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Andrews v. Industrial Special Indem. Fund Appellant's Brief Dckt. 44241

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN ANDREWS, Claimant/Appellant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Respondent.	)	Supreme Court Docket No. 44241-2016 I.C. Case No. 2009-007783

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APPELLANT'S OPENING BRIEF

Appeal from the Industrial Commission of the State of Idaho, Referee Michael E. Powers, Presiding.

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STATEMENT OF THE CASE

Nature of the Case

This is a case involving a claim against the Industrial Special Indemnity Fund ("ISIF").

In filing this appeal, Claimant/Appellant Steven Andrews asserts the Idaho Industrial Commission and Referee Michael E. Powers erred in finding and concluding that Mr. Andrews' total and permanent disability is solely due to the March 17, 2009 accident and ISIF is not liable.

The Course of the Proceedings Below

On or about November 8, 2010 Mr. Andrews filed his initial Workers' Compensation Complaint. *R. 1-4.* Thereafter on November 19, 2010 the Corporation of the President of the Church of Jesus Christ of Latter Day Saints filed its Answer to Complaint. *R. 4-5.* On approximately November 16, 2011 a settlement agreement was reached between Mr. Andrews and the Corporation of the Church of Jesus Christ of Latter Day Saints, and an Order of Approval and Discharge was signed by the Industrial Commission on November 29, 2011. On November 25, 2011 Mr. Andrews filed his Workers' Compensation Complaint Against the Industrial Special Indemnity Fund ("ISIF"). *R. 6.* Thereafter on December 12, 2011 ISIF filed its Answer to Complaint. *R. 7-8.*

A hearing was held before Referee Michael E. Powers on June 16, 2015 in Pocatello. Mr. Andrews presented live testimony at the hearing. Post-hearing depositions were taken of Mr. Andrews' expert witnesses Hugh Selznick, M.D. and Nancy Collins, Ph.D., and ISIF's witness Delyn Porter. On October 9, 2015 Mr. Andrews filed Claimant's Opening Brief, and on October 27, 2015 ISIF filed its Closing Brief. On November 9, 2015 Mr. Andrews filed his Closing Brief.

On May 10, 2016 Referee Michael Powers issued his Findings of Fact, Conclusions of Law, and Recommendation, finding in favor of ISIF and against Mr. Andrews. *R. 9-31.* Referee Power's decision was adopted by the Industrial Commission in its Order on the same day, May 10, 2016. *R. 32-33.*

Statement of Facts

Claimant/Appellant, Steven Andrews, is currently 58 years old. Mr. Andrews graduated from Marsh Valley High School in 1977. *Hearing transcript, pp. 12 and 14.* Following graduation from high school, Mr. Andrews worked for Pocatello Sod doing landscaping and laying sod. The following year he took another landscaping job at Pocatello Greenhouse. After a few months at Pocatello Greenhouse, Mr. Andrews moved to New Mexico and worked for a short time at AMF Tuboscope, a pipe surveying company, surveying pipes for cracks or leaks. Mr. Andrews was at AMF Tuboscope for about three weeks before he secured a job at Dowell, an oil field fracking company, driving truck. *Id., pp. 15-16.* In approximately 1980, Mr. Andrews took a two week defensive driving course and obtained his Commercial Driver's License. *Id., p. 14.* After driving truck for Dowell for about a year, Mr. Andrews took a new job driving truck for Southwest Building Block. He worked at Southwest Building Block for approximately two years. *Id., p. 16.* In the early '80s Mr. Andrews lost his job at Southwest Building Block and he and his family moved back to Idaho. Upon returning to Idaho, Mr. Andrews found work at Creative Landscaping in Pocatello. In 1983, Mr. Andrews was in an industrial accident where a slab of concrete fell on his right knee damaging and loosening tendons and causing very severe damage to his knee. Following that

accident, an anterior cruciate repair including arthroscopy and meniscectomy and medial collateral ligament repair was performed. Several years later, in 1989, he had to have an anterior cruciate reconstruction surgery on his right knee. *See Claimant's Exhibit B, Medical Records Review, p. 2.* Unfortunately Mr. Andrews continues to experience pain in his right knee and walks with a limp. Additionally due to pain and instability in his right knee, Mr. Andrews has difficulty walking on uneven surfaces, walking downhill and driving a vehicle with a clutch. *Hearing transcript, pp. 16-17.*

After his knee injury in 1983, Mr. Andrews was no longer able to do landscaping work, and he obtained a job as grounds supervisor for State Hospital South in Blackfoot through the Industrial Commission. His job duties included monitoring the grounds crew, maintenance of the irrigation system, and some pruning, as well as snow removal during the winter. Mr. Andrews worked at State Hospital South for approximately four years. *Id., p. 18.* During his time at State Hospital South, in approximately 1985, Mr. Andrews strained his low back while working on a snow plow. He was seen by Dr. Marafioti, who released him to return to work with no restrictions.

In 1988 Mr. Andrews was offered a job at the LDS Church. When he started the job he was doing custodial work, but he eventually moved up to doing maintenance of the HVAC systems and monitoring and repairing drinking fountains, toilets, lighting and electrical, as well as programming and repairing the computerized door locks. During his time working at the LDS Church Mr. Andrews took care of between 6 and 42 church buildings. Mr. Andrews loved working for the LDS

Church and worked there for nearly 23 years. *Id., pp. 19-21.* Unfortunately during his time at the LDS Church Mr. Andrews had quite a few accidents and injuries, including low back injuries while trying to lift a piano, trying to hold a retaining wall, moving a table and moving a bookshelf. He also suffered a back injury and re-injured his right knee when he slipped and fell while trying to carry a toilet off of the roof of a seminary building. In the early 1990s Mr. Andrews underwent two low back surgeries in which they performed a discectomy, laminectomy, and neurosurgery on his spine to remove scar tissue. *Id., p. 26.* In 2007 Dr. Clark Allen in Pocatello performed a third surgery, a lumbar discectomy, and following the surgery gave Mr. Andrews permission to return to work with a 25 pound lifting restriction and frequent changes in position. *See Claimant's Hearing Exhibit D (Andrews 81).* In March of 2009, Mr. Andrews severely re-injured his back and aggravated his knee injury when he fell off of a ladder at a church building and fell from the upper mezzanine room onto the stage floor. Mr. Andrews was again treated for his back injury by Dr. Allen. Dr. Allen initially believed Mr . Andrews had herniated disks in his back and performed an operation on Mr. Andrews to repair the disks. During the surgery Dr. Allen discovered that Mr. Andrews actually had a cracked vertebrae. Dr. Allen placed three sets of rods in Mr. Andrews low back, and also trimmed scar tissue from his spinal cord, which was residual from his past back injuries. *Hearing transcript, pp. 22-27.*

