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Gerdon v. Con Paulos, Inc. Respondent's Brief Dckt. 43234

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

JOSEPH GERDON,

Claimant/Appellant,

vs.

CON PAULOS, INC., Employer, and
LIBERTY NORTHWEST INSURANCE
CORPORATION, Surety,

Defendants/Respondents.

) Supreme Court No. 43234

)
)
) **RESPONSIVE BRIEF OF**
) **DEFENDANT/RESPONDENTS**
) **CON PAULOS, INC., and LIBERTY**
) **NORTHWEST INSURANCE**
) **CORPORATION**

**RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS
CON PAULOS, INC., and LIBERTY NORTHWEST INSURANCE CORPORATION**

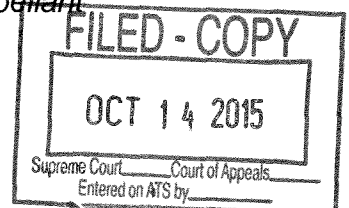
**APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO
R. D. MAYNARD, CHAIRMAN**

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Claimant/Appellant



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STATEMENT OF THE CASE

I. Nature of the Case

Claimant/Appellant, Joseph Gerdon (“Claimant”), is represented by Daniel Luker of Boise, Idaho. Respondents/Defendants, Con Paulos, Inc. (“Defendant/Employer”), and Liberty Northwest Insurance Corporation (“Defendant/Surety”), are represented by Joseph M. Wager of Meridian, Idaho.

This matter was heard on September 5, 2014, before Industrial Commission Referee LaDawn Marsters (“Referee”) on the sole issue of Claimant’s entitlement to benefits for psychological treatment pursuant to Idaho Code Section 72-451. Claimant contended he was entitled to benefits for psychological care because his industrial injuries were the predominant cause of his mental condition. While Defendants agreed that Claimant suffers from depression and that both counseling and medication treatment are reasonable, Defendants contend that Claimant’s pre-existing psychological conditions are equally responsible for his current mental state. Thus, Claimant failed to meet his burden of proving he suffered a compensable psychological injury under Idaho Code Section 72-451.

On April 7, 2015, the Commission issued its Order in this matter, adopting as its own and in its entirety, Referee Marsters’ March 20, 2015, Findings of Fact, Conclusion of Law, and Recommendation (hereinafter “2015 Decision”), finding that Claimant had failed to prove a compensable psychological injury pursuant to Idaho Code Section 72-451. Claimant timely filed this appeal on May 18, 2015. *AR* p. 23-32.

II. Course of Proceedings Below

A previous hearing, also before Referee Marsters, was held in this case on January 30, 2012, culminating in a decision and order issued by the Commission on October 15, 2012 (hereinafter "2012 Decision"). Portions of that order relevant to the issue currently before the Commission are:

1. Claimant's treating physician is Dr. Marsh.
2. Claimant has proven that, as a result of his industrial accident, he suffered injuries including left ankle fracture, CRPS of the left lower extremity, L3-4 disc herniation, bilateral knee osteoarthritis and temporary thoracic spine pain (now healed). ...
5. Claimant has proven entitlement to future palliative medical care from Dr. Marsh, including Methadone therapy for pain relief; as well as periodic monitoring and evaluation of his left ankle, CRPS, L3-4 disc herniation and bilateral knee osteoarthritis conditions.
6. **Claimant has failed to prove he is entitled to future care consisting of** sympathetic nerve blocks, a spinal cord stimulator, bariatric care, gym membership, a power chair, physical therapy, **or psychological care or counseling.**

AR p. 11-13, ¶ 1, 2, 5, 6 (emphasis added).

Claimant filed a Motion for Reconsideration of the 2012 Decision which was denied. Claimant did not appeal and the decision became final. Approximately eighteen months later Claimant filed a Request for Emergency Hearing on July 7, 2014. The sole issue to be decided was whether Claimant met his burden of proving a compensable psychological injury under Idaho Code § 72-451.¹

¹ As of September 28, 2015, Defendants have paid indemnity benefits to Claimant in the amount of \$140,942.23, and have paid medical expenses on Claimant's behalf in the amount of \$156,888.90.

III. Statement of Facts

A. Claimant's expert- Daniel Marsh, M.D.

From January 30, 2012 through July 1, 2014, Claimant received palliative medical care from Dr. Marsh. Claimant treated with Dr. Marsh at St. Alphonsus Pain Management Center in Boise, through 2013. Beginning in 2014, Dr. Marsh ceased his affiliation with St. Alphonsus Pain Management Center, and Claimant has since seen Dr. Marsh at his private practice known as Exodus Pain Clinic, in Boise. *Marsh Depo.*, p. 4, lines 24-25, p. 5, line 1, 10-19; DE 3, p. 68-95.

