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Andrews v. Industrial Special Indem. Fund Respondent's Brief 1 Dckt. 44241

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 No. 44241-2016 I.C. Case No. 2009-007783

RESPONDENT'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

REFEREE MICHAEL E. POWERS PRESIDING

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I. STANDARD OF REVIEW

When reviewing Industrial Commission decisions, The Idaho Supreme Court "exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings." *Jensen v. City of Pocatello*, 135 Idaho 406, 410, 18 P.3d 211, 214 (2000). The Court's role on appeal of the Commission's rulings is "not to re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Id.*

Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Id.* Substantial evidence is "more than a scintilla of proof, but less than a preponderance." *Id.* at 412, 18 P.3d at 216. Additionally, the Commission's conclusions on the credibility and weight of evidence will not be disturbed unless such conclusions are "clearly erroneous." *Id.* at 410, 18 P.3d at 214. Finally, the Commission's factual findings are reviewed "in the light most favorable to the prevailing party." *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 190, 207 P.3d 162, 166 (2009).

It is the Industrial Commission's province to decide the weight which should be given to the facts presented and the resulting conclusions drawn from those facts. *See Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996). The Commission's conclusions on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous. *See Wheaton v. Indus. Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

II. STATEMENT OF THE CASE

A. Statement of the Case

This case involves a claim brought by Steven Andrews, Appellant, against the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). The questions submitted below for the consideration of the Industrial Commission were:

1. Whether or not Appellant was totally and permanently disabled; and
2. If the Appellant was totally and permanently disabled, whether or not his industrial accident has combined with preexisting medical conditions in order to establish ISIF liability under the applicable statutory structure.

This appeal presents the issue of whether there was substantial evidence to support the Industrial Commission's finding that the ISIF was not liable under the applicable statutory structure.

B. Statement of Facts

A hearing on the matter was conducted before Referee Powers on June 16, 2015 in Pocatello. The sole witness to provide live testimony was Appellant. R. 106. Post hearing depositions of Nancy Collins, Ph.D. and Hugh Selznick, M.D. were completed and considered as evidence by Referee Powers. *Id.* Likewise, all exhibits offered by both Andrews and ISIF were admitted at the hearing and considered by Referee Powers. *Id.*

i. Testimony from Mr. Andrews

At the time of hearing Appellant was 57 years old. *June 16, 2015, Hearing Transcr*ipt (12:17), (13:8). He graduated from high school in 1977. *Id.* (14:12). At the time of his industrial accident, Claimant was employed by the LDS Church. In the course of his employment with the

Church, Andrews provided plumbing, electrical, custodial, building maintenance, mechanic and HVAC services. *Id.* (19:9; 20:11).

At the time of the subject industrial accident, Andrews had been employed by the LDS Church for 23 years while also engaging in outside businesses. *Id.* (57:6). Prior to engaging in employment for the LDS Church, Andrews drove commercial truck, worked in landscaping, surveyed pipe, worked as a grounds supervisor for State Hospital South, and worked in maintenance. *Id.* (14:20; 15:6, 9, 24; 18:2,12,18; 55:19: 56:2).

The injury which gave rise to Appellant's claim was a back injury he sustained as a result of a industrial accident. Claimant was instructed to avoid twisting, turning, crawling and ladders. He was initially given a 10 pound lifting restriction. *Id.* (28:12). Claimant carries a walking staff because a cane causes his back to twist. *Id.* (37:4). His lifting restriction was later raised to 25 pounds, however, he testified he can't lift above 5 or 6 pounds without pain. *Id.* (51:21; 52:13). Claimant testified that, because of his back injury from the Church accident, he cannot sit without pain, twist, stoop or bend over or reach. *Id.* (61:1-2, 6, 11).

Appellant was clear in testifying that it was his back injury which disqualified him from work. *Id.* (62:7-16). At the time of the hearing, Appellant was taking Percocet on a daily basis. He had never taken Percocet prior to the industrial accident at issue. *Id.* (61:16-20).

Prior to the injury which was at issue in this matter, Appellant testified he had "several" on the job injuries to his back working for the LDS Church. *Id.* (21:9-11). To the best of his recollection his first low back surgery was "in the 90's." *Id.* (25:2-5). After his back surgery in

1991 he was limited to lifting of 70-80 pounds. However, after his second back surgery in 2007 he was told he could not lift over 100 pounds. *Id.* (60:7-15).