Following the surgery in 2009, Mr. Andrews planned to return to work for the LDS Church with the additional restrictions that Dr. Allen had imposed following his 2009 surgery. However when he attempted to return to work, the LDS Church informed him that they felt they could no

longer employ him because due to his restrictions and physical disabilities he was too great a risk. *Id., 27-28.*

After being informed that he could not return to work for the LDS Church, Mr. Andrews began working with the Industrial Commission to find a job. He applied for maintenance positions at all of the school districts in Southeast Idaho, he also applied for a maintenance job at the Pocatello Women's Correctional Facility and ON Semiconductor. However despite his willingness to return to work, Mr. Andrews was turned down by every potential employer due to his physical limitations. *Id., pp. 29-30.* Mr. Andrews also researched the possibility of renewing his CDL license and driving truck, however he discovered that he would be unable to obtain a CDL license due to the prescription medication he is taking. Mr. Andrews has also had to concede that realistically he would physically be unable to drive truck because due to his back pain he would be unable to sit in one position for prolonged periods of time, and it would also be a challenge for him to climb up into the cab of a truck with his knee pain, stiffness, immobility, back pain and foot problems. *Id., pp. 30-32.*

In his notes on December 7, 2011, with regard to Mr. Andrews' pre-existing conditions, his 2009 industrial accident and his ability to return to work, Dr. Allen stated as follows:

> I reviewed the films with him and showed him the area of scar and the clumping of the roots. I think this is contributing to his residual leg symptoms and the increasing problems in his leg.
>
> Mr. Andrews during his working years has undergone four spinal surgeries and returned to work each time. The last surgery gave him some stability but he has residual symptoms that have kept him from working. I understand he

> has filed for SSD. It is my opinion that he should be looked upon favorably for this determination as the ability of him to return to gainful employment is poor. I have communicated this to him.

See Claimant's Hearing Exhibit D (Andrews 171)

Currently, as previously indicated, Mr. Andrews has back pain and stiffness caused by work related injuries and subsequent surgeries, as well as knee pain and instability related the injuries mentioned above. In addition, Mr. Andrews has nerve damage with associated toe drop in his left leg. *Id., p. 33.* In the late '80s Mr. Andrews had several foot surgeries due to "turf toe", which is a sprain of the ligaments around the big toe joint. Mr. Andrews' turf toe condition was caused by crawling through steam tunnels at AMF Tuboscope and from kneeling with his weight on his toes. *May 29, 2012 Deposition of Steven L. Andrews, p. 16.* Since his surgeries, Mr. Andrews has developed arthritis in his feet as well, and currently experiences foot pain and is unable to wear normal shoes. *Hearing transcript, pp. 34-35.*

Additionally, Mr. Andrews has had impinged tendons, or "burrs" on both shoulders caused by doing excessive overhead work such as replacing lights and ballasts, and he has had bilateral shoulder surgeries to release the impingements. He is now able to do only very limited overhead work and has difficulty lifting his arms above his head. *Id., pp. 41-42.*

Mr. Andrews also has a bad disk in his neck, making it difficult for him to sit at a computer for any length of time. It also limits the mobility in his neck and his ability to turn his head. *Id., pp. 42-43*

As previously stated, Mr. Andrews currently has very limited mobility in his back and neck and he is unable to twist or bend. This has made personal hygiene and activities of daily living very difficult for him. *Id., pp. 40-41.*

Despite Mr. Andrews' desire and willingness to continue working, he is completely and totally disabled due to injuries and problems with not only his back, but also his neck, shoulders, knees, legs and feet.

Claimant/Appellant Steven Andrews retained orthopedic surgeon Hugh Selznick, M.D. and vocational rehabilitation expert Nancy Collins, Ph.D. as his experts in this matter. Defendant/Respondent ISIF retained Delyn Porter as their vocation rehabilitation expert. The experts' reports and testimony are summarized as follows:

1. Hugh Selznick, M.D.

Dr. Hugh Selznick is a physician practicing in Pocatello and Blackfoot, Idaho as well as Las Vegas, Nevada. He is a board certified orthopedic surgeon, with a license to practice medicine in Idaho, Utah, Nevada, New York, Washington and California.

Dr. Selznick performed a thorough medical records review and an interview and independent medical evaluation of Steven Andrews in 2011. Dr. Selznick's post-hearing deposition was completed on September 1, 2015 wherein he reiterated and affirmed the opinions set forth in the initial March 30, 2011 report and the supplemental report he issued on May 26, 2011. And were opinions he held with reasonable medical probability.

In his deposition, Dr. Selznick stated that in his medical records review and discussions with Mr. Andrews he found that Mr. Andrews has had prior low back issues, prior knee issues, issues with both his shoulders and a hallux toe. He assigned between 5% to 10% to Mr. Andrews' right knee; 1% to 2% for Mr. Andrews' right knee; 1% to 2% for Mr. Andrews' left knee; 3% to 4% for Mr. Andrews' right shoulder surgery; 3% to 4% for Mr. Andrews' left shoulder surgery; and 2% for his right big toe surgery. *Id., p. 11, l. 15 to p. 14, l. 24.*

With regard to the injuries Mr. Andrews sustained in the March 17, 2009 industrial accident, Dr Selznick testified as follows:

> Q. And as a result of that accident, did you determine whether or not Mr. Andrews sustained industrial injuries?
> A. Yes.
> Q. And what were the industrial injuries that he sustained?
> A. It was my, and remains my opinion, that he sustained injury to his low back, most notably structural injury which then necessitated his L3 to S1 fusion.
> Q. And was there an exacerbation to his right knee?
> A. As you are aware, after subject incident on 03/17/09, he had left greater than right lower extremity issues. Despite initial conservative treatment for his low back and radicular complaints, including injections, he had surgery, which I just mentioned, the L3 to S1 instrumented fusion. Unfortunately, although improved, he still had persistent left -- and I repeat, left lower extremity complaints. The records bear that out. And it is in this setting that his right knee became more and progressively symptomatic; so I do think he did have hastening of his right knee symptomatic arthritis.