Claimant's counsel filed a Request for Emergency Hearing on July 7, 2014, based on circumstances and events reported by Claimant to Dr. Marsh on July 1, 2014. At the July 1, 2014, office visit with Dr. Marsh, Claimant reported increased pain, frustration and depression affecting his appetite and sleep. Claimant's mother, Mickey Gerdon, attended this appointment with Claimant. Dr. Marsh noted, "He is suicidal, it crosses his mind, He has thought of driving the car off the canyon as recently as five days ago. His mother has lost one child to suicide." It is not clear, either from Dr. Marsh's chart notes, or his deposition testimony, whether the source of this information was Claimant, Claimant's mother, or a combination thereof. *Marsh Depo.*, p. 24, lines 21-23; DE 3, p. 94-95.

After spending 45 minutes with Claimant and Claimant's mother, Dr. Marsh diagnosed: 1) Anxiety; 2) Depression, related to his work injury and severe back, knee and neuropathic pain; 3) Opioid Type Dependence, Continuous Use related to his work

injury, severe back pain and neuropathic pain; 4) Depressive Disorder related to his chronic pain as a result of his work related injury. Patient is suicidal; 5) Chronic Pain Syndrome; 6) Causalgia/left directly related to his work injury; 7) Sacroiliac Joint Pain; and 8) Bursitis of Hip, bilateral related to his severe work-related back pain and secondary gait disturbance (although the same chart notes indicates station and gait within normal limits). Dr. Marsh added the following Diagnosis Note, "Depression related to his work injury and severe pain in his back and knee and neuropathic pain and inability to care for his daughter." The treatment plan included the following:

1. Refer to Dr. Sean Hassinger for bilateral hip pain;
2. F/u with Omega Health Clinic for Ketamine therapy;
3. Daniel Luker at Goicoechea-336-6400;
4. Plan referral for motorized scooter;
5. Plan referral for counseling with Dr. Holley;
6. Plan referral for psychiatric;

This patient has had a sig [sic] worsening of his situation and is suicidal. He has a family history of suicide. His mother is very worried about him. He has devised a plan and is actively thinking about suicide. I have spoken with him and he has expressed hope that things will get better with ketamine therapy. Also Prialt therapy and spinal cord stimulation are possible options.

DE 3, p. 94-95.

Claimant undertook the post-hearing deposition of Dr. Marsh on October 9, 2014. Dr. Marsh graduated from the University of Alabama Medical School in 1997, completed a residency in physical medicine and rehabilitation in 2001, and did a fellowship in spine and sports medicine in Buffalo, New York. Dr. Marsh has been certified in his specialty of physical medicine and rehabilitation, as well as an additional certification in pain

medicine, since approximately 2000. After working in Colorado and Michigan, Dr. Marsh relocated to Idaho, where he worked at St. Alphonsus for eight years. Currently, Dr. Marsh is engaged in solo private practice at his facility, Exodus Pain Clinic. *Marsh Depo.*, p. 4, lines 10-25, p. 5, lines 1, 10-19.

Dr. Marsh holds no certifications related to psychology, nor has he participated in any advanced training related to psychology. Dr. Marsh does not, and could not, hold himself out as a psychologist. No patients in his current private practice at Exodus Pain Clinic are receiving psychiatric care from Dr. Marsh. *Id.*, p. 20, lines 3-17.

Dr. Marsh's deposition testimony provided negligible clarification or support for the diagnoses and plan of care he recommended for Claimant on July 1, 2014. As discussed above, Dr. Marsh does not possess any professional qualifications to make a psychological diagnosis. He is not licensed as a psychiatrist or a psychologist in any state.

Dr. Marsh's testimony clearly demonstrates his lack of familiarity with the "predominate cause as compared to all other causes combined" elevated standard of proof required by Idaho Code 72-451(3) for psychological injuries. On direct examination, Claimant's counsel told Dr. Marsh to "please make sure that any opinion you offer is on a more-probable-than-not basis." Dr. Marsh's lack of comprehension of the "predominate cause" standard is evident in the following testimony:

Mr. Luker: I'm going to ask you a question, and the answer may be obvious, but I think it's important for the record to kind of-to kind of spell

that out. In your opinion, what is the relationship ... between Joe's depression and anxiety and his work injury?

Dr. Marsh: I think there's a direct link between his work injury and his psychological situation.

Mr. Luker: Okay. And in your opinion, what is the predominant cause of the depression, anxiety?

Dr. Marsh: I think that his depression and anxiety are related to his injury, **more probably than not.**

Marsh Depo, p. 5, lines 7-9, p. 16, lines 23-25, p. 17, lines 1-8 (emphasis added).

Notwithstanding the leading questions asked by Claimant's attorney, Dr. Marsh continued to demonstrate his lack of understanding of the "predominant cause" standard, and on re-direct by defense counsel, managed to completely avoid providing a coherent answer, testifying as follows:

Mr. Wager: ... you're aware of the standard that the Industrial Commission looks at when determining the relationship between the industrial accident and the need for care; are you aware of the standard that's required?