Appellant had left knee surgery prior to the industrial accident at issue in 2009. *Id.* (38:1-3; 59:11-15). He testified that current problems with is left knee are due to arthritis. *Id.* (59:19-21). He did not attribute his difficulties with this knee to his most recent back surgery. *Id.* At the time of hearing, Appellant had not been disqualified from any jobs due to left knee problems or limitations. *Id.* (62:11-13).

Appellant has had multiple knee injuries and resulting surgeries on his right knee and it was replaced in 2010 after this industrial accident at issue. *Id.* (58:1-20). The original injury to the knee occurred in a motorcycle accident in 1977. *Id.* No restrictions were issued, at the time of hearing, with respect to the right knee. He chose to replace the knee because he "was still on Church insurance." *Id.* (58:8-21).

Appellant also had previous surgery on both shoulders. *Id.* (42:5-10). Prolonged overhead lifting of his arms, would cause inflammation in his shoulders. *Id.* (45:21-25; 46:1-2). Andrews also had issues with "Turf Toe," on his right foot, prior to the industrial accident at issue. *Id.* (33:19-25). Appellant testified that standing "is an issue" and he can stand unassisted for 5 minutes and walk about a quarter mile with assistance from a walking stick or a shopping cart. *Id.* (36:15-25; 37:1-9). He also identified arthritis in his right foot. *Id.* (37:15-16).

Prior to the industrial accident, Andrews testified that he has Type II diabetes and had high blood pressure. *Id.* (44:21-25; 45:1-2). However, Claimant testified that the high blood pressure resolved after he left his employment at State Hospital South. *Id.*

ii. Post-Hearing Deposition Testimony of Nancy Collins, Ph. D.

Nancy Collins, Ph. D. ("Dr. Collins") issued two vocational reports regarding Andrews. The first in March of 2011 and second in July of 2013. *See Claimant's Exh. A*, Report of Nancy J. Collins. Dr. Collins testimony was preserved for the record through a post hearing deposition taken on August 19, 2015 and has been made a part of this record on appeal.

As part of her vocational analysis Dr. Collins took note of various restrictions placed upon Claimant. Specifically, the lifting restriction of 35 pounds alone, and 50 pounds in combination with a co-worker. *See Claimant's hearing Exh. A, p. 1.* Dr. Collins also agreed the 35 pond lairing restriction was greater than the limitation issued to him after his 2007 back surgery. *Collins Deposition* (36:6-18).

Likewise, Sarah Fagan, P.A. provided a large list of restrictions which included, no sitting, standing or walking for more than 1 to 3 hours each per day, no driving more than 1 to 3 hours per day. Lifting restriction of no more than 10 pounds for 5 to 8 hours per day, 10 to 15 pounds 3 to 5 hours per day, 15 to 35 pounds 1 to 3 hours per day, and 50 pounds only with a co-worker. *See Claimant's Hearing Exh. A, p. 1.* Similarly, Ms. Fagan specified a permanent restriction of limiting any bend, stoop, push/pull, twist, climb, squat, kneel, reach, grasp or repetitive movements to 1 to 3 hours per day, no balancing or crawling, and opined that claimant would require frequent changes in position. *Id.* These limitations were noted in Dr. Collins report. *Id.*

Dr. Collins also opined that Claimant has subjective limitations. Specifically, she opined that he has problems with stamina, sitting limitations of 30 minutes, standing limitations of 10

minutes, difficulty walking, complaints of loss of sensation and pain, incontinence, impaired dexterity and limited mobility. *Id.*

Dr. Collins also testified regarding the source of Claimant's limitations. Specifically, she testified that, as a result of the industrial accident, which necessitated a bilateral hemi laminectomy with nerve root decompression at L 3-4, Andrews was severely limited. *Collins Deposition* (38:19-25; 39-41; 42:1-13). Dr. Collins testified that due to this industrial accident alone, and Andrews's non-ratable factors, no jobs were available to Appellant. *Id.*

iii. Post Hearing Deposition Testimony of Hugh S. Selznick, M.D.

Dr. Selznick was retained by Appellant to perform an independent medical exam.[1] Dr. Selznick testified, "The main issues of play, just for the record or whoever reads this deposition transcript, are the low back and right knee." *Id.* (34:7-9).

