BY THE IDAHO INDUSTRIAL COMMISSION ON THE 29TH DAY OF JANUARY, 2015

Chairman RD Maynard, Presiding

Justin Aylsworth
Goicoechea Law Offices, Chtd.
2537 W. State St.
PO Box 6190
Boise, Idaho 83707

Attorneys for Appellant/Claimant

Nathan T. Gamel, ISB 8213
Bowen & Bailey, LLP
1311 W. Jefferson St.
PO Box 1007
Boise, Idaho 83701

Attorneys for Respondents/Defendants

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I.

STATEMENT OF THE CASE

A. Nature of the Case:

This is an appeal from the Idaho Industrial Commission's February 20, 2015, Decision and Order (the "Decision") denying workers' compensation benefits to Appellant, Amanda Wilson ("Claimant"), a former employee of ConAgra. Claimant had come to work for ConAgra with serious pre-existing problems with her lower back. She attempted, through the filing of a workers compensation claim, to have necessary treatment, including surgery, covered under the Worker's Compensation Act at the expense of ConAgra and its workers compensation Surety. Her attempt failed primarily due to her own inconsistent statements as regards the onset of her problems and the occurrence of an alleged industrial accident. The Industrial Commission ("Commission") concluded in its Decision that Claimant was not credible and failed to meet her burden of proving that she suffered an industrial accident with resultant physical injuries. The Commission rejected Claimant's arguments that Defendants were estopped to deny the validity of her claim. The Commission held that Claimant was not entitled to workers compensation benefits. Claimant has appealed to this Court, contending that the Commission erred in reaching its decision. In the briefing, Claimant goes so far as to suggest that the Commission and its Referee were somehow biased and prejudiced against Claimant. (e.g. Appellant's Brief p.39). As discussed below, the legal conclusions reached in the Commission's Decision are sound and the factual findings are based upon substantial and competent evidence.

B. Statement of Facts:

The Commission's Decision contained detailed factual findings. (R. pp. 8-14). For purposes of brevity, Respondents will not endeavor to revisit in this brief each and every fact identified by the Commission.

With that said, Respondents would draw this Court's attention to several key facts bearing on Claimant's lack of credibility in reporting the alleged industrial accident. These facts supply the Commission with ample reason for doubting Claimant's credibility. Other facts will be discussed, as appropriate, in the Argument section below.

Claimant worked at ConAgra through a Temp Agency with which she was employed. She became an employee of ConAgra in February of 2011. She was hired to work in the Sanitation Department. Claimant's workers compensation Complaint alleges she injured her low back while shoveling potatoes at ConAgra on March 16, 2011. (R. p. 1).

Three weeks after this alleged accident, Claimant presented to Family Health Services for treatment of lower back complaints. She was seen there on April 5, 2011. This was the first "post-accident" medical care Claimant received despite her later allegation of severe and debilitating back symptoms dating back to mid-March. Claimant reported three different sources for her back pain. First, she acknowledged that she experienced problems with her back since approximately 2008 when she "ruptured discs." Claimant also stated that she began experiencing right sciatic nerve pain that radiated down to her right heel six months prior to this visit, which

would place the onset of Claimant's low back pain in approximately October or November 2010, before Claimant became an employee of ConAgra. Claimant then indicated that her back began hurting "1 or 2 days ago" (i.e. April 3rd or 4th). None of these dates line up with Claimant's assertion of a low back injury on March 16, 2011. (See Defense Exhibit 7).

Claimant next presented to the St. Luke's emergency room on April 6, 2011 with continued complaints of low back pain. According to this record, Claimant again changed her date of accident to her current date of injury - the middle of March 2011. Therefore, in the course of two days and two medical treatments, Claimant provided at least four different dates for the onset of her back pain that varied to an extreme degree. (See Defense Exhibit 2).

To make matters more confusing, there is yet another alternative that has been presented in this case by Claimant herself. That alternative is that Claimant never actually had an industrial onset of back pain at ConAgra at all. After Claimant stopped working at ConAgra, she went through an unemployment process involving ConAgra and the Department of Labor. As part of that hearing process, Claimant was interviewed telephonically by the Hearing Officer (Def. Ex. 18, p. 356). In that statement, Claimant told the Hearing Officer that she did not tell the emergency room doctor at St. Luke's on April 6, 2011 that she had hurt herself at ConAgra. She stated she was of the opinion that she had not hurt herself at work. Claimant noted that "this is a complete miscommunication issue and I never wanted to lose my job over this issue. I wanted them to bill Medicaid, not ConAgra". Claimant went on to state that "I never went to the

emergency room to have the back injury as a report for workman's comp. injury". (Def. Ex. 18, pp. 356-357). While arguably not a sworn statement under oath, Claimant was nonetheless representing to a quasi-judicial body that her physical problems were not the result of an industrial event.

