11-15-2016

Andrews v. Industrial Special Indem. Fund Appellant's Reply Brief 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 Docket No. 44241-2016 I.C. Case No. 2009-007783

APPELLANT'S REPLY BRIEF

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

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A. THE REFEREE'S DECISION THAT MR. ANDREWS' PREEXISTING PERMANENT IMPAIRMENTS WERE NOT SUBJECTIVE HINDRANCES TO EMPLOYMENT WAS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE AND WAS CLEARLY ERRONEOUS.

1. The Referee and Commission did not construe the worker's compensation laws in favor of Mr. Andrews.

It must be remembered, that the worker's compensation laws are to be construed in favor of the claimant. As this Court held:

> The provisions of workers' compensation laws are to be liberally construed in favor of the claimant, as the humane purposes they seek to serve leave no room for narrow, technical construction.

Fowble v. Snoline Express, Inc., 146 Idaho 70, 74, 190 P.3d 889, 893 (2008). Further, "'the primary purpose of [Industrial Commission] proceedings [is] the attainment of justice in each individual case.'" *Green v. Green*, 160 Idaho 275, 281, 371 P.3d 329, 335 (2016)(citation omitted)). As will be argued in the remainder of this brief, the Referee's decision, and the Commission's adoption of that decision failed to construe the statutes in Mr. Andrews' favor, as they are not based on substantial and competent evidence and/or are clearly erroneous.

2. The Referee's decision that there were no subjective hindrances is not based on substantial and competent evidence and is clearly erroneous.

The Court may set aside the Industrial Commission's conclusions where "they are clearly

erroneous." *Fowble,* 146 Idaho at 74, 190 P.3d at 893. Moreover, the Court may set aside the Commission's order where the findings of fact are not based on substantial and competent evidence or where the findings of fact do not, as a matter of law, support the order. *Id.* (citing, I.C. §72-732; *Page v. McCain Foods, Inc.*, 145 Idaho 302, 305, 179 P.3d 265, 268 (2008)). Further, "a challenge to the Commission's application of a statute is a question of law over which [the] Court exercises free review." *Smith v. J.B.Parson Co.*, 127 Idaho 937, 943, 908 P.2d 1244, 1250 (1996)(citing, Idaho Const. Art. V, §9; *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994)).

Contrary to the ISIF's arguments, Mr. Andrews is not asking the Court to reweigh the evidence. Rather, Mr. Andrews properly seeks appellate review of the Commission's order, as a review of the record establishes that the Referee's and Commission's conclusion that there were no subjective hindrances to employment is not supported by substantial, competent evidence.

ISIF does not refute the following 18 pre-existing job impairments, which were both subjective and objective:

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;

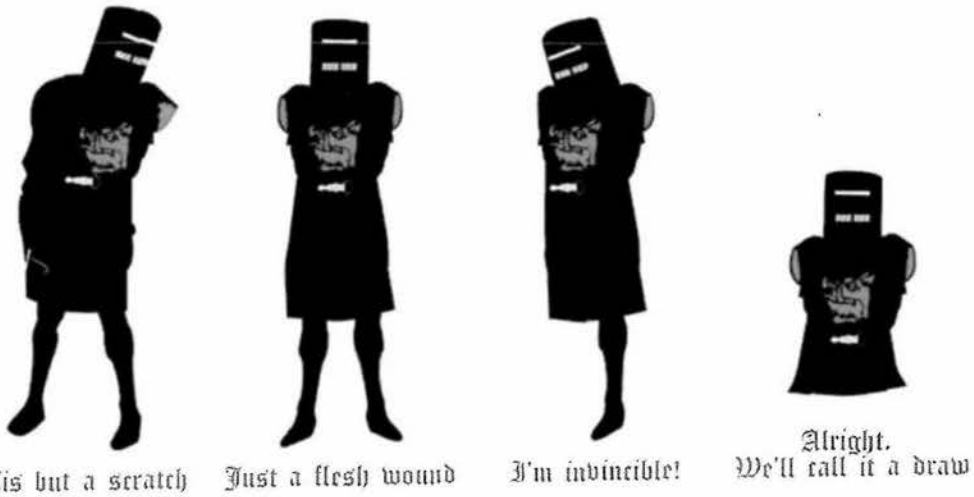
15. Unable to walk on uneven surfaces;