Dr. Selznick agreed with the limitations identified by Dr. Collins and Nancy Fagan. *Selznick Deposition* (28:11-25; 29:1-11). Dr. Selznick further testified these limitations were caused solely by the industrial accident. *Id.* (28:20-25; 29:1-11).

Dr. Selznick also testified that, at the time of the industrial accident, Claimant was not under any restrictions and was "grossly asymptomatic." *Id.* (25:4-13). He further testified that the treatment received after the industrial accident should be entirely attributed to the subject industrial accident. *Id.* (25:23-25; 26:1-3).

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[1] Dr. Selznick offered several "hypothetical" ratings for Andrews's various medical conditions during his deposition. The "ratings" issued by Dr. Selznick were issued for the first time at his post hearing deposition. The ratings were issued in answer to "hypothetical" questions posed by Claimant's counsel. A motion to strike was made due to the inappropriate nature of the ratings. Referee Powers denied the motion holding that the hypothetical ratings went to credibility of the witness. R. 103.

Dr. Selznick also testified that Andrews "related to me no issues with his low back, and I have no reason to disagree with him that he had on average zero of ten pain. If I recall correctly, he was doing maintenance on up to 26 buildings, and he was with the church as a long-term employee for upwards of 20 years...." *Id.* (24:9-21).

Dr. Selznick also opined that the right knee was exacerbated and/or aggravated by the industrial accident. However, he was unable to offer anything other than the timing of the subjective increase in symptomology and his examination with respect to flexion. *Id.* (31-33). He also readily admitted that arthritis is a degenerative disease and that his examination would be consistent with normal denegation of that condition. *Id.*

iv. Delyn Porter Vocational Report

Mr. Porter issued a report in the case below but was not deposed. Mr. Porter's report was geared towards identifying potential jobs for Andrews. However, the commission ruled against the ISIF finding that Andrews had proved he was an odd-lot worker. This finding has not been appealed. As such, Mr. Porter's report is of very limited relevance to this appeal.

C. Proceedings Below.

The hearing before Referee Powers was with respect to ISIF liability only. Appellant's employer, the Corporation of the Church of Jesus Christ of Latter Day Saints ("LDS Church"), settled with Appellant prior to hearing.

Briefing was submitted after the closing of evidence by both parties pursuant to the Judicial Rules of Practice and Procedure adopted by the Industrial Commission. On May 10, 2016, referee Powers issued his Findings of Fact and Conclusion of Law and Recommendation, finding

that Appellant had failed to establish ISIF liability. R. 126. On May 10, 2016 the Industrial Commission issued an order adopting Referee Powers' recommendation. R. 128.

III. ISSUES ON APPEAL

(1) Was there substantial and competent evidence to support the finding that Appellant failed to establish that his preexisting permanent partial impairments were a subjective hindrance to employment?

(2) Was there substantial and competent evidence to support the finding that Appellant failed to establish that but for his preexisting impairments he would not be totally and permanently disabled?

IV. ADDITIONAL ISSUES ON APPEAL

(1) The award of attorney fees on appeal.

V. ARGUMENT

A. SUBSTANTIAL AND COMPETENT EVIDENCE WAS RELIED UPON BY THE INDUSTRIAL COMMISSION AND REFEREE POWERS IN FINDING AN ABSENCE OF A SUBJECTIVE HINDRANCE TO EMPLOYMENT.

In order to establish ISIF liability under I.C. § 7-332 a claimant must show: (1) A pre-existing impairment, (2) the impairment was manifest, (3) the impairment was a subjective hindrance to employment, and (4) the impairment combines with the industrial accident in causing total and permanent disability. *Dunmaw v. J.L. Norton Loggin,* 118 Idaho 150, 795, P.2d 312 (1990).

Appellant first argues that he has established a subjective hindrance based upon preexisting impairment. In advancing this argument, Appellant leaves out that the Supreme Court reviews the

Commission's findings of fact "in the light most favorable to the prevailing party." *Stoddard*, 147 Idaho at 190, 207 P.3d at 166. After the factual finding is so viewed, a determination of whether substantial and competent evidence, which is defined as "relevant evidence which a reasonable mind might accept to support a conclusion", exists in the record to support the Industrial Commission's finding. *Jensen*, 135 Idaho at 410, 18 P.3d at 214.

In large measure, Appellant makes an argument which would necessitate the re-weighing of the evidence before the Industrial Commission. He points this Court to testimony and expert reports which he argues should be persuasive and ignores much of the evidence relied upon my Referee powers.