Id., p. 15, l. 18 to p. 16, l. 16.

Dr. Selznick did assign a 31% whole person impairment rating to Mr. Andrews' low back injury and a 22% whole person impairment rating for his right knee, for a total impairment of 46% per the Guide to Evaluation Permanent Impairment 6th Edition, for the March 17, 2009 accident. *Id., p. 14, l. 25 to p. 18, l. 21.*

In addition, Dr. Selznick also opined that Mr. Andrews had further personal activity limitations in addition to the impairment he assigned. He further stated that he agreed completely with Dr. Nancy Collins' report and her opinion that Mr. Andrews' was completely disabled. *Id., pp. 20-21.*

2. Nancy Collins, Ph.D.

Dr. Nancy Collins is a highly qualified vocational rehabilitation expert with 30 years of experience in vocational rehabilitation. She is also a Certified Rehabilitation Counselor, Forensic Vocational Expert, ABDA Diplomat & Senior Disability Analyst, and Certified Life Care Planner.

Dr. Collins was retained by Steven Andrews to perform a disability evaluation in 2011, and on March 18, 2011 she issued a report. *See Deposition of Nancy J. Collins, Ph.D. ("Collins Deposition."), Exh. 1.* On July 10, 2013 she met with Mr. Andrews a second time to do a follow up evaluation, and on July 12, 2013 Dr. Collins provided an updated report regarding Mr. Andrews' employability and future vocational disability. *See Claimant's hearing Exh. A, Report of Nancy J. Collins, Ph.D.*

As set forth in her reports, Dr. Collins performed a very thorough review of Mr. Andrews' medical records, all written discovery exchanged in this matter, Mr. Andrews' tax records, ICRD notes, Social Security Disability records and the vocational report by Delyn. D. Porter. In addition, Dr. Collins interviewed Mr. Andrews, once in 2011, and again in 2013. *See Claimant's hearing Exh. A.*

Dr. Collins provided a detailed breakdown of her analysis of this case in her July 12, 2013 report, and reiterated the same in her deposition on August 19, 2015.

In addition to the restrictions imposed by Mr. Andrews' physicians, Dr. Collins also found that Mr. Andrews had subjective limitations as follows: Reduced physical stamina, he feels fatigued daily; loss of sensation in his left foot and left leg; he is unable to sit for periods of more than 30 minutes; he is unable to stand for more than 5 to 10 minutes at a time; he has difficulty walking and tends to stumble; he has pain with leaning back and reaching up; his dexterity is impaired due to arthritis in his fingers; he has difficulty stooping due to pain; he cannot squat; he is unable to climb hills or ladders due to knee pain; he has difficulty lifting more than 25 pounds; he is unable to bend or twist due to pain; he cannot crawl or kneel due to knee pain and stiffness; he has difficulty with balance due to weakness in his left leg; he has headaches which increase with back tension; he has some bowel incontinence due to colonoscopy surgery which caused loss of sphincter control; he is unable to drive after taking his prescribed pain medication; and cold weather increases pain and stiffness. *Id., p. 1.*

Dr. Collins also found that Mr. Andrews has severe functional limitations. She notes that Mr. Andrews has difficulty with personal hygiene and activities of daily living. He has trouble bending to put on his shoes and socks, and he has to lean against a wall to put his pants on. He is unable to do housework that requires lifting anything heavy or bending or kneeling. He is no longer able to garden, do yard work or hunt or fish as he used to do. *Claimant's hearing Exh. A, p. 5.*

In her deposition on August 19, 2015, Dr. Collins provided a succinct summary of Mr. Andrews pre-existing injuries as follows:

> Q. So go through with us, if you can, what his pre-2009, pre – that industrial accident that happened in 2009, what impediments or limitations he would have – Mr. Andrews would have had to access to the labor market because of preexisting conditions or restrictions?
>
> A. Well, he had a significant right knee condition. He had injuries in 1984, 1987, 1991; had complained about it for many years. He had a left knee surgery in 1993, but his right knee seemed to be the one that caused him the most problem – the most difficulty.
>
> And he did tell me during the interview that he was – had a really difficult time squatting, crouching, kneeling before the accident and would make accommodations if those – if that position was required. It also caused him to have some difficulty climbing and standing for long periods.
>
> He also had previous back injuries and surgeries. He had a surgery, I think, in '92 and '94 and then again in 2007.
>
> And, again, he discussed that in his job he'd been there – well, he worked there for like 25 years. He – and he was a supervisor, so he was able to delegate work that he felt was too heavy, or if it required kneeling, squatting, twisting, bending. **But he felt like he was still able to do his job, and his expertise allowed him to still be a valuable worker.**

> He also had pretty significant foot problems that are discussed in the records in 1999, 2000, and 2004. He'd had surgeries. In the records it talks about that he had difficulty wearing open-toed shoes. When I met him, he had sandals on. If he did have to wear a closed-toe boot or shoe, it had to be, I think, three times – not his shoe size, but bigger than what he wore on – would wear traditionally.
>
> And he limped, both because he had radicular pain down his leg from the 2009 injury, and then also because he had preexisting pain in his feet from those injuries or the conditions on his foot.
>
> And then he had bilateral shoulder injuries, and I think surgeries on both. And those had gone pretty well. He'd returned to work after all these surgeries, and in the records he would request a return to work.

Collins Deposition, p. 6, l. 25 to p. 9., l. 12. [Emphasis added].

As Dr. Collins indicates in her deposition, due to his pre-existing conditions, Mr. Andrews was limited as to what job duties he was able to perform at the LDS church, and in the years preceding the 2009 accident he was able to modify his work duties to accommodate his objective and subjective limitations because he was working in a supervisory capacity and was able to delegate some of the heavier tasks. *Id., p. 10, l. 24 to p. 11, l. 8.*

Dr. Collins is of the opinion that Mr. Andrews meets the criteria for an odd-lot worker. In addition to his many physical restrictions set forth above, Mr. Andrews has only a high school education and is dyslexic, he is unskilled in using a computer, typing, or any sort of office work, his interpersonal skills are limited and he is an older worker. In her deposition Dr. Collins testified as follows:

Q. And after going through additional records in 2013, did you formulate an opinion as to whether or not Mr. Andrews would meet the category of an odd-lot worker at that time?