Claimant also explicitly told one of her treating physicians, explicitly that she was not injured at ConAgra. Claimant presented to Dr. Douglas Stagg on April 13, 2011. Dr. Stagg came to the following diagnosis: "Diagnosis of chronic low back pain with a recent flare, nonindustrial". The following statements were also contained in the record:

> The patient works as a packaging operator at ConAgra. She has been with them 2 months full time and with them nearly a year initially as a temp. She has some chronic issues for the last 4 years and ended up in the emergency department with some pain on April 6, 2011. Apparently her fiancé said something to the emergency room physicians about this being related to shoveling at work. But she said this is not work related. She is not claiming this is work related but this is just something that she has dealt with for the past several years and she has had a recent flare. She has no recent injuries. But approximately the first of April, she started having more low back pain than usual . . . She wants to get back to work and again says this has nothing to do with her work . . . She said she has had spells where her back is better but she has never been totally pain free but it has not slowed her down from doing her normal activities. . . This patient is not claiming this is an industrial or work comp injury and I agree. She is cleared for her normal work. (See Defense Exhibit 2, pages 16-17)(Emphases added).

In addition, Claimant testified during her deposition that March 16, 2011, the date of her alleged accident, was her last scheduled day in the Sanitation Department. Thereafter, she began working full time in the Packaging Department, which resulted in a pay raise of approximately $1.00 per hour. Claimant's job in the packaging department did not require any shoveling.

Claimant successfully completed her shifts in the Packaging Department and has no memory of bringing any concerns regarding back pain to her supervisors in the Packaging Department. (Def. Ex. 14 (Cl. Depo., p. 36, l. 6 – p. 40, l. 9)). This is significant because one of the stories Claimant has told places her industrial accident in early April 2011 at a time when she would not have been doing the work (shoveling) described as the cause of the injury. As discussed below, the Commission had ample reason to question Claimant's credibility with regard to the alleged industrial accident.

II.

ISSUES PRESENTED ON APPEAL

Claimant has asserted the following issues on appeal:

1. Did the Industrial Commission err in determining that the doctrine of quasi-estoppel was inapplicable as against Defendants/Respondents?
2. Did the Industrial Commission err in refusing to address, or otherwise invoke the doctrine of judicial estoppel?
3. If not otherwise rendered moot, whether the Industrial Commission's conclusions that Claimant/Appellant failed to prove the occurrence of a work-related accident with resultant physical injuries on or about March 16, 2011, are supported by substantial and competent evidence?

4. Did the Industrial Commission violate Claimant/Appellant's due process rights?

5. Did the Industrial Commission err in determining that all remaining issues were moot?

6. Whether or not Claimant is entitled to attorney's fees on appeal.

Respondent, for purposes of this appeal, sets forth the following additional issue:

7. Whether or not Respondents are entitled to attorney fees on appeal?

III.

ARGUMENT

A The Industrial Commission's Findings that Claimant was Not Credible and Failed to Meet her Burden of Proof that She Suffered a Work-Related Accident on March 16, 2011 were Based upon Substantial and Competent Evidence and Should be Upheld.

When the Idaho Supreme Court reviews a decision from the Industrial Commission, it exercises free review over questions of law but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." Boise Orthopedic Clinic v. Idaho State Ins. Fund, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996).

Claimant has the burden of proving the condition for which compensation is sought is causally related to an untoward mishap/event occurring at the work place. Callantine v. Blue

Ribbon Supply, 103 Idaho 734, 653 P.2d 455 (1982). Pursuant to Idaho Code § 72-102(18)(b), an accident means an unexpected, undersigned, and unlooked for mishap, or untoward event, connected with the injury in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

The Commission determined that Claimant failed to meet her burden of proof that she suffered an industrial accident on March 16, 2011, as she alleged. This conclusion reached by the Commission was based upon substantial and competent evidence and should be upheld. The record is replete with inconsistencies regarding when, if at all, Claimant actually sustained a work-related accident and injury.