Dr. Marsh: I think you'll have to phrase it a little differently. ... I'm not sure what you're referring to.

Mr. Wager: Mr. Luker has asked you to tell us what you think the predominant causes are for Joseph Gerdon's need for psychological care. Do you understand that that's the standard and not more probable than not?

Dr. Marsh: I can only tell you that in chronic pain and chronic regional pain syndrome, it's extremely unlikely for someone to live the life that Joe has and not have depression and anxiety that is a direct relationship to everything he's given up in his life because of his pain. ... And more than that, although I'm not a psychologist, if you go to any pain –chronic pain textbook, go to any chronic pain meeting and you will be inundated with

the psychological ramifications of chronic pain. Whether the Industrial Commission has risen to that standard, I have No idea. But I do know that it took them forever to even recognize pain, you know. They had the impairment guides for years, and it wasn't until the Fifth Edition that they came out and recognized pain at all. So as a compensable injury or what – you know, I don't know the right terminology, but – so it's taken the workers' comp system a long time to come up to the standard. So I don't know exactly what they recognize as their standard, but I do know they lag far behind when it comes to pain.

Mr. Wager: Okay. Have you had an opportunity to read Dr. Calhoun's psychological evaluation of Mr. Gerdon?

Dr. Marsh: **I haven't read it.**

Id., p. 20, lines 22-25, p. 21, lines 1-25, p. 22, lines 1-11, (emphasis added). In response to defense counsel's questions about the source of the information upon which his conclusions were formed, Dr. Marsh confirmed that he did **no testing of any kind**, but simply relied upon the self-reported personal history provided by Claimant and Claimant's mother to conclude Claimant was suicidal, that Claimant had a family history of suicide, and that Claimant required counseling and psychiatric care. *Id.* p. 23, lines 12-25, p. 24, lines 1-9. Further demonstrating his misunderstanding of the applicable legal standard, Claimant's counsel elicited the following comments from Dr. Marsh:

Mr. Luker: ...When you're assessing the cause of Joe's mental state, what to you is the major thing, the thing that really requires him to have the mental health treatment?

Dr. Marsh: Well, having a multidisciplinary approach, having a neuropsychological approach and a counseling approach, and a medication approach, I think are important to overall wellbeing. Some people feel that depression just with counseling can improve. So I feel he needs both angles, both medication as well as counseling.

Mr. Luker: ... [W]hy does he need that? What's the cause?

Dr. Marsh: The cause is ultimately his chronic pain and his work-related injury.

Mr. Luker: Are there other things in his life that affect his depression?

Dr. Marsh: Well, I mean, sure. You know, you can have a –you take people the way they come, right? I mean, I'm sure he's—I did ask him about this at some point, and you know, I asked if he'd ever had depression, and you know, what he acted like as a kid, and there's no indication, in my mind, that he had a pre-existing depressive disorder. So taking somebody like that and then putting them through what he's been through, I think it's only logical that his current psychological state is directly related to his chronic pain.

Id., p. 27, lines 15-25, p. 28, lines 1-17, (emphasis added).

B. Defense expert psychological evaluations- Robert F. Calhoun, Ph.D.

Claimant has undergone multiple psychological evaluations by Robert F. Calhoun, Ph.D. The first evaluation occurred in April, 2009, for the purpose of determining whether Claimant was appropriate for the Work Star multidisciplinary rehabilitation program for assisting injured workers to achieve pre-injury work status. Thirteen months later, in May of 2010, Defendants retained Dr. Calhoun to perform a psychological evaluation prior to commencing a dorsal column stimulator trial. Claimant's third and most recent psychological evaluation by Dr. Calhoun occurred in July, 2014 ("the 2014 evaluation"). The purpose of the 2014 evaluation was to re-evaluate Claimant's psychological status and to determine whether his current psychological presentation was predominantly caused by his 2008 industrial injury. *Calhoun Depo*, p. 17, lines 13-15; *Def. Exh. 2*, p. 61. Dr. Calhoun issued written

reports of all three evaluations and was subsequently deposed on behalf of Defendants on October 22, 2014. *Calhoun Depo*, p. 2, lines 1-5; *DE. 2*, p. 61.