Referee Powers did, in fact, recognize the *hypothetical* ratings of Dr. Selznick. *See* R. 124 ¶ 64. Likewise, Referee Powers agrees that the preexisting conditions were manifest. *Id.* ¶ 65. However, he found that there was no subjective hindrance to employment. *Id.*

Appellant cites to *Archer v. Bonners Ferry Datsun,* 117 Idaho 166, 786 P.2d 557 (1990), for the proper standard in determining whether a preexisting condition is a subjective hindrance. However, claimant only cited to a portion of the test and guidance provided by the Court. *Archer* held that the proper test was to determine "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. In providing guidance in applying the test the Court stated:

> Under this test, evidence of the claimant's attitude toward the pre-existing condition, the claimant's medical condition before and after the injury or disease 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 will all be admissible. *No*

> *longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant.*

Id. (emphasis supplied).

Referee Powers cited to both the testimony of the Appellant and his experts in support of his finding. He stated, "Claimant's own testimony, bolstered by Dr. Selznick, is fairly clear that he was doing his job without any physicians-imposed restrictions at the time of his accident of March 17, 2009." R. 124-125 ¶ 65. He also recognized that certain accommodations may have been afforded from time to time. *Id.* However, under the circumstances of this particular claimant, Referee Powers found that such accommodations were not unusual for a "valued and worthwhile employee of Employer and his supervisory position." *Id.*

The records before the Court are filled with substantial and competent evidence which support Referee Powers finding. Dr. Selznick testified as follows with respect to Appellant's limitations:

> **Q.** But as far as looking at these restrictions, that would be consistent with the type of surgery that Mr. Andrews was required to have?
>
> **A.** For my own patients that I've performed lumbosacral fusion on in the past, I think her restrictions are actually quite generous. I would never even put down 50 pounds with a co-worker. I would be closer to the lower limits in my own clinical practice, with all honesty, rather than the maximum limits that you noted.
>
> **Q.** In any event, these limits or the lower limits you've spoken of that you would have put into place were the result of the surgery necessitated by the industrial accident?

A. More likely than not, yeah. It's a very extensive surgery to have three motion segments in your low back fused.

Selznick Deposition (28:20-25; 29:1-11).

Dr. Selznick also testified that Appellant was "grossly asymptomatic" at the time of the industrial accident and that he could work without restriction.

Q. Take a look at page 16 of that same report [Hearing Exhibit B] 5 for me, Doctor. And in the second to last paragraph at the bottom in the last sentence, you indicate that he was grossly asymptomatic for the 18-month period prior to the subject industrial incident. And what do you mean by "grossly asymptomatic"?

A. He wasn't receiving active low back directed treatment. *He was able to continue with his vocational and avocational activities without restriction.* That's grossly asymptomatic.

Id. (25:4-13) (emphasis supplied).

Q. And, in fact, in -- on page 16 at the bottom of the first paragraph, you opine that the surgery and treatment received after the industrial accident should be attributed in its entirety to the March of 2009 industrial accident; is that correct?

A. Correct

Id. (25:23-25; 26:1-3).

Q. And given these representations, Doctor, is -- did he appear to be under any limitations with respect to his back before the date of this industrial accident?

A. What he related to me was that he was working full time for the Church of Latter-day Saints up and through subject accident as a maintenance mechanic. He related to me no issues with his low back, and I have no reason to disagree with him that he had on average zero of ten pain. If I recall correctly, he was doing maintenance on up to 26 buildings, and he was with the church as a long-term employee for upwards of 20 years....

Id. (24:9-21).

Appellant testified, at the time of hearing, that his left knee was fine at the time of the subject accident. *Hearing Transcript* (59:11-15). He attributed his current problems with is left knee to arthritis. *Id.* (59:19-21). He does not attribute his difficulties with this knee to his most recent back surgery. *Id.* Likewise, Appellant testified he had not been disqualified for any jobs due to left knee problems. *Id.* (62:11-13). Appellant chose to have his right knee replaced because he "was still on Church insurance." *Id.* (58:8-21).

All of these statements, among others, provide substantial and competent evidence to support Referee Powers' findings. When viewing this testimony in a light most favorable to the ISIF, competent evidence exists to support Referee Powers' statement that "Claimant testified to the effect that he was fine before his 2009 accident" and "virtually all of Claimant's current restriction stem from hiss 2009 back and right knee injuries alone." R. at 125 ¶65.