Claimant's pre-existing history of low back problems is highly significant. Dating back to at least February 2008, Claimant was under treatment for severe low back problems. Claimant's low back pain began in approximately January of 2007, while Claimant was living in Arizona. Claimant experienced intermittent and severe back and sciatic nerve pain that was described as being at a pain level of 10 out of 10. She was diagnosed in February 2008 with a disc protrusion at L4-5 and lower lumbar facet arthrosis. (Def. Ex. 10, pp. 229-236; HT, p. 94, ll. 5-23). She followed-up at the Mesa Family Physicians on February 19, 2008 with low back pain radiating into her right leg and noted that her back pain was always present but fluctuated in intensity. Claimant was unable to sit or stand for long periods of time and was diagnosed with acute low back pain with right leg radiculopathy. Claimant was prescribed Percocet and Flexeril

and a lumbar MRI was ordered. She was also referred to the Scottsdale Center for Pain Management. (Def. Ex. 12, p. 250; See also HT, p. 97, ll. 2-4).

The lumbar MRI was taken on February 29, 2008 and was remarkable for a large disc protrusion at L4-5 that compressed the nerve root. It was also remarkable for another disc bulge at L5-SI and degenerative disc disease at the same level. (Id., at 251). Claimant then presented to the Scottsdale Center for Pain Management on March 5, 2008 at which time it was noted she had undergone a trial of oral prednisone that was not helpful in relieving Claimant's low back symptoms. Claimant was diagnosed with lumbar degenerative disc disease, a herniated disc at L4-5, right leg radiculopathy, lumbago, obesity, and depression. However, as was evident from the February 29, 2008 lumbar MRI, Claimant also suffered from a pre-existing disc bulge at L5-S1. An epidural steroid injection was recommended and Claimant was prescribed very potent painkillers including OxyContin, Fentanyl, and Versed. (Def. Ex. 11, pp. 242-243; HT pp. 19-20). On March 11, 2008, Claimant called the pain management center to request more OxyContin and was prescribed Vicodin for back pain. (Id, at 245).

Claimant next received an epidural steroid injection on March 27, 2008. The injection took place at L4-5. (Id., at 246). Claimant received a second epidural steroid injection on May 6, 2008. It was noted that Claimant had only one week of relief from her pain symptoms from the first injection. She then went on vacation where she ended up in an emergency room with "severe debilitating back pain." Claimant testified at hearing that this severe debilitating back

pain that occurred on vacation was caused merely from "the long car ride" from Arizona to California. Claimant noted that the car ride was just "a couple hundred miles." (HT, p. 100, ll. 6-22; p. 101, ll. 8-9). In this regard, Claimant's testimony that a mere car ride caused her severe debilitating back pain gives the Court a good sense of the absolute severity of Claimant's pre-existing back conditions. In any event, Claimant was diagnosed with bilateral back pain with right leg radiculopathy. This is important as it is evident from this record that Claimant had not only right-sided back pain, but also left-sided back pain dating back to at least 2008.* Claimant also was prescribed Norco. (Id, at 248-249).

Claimant then began another set of low back treatments in the 6 month time period prior to the date of the alleged accident in this case. She presented to Family Health Services on October 4, 2010 with low back pain complaints that radiated down her right leg to her right foot. Of interest, Claimant stated she had injured her back nine days prior while shoveling potatoes at ConAgra. (Def. Ex. 7, pp. 189-190).

Defendants would note that this story puts the actual onset of Claimant's low back pain on approximately September 25, 2010 as opposed to March 16, 2011 as asserted by Claimant. This contention is supported by the April 5, 2011 record from Family Health Services, discussed above, in which it was noted that Claimant began experiencing right sciatic nerve pain that

* This record is very significant considering Dr. Verska also diagnosed Claimant with an acute disc herniation at L4-5 on the left and it has been Claimant's argument that her pre-existing back symptoms were only right-sided prior to the accident at issue in this litigation. Clearly, that is not accurate. As is evident from this record, Claimant had an onset of left-sided low back pain dating back to 2008.

radiated down to her right heel six months prior to that visit. Counting back six months from that post-accident, April 5, 2011 record, would place Claimant's alleged accident and injury in September 2010, at a time prior to her employment by ConAgra. Crucially, Claimant admitted at hearing that she did not report this September 2010 alleged low back injury to ConAgra or the temp agency (with whom she was actually employed) at the time. (HT, p. 105, ll. 1-2; p. 106, ll. 6-10) (Emphasis added).