Dr. Calhoun is a clinical psychologist who is licensed to practice in the State of Idaho. Dr. Calhoun holds a bachelor's degree in psychology, anatomy and physiology from Boise State University, a master's degree in clinical psychology from Eastern Washington University, and a doctoral degree in clinical psychology from Washington State University. After completing a post-doctoral internship in neuropsychology and pain management at the University of Washington School of Medicine, Dr. Calhoun began his practice as a neuropsychologist at St. Alphonsus Regional Medical Center, ("SARMC") in Boise, Idaho. Dr. Calhoun is currently the neuropsychologist director of the brain injury and stroke programs at SARMC, as well as a consulting psychologist for the Work Star rehabilitation program. Dr. Calhoun also engages in private practice at Mountain States Counseling & Psychological Services, ("Mountain States"). Dr. Calhoun has treated workers' compensation claimants for approximately twenty years, and estimated that fifteen to twenty percent of Mountain States' cases involve worker's compensation matters, and that about half of his practice consisted of treating pain patients. Dr. Calhoun also treats patients with posttraumatic stress disorder. Dr. Calhoun performs the specific type of evaluation at issue in the present case where he ultimately provides a causation opinion, one or two times a month. Dr. Calhoun testifies as an expert witness in workers' compensation cases about five to six times annually, and estimates that he is retained as an expert equally by injured workers and

employer/surety. *Calhoun Depo*, p. 4, lines 21-25, p. 5, lines 1-22, p. 18, lines 21-24, p. 21, lines 1-13.

At his October, 2014, deposition, Dr. Calhoun testified regarding all three of the psychological evaluations he had performed on Claimant over the years.

The 2009 evaluation included standardized psychological testing, clinical observation, medical record review, as well as a multidisciplinary team staffing. *Calhoun Depo*, p. 6, lines 12-25, p. 8, lines 1-10; *DE 2*, p. 4-9. Dr. Calhoun administered standardized psychological tests including the Minnesota Multiphasic Personality Inventory-2 (“MMPI-2”), the State-Trait Anger Expression Inventory (“STAXI-2”), and the Detailed Assessment of Posttraumatic Stress (“DAPS”). These tests provide **objective data in terms of how the individual copes with stress, any psychological symptoms that may be present, the presence of anger and hostility.** *Calhoun Depo*, p. 8, lines 21-25, p. 9, lines 1-13.

Claimant’s 2009 test results, all of which produced valid profiles, demonstrated Claimant was:

- a) Experiencing psychological distress, lassitude and malaise;
- b) Significantly depressed, sad and blue;
- c) Highly anxious;
- d) Acutely angry, responding to a wide variety of situations with anger and irritability;
- e) Tempestuous, cynical and hostile, with **chronic issues concerning cynicism and hostility;**
- f) Pessimistic about his future and not easily trusting of others;
- g) Feeling insecure in his world and tending to ruminate over his problems;
- h) Highly somatically focused and at risk for somaticizing stress;
- i) Likely experiencing intensified pain when under emotional stress; and

j) Re-experiencing his accident, avoidant of stimuli associated with it, and at risk for hyper-arousal, indicative of PTSD. *DE 2, p. 4-9.*

Dr. Calhoun made the following observations/treatment recommendations:

- a) At this time, there continue to be multiple psychological and behavioral factors impacting his pain problem and level of physical debilitation;
- b) Mr. Gerdon **does appear to be motivated to get better. Because of this I do see him as a reasonable candidate for the Work Star Program despite the multiple psychological barriers to recovery;**
- c) It is recommended that the patient be started on an anti-depressant which has anxiolytic properties. He will also benefit from a beta-blocker, which can help him with sympathetic nervous system over-reactivity. I will certainly discuss with Dr. Krafft, the appropriateness of a beta-blocker given the patient's overall medical presentations and level of stability;
- d) While in the Work Star Program, the patient will require cognitive restructuring and relaxation techniques to help him with his tendency to over-respond sympathetically in reaction to pain and stress;
- e) The patient will also require psychological treatment which addresses his ongoing symptoms of posttraumatic stress disorder as well as symptoms of irritability, short frustration tolerance, passive coping in reaction to his pain, pain contingent activity level, deconditioning, and anger management issues;
- f) The patient will likely require 10-12 sessions of psychological treatment focused on treating his symptoms of posttraumatic stress disorder and pain management issues.

DE 2, p. 8-9.

Claimant was accepted into the Work Star program and began receiving multidisciplinary treatment including psychological treatment provided by Dr. Calhoun, as well as ongoing medical treatment and physical therapy. Claimant treated with Dr. Calhoun seven times between May 12, 2009 and August 19, 2009. Claimant was a no-show for an appointment with Dr. Calhoun scheduled for July 8, 2009, after verbally confirming it the day before. **Although instructed to follow-up in two to three weeks,**

after the August 19, 2009, appointment, Claimant failed to return for further treatment with Dr. Calhoun. *Calhoun Depo, p.7., lines 21-25; DE 2, p.48-55.*

In response to defense counsel's request during his deposition, Dr. Calhoun summarized Claimant's response to the multidisciplinary Work Star program as follows:

Dr. Calhoun: ... [W]hile he was in the Work Star program, we were starting to look at his frustration in reaction to pain, his fear of pain and movement. We were also trying to get him to come off some of his pain medications, which was very overwhelming for him. We also addressed his tendency to anticipate the future anxiously and cynically, and then, again, bringing that back on how that can exacerbate his pain. ... And then trying to get him to move away from anger, as far as being such a readily available and frequent emotion for him.