A. I felt in 2013 that his condition had certainly not improved. In combining his restrictions from the back injury and considering all of the limitations he had with his feet, his knees, his shoulder, his neck, his chronic pain, his narcotic pain usage, his age, that it would be very difficult for him to find an employer to hire him, and he would need significant accommodations in any job.

Q. And is it your opinion then that he meets the test for an odd-lot worker --

A. It is.

Q. -- for total disability?

A. Yes.

Collins Deposition, p. 26, l.21 to p. 27, l. 11.

3. Delyn Porter

Delyn Porter is a private vocational rehabilitation consultant/counselor retained by Defendants to do a vocational evaluation of Steven Andrews. *See Defendants' Hearing Exhs. A and B.*

Mr. Porter prepared a Vocational Evaluation Report and later provided an addendum to the report. ISIF did not take Mr. Porter's deposition. Mr. Porter reviewed Mr. Andrews' medical records, including the medical records documenting Mr. Andrews' pre-existing medical records, and provides a summary of the same in pages 1 through 9 of his initial report.

Mr. Porter met with Steven Andrews on October 24, 2012. Mr. Porter indicates in his report that the full extent of Mr. Andrews' formal education is a high school diploma and he has previously held a commercial driver's license. He also notes that Mr. Andrews is a very slow reader and suffers from dyslexia. *Defendants' Hearing Exh. A, p. 14.*

Mr. Porter also notes that Mr. Andrews had several prior industrial injuries, including a right knee injury, two prior back injuries with three prior back surgeries. *Id., p. 15.*

In pages 17 through 19 of his report, Mr. Porter goes on to report Mr. Andrews' very significant residual functional capacity restrictions with standing, walking, sitting, lifting/carrying, pushing/pulling, bending/stooping/kneeling, twisting, forward reaching, overhead reaching, climbing, gripping, handling, feeling, sleeping and driving. Additionally, with regard to Mr. Andrews' ADLs Mr. Porter states:

> Mr. Andrews reports some difficulty with activities of daily living. He is able to shower independently, but has a stool in the shower so can sit down if needed. He is unable to shampoo his hair and requires assistance with shampooing. He is able to dress independently, but reports some difficulty putting on socks and shoes. He has to sit to put on his socks and shoes. Typically wears sandals to avoid having to tie shoelaces. Has to purchase shoes that are three sizes too big due to swelling and arthritis in his feet. He has some difficulty with toileting and cleaning himself. He has a handicap toilet and bar installed in his bathroom to help him get up and down from the toilet. He does not sweep or mop. He is able to do some cooking, but keeps a milk can in the kitchen that he will sit on as needed when cooking. He was previously left hand dominant, but has had to learn to become right hand dominant.

Id., p. 19.

Although Mr. Porter's residual functional capacity test placed Mr. Andrews in a sedentary to below sedentary work capacity, Mr. Porter opines in his report that there is a discrepancy between Mr. Andrews' reported complaints and the objective medical facts, and puts Mr. Andrews in a light/medium physical strength capacity. *Id., p. 25.* Mr. Porter's opinion however, is belied by the first 10 pages of his own report, wherein he summarizes Mr. Andrews' extensive medical history,

pre-existing industrial accidents, surgeries and procedures. *Id., pp. 1-10.* Additionally, Dr. Nancy Collins adamantly disagreed with Mr. Porter's assertion in his report that there was any discrepancy between Mr. Andrews' subjective complaints and the objective medical facts.

Mr. Porter further discussed in his report Dr. Collins' analysis of Mr. Andrews' loss of labor market access based upon the SkillTran system being in the range of 66% to 96%. Mr. Porter was in agreement with Dr. Collins' opinion that an evaluator would be unable to in the SkillTran system adjust for Mr. Andrews' need for frequent position changes, and therefore his loss of labor market access would be higher than the previously stated 66% to 96%. However, Mr. Porter goes on to state that in his opinion, by excluding unskilled, closely transferable and generally transferable occupations Dr. Collins was artificially inflating Mr. Andrews' total market loss. However, in reviewing the types of jobs Mr. Porter suggests in his report, common sense would dictate that Mr. Andrews is unable to actually perform the duties required due to both subjective and objective limitations. Mr. Porter suggested the following jobs in his first report dated April 24, 2013:

1. HVAC Technician - This work is certainly heavier than Mr. Andrews is supposed to lift. It would also require climbing, kneeling, squatting, crawling and reaching. Additionally, the majority of this work is typically performed while standing.

2. Final Assembler - Requires the use of hand tools and small power tools, which would be very difficult for Mr. Andrews. It would also require prolonged standing. Mr. Andrews would also have to climb on and off a forklift, as well as sit for long periods of time on the forklift.

3. Parts and Sales Person for Motorcycle and ATVs - Requires a person to work in a very active environment, and also would require good customer service skills and the ability to operate a computer and multiple phone lines, which would be extremely difficult for Mr. Andrews.

4. Materials Handler - Would require climbing on and off a forklift, as well as prolonged sitting on a forklift. It is also doubtful that this employer would be agreeable to hiring Mr. Andrews due to the prescription medication he has to take.

5. Maintenance, Janitorial or Custodial - These jobs would require constant walking, bending, kneeling, crawling, climbing and/or lifting with no opportunity to sit. They may also require knowledge regarding troubleshooting of HVAC systems which Mr. Andrews had very little experience in.

6. Telephone Interviewer - This job would require long periods of sitting, and would also require the ability to read and type quickly as well as good customer service skills.

7. Glass Installer - This is a heavy job and requires good customer service skills.

8. Truck Driver, School Bus Driver or Hotel Shuttle Driver - Mr. Andrews likely would not be hired as a truck driver due to the narcotic medication he is taking, and further it would be unsafe for him to drive a school bus or shuttle bus. In addition he does not have the appearance or personality that would be conducive to these professions. He would also be limited in the amount of time he could spend sitting behind the wheel. *See Defendants' Hearing Exh. A, pp. 36-38; see also Claimant's Exh. A, p. 3-4.*

In his later report on June 3, 2015 Mr. Porter suggested additional job possibilities as follows:

1. Job Estimator - Mr. Andrews does not have any experience in estimating the cost of jobs in commercial and residential settings. In addition, this job would require him to drive extensively, and would also require good interpersonal skills.

2. Maintenance Coordinator - This job would require the ability to read and maintain blueprints, provide data analysis and written reports on work performed and a knowledge of maintenance management software and MS Office fluency. As previously indicated, Mr. Andrews is dyslexic, has difficulty reading and has very limited computer skills. This job also requires strong customer service skills.