Moreover, the testimony from Claimant and her fiancé, Mr. Lehman, further undercuts the argument that Claimant injured her lower back in the alleged accident at ConAgra. At the Industrial Commission hearing Claimant testified generally that her back was doing "fine" until the March 16, 2011 shoveling incident. (Tr. p. 66). Her fiancé supported her testimony. (Tr. p. 44). Their testimony does not comport with the medical care that Claimant received. On October 6, 2010, Claimant called Family Health Services asking for a referral to a back specialist. She also inquired about undergoing physical therapy for her back pain. On November 14, 2010, Claimant again called Family Health Services regarding scheduling a pre-lumbar MRI doctor's appointment. Furthermore, as discussed above, Claimant told the Family Health Services on April 5, 2011 that she had ongoing right-sided sciatic nerve pain with right leg radiculopathy for the prior 6 months. Claimant's argument that her back was merely "sore" and "fine" and "got better" and her fiancé's attempts to corroborate this testimony are utterly contrary to the medical facts. The medical records suggest that Claimant complained of an injury

in the fall of 2010, although she never reported it. The medical records also document that Claimant has denied ever injuring her low back at ConAgra. Of all the possibilities suggested by the medical records, the least likely possibility is that Claimant sustained an accident and injury to her back in March 2011 as she contends. The only support for that contention is Claimant's own testimony (and perhaps that of her fiancé) and that testimony conflicts with contemporaneous medical records.

It is therefore not surprising that the Commission held that Claimant had failed to meet her burden of proof of a compensable accident and injury. Those findings are amply supported by the record before this Court. Claimant could have injured her back in September 2010 and then completely failed to report it. It could also be possible that she never had a back injury at ConAgra as she stated to Dr. Stagg and in her own statement before the Department of Labor. She might have had some sort of flare-up in early April of 2011, but even that date is inconsistent with Claimant's own testimony that she hurt her back shoveling potatoes on her last day in Sanitation on March 16, 2011. The bottom line is that it is literally impossible to discern Claimant's time and place of injury, if any, with any reasonable certainty whatsoever.

Upon reviewing the totality of the conflicting evidence discussed above, the Commission made the following conclusion:

> 46. The initial records generated in the spring of 2011 are difficult to square with Claimant's current insistence that she suffered an untoward mishap/event on March 16, 2011. We are also mindful that to Dr. Stagg, Claimant denied that her injuries bore any relation to her employment. On the whole, we find that

> Claimant lacks substantive credibility, and conclude that she has failed to prove the occurrence of the claimed untoward mishap/event of March 16, 2011. (R. pp. 20, 21).

This conclusion clearly is based upon substantial and competent evidence. There are numerous disparities between the contemporaneous medical records in evidence and Claimant's insistence upon a specific injury date of March 16, 2011.

Claimant's arguments to the contrary lack merit. In this regard, Claimant argued that the Commission's decision regarding Claimant's credibility and alleged accident date were overly narrow and consisted of an extrapolation of "hyper-technical inconsistencies from the medical records." Incredibly, Claimant boils down the overwhelming conflicting evidence discussed above into what she believes are merely "hyper-technical inconsistencies." This argument ignores the fact that the medical records relied upon by the Commission, as discussed above, directly contradicted Claimant's assertion of a March 16, 2011 accident. The Commission did not need to engage in a narrow or hyper-technical review of the medical records to reach its conclusion. The records are clear and they say what they say. There was no need to "read between the lines" or try to "make inferences" or "extrapolate" anything from the records. They clearly set forth several different possible injury dates across a wide span of time and are directly contradictory to Claimant's assertions (as well as her fiancé's) that her back was "fine" until a March 16, 2011 accident. Claimant asserts that the evidence should be liberally construed in her

favor. But, no amount of liberal construction resolves the conflicting stories that Claimant has told regarding the onset of her back problems and her alleged industrial accident.