Mr. Wager: So what causes a person to have these types of issues that Mr. Gerdon was exhibiting?

Dr. Calhoun: ... [S]ome of it certainly was related to the pain itself that he was going through, **but also he had, certainly, a preexisting propensity toward being hostile or cynical or mistrustful of others.**

Mr. Wager: How do we know that from a clinical sense?

Dr. Calhoun: Well, that was based on the State-Trait Anger Expression Inventory-2 and then also just in his presentation. That his anger often seemed to be out of proportion of [sic] what was going on at the moment. And his mistrust for what doctors were telling him or the direction the doctors were trying to move him, he just got really angry about that and reacted very strongly.

Mr. Wager: So what was the conclusion of his treatment through this Star program ...

Dr. Calhoun: Just that he did have difficulty responding to the multidisciplinary team treatment. He did have difficulty responding to Dr. Krafft and his medical recommendations and how he was approaching Mr. Gerdon. And he just had difficulty, again, really trusting us and what it was we were trying to help him with.

Mr. Wager: Would you call his participation in the Star program successful?

Dr. Calhoun: No. I don't think he improved much in his ability to function or come off his medicines or manage his pain; so I don't think we got a very good outcome with him in that program.

Calhoun Depo, p. 12, lines 4-25, p. 13, lines 1-21(emphasis added). Claimant's final session with Dr. Calhoun related to the Work Star program occurred on August 19, 2009. While the chart note for this date indicates Claimant was to follow-up with Dr. Calhoun in two to three weeks, Claimant did not return for additional sessions. *DE 2, p. 48-55.*

Approximately ten months later, Defendants retained Dr. Calhoun to perform a psychological evaluation prior to commencing a dorsal column stimulator trial.² Dr. Calhoun estimates he performs two to three such evaluations each month. The purpose of the evaluation is to determine whether a patient is an appropriate candidate for use of the device. The psychological evaluation assesses an individual's coping skills, ability to control stress responses, use relaxation techniques, as well as whether the patient has significant depression, anger, anxiety, somatoform tendencies, or significant substance or opioid dependence. *Calhoun Depo, p. 14, lines 3-25, p. 15, lines 1-4.*

Dr. Calhoun concluded, based on clinical observation, Claimant's thought processes, Claimant's cognition in terms of how he was viewing things, and **Claimant's**

² Dr. Calhoun described a dorsal column stimulator as an electrical device that is implanted just outside the patient's spinal column. The device shoots electrical signals to break up the pain sensation, to try to help individuals get better control of their pain. Typically, individuals will undergo a psychological evaluation prior to having a dorsal column stimulator trial. *Calhoun Depo, p. 14, lines 3-11.*

lack of compliance with testing procedures, that Claimant was not a good candidate for the procedure. Dr. Calhoun testified that at that time Claimant still had significant anger issues, frustration, depression, opioid dependency, manipulative behaviors, and a sense of entitlement and control that he was trying to maintain while in the workers' compensation system. **Dr. Calhoun testified that Claimant's continued lack of personal skills to deal with his pain (i.e., personality style, cynicism, inability to trust, inability to regulate his emotions) made Claimant inappropriate for the procedure.** From the time of Claimant's treatment in the Work Star program, to the time of Claimant's evaluation for the dorsal cord stimulator, Dr. Calhoun did not see anything positive that indicated Claimant had acquired any skills to help himself. Claimant "pretty much presented about the same." *Id.*, p. 15, lines 9-25, p. 16, lines 1-25, p. 17, lines 1-5 (emphasis added).

Dr. Calhoun did not see Claimant again until July 31, 2014, when he was retained by Defendants a third time, to evaluate Claimant's psychological status and determine whether or not his current presentation was being caused by his industrial injury. *Id.*, p. 17, lines 13-25. Dr. Calhoun reviewed the pertinent medical records, and met with Claimant to talk with him about his psychosocial history and what was currently going on in his life, what might be causing stress. A diagnostic interview mental status examination looking specifically at symptoms of depression, and/or anxiety was conducted and additional psychological tests were administered to **obtain objective**

data about Claimant's personality makeup, coping skills, and identify patterns over time.