3. Bannock County Building Official - This job is clearly out of the scope of Mr. Andrews' experience and ability. It would require a through knowledge of building and construction codes; practice and procedures for field inspections; the ability to read and interpret complex construction plans and blueprints; the ability to prepare oral and written reports. Additionally the job description states the candidate must have the following physical abilities:

> Sufficient personal mobility, flexibility, strength and agility to work in an office setting that requires sitting for long periods of time and to perform field inspections at building sites that requires climbing ladders, crawling around and under buildings, in ditches and trenches, and across rough and/or steep terrain.

The preferred candidate for this position would also have a Bachelor's degree in construction management and a Building Code Inspector Certification and an ICC Plans Examiner Certification.

4. Groundskeeping, Custodial and HVAC Technician - These jobs would require constant walking, bending, kneeling, crawling, climbing and/or lifting with no opportunity to sit. They may also require knowledge regarding troubleshooting HVAC systems which Mr. Andrews has had very little experience in.

5. Parts Counterperson - This job would require customer service skills, as well as computer and telephone skills.

6. Telephone Interviewer - This job would require long periods of sitting, and would also require the ability to read and type quickly as well as good customer service.

7. Construction Equipment Operator - This job would require hours of sitting in heavy equipment, as well as climbing in and out of the equipment. This would also be a dangerous job for Mr. Andrews to do while he is taking narcotic pain medication. *See Defendants' Hearing Exh. B, pp. 5-11.*

ISSUES ON APPEAL

(1) Did the Referee and the Industrial Commission have substantial and competent evidence in finding and concluding that Claimant/Appellant had failed to establish that his pre-existing permanent impairments were subjective hindrances to employment in order to establish the liability of ISIF?

(2) Did the Referee and the Industrial Commission have substantial and competent evidence in finding and concluding that Claimant/Appellant failed to establish that his pre-existing physical impairments combined with the industrial accident in causing total disability in order to establish the liability of ISIF?

ARGUMENT

A. MR. ANDREWS ESTABLISHED THAT HIS PREEXISTING PERMANENT IMPAIRMENTS WERE SUBJECTIVE HINDRANCES TO EMPLOYMENT.

This Court in *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), set forth the four elements of a prima facie case for apportioning liability for a total and permanent disability under Idaho Code § 72-332: (1) whether there was a preexisting impairment, (2) whether the impairment was manifest, (3) whether the impairment was a subjective hindrance, and (4) whether the impairment in any way combines in causing total and permanent disability. *Id.*

In this case, the Commission found that Mr. Andrews had preexisting impairment and also found that Mr. Andrews' preexisting impairments were manifest. However, the Commission found that Mr. Andrews' impairment was not a subjective hindrance. The Commission's conclusion in this regard is not supported by substantial and competent evidence that "a reasonable mind might accept to support a conclusion." *Uhl v. Ballard Med. Products, Inc.*, 138 Idaho 653, 67 P.3d 1265 (2003). "Whether [the Commission's] factual findings are supported by substantial and competent evidence is a question of law." *Fife v. the Home Depot Inc.*, 260 P.3d 1180 (2011).

With regard to the question of whether or not Mr. Andrews' impairment was a subjective hindrance, the Court is to consider, "evidence of the claimant's attitude toward the pre-existing condition, the claimant's medical condition before and after the injury for which compensation is sought, nonmedical factors concerning the claimant, **as well as expert opinions and other evidence concerning the effect of the pre-existing condition on the claimant's employability**...." *Archer v. Bonners Ferry Datsun,* 117 Idaho 166, 786 P.2d 557 (1990). [Emphasis added].

The Commission's decision and findings regarding whether or not Mr. Andrews' impairment was a subjective hindrance to employment is directly contradicted by expert opinion and specifically the testimony of Dr. Nancy Collins. Dr. Collins stated in her report as follows:

> From 2007 until his industrial accident he was performing lighter work.
>
> Prior to his industrial accident in 2009, Mr. Andrews had bilateral knee surgeries, bilateral shoulder surgeries, back surgery and painful feet. He had surgery on his back in 2007 and was given work restrictions for 25# maximum lifting and the need to change positions. I did not recognize these restrictions as permanent when I did the original evaluation.
> Mr. Andrews explained he returned to his maintenance job and his supervisor told him he was in trouble for returning him to his job with restrictions. The church knew about the trouble he had with his feet and they were aware of his knee limitations. He was unable to climb a ladder safely because he could not use his toes for climbing. This is actually why he fell from the ladder in 2009. After returning to work in 2007 the church was doing a cost needs analysis and Mr. Andrews' job was to inventory everything in every church. He spent most of his time performing this light work. He remembered his supervisor giving him this job because of his physical condition. He was also in charge of all the electronic keying for 40 buildings. He thought this job task took about 30% of his time and was lighter than the actual maintenance work. He did do some maintenance tasks along with another maintenance mechanic.

> When working before his 2009 injury, he was unable to kneel or squat because of his knees and he avoided standing or walking for long periods because of low back pain and foot pain. He had tendinitis in both hands and his hands would lock up when he performed repetitive work. He used a hand truck for moving heavy things. He discussed with his employer the need to avoid heavy lifting.

Claimant's Hearing Exhibit A, p. 3 (Andrews 3). In summary Dr. Collins documents 18 pre-existing job impairments that were both subjective and objective as follows:

1. Bilateral knee surgeries;
2. Bilateral shoulder surgeries;
3. Painful feet and foot surgeries;
4. Multiple back surgeries;
5. 25 pound lifting restrictions;
6. Need for frequent position changes;
7. Returned to maintenance job, but had trouble with employer and restrictions;
8. Employer knew of knee limitations;
9. Unable to climb ladder;
10. Could not use his toes;
11. Supervisor restricted his job because of physical condition;
12. Unable to kneel;
13. Unable to squat;
14. Unable to stand for more than 5 minutes without support;

15. Unable to walk on uneven surfaces;

16. Tendinitis in both hands;

17. Unable to do repetitive work with his hands;

18. Unable to do heavy lifting due to the formal 25 pound lifting restriction imposed by Dr. Allen following his 2007 back surgery. *See Claimant's Hearing Exhibit D (Andrews 81).* From this, the Industrial Commission erroneously concluded that Mr. Andrews "had no permanent restrictions *per se"* (R., p. 115, ¶ 28); that "Claimant had no activity restrictions prior to his March 2009 industrial accident (R., p. 121, ¶ 51); that "he was doing his job without any physician-imposed restrictions at the time of his accident of March 17, 2009" and "Claimant had never been assigned any formal work restrictions prior to Claimant's 2009 accident and injury" (R., pp. 20-21, ¶ 65); and finally that "the restrictions from Claimant's 2009 back injury alone render him totally and permanent disabled" (R., p. 26, ¶ 69). The foregoing conclusions by the Industrial Commission are not supported by substantial, competent evidence and misconstrue the entire record.