Claimant further argues that the Commission "completely failed to consider the testimony of Claimant's fiancé Christopher Lehman at the February 22, 2013 hearing" and that Mr. Lehman's testimony "wholly corroborates Wilson's testimony." Claimant went so far as to assert that the Commission's handling of this evidence constituted "an 'arbitrary and capricious' act ... demonstrating a bias or prejudgment against Wilson, necessarily implicating her due process rights." (Appellant's Brief p. 26) None of this is accurate. The Commission specifically stated on page 3 of its Decision that it considered Mr. Lehman's testimony. (R. p. 8). Therefore, the suggestion that the Commission simply did not consider this testimony is just inaccurate. Furthermore, to the extent that Mr. Lehman's testimony purportedly "wholly corroborated Wilson's testimony," it similarly suffers from the same problem, which is that Claimant's testimony was directly contradicted by the contemporaneous medical evidence discussed above and was therefore deemed not credible.

With regard to Claimant's argument that the Commission was biased against her, acted arbitrarily and capriciously, and violated her due process rights, Claimant has failed to set forth any proof beyond her insistence that the Commission should have apparently ignored all the conflicting evidence discussed above and then just wholly accepted every word of Claimant and Mr. Lehman's testimony. In this regard, the Commission did not display any type of bias or

prejudgment or otherwise violate Claimant's due process rights by giving serious consideration to the conflicting evidence in the record in rendering its decision. Rather, in giving serious consideration to the conflicting evidence in rendering its decision, the Commission fulfilled its obligation. Merely because Claimant does not like the conclusion the Commission reached does not mean her due process rights were violated.

Claimant next argues that although she has insisted upon a March 16, 2011 injury date, she is not actually required to give an exact injury date. Although she has insisted upon a March 16, 2011 injury date, she asserts that she should prevail because she is only required to "reasonably locate the occurrence of the accident in time and place" pursuant to Hazen v. General Store, 111 Idaho 972, 729 P.2d 1035 (1986) and Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983). Those cases deal with situations in which an injured Claimant may not be able to recall or pinpoint the specific date when his or her accident occurred. In that circumstance, a Claimant may still prevail if he or she can "reasonably locate" in time and place when the industrial accident occurred. This line of cases provides an allowance for flawed memory of the specific timing of an accident. The cases do not provide a substitute for proof that an industrial accident actually occurred. The failure of such proof was the ultimate problem for Claimant. Moreover, this is not a circumstance in which Claimant can't determine the precise date of her accident and injury. Claimant has specifically located her time of accident to a specific shift on March 16, 2011. She simply failed to prove the occurrence of the alleged

accident. Furthermore, according to the medical records discussed above, Claimant's flare-up of low back pain could have begun at any time between October 2010 and April 2011. Again, this is a 6-month spread of time in which Claimant could have hurt her back. Simply pointing to a 6-month spread of time as to when Claimant may have injured her low back does not "reasonably locate" the time and place of the occurrence of the accident.

The bottom line is that Claimant cannot simply dismiss the overwhelming conflicting evidence in the record as "hyper-technical inconsistencies". The Commission correctly concluded that Claimant was not credible. Claimant's complete lack of credibility left the Commission with little choice but to rule against her. This result was not, as Claimant asserts, due to bias, prejudgment or due process violations by the Commission. These assertions are completely inappropriate. The Commission considered Claimant's evidence, found it lacking and ruled in favor of the Defendants. This ruling is amply supported by the evidence in the record and should be affirmed.

B. The Commission's finding that Claimant Failed to meet her Burden of Proof on Medical Causation is based upon Substantial and Competent Evidence and should be upheld.

Claimant's proof also failed on the required element of medical causation. In addition to proving the occurrence of an untoward mishap/event, Claimant must also demonstrate that such event caused damage to the physical structure of her body, i.e. an injury. See Idaho Code § 72-102(18)(b) and (c). There must be evidence of medical opinion - by way of physician's

testimony or written medical record - supporting the claim for compensation to a reasonable degree of medical probability. Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 591 P.2d 143 (1979); Roberts v. Kit Manufacturing Company, Inc., 124 Idaho 946, 866 P.2d 969 (1993). A Claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. Dean v. Drapo Corporation, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973); overruled on other grounds by Jones v. Emmett Manor, 134 Idaho 160, 997 P.2d 621 (2000).