The testimony before the Commission certainly constitutes "relevant evidence which a reasonable mind might accept to support a conclusion." *Jensen*, 135 at 410, 18 P.3d at 214. In sum, Referee Powers did precisely what the *Archer* case directs. He weighed the evidence presented on the issue and made a determination with respect to this particular claimant.

Appellant advocates for the precise result which *Archer* seeks to avoid. He spends a great deal of time setting forth statements from Dr. Collins report and testimony from Appellant. This analysis ignores the statement in *Archer* that this determination is not to be controlled by claimant's attitude or expert opinion. Instead a weighing of all the admissible evidence is to be undertaken.

In the case at hand, it is clear that Referee Powers found the testimony of Dr. Selznick and Appellant to weigh in favor of his determination that no subjective hindrance had been established.

In sum, Appellant is asking this Court to re-weigh the evidence. Such an approach is not supported by the standard of review or the evidence produced to the Industrial Commission.

Appellant also argues the Commission was required to accept the allegation of a subjective hindrance because it has "not been contradicted." *Appellant's Opening Brief* p. 27. Nothing could be further from the truth. Dr. Selznick's examination of Appellant contradicts the testimony of other experts.

Dr. Selznick attempted to opine that the right knee was exacerbated by the industrial accident. However, he was unable to offer anything other than the timing of the subjective increase in symptomology and his examination with respect to flexion. *Selznick Deposition* (31-33). He also readily admitted that arthritis is a degenerative disease and that his examination would be consistent with normal denegation of that condition. *Id.*

Dr. Selznick further failed to note in his deposition that the knee was limited in flexion due to knee replacement which occurred in 2010. Claimant reported that the stiffness was due to the artificial knee. *Hearing Transcript* (59:9-10). Appellant's analysis also ignores Dr. Selznick's testimony, outlined above, that Appellant had been asymptomatic for some time before his 2009 industrial accident.

Clearly substantial and competent evidence exists to support the finding of the Industrial Commission. When the facts are viewed in favor of the ISIF it is clear that the findings must be upheld.[2]

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[2] It must be noted that whether or not the physical conditions were a hindrance to employment is not dispositive of the case. The Commission also found that there was no combination. As such, upholding the decision below does not hinge on this point alone.

B. SUBSTANTIAL AND COMPETENT EVIDENCE SUPPORTS THE INDUSTRIAL COMMISSION'S FINDING THAT THE SUBJECT INDUSTRIAL ACCIDENT DID NOT COMBINE WITH PREEXISTING IMPAIRMENTS.

Appellant next takes issues with the Industrial Commission's finding that Appellant failed to establish that but for his pre-existing impairment he would not be totally and permanently disabled. Appellant argues that "bur for Mr. Anders' pre-existing conditions, the 2009 accident would not have rendered him totally and permanently disabled." *Appellant's Opening Brief* p. 32. This argument ignores testimony provided by Dr. Collins, a vocational expert retained by Appellant.

Dr. Collins testified as follows:

> Q. Now, as a result of the industrial accident, he had a bilateral hemi laminectomy with nerve root decompression, correct?
> A. Yes.
> Q. That was at L3-4?
> A. Yes.
> Q. Okay. Which has, in part, sciatic nerve which sends pain into your leg and foot; is that correct?
> A. Yes.
> Q. And as a result of the restrictions from the back, out of your report, he was restricted to 35 pounds lifting -- up to 35 pounds, correct?
> A. Yes.
> Q. Sitting one to three hours?
> A. Yes.
> Q. Standing one to three hours?
> A. Yes.
> Q. Driving one to three hours?
> A. Correct.
> Q. Walking one to three hours?
> A. Yes.
> Q. He had limits on bending, correct?
> A. Yes.
> Q. Stooping?
> A. Yes.

Q. Pushing?
A. Yes.
Q. Pulling?
A. Yes.
Q. Twisting?
A. Yes.
Q. Climbing?
A. Yes.
Q. Squatting?
A. Yes.
Q. Kneeling?
A. Yes.
Q. Reaching?
A. Yes.
Q. Grasping?
A. Yes.
Q. Repetitious movements?
A. Yes.
Q. Okay. He was not -- he had no balancing – he was to do no balancing, correct?
A. Yes.
Q. No crawling?
A. Correct.
Q. And he had to have frequent changes of position?
A. Correct.
Q. Okay. Now, I think you have provided in your reports that he was 55 at the time you saw him?
A. I think he was 53.
Q. 53. But he looked much older?
A. Yes.
Q. He was very large?
A. Yes.
Q. He was using a staff?
A. He was.
Q. Okay. He had the long, white beard?
A. Yes.
Q. Long, white hair?
A. Yes.
Q. He was in constant pain?
A. Yes.
Q. And he was taking medications for his back?