Additionally, Dr. Selznick assigned hypothetical impairment ratings to Mr. Andrews' pre-existing impairments of between 5% to 10% to Mr. Andrews' right knee; 1% to 2% for Mr. Andrews' right knee; 1% to 2% for Mr. Andrews' left knee; 3% to 4% for Mr. Andrews' right shoulder surgery; 3% to 4% for Mr. Andrews' left shoulder surgery; and 2% for his right big toe surgery. *Id., p. 11, l. 15 to p. 14, l. 24.*

In *Archer v. Bonners Ferry Datsun,* 117 Idaho 166, 786 P.2d 557 (1990), this Court sets forth the test for determining whether an impairment was a "subjective hindrance" to employment. Under *Archer,* the correct test is "whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant." *Id.*, at 172, 786 P.2d at 563; see also *Langley v. State*, 126 Idaho 781, 788, 890 P.2d 732, 739 (1995). Both Dr. Collins and Dr. Selznick testified that Mr. Andrews' preexisting conditions represented a hindrance to employment. As stated above, Dr. Selznick provided hypothetical impairment ratings to each of Mr. Andrews' major preexisting impairments, and Dr. Collins' stated in her deposition testimony that she believed there was an extremely limited number of jobs that Mr. Andrews would have been capable of performing prior to his 2009 injuries.

There is no question or argument that Mr. Andrews was afforded certain accommodations for his pre-existing conditions while working at the LDS Church prior to the 2009 accident. Due to his seniority and supervisory position he was able to delegate all heavy lifting. *See R., p. 125; Collins Deposition, p. 6, l. 25 to p. 9., l. 12; and Claimant's Hearing Exhibit A, p. 3 (Andrews 3).*

The Referee states in the Findings of Fact, Conclusions of Law, and Recommendations that Mr. Andrews was:

> [D]oing his job without any physician imposed restrictions at the time of his accident of March 17, 2009. While it may be true that Claimant was afforded certain accommodations from time to time, it would not be unusual for that to be the case, especially in light of his twenty-plus years as a valued and

worthwhile employee of Employer and his supervisory position.[1]

R., p. 30, ¶ 65.

Idaho Code § 72-332(2) states in pertinent part as follows:

> This shall be interpreted subjectively as to the particular employee involved, however, **the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.**

[Emphasis added].

Additionally the Referee not only ignored, but misstated, Mr. Andrews' hearing testimony, and came to the surprising, and incorrect, conclusion that "Claimant testified to the effect that he was fine before his 2009 accident." *R., p. 125, ¶ 65.* However this statement is contrary to the evidence in the record and the facts Mr. Andrews testified to during the hearing. In fact, Mr. Andrews testified regarding his pre-existing low back problems as follows:

> Q. When was the first time you had low back surgery?
> A. I can't remember the date. But it was in the '90s.
> Q. And what kind of procedure did you have in –
> A. The first one, Dr. McCowin did, Phil McCowin in Idaho Falls. Well, actually, it was Ty McCowin, his dad, did the first one. And that was a discectomy, laminectomy surgery.

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[1] This statement by the Referee is not completely accurate however, as Dr. Allen had, prior to the 2009 industrial accident, imposed a 25 pound lifting restriction, with frequent changes in position, on Mr. Andrews after his 2007 back surgery. *See Claimant's Hearing Exhibit D (Andrews 81).* This is further supported by Craig Stevens, M.D., who did an IME for the LDS Church where he documented the pre-existing 25 lb weight restriction. *See Claimant's Hearing Exhibit D (Andrews 268).* Dr. Collins also documented these restrictions. *Claimant's Hearing Exhibit A, p. 3 (Andrews 3).*

And then I developed problems from that and his son did the next surgery, which was Phil McCowin, and he went in and did a discectomy. And then also had to do – they had to do neurosurgery on my spine because of scar tissue.
And then the next surgery I had was Dr. Allen did a discectomy, laminectomy. It just kept working up.

Q. Kept working up in levels on your lower back?
A. Yes. Yeah. Yeah.
Q. And with each of these back surgeries, did you notice things that became more difficult for you to do physically?
A. Yeah, bending. Bending over or twisting was – started to become a problem.

See hearing transcript, p. 26, l. 2 through p. 27, l. 1.

Mr. Andrews further testified regarding his pre-existing foot and "turf toe" conditions as follows:

Q. And what type of problems do your feet currently cause you?
A. Well they ache all the time. But at night it's worse.
. . .
Q. So what type of limitations do your feet cause you as it relates to your daily activities?
A. Well standing is an issue, for very long. And walking is an issue, if I have to do very much of it, because of the way it bends my toes.
Q. How long can you stand?
A. Without a stick?
Q. Yes.
A. About five minutes.
. . .
Q. Any other limitations as it relates to you feet that we haven't discussed?
A. Just arthritis.
Q. And what's your understanding of the arthritis in your feet?
A. That I have arthritis through my foot, the entire foot. But it's worse where my big toes are. It's starting to spread up into the – from the big toe joint up to the next joint that goes up towards your ankle, and I don't know what that bone is called.

Id., 35, ll. 15-18; p. 36, ll. 15-23; and p. 37, ll. 10-19.

With regard to his pre-existing knee impairments Mr. Andrews stated as follows:

> Q. And problems with your knees?
> A. Yeah, my knees have always – I've had five knee surgeries on my right knee. It's now artificial.
> Any my left knee, I have – I've had one surgery on, which was – they went in and trimmed the cartilage that was bad.
> . . .
> Q. And what kind of limitations do you notice as it relates to your right and left knee issues?
> A. Well my right knee doesn't bend all the way, so I can't crawl. Because I can't – it won't bend enough to bring it forward to crawl.