In this regard, the Commission correctly concluded that the "evidence fails to demonstrate that any physician treating Claimant subsequent to April 1, 2011 has expressed the opinion that Claimant's low back condition is related to her claimed accident." (See Decision, par. 49). In coming to this conclusion, the Commission again reiterated the vast array of inconsistent possible accident dates arising out of the conflicting medical records in this case. Of great importance, as pointed out by the Commission, none of the medical professionals who treated Claimant subsequent to the alleged accident actually rendered an opinion supporting her position on the issue of medical causation. (R. pp. 21-22). In fact, the only physician in this case who rendered an opinion on medical causation in Claimant's favor was Dr. Joseph Verska. However, as pointed out by the Commission at Paragraph 56 of its Decision, Dr. Verska's opinion in this regard was inconsistent not only with the lack of medical causation opinions from Claimant's treating doctors, but was also inconsistent with Claimant's insistence to Dr. Stagg on

April 13, 2011 that she did not suffer an accident. Dr. Verska's causation opinion was founded on the history he received of a very specific injury on March 16, 2011, a proposition that the Commission found unproven. In that regard the Commission stated:

> 56. Dr. Verska's opinion rests on a particularized mechanism of injury of March 16, 2011 which is nowhere described in the medical records generated immediately following the alleged accident and which is inconsistent with Claimant's insistence to Dr. Stagg on April 13, 2011 that no such mishap/event had occurred. (R. pp. 23, 24).

The commission also expressed concern that Claimant's history given to Dr. Verska may have been incomplete in that he was not advised of Claimant's low back treatment in the fall of 2010. (R. p.23).

The above quoted conclusion from the Commission decision clearly indicates that the Commission appropriately considered Dr. Verska's causation opinion. The Commission simply did not find it persuasive in view of the other evidence in the record. This is not an indication of bias or prejudice on the part of the Commission. It is an indication of failure of proof on the part of the Claimant.

Recognizing the problems with Dr. Verska's opinion, the Commission correctly determined that Dr. Verska's testimony was unpersuasive and that Claimant had failed to meet her burden on the medical causation element. The Commission's findings in this regard were well reasoned and based upon a careful analysis of the totality of the medical records in the

evidentiary record. The finding was based upon substantial and competent evidence and should be upheld.

C. The Commission's Findings and Conclusions Regarding the Estoppel Issue should be upheld.

For reasons not entirely clear, Claimant seems to focus her argument on appeal on the notion that she should prevail on her workers' compensation claim - which the commission found factually unproven - due to something that may have occurred in connection with an unemployment benefits hearing. These Respondents must confess that they may not fully understand Claimant's estoppel arguments. Evidently, Claimant is suggesting that a position the Employer took in Claimant's unemployment preceding is somehow inconsistent with the arguments in defense of the workers' compensation claim and that therefore (despite a lack of evidence) Claimant should prevail.

In fact, Claimant's employment was terminated due to violation of company policy that required immediate reporting of any industrial accident. Claimant had not reported the alleged accident of March 16, 2011 to her Employer. The Employer learned of Claimant's alleged accident via the receipt of a medical record several weeks after the alleged accident. Claimant was asked about the circumstances and denied having told the doctor she had suffered an on-the-job injury in mid-March. This was contrary to the doctor's recollection and records. Accordingly, Claimant was terminated for violation of company policy requiring an immediate reporting of industrial accidents. In a subsequent unemployment hearing, the Employer took the position that

Claimant was terminated for cause; i.e. for violation of the reporting policy. This is discussed by the Commission at pages 11 and 12 of its decision. (R. pp. 16, 17).

The Commission recognized - although Claimant may not - that there was nothing inconsistent about the positions taken by the Employer in the matter of Claimant's termination and in the workers compensation proceeding. The Commission found:

> In defending the claim for unemployment compensation, Employer did not need to demonstrate that the claimed accident occurred as alleged in mid-March 2011. Rather, all it needed to do, and all it did, was assert that if the claimed accident occurred as eventually acknowledged by Claimant, Claimant failed to immediately notify Employer as required by company policy. Therefore, in taking the position in this matter that the claimed accident did not occur, Employer is not taking a position inconsistent with any position it took in the proceedings to secure unemployment compensation. (R. pp. 16, 17).

For this reason, the Commission correctly rejected Claimant's estoppel argument. To hold otherwise would produce the rather bizarre conclusion that Claimant, having failed to prove the occurrence of the alleged industrial accident, is nonetheless entitled to workers' compensation benefits. Estoppel is inapplicable to this case. But, if it should apply, its application should bar Claimant as it was Claimant who took the "inconsistent position" of attempting to obtain unemployment benefits by arguing that she did not suffer or report a work-related injury. (See Def's Ex. 18).