A. Correct.
Q. He was taking Lyrica; is that correct?
A. Yes.
Q. And Percocet?
A. Yes.
Q. He had radiating pain to his left foot?
A. Yes.
Q. He needed to nap during the course of the day?
A. Yes.
Q. He had left foot drop?
A. He did.
Q. Okay. He suffers from dyslexia?
A. Yes.
Q. And reading problems?
A. Yes.
Q. Okay. With those factors alone, just those factors alone, can you tell me a job that's available to him in the Pocatello labor market?
A. Well, the only job that I can think he might be able to do is some kind of -- not commercial driving job, but some kind of light shuttle or van or -- but, again, he would have the narcotics to consider.
Q. That's the Percocet and the Lyrica --
A. Yes.
Q. -- is that correct?
A. Yes.
Q. Any other jobs?
A. No

Collins Deposition (38:19-25; 39-41; 42:1-13). Clearly, in response to questions related to the limitations of the industrial accident alone, Dr. Collins agreed no jobs were available to Appellant.

It is also worth noting that Dr. Selznick's testimony with respect to aggravation of Appellant's right knee is far less concrete than represented.

Q. And his right knee was not hurt in the industrial accident; is that correct?

A. The right knee itself was not injured, but in a way, he's an eggshell plaintiff because he had an arthritic in that knee. That was asymptomatic. And it became symptomatic after subject accident. The knee with the flexion contracture -- if he had the other knee to bear some of the stress and force, he'd be fine. But in this case, the records clearly

show progressive right knee symptomatology.

Q. And the osteoarthritic condition of his right is a progressive disease. It gets worse over time; correct?

A. Osteoarthritis of the knee can get worse over time objectively, but not always do patients have increasing pain. And I -- of those 20 patients I saw in the office today, one is a 92-year-old gentleman who I think you know, and his knees are awful on x-ray, but he's only now coming in for treatment, and I gave him an injection. But I ensure you, his x-rays looked pretty bad ten years ago, but he didn't have issues ten years ago.

Q. I understand that, but at any rate, it is a degenerative condition; correct?

A. Yes.

Selznick Deposition, (32:17-25), (33:1-16).

Dr. Selznick's medical opinion is revealed to be much less clear than Appellant argues. Not only does Dr. Selznick testify that he believes there was an aggravation, he admits that predicting when an arthritic knee will need intervention is very unpredictable. In other words, his testimony supports the conclusion that degeneration due to the arthritic condition alone could be a cause of Appellant's right knee trouble. It is also worth noting that Dr. Selznick agrees that the right knee was asymptomatic at the time of the industrial accident. Dr. Selznick's opinions were, in large measure, hypothetical and this certainly would have impacted the weight Referee Powers decided to assign to his testimony.

Appellant also cites to *Green v. Green,* Opinion No. 48 (April 26, 2016) in support of his argument. However, contrary to Appellant's representation, this decision weighs in favor of upholding the Industrial Commission in this case. In *Green* this Court looked at "the whole" of the Commission's decision to determine if the "but for" test had been properly applied. *Green,* p. 12.

Where a claimant's total and permanent disability arises solely from pre-existing conditions, solely from the industrial accident or disease, from post injury changes in health, or from a combination of pre-existing and past injury problems, the ISIF is not responsible for any combined effects. *See Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 722 P.2d 173 (1989). In the case at hand, Referee Powers properly applied the test.

In analyzing the "but for" requirement Dr. Collins' testimony was considered and directly quoted. Specifically, in Paragraph 69 of the Findings of Fact and Conclusions of Law, Referee Powers correctly states that Dr. Collins testified Appellant's 2009 back injury and resulting restrictions rendered Appellant totally and permanently disabled. R. 126 ¶ 69; *Collins Deposition* (38:19-25; 39-41; 42:1-13).[3] In paragraph 16 and 18 the Referee clearly identified testimony relating to Appellant's condition at the time of the accident. R. 111. Referee Powers also thoroughly considered each vocational expert. R. 112-122. When the ruling below is viewed as a whole, it is clear that Referee Powers did precisely what *Green* requires. He did not limit himself to a simple medical inquiry and considered the opinions and statements of vocational experts and the testimony of Appellant as well.