Id., p. 37, l. 22 through p. 38, l. 3; p. 38, ll. 9-13

As to his shoulder problems, Mr. Andrews testified as follows:

> Q. As it relates to your shoulders, do you have problems with your shoulders?
> A. Yeah. If I have to do anything overhead, you know, if I have to hold my arms up like this for very long, then it's a problem.
> Q. So what is your understanding of the condition of your shoulders?
> A. Basically, they were the same as my feet, as far as the impingement went. It's where that tendon comes off your collar bone and over to your shoulder, it formed a big knot in there they went in and trimmed that off and re-anchored the tendons back up.
> . . .
> Q. So when was your right shoulder surgery?
> A. I don't remember the dates.
> Q. And do you remember when your left shoulder surgery was?
> A. No. As far as dates go, I can't – I've had 16 surgeries. So I forget.
> Q. As far as your limitations which you, that would affect your ability to be employed, what have you noticed those limitations are?
> A. Well, in my old job, if I had to do lights, or something like that, I would have to just do a few.

Id., p. 41, l. 18 through p. 42, l. 4; p. 42, l. 12 through p. 43, l. 2.

Finally, with respect to Mr. Andrews' neck, he testified as follows:

> Q. Do you have any problems with your neck?
> A. Yeah, I've got a bad disk in my neck. And the doctor told me he won't operate on it unless he positively has to because of where it's at. If I sit at a computer screen too long – I need to – can I stand up?
> REFEREE POWERS: Sure.
> THE WITNESS: That gets to burning after a bit.
> If I sit at a computer screen very long – like I try to do genealogy because – just because I get so bored I can't stand myself. I can usually sit at computer screen for, oh, 15 to 20 minutes, sometimes 30 minutes on a good day.

Id., p. 43, ll. 3-16.

This Court has held that a Commission referee "must accept as true the positive, uncontradicted testimony of a credible witness...." *Mazzone v. Texas Roadhouse, Inc.* 154 Idaho 750, 758, 302 P.3d 718, 726 (2013). Mr. Andrews' testimony regarding his pre-existing impairments have not been contradicted in any way, and in fact have been confirmed by his physicians, Dr. Collins, and even ISIF's expert, Mr. Porter.

The record clearly shows that before the 2009 accident Mr. Andrews had a significant right knee condition caused by work related injuries in 1984, 1987, 1991; he had a left knee surgery in 1993; as well as ongoing right knee pain and stiffness which resulted in difficulty squatting, crouching and kneeling before the accident, and difficulty climbing and standing for long periods; he also had previous back injuries, and had surgeries to address those injuries in 1992, 1994 and 2007 (the 2007 back surgery resulted in a 25 pound lifting restriction and the need for frequent position changes); he also had significant foot and toe injuries and problems, which resulted in

multiple surgeries (he is, and was at the time of the 2009 accident, unable to wear a closed-toe boot or shoe); he also had bilateral shoulder injuries, which resulted in surgeries on both shoulders.

Based on the foregoing, Claimant asserts that the Commission failed to base its finding that Mr. Andrews' pre-existing permanent impairments were not subjective hindrances to employment on substantial and competent evidence, as their conclusions are clearly erroneous. *Eckhart v. Indus. Special Indem. Fund,* 133 Idaho 260, 985 P.2d 685 (1999).

B. MR. ANDREWS' PRE-EXISTING PHYSICAL IMPAIRMENTS COMBINED WITH THE INDUSTRIAL ACCIDENT IN CAUSING TOTAL DISABILITY THUS ESTABLISHING THE LIABILITY OF ISIF.

Idaho Code § 72-332(1) provides as follows:

> If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, **and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability**, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

[Emphasis added].

The Commission determined that Mr. Andrews had failed to meet the fourth element of the *Dumaw* test: "[W]hether the impairment in any way combines in causing total and permanent disability." *Dumaw,* supra. In paragraph 67 of its Findings of Fact, Conclusions of Law, and

Recommendation, the Referee implies, but does not actually state, that it was Dr. Collins' testimony that because of Mr. Andrews' pre-existing conditions he was totally disabled, and therefore did not meet fourth element of the *Dumaw* test:

> On cross-examination, Dr. Collins testified that even without considering Claimant's back restrictions from his 2009 accident, he was "realistically unemployable" based on his pre-existing conditions.

See R., p. 26, ¶ 67. However the Referee fails to cite where in the record Dr. Collins made the above statement, and after review of the record, Claimant is unable to locate anywhere that Dr. Collins made this statement. However, in her deposition, when discussing her 2011 versus 2013 report, Dr. Collins used similar language, stating as follows:

> Q. Okay. So is your 2013 report saying now that he's more totally and permanently disabled?
> A. No. I think what it says is that when you're not looking **just** at the restrictions for the 2009 back injury and you look at all the other conditions that he had, that he's realistically not employable.

Collins Depo., p. 34, l. 21 through p. 35, l. 1. [Emphasis added]. Dr. Collins' testimony in this instance is clearly indicating that it is her opinion that it was not Mr. Andrews' 2009 injury alone, but the 2009 injury along with all his past conditions that render him realistically unemployable.

In this case, concurrently with the *Dumaw* test, the "but for" standard must be applied. The Court in *Corgatelli v. Steel W., Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) stated: "[T]he Commission must determine whether the claimant's disability would not have been total *but for* the preexisting impairment. *Id. [Emphasis in original]* (quoting *Bybee v. State Indus. Special Indem. Fund*, 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996)). The Commission correctly references the

"but for" standard in its decision, however, it fails to base its conclusions on substantial and competent evidence; the Commission relies heavily upon Dr. Collins' supposed testimony to reach its conclusion that but for his pre-existing impairments Mr. Andrews would not be totally and permanently disabled, it stated: "Dr. Collins testified that the restrictions from Claimant's 2009 back injury alone render him totally and permanently disabled in the Pocatello area labor market." *R., p. 26, ¶ 69.* Again, the Commission offers no cite to indicate where in the record Dr. Collins testified to this effect. And, in fact, Dr. Collins' actual testimony was that it was the combined effects of Mr. Andrews' 2009 injury with his pre-existing conditions that rendered him totally disabled. She stated as follows:

> In my opinion, Mr. Andrews is realistically permanently and totally disabled by his significant physical limitations, his age, his appearance, his chronic pain and his lack of transferable skill for lighter work. **I do think his total disability is a combination of his pre-existing low back, bilateral shoulder conditions, bilateral knee conditions, limited hand function, painful feet and his current low back pain, right knee replacement, bowel incontinence and his balance problems.**

Claimant's Hearing Exhibit A, pp. 4-5 (Andrews 5-6). [Emphasis added]. Additionally, again, in her post hearing deposition, Dr. Collins stated as follows:

> I felt in 2013 that his condition had certainly not improved. In combining his restrictions from the back injury and considering all of the limitations he had with his feet, his knees, his shoulder, his neck, his chronic pain, his narcotic pain usage, his age, that it would be very difficult for him to find an employer to hire him, and he would need significant accommodations in any job.