Claimant's brief suggests that although the Commission considered her argument for "quasi estoppel," the Commission erred in not considering an argument for "judicial estoppel."

As to this, the Respondents would offer only two comments. First none of these estoppel arguments were raised in Claimant's Complaint or properly noticed for hearing, although the Commission actually favored the Claimant by considering the estoppel arguments. Second, whether "quasi estoppel" or "judicial estoppel" is relied upon, the underlying basis must be an inconsistent position taken by a party in the subsequent proceeding. See the discussion in Appellant's Brief beginning at p. 18 and *see* Robertson Supply, Inc. v. Nicholls, 131 Idaho 99, 952 P.2d 914 (1998). In this case there was no inconsistent position taken – at least by the Defendants – and hence no basis for an estoppel. Claimant's arguments to the contrary are completely devoid of merit.

D. Claimant's Due Process Rights Were Not Violated.

Claimant has asserted that her due process rights were violated. There is no way to read Claimant's argument in this regard other than to reach the conclusion that she believes her due process rights were violated because she lost her case—because both the Referee who presided over the hearing and the Commission who then generated a subsequent Decision disagreed with her arguments. Claimant is not asserting that she was deprived of the ability to file a Complaint, or to take depositions, or hire an attorney, or attend a hearing, or call witnesses, or conduct post-hearing depositions. She is not asserting that the Referee failed to review her claim or that the Commission failed to review her claim. She is not asserting that she was denied the opportunity to request reconsideration of Commission's Decision. She is not arguing that she was somehow

arbitrarily denied any type of administrative process or review available to her under Idaho law. Rather, Claimant is arguing that her right to due process was violated because she lost her case.

This is litigation. The system produces winners and losers. Just because you lost your case does not mean your due process rights were violated. Claimant's case received a fair hearing. She just failed to provide convincing evidence to support her claim. It is quite evident that Claimant is hyper-sensitive to this due process argument. As part of her appeal, she has literally argued that her due process rights were violated because the Commission discussed the notice issue - even though Claimant won that argument! The Commission determined that adequate notice was given, yet, Claimant asserts that her due process rights were violated merely because the Commission discussed that issue. (Appellant's brief p. 42). Claimant's due process arguments really trivialize the concept and application of due process protections. The arguments amount to nothing more than complaints that Claimant must have been treated unfairly because she lost her case. These arguments do not merit further discussion.

E. The Court Should Consider an Award of Attorney Fees to the Respondents.

The Workers' Compensation Act does not currently provide a statutory basis for an attorney fee award against a workers' compensation Claimant. Nonetheless, on appeal, the Court can and should consider an award of attorney fees under Idaho Appellate Rule 11.2.

Despite the overwhelming evidence against Claimant, she filed this appeal. Other than a scorched earth due process argument, Claimant on appeal has merely re-tread old ground that

was already covered by the Commission. In this scenario, Defendants are entitled to fees on appeal: "Attorney fees and costs are properly awarded when an appeal asks this Court to do nothing more than reweigh the evidence submitted to the Commission." Wutherich v. Terteling Co., 135 Idaho 593, 596, 21 P.3d 915, 918 (2001). The legal arguments raised on appeal are meritless and the factual arguments simply ask the Court second-guess the factual findings of the Industrial Commission. An award of fees should be considered.

F. Claimant is not entitled to Attorney Fees or Costs.

For all the reasons set forth above, Claimant is not entitled to fees or costs. Clearly, as recognized by the Commission in its Decision, Defendants' denial of Claimant's claim was supported by the law and the evidence.

IV.

CONCLUSION

For the reasons set forth above, the Commission's Decision should be affirmed and Defendants should be awarded fees and costs on appeal.

DATED this 17th day of September 2015.

BOWEN & BAILEY, LLP

Nathan T. Gamel

NATHAN T. GAMEL, of the firm
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of September, 2015, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

Jerry Goicoechea Goicoechea Law Offices, Chtd. PO Box 6190 Boise, Idaho 83707 Fax 208-336-6404	____ US Mail __X__ Hand Delivery ____ Express Mail ____ Facsimile

Nathan T. Gamel