Here again, ample proof was present in the record for the Industrial Commission to find the absence of any combination. Again, Appellant asks this Court to ignore evidence which would weigh against him and view the case below in a light only most favorable to him. This appeal is not a forum in which Appellant may attempt to retry or have reconsidered the findings below. There is no doubt

[3] Appellant also argues that Referee Powers misquotes Dr. Collins deposition. It appears the quoted phrase does not appear in Dr. Collins' deposition. However, the testimony is less than clear. A fair interpretation would be that the pre-existing conditions alone made Appellant unemployable. Regardless, it is a moot point because substantial and competent evidence exists with or without paragraph 67 of the Findings of Fact and Conclusions of Law.

that some conflict in the evidence exists. However, all that is necessary for this Court to uphold the findings of the Industrial Commission is "relevant evidence which a reasonable mind might accept to support a conclusion." *Jensen,* 134 Idaho at 410, 18 P.3d at 214. Substantial evidence is "more than a scintilla of proof, but less than a preponderance." *Id.* at 412, 18 P.3d at 216. The factual findings clearly support the conclusions of law stated in the opinion below.

VI. REQUEST FOR ATTORNEY FEES PURSUANT TO I.A.R. 11.2

A violation of rule 11.2 (formerly 11.1) requires that the signed notice of appeal, petition, motion, brief or other document "(1) not be well grounded in fact (2) not be warranted by existing law or not be a good faith argument for the extension, modification, or reversal of existing law and (3) to be interposed for an improper purpose." *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 803, 118 P.3d 133, 135 (2005) (citing *Painter v. Potlatch Corp.*, 138 Idaho 309, 315, 63 P.3d 435, 441 (2003) (interpreting former rule 11.1, now 11.2).

Rule 11.2 provides in part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Based on the foregoing, the instant appeal is not well grounded in fact. In this case, element one is satisfied as the Industrial Commission's findings of fact are clearly supported by substantial and competent evidence. Element two is satisfied because there is no argument made in the briefing for extensions, modification or reversal of existing law.

Element three can be inferred, as this appeal is a request to have the Supreme Court reconsider and re-weigh the factual findings of the commission. In sum, the appeal argues that the Commission did not focus on the evidence Appellant wanted them to. "On appeal, this Court does not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." *Neihart*, 141 Idaho at 803, 118 P.3d at 135 (citing *Warden v. Idaho Timber Corp.*, 132 Idaho 454, 457, 974 P.2d 506, 509 (1999)). A request to re-weigh the evidence is not only contrary to the standard of appeal in a worker's compensation case, it needlessly increases the cost of litigation.

Pursuant to Idaho Appellate Rule 11.2, fees and costs on appeal should be awarded to the ISIF.

CONCLUSION

The record before the Court clearly establishes substantial and competent evidence to support the factual findings of the Industrial Commission and as a result the conclusion of law. Accordingly, the ISIF respectfully requests that this Court uphold the Findings of Fact, Conclusions of Law and Recommendation adopted by the Industrial Commission on May 12, 2106.

DATED this 18th day of October, 2016.

BENOIT, ALEXANDER, HARWOOD,
HIGH & MOLLERUP, PLLC

By _____
Bren E. Mollerup
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 126 Second Avenue North, Twin Falls, Idaho, certifies that on the 18th day of October, 2016, he caused a true and correct copy of the **RESPONDENT'S BRIEF** to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

Reed W. Larsen
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P.O. Box 4229
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Hand Delivered	☐
U.S. Mail	☒
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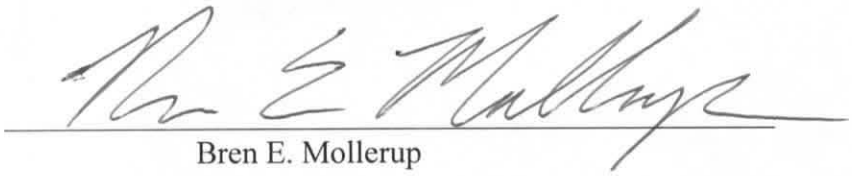

Bren E. Mollerup