Deposition of Nancy Collins, Ph.D., pp. 26-27.

This Court in its recent opinion in *Green v. Green,* Opinion No. 48 (2016) stated as follows:

> There is no requirement that a precise "but for" question be directed to a physician as a prerequisite to ISIF liability. The issue whether a total permanent disability is the result of the combined effects of a pre-existing and work-related injury is more expansive than a simple medical inquiry because a determination of total permanent disability necessarily takes into account non-medical factors.

Green, supra., at p. 12. However, although he did not directly address the "but for" question, it was Dr. Selznick's opinion that Mr. Andrews' disability was a result of the aggravation and acceleration of a pre-existing impairment. In his 2011 report he opined as follows:

> [I]t is my opinion Mr. Andrews sustained a distinct exacerbation of objectively evident, albeit relatively asymptomatic, degenerative disease in his lumbar spine as a result of subject incident on 03/17/09.
>
> . . .
>
> It is my opinion Mr. Andrews has a distinct exacerbation of previously evident right knee osteoarthritis with increased symptomology not inconsistent with ongoing contralateral left lower extremity symptomatic radiculopathy which necessitated increased dependence upon unaffected right lower extremity, hence aggravating or exacerbating underlying right knee degenerative condition.
>
> . . .
>
> Given his prior simple decompressive surgeries performed at interval points over a two decade time span (07/15/91 at L4-5; 01/31/96 at L4-5; 09/10/07 at L3-4), with intervening periods of medical record silence would put Mr. Andrews in a pre-existent DRE Category III which carries a 10% whole person impairment, which he had prior to subject accident.

Claimant's Hearing Exhibit B, p. 16 (Andrews 23). Dr. Selznick later, during his deposition, clarified the above opinions as follows:

A. The only thing that I think for clarification is I'm a little smarter now in 2015 than I was in 2011, and when I read my report this morning, I was a little upset with myself for using the word "exacerbation," because in reality, based on the 6th Edition and the definition of exacerbation, he really sustained an aggravation, not an exacerbation. He got distinctly worse after subject accident beyond the natural history of his condition.

Q. And the 6th Edition draws a distinction between those two terms?

A. Very important. Exacerbation implies return to baseline. Very important. And I mistakenly used the words in my reporting, because of lack of updated education on my part, and there is a big difference between exacerbation and aggravation. He did not sustain an exacerbation, which was the word I used, because by definition that implies return to pre-existing status.

Q. And what he sustained was an aggravation that resulted in a continual decline of his status?

A. Correct. It was a subject injury, a distinct worsening of his condition both as it relates to his knee and to his low back, which absent subject accident, based on natural history, studies would not have occurred.

Selznick depo., p. 22, l. 3 through p. 23, l. 3.

The injuries Mr. Andrews sustained in the 2009 accident included lumbar disk herniation at the L3-4 level where he had undergone previous surgery, which necessitated a lumbar fusion. It also caused injury to his knee, which aggravated his prior knee issues. However, had Mr. Andrews not had multiple pre-existing conditions, i.e. prior back injuries, knee injuries, shoulder injuries, neck pain, foot injuries and pain, bowel incontinence, arthritis in his hands, knees and feet, etc., the injuries he sustained in the 2009 accident were extremely unlikely to have caused total permanent disability. Put another way, but for Mr. Andrews' pre-existing conditions, the 2009 accident would not have rendered him totally disabled.

Of note, contrary to the Commission's finding that Mr. Andrews' total and permanent impairment was due solely to his March 17, 2009 industrial accident, J. Craig Stevens, M.D., the retained expert for the LDS Church, provided the following opinion:

> [G]iven the entirety of his prior history, which is quite complicated and extensive, I apportion at this stage any future treatment of his lumbar condition to management of the preexisting factors with minimal contribution of his most recent injury superimposed upon that extensive prior history.
> . . .
> I note that following his surgery in 2007, he was placed on a 25 lb lift restriction and discharged to prn follow up, indicating to me, that that was a permanent restriction; now superceded by this lesser restriction.

See Claimant's Hearing Exhibit D (Andrews 268).

As the Court stated *Dohl v. PSF Industries, Inc.*, 127 Idaho 232, 899 P.2d 445 (1995):

> The purpose of establishing the I.S.I.F. was to encourage employers to hire older and partially disabled employees and to spread the risks of hiring those employees among employers. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 117, 686 P.2d 54, 62 (1984). This Court has interpreted the second injury fund statutes as intending to make employers liable only for the portion of the employee's disability caused by the industrial injury, and any additional injury that was due to a pre-existing condition of the employee would be covered by the second injury indemnity fund.

Dohl, 127 Idaho at 236, 899 P.2d at 449.

In this case, the Commission's factual findings were not supported by substantial and competent evidence, and Mr. Andrews' pre-existing conditions should be covered by the ISIF as his pre-existing conditions combined with his 2009 injury to render him completely disabled.

CONCLUSION

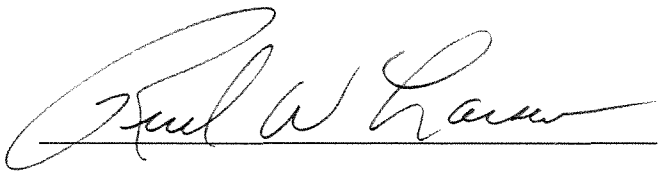
Based on the foregoing, Mr. Andrews respectfully requests that the Court reverse the May 12, 2016 Findings of Fact, Conclusions of Law, and Recommendation adopted by the Commission, and remand this case back to the Commission, with instructions that Mr. Andrews is totally disabled, an odd-lot worker and to make application of the Carey Formula to award Mr. Andrews ISIF benefits.

DATED this 16 day of September, 2016.

COOPER & LARSEN, CHARTERED

By _____
REED W. LARSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16 day of September, 2016, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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