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).*

In Mr. Andrews' opening appellate brief, and at the hearing below, it was acknowledged that by physical appearance, Mr. Andrews resembles Santa Claus. By work ethic and determination, and his subjective desires, he more likely resembled the "Black Knight" from Monty Python's, "The Holy Grail."



Even with his 18 objective findings, Mr. Andrews still desires to work–like the Black Knight who continues to fight with his arms and one leg gone. Subjectively, even after the last leg was cut off, he fought on. So too does Mr. Andrews. Even after his last surgery, Mr. Andrews still wanted to work. The Commission and Referee erroneously mistook this for a lack of "subjective hindrance" and concluded that Mr. Andrews had no physician imposed, permanent restrictions prior to the 3-17-2009 accident, and that said accident alone rendered him totally and permanent disabled. Not only is the Commission's order not supported by substantial and competent evidence and clearly erroneous, it is also a misapplication of the statute, mandating the Court to

set it aside.

The Referee's concluded, "**[it] is fairly clear that [Mr. Andrews] was doing his job** without any physician-imposed restrictions at the time of his accident of March 17, 2009." R., 125, ¶ 65 [Emphasis supplied].[1] This conclusion is a direct violation of I.C. §72-332(2), which provides, in relevant part, as follows:

> [T]he 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.

The Commission's aforementioned finding clearly violates the statute. It is also belied by the facts in the record, that in 2007, Dr. Clark Allen, following a third 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 addition, the LDS Church's IME expert, Dr. J. Craig Stevens documented the permanent, pre-existing 25 pound weight restriction. *Claimant's Hearing Exh. D (Andrews 268).* Dr. Collins also documented this. *Claimant's Hearing Exh. A., p. 3 (Andrews 3).* The ISIF has never refuted that these restrictions existed prior to the industrial accident on March 17, 2009.

As to Mr. Andrews' hearing testimony, the minimal response the ISIF posited was related

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[1]This is also clearly erroneous, as in addition to Mr. Andrews'25 pound lifting restriction, he also had a restriction with his knees, climbing ladders, squatting and kneeling.

to Mr. Andrews' knees.[2] However, in looking at the entire record, Mr. Andrews had multiple physical impairments, in addition to his knees, before the 2009 accident. Those impairments were surgeries on his low back; pre-existing foot and "turf toe" conditions; both left and right knee impairments; bilateral shoulder surgeries and impairments; and a bad disk in his neck. *Hearing Tr., p. 26:2-p. 27:1; p. 35:15-18; p. 36:15-23; p. 37:10-p. 38:13; p. 41:18-p. 42:4; p. 42:12-p. 43:2; p. 43:3-16.* The ISIF has never refuted Mr. Andrews' testimony as to this hindrances.[3]

Also, Mr. Andrews' testimony was confirmed by Dr. Collins, as well as the ISIF's expert, Delyn Porter.[4] *Defendants' Hearing Exh. A., pp. 14-15 & 19.* Further, Dr. Selznick's assignment of impairment ratings to Mr. Andrews' pre-existing impairments supported Mr. Andrews' testimony. Dr. Selznick assigned impairments as follows: 5% to 10% -right knee; 1% to 2% ; 1% to 2% - left knee; 3% to 4%- right shoulder surgery; 3% to 4% -left shoulder surgery; and 2%

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[2]Respondent's Brief, p. 12-13.