Claimant took four psychological tests including the MMPI-2, the Millon Clinical Multiaxial Inventory- III, the Psychopathic Personality Inventory-Revised, and the State-Trait Anger Expression Inventory-2. Dr. Calhoun discussed the results as follows: Claimant's MMPI-2 profile was of questionable validity and was consistent with someone exaggerating their symptoms. It also showed risk for anxiety and significant depression. **The somatoform tendencies were very consistent over the years, showing his pain is highly influenced by psychological factors and that he was at risk for antisocial personality behavioral patterns, meaning he could be using his symptoms to manipulate/control his environment.** Claimant was restive, unable to calm himself, and still had very limited coping skills. The Millon profile showed Claimant to be at risk for over-exaggerating his level of experienced illness, that he could be very self-pitying, and consistently somaticize stress. The profile suggested **both chronic and acute severe psychopathology, indicating Claimant was at risk for pre-existing depression.** The Psychopathic Personality Inventory-Revised profile did not show a significant pattern of psychopathic personality issues, but did show a tendency to over-report his level of psychopathology. The State-Trait Anger Expression Inventory-2 profile showed difficulty with acute and chronic anger and continued hostility and resentment. **Dr. Calhoun found the chronicity of the patterns identified in Claimant's testing to be of concern. He was one who was most likely a hostile**

individual pre-injury, had prior anger issues, and was certainly prone to depression. These patterns tended to carry over through many evaluations over the years. *Id.* p. 24, lines 7-25, p. 25-27 (emphasis added).

Dr. Calhoun concluded that Claimant's industrial accident and subsequent pain disorder (i.e., CRPS) contributes to 50% of his **current depression**. Claimant's **pre-existing personality traits** of hostility, anger, resentment and dysthymia are the factors which **contribute to the other 50% of his current depression**. *Id.*, p. 33 (emphasis added).

IV. Issue Presented on Appeal

WHETHER THERE IS SUBSTANTIAL AND COMPETENT EVIDENCE OF RECORD TO SUPPORT THE INDUSTRIAL COMMISSION'S DECISION THAT CLAIMANT HAS FAILED TO PROVE A COMPENSABLE PSYCHOLOGICAL INJURY PURSUANT TO IDAHO CODE § 72-451

ARGUMENT

I. Relevant Law

"The terms of Idaho's workers' compensation statute are liberally construed in favor of the employee. However, conflicting facts need not be construed liberally in favor of the worker." *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 755, 302 P.3d 718,723 (2013). Generally, **a claimant must provide medical testimony** that supports a claim for compensation to a reasonable degree of medical probability, *Langley v. State Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732,736 (1995), and "probable" is defined as "having more

evidence for than against.” *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, P.2d 903, 906 (1974). Generally, “an employer takes an employee as it finds him or her, a pre-existing infirmity does not eliminate the opportunity for a worker’s compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought.” *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002). However, in 1994, the Idaho State Legislature adopted Idaho Code § 72-451 regarding the compensability of certain types of psychological injuries. Under Idaho Code § 72-451, **more rigorous causation standards** apply when psychological injuries are alleged:

72-451. PSYCHOLOGICAL ACCIDENTS AND INJURIES. Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:

(1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by an accident and physical injury as defined in section 72-102(18)(a) through 18(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and

(2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

(3) Such accident and injury must be the **predominant cause as compared to all other causes combined** of any consequence for

which benefits are claimed under this section; and

(4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho workers' compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered, and

(6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury.

This section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994.

Id., (emphasis added).

The current case involves a dispute only as to Idaho Code § 72-451(3). Idaho Code § 72-451(3) does not present a "but for" standard of causation. The Commission described the proof necessary to establish a predominant cause in *Smith v. Garland Construction Services*, 2009 WL 5850562 (Idaho Ind. Com.) (2009):

Under the predominant cause standard, it is not sufficient that the industrial injury be merely the proverbial "straw that breaks the camel's back." Although an employer takes an employee as he is, in

determining the predominant cause of a psychological condition, the contribution of all of the employee's pre-accident factors must be weighed against the contribution of the industrial accident. To be the predominant cause, the work injury must be a greater cause of the psychological condition than all other causes combined. Thus, if a percentage of contribution were assigned to each and every factor which collectively produce a claimant's psychological condition, the contribution of the industrial accident must be more than 50% of the total of all of the causes. **Against this standard, the evidence, including expert testimony, produced by the parties must be evaluated.**

Id., (emphasis added). More recently, in *Warren v. Williams & Parson PC CPAS*, 157 Idaho 528, 337 P.3d 1257 (2014), this Court agreed that the Commission properly based its decision on the third requirement from Idaho Code § 72-451 that “such accident and injury must be the predominant cause as compared to all other causes combined of any consequence,” stating, “We agree that this requirement forecloses Warren’s claim for a compensable psychological injury. The Commission explained:

Of central importance, [Warren] must demonstrate that the subject accident is the “predominant cause as compared to all other causes combined” of the psychological injury in question. Here, the evidence fails to establish causation per this **elevated burden of proof**; it is not disputed that the subject accident is, in some respect, responsible for contributing to this psychological diagnoses ... but the evidence fails to establish that the subject accident is the predominant cause of those conditions.”

Warren, 157 Idaho at 539, 337 P.3d at 1268 (emphasis added).

II. Standard of Review

In reviewing decisions by the Commission, “This Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and

competent evidence.” *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 140, 254 P.3d 36, 41 (2011) (citing I.C. § 72–732). “Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion.” *McNulty v. Sinclair Oil Corp.*, 152 Idaho 582, 584–85, 272 P.3d 554, 556–57 (2012) (quoting *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003)). “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). The Court does not re-weigh the evidence, and “[t]he Commission’s conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous.” *Knowlton*, 151 Idaho at 140, 254 P.3d at 41; *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 455, 50 P.3d 461, 470 (2002). All facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Zapata*, 132 Idaho at 515, 975 P.2d at 1180.

III. The Commission Had Substantial and Competent Evidence To Conclude That Claimant Did Not Suffer A Compensable Psychological Injury Under Idaho Code Section 72-451

The Commission’s conclusion that Claimant did not suffer a compensable psychological injury under Idaho Code Section 72-451 is supported by substantial and competent evidence. This issue turns on expert opinion evidence regarding Claimant’s pre- and post- industrial injury psychological condition. Proper evaluation of the effect of Claimant’s pre-existing psychological condition on his post-injury condition is

necessary to this determination. The Commission's Decision rests on Dr. Calhoun's expert opinion that "the industrial injury of June 13, 2008, is not the predominant cause of Claimant's present depressed state. Instead, it is 50% due to his chronic pain from his industrial injuries and 50% due to Claimant's pre-existing personality traits of hostility, anger, resentment and dysthemia, which were consistently identified by psychological testing over time. AR p. 21, ¶ 20 (emphasis added). Significantly, Dr. Calhoun further opined that, even if Claimant had not suffered the industrial accident, he probably would have experienced some other event at some point in his life that would have resulted in "significant decompensation." *Id.*; *Calhoun Depo*, p. 31, lines 6-9.

Claimant argues that the Commission's Finding 5 conflicts with Finding 11, "especially in light of Dr. Calhoun's own testimony" and that such conflicting credibility determinations, [allegedly] left unresolved by the Commission, "result in a decision not based on substantial and competent evidence." *Claimant's Opening Brief*, p. 11-13.

Finding 5 states:

"Claimant's mother, wife, and friends all testified that Claimant was an optimistic, fun-loving person with no history of anger before his industrial accident, but he became withdrawn hostile, self-pitying and unlikeable afterward. Their testimony regarding the change in Claimant's personality following his industrial accident is undisputed and persuasive, and it need not be detailed here."

Finding 11 states:

"This issue turns on expert opinion evidence regarding Claimant's pre- and post- industrial injury psychological condition. Proper evaluation of the effect of Claimant's pre-existing psychological condition on his post-injury condition is necessary to this determination."

AR p. 16, ¶ 5, p. 19, ¶ 11 (emphasis added). However, contrary to Claimant's assertion, the 2015 Decision includes detailed findings articulating the analysis of the credibility of the respective lay witnesses and expert witnesses, as well as the weight afforded to each. Specifically, the credibility of Claimant's lay witnesses was addressed in Finding 5, while the weight afforded to their testimony is clearly specified in Finding 23, which states:

"The observations of Claimant's mother, wife, and friends are inadequate to overcome Dr. Calhoun's opinion as to Claimant's preexisting psychological condition."

AR p. 22, ¶ 23. The lay witness observations of Claimant's mother, wife and friends, while determined to be credible by the Referee, are insufficient and completely inadequate to overcome Dr. Calhoun's proper evaluation and expert opinion as to Claimant's pre-existing psychological condition. As stated above, and also by the Commission, the issue turns on expert opinion evidence regarding Claimant's pre- and post- industrial injury psychological condition. Proper evaluation of the effect of Claimant's pre-existing psychological condition on his post-injury condition is necessary to this determination. *AR, p. 19, ¶ 11* (emphasis added).

Claimant further contends that, based on one statement made by Dr. Calhoun during his October, 2014 deposition, Dr. Calhoun's entire expert opinion on Claimant's pre- and post- industrial injury psychological condition must be disregarded because it conflicts with the September, 2014, hearing testimony of Claimant's wife, mother and two friends:

Mr. Wager: One last thing just to touch on some of the pre-existing conclusions that you made ... If I'm a good friend of Joe's, do I know that he has anger and hostility and resentfulness just by being around him?

Dr. Calhoun: I'm sure you would, yes. I'm sure there were times where he would lose his temper around friends or family, or there were times when he would show substantial depression, that kind of thing. **He also had, you know, lost a brother to suicide, his father abandoned him; so he had significant psychosocial stressors in his background too, that I'm not sure he ever dealt with in formal psychological treatment.**³

Calhoun Depo, p. 33, lines 14-15, 20-25, p. 34, line 1-6 (emphasis added). However, Claimant cannot escape the fact that, upon cross-examination, when Claimant had the opportunity to question Dr. Calhoun about this alleged inconsistency, Claimant did not even raise the issue. Now Claimant asks this Court to simply substitute its opinion regarding the weight to be given Dr. Calhoun's testimony for the Commission's opinion. Such second-guessing of the Industrial Commission was expressly rejected by this Court in *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 455, 50 P.3d 461, 470 (2002).