[3]ISIF misses the point in asserting that evidence of a subjective hindrance has not been contradicted. Mr. Andrews' asserted that his pre-existing impairments, which are subjective, have not been contradicted in any way. Appellant's Opening Brief, p. 27. ISIF provides no factual basis to dispute these hindrances.

[4]ISIF gives short shrift to Mr. Porter's opinions in its brief, asserting his part was merely to identify potential jobs. *Respondent's Brief*, p. 7. However, to the contrary, Mr. Porter's acknowledgment that Mr. Andrews had several pre-existing injuries related to his right knee, prior back surgeries and significant 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 and ADLs are certainly relevant to the subjective hindrances and disability issues.

-right big toe surgery(see *Dr. Selznick Post Hearing Deposition, p. 11, l. 15 to p. 14, l. 24).*

Ultimately, there is no substantial and competent evidence supporting the Commission's decision. Moreover, the Commission and Referee ignored and misstated Mr. Andrews' uncontradicted testimony as to his pre-existing impairments, in violation of the holding in *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 758, 302 P.3d 718, 726 (2013)(A Commission referee "must accept as true the positive, uncontradicted testimony of a credible witness...."). Further, the Commision violated I.C. §72-332(2) in concluding that because Mr. Andrews was employed at the time of the 2009 industrial accident, there were no subjective hindrances to employment. These findings are clearly erroneous and the Court must set aside the Commission's order.

B. THERE IS NO SUBSTANTIAL AND COMPETENT EVIDENCE SUPPORTING THE COMMISSION'S DECISION TO CONCLUDE THE ISIF IS NOT LIABLE FOR A PORTION OF MR. ANDREWS' TOTAL AND PERMANENT DISABILITY.

ISIF admits that the Referee's conclusion at paragraph 67, that Dr. Collins' testified the 2009 accident alone made Mr. Andrews unemployable, was not Dr. Collins' testimony. *Respondent's Brief, p. 18, fn.3.* In fact, Dr. Collins' testimony was 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 clearly indicated that it was her opinion that it was not Mr. Andrews' 2009 injury alone, but the 2009 injury along with all his past conditions that rendered him realistically unemployable. This unequivocally establishes the Referee's conclusion is not based on substantial and competent evidence and is clearly erroneous.

Despite this, the ISIF, like the Referee, goes on to misrepresent Dr. Collins' testimony, by incorrectly stating Dr. Collins testified Mr. Andrews' restrictions from the 2009 work injury alone rendered him totally and permanently disabled.[5] No where in Dr. Collins' testimony did she testify that the 2009 work accident, alone, rendered Mr. Andrews totally and permanently disabled. *Dr. Collins Post Hearing Deposition, p. 38:25 to p. 42:13.* To the contrary, in her report, Dr. Collins' concluded the exact opposite, 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]. Moreover, Dr. Collins testified to the exact opposite of what the ISIF and the Referee have stated, evidenced by the

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[5]Respondent's Brief, p. 18; R., 126, ¶69.

following testimony:

> 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.

Dr. Collins Post Hearing Deposition., p. 26:25 to p.27:6 [Emphasis supplied].

Additionally, the ISIF's position as to Dr. Selznick's testimony not being clear, is inaccurate. Dr. Selznick's testimony was **that Mr. Andrews sustained an aggravation and acceleration of a pre-existing impairment related to his right knee and low back.** *Claimant's Hearing Exh. B., p. 16 (Andrews 23); Dr. Selznick Post Hearing Deposition, p. 22:3-p. 23:3.* Further, in its response, the ISIF does not refute the fact that Dr. J. Craig Stevens, the LDS Church's IME expert, found that Mr. Andrews had restrictions following his 2007 low back surgery of 25 pound lifting restriction. *Claimant's Hearing Exh. D (Andrews 268).* Further, Dr. Stevens concluded that the 2007 restriction was a permanent restriction. *Id.* This certainly establishes that the Referee's conclusion, that Mr. Andrews' total and permanent impairment was caused solely by the 2009 accident, is clearly erroneous.

While the ISIF's cites to *Green, supra,* as supportive of its position, a careful reading of the case shows its conclusion supporting Mr. Andrews' request to set aside the Commission's order. In *Green,* the referee and the Commission did apportion liability to the ISIF. *Id.,* 160 Idaho at 285, 371 P.3d 339. Here, a review of the entire record establishes the Commission's

order is not based on substantial and competent evidence. Dr. Collins unequivocally testified but for Mr. Andrews' multiple pre-existing issues, in combination with the 2009 accident, Mr. Andrews was not employable. Likewise, Dr. Selznick's testimony that Mr. Andrews exacerbated and aggravated pre-existing impairments, which also meets the "but for" standard. Finally, Mr. Andrews' testimony as to the multiple issues he had pre-2009, all clearly establish that the Commission's order denying benefits and apportionment was clearly erroneous and not based on substantial and competent evidence.

C. THE ISIF IS NOT ENTITLED TO ATTORNEY'S FEES OR COSTS.

The ISIF is not entitled to attorney's fees or costs on appeal, as the record before the Court shows the Commission's order is not based on substantial competent evidence and was clearly erroneous. Mr. Andrews' appeal is well grounded in fact, is based on a good faith argument and not filed for an improper purpose. While the ISIF cites to *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 118 P.3d 135 (2005), the facts of that case are inapposite to those present in this case. In *Neihart*, the claimant's attorney "misstated this Court's standard of review" by asserting the standard of review was whether the record supported the claimant's position. *Id.*, 141 Idaho at 803-04, 118 P.3d at 135-36. Furthermore, in *Neihart*, the claimant's attorney failed to file any reply brief to respond or clarify what the issues were. As the Court can see in this case, Mr. Andrews has asserted the correct standard, whether the Commission's order is based on substantial competent evidence and/or was clearly erroneous, in both of his briefs on

appeal. Thus, the Court should find *Neihart* inapposite.

The precedent the Court should look to and apply in denying the ISIF's request is *Fowble, supra.* There, the Court set forth the following standard in denying an award of fees under I.A.R. 11.2 (formerly Rule 11.1):

> Fowble seeks attorney's fees under Idaho Appellate Rule 11.1. This rule states the following:
>
> Every notice of appeal, petition, motion, brief and other document of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed. A party who is not represented by an attorney shall sign the notice of appeal, petition, motion, brief or other document and state the party's address. 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 signers 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. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorneys fee.
> This rule serves to sanction attorneys who violate the certification that they made when signing a notice of appeal. **We cannot say that this appeal was so far outside the realm of reasonability that it warrants a sanction on the losing attorney. Fees therefore are not awarded.**

Fowble, 146 Idaho at 77, 190 P.3d at 896 [Emphasis supplied]. In *Fowble*, the Court affirmed

the Commission's decision, concluding it was supported by substantial and competent evidence. While this case dictates the reversal of the Commission's decision, the import from *Fowble* applies to preclude the award of attorney's fees to the ISIF against Mr. Andrews' counsel. Mr. Andrews and undersigned counsel's appeal is reasonable, given the lack of substantial, competent evidence to support the clearly erroneous decision reached by the Referee and the Commission.

Further, this Court has also held, in interpreting Rule 11.2 that "sanctions are generally not appropriate unless there is "'a showing that the appeal was brought for an improper purpose.'" *Danti v. Danti*, 146 Idaho 929, 944, 204 P.3d 1140,1155 (2009)(citing, *Chavez v. Barrus*, 146 Idaho 212, 226, 192 P.3d 1036, 1050 (2008)). In *Danti*, the Court did not award attorney's fees to the prevailing respondent, noting the appellant had raised legitimate questions and the respondent failed to show the appeal was brought for an improper purpose. *Id.* Likewise, here, the Court should deny an award of attorney's fees to the ISIF, as it has failed to establish this appeal was brought for an improper purpose.

D. CONCLUSION