As stated in Finding 13, Dr. Marsh and Dr. Calhoun agree that Claimant has no known history of **treatment** for psychological difficulties. *AR p. 19, ¶ 13* (emphasis added). Claimant contends, ergo, that there is no evidence in the record to support Dr. Calhoun's determination that 50% of Claimant's current depression is caused by Claimant's pre-existing hostility, anger, resentment and dysthymia, and that, in fact, the

³ Due to Claimant's failure to include the final sentence of Dr. Calhoun's statement on page 14 of his Opening Brief, Defendants provide it here for the Court's convenience.

“unrebutted” evidence of record provided through the testimony of Claimant’s lay witnesses including his wife, mother and two friends, is that “evidence of anger, hostility and depression was not observable to those who were around the Appellant prior to the 2008 industrial injury.” *Claimant’s Opening Brief*, p. 16. As stated unambiguously and repeatedly by this Court:

“Generally, a claimant **must provide medical testimony** that supports a claim for compensation to a reasonable degree of medical probability.”

Langley v. State Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732,736 (1995). However, in 1994, the Idaho State Legislature adopted Idaho Code § 72-451 regarding the compensability of certain types of psychological injuries. Under Idaho Code § 72-451, **more rigorous causation standards** apply when psychological injuries are alleged. Accordingly, Claimant still **must provide medical testimony** that supports a claim for compensation, which medical testimony is subject to the elevated standard enunciated in Idaho Code § 72-451(3). Idaho Code § 72-451(3) does not present a "but for" standard of causation. The Commission described the proof necessary to establish a predominant cause in *Smith v. Garland Construction Services*, 2009 WL 5850562 (Idaho Ind. Com.) (2009):

Under the predominant cause standard, it is not sufficient that the industrial injury be merely the proverbial "straw that breaks the camel's back." Although an employer takes an employee as he is, in determining the predominant cause of a psychological condition, the contribution of all of the employee's pre-accident factors must be weighed against the contribution of the industrial accident. To be the predominant cause, the work injury must be a greater cause of the psychological condition than all other causes combined. Thus, if a

percentage of contribution were assigned to each and every factor which collectively produce a claimant's psychological condition, the contribution of the industrial accident must be more than 50% of the total of all of the causes. ***Against this standard, the evidence, including expert testimony, produced by the parties must be evaluated.***

Id., (emphasis added).

Finding 21 unambiguously articulates why Claimant's contention is wrong:

"Dr. Calhoun's opinions are credible and well-supported by his clinical experiences with Claimant, as well as his testing results over time. Dr. Marsh's opinion is credible, but is limited by its narrow foundation. It lacks the depth of information about Claimant that Dr. Calhoun utilized, particularly in regard to Claimant's pre-existing psychological condition. Whereas Dr. Marsh assumed that because Claimant had not previously received psychological treatment, he was not at higher than normal risk than other chronic pain patients for depression, Dr. Calhoun's undisputed analysis of information related to Claimant's pre-existing psychological condition establishes that he was. Also, Dr. Marsh believed that the Idaho workers' compensation law "takes a claimant as found" in regard to psychological treatment, leading him to conclude that the industrial injury was the predominant cause of Claimant's depression without the need to further assess Claimant's pre-existing condition. As Defendants assert, and as set forth above, this is an inaccurate understanding of the predominant cause standard. Because Dr. Marsh's opinion does not address the appropriate standard, it should be given little weight.

AR p. 21-22, ¶ 21 (emphasis added).

As recognized by the Commission, the records and testimony of defense expert Dr. Calhoun show that Claimant did not suffer a compensable psychological injury. ***Dr. Calhoun's opinion is the only opinion that considers all of Claimant's relevant preexisting factors and the appropriate legal standard and, thus, it is the only persuasive medical opinion on the issue at bar.*** *AR, p. 22, ¶ 24* (emphasis added).

Claimant has failed to prove by clear and convincing evidence that his industrial accident

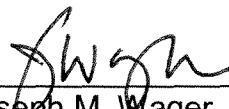
was the predominant cause of his depression and, therefore, he is not entitled to additional benefits for psychological treatment.

CONCLUSION

As previously set forth, Defendants respectfully pray this Court affirm the Commission's 2015 Decision in all respects.

Respectfully submitted this 13th day of October, 2015.

LAW OFFICES OF KENT W. DAY

By: 

Joseph M. Wager
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2015, I caused a copy of the foregoing **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS** to be served by first class mail, postage prepaid, upon the following:

Daniel J. Luker
Goicoechea Law Offices
2537 W. State Street
Boise, ID 83707



Joseph M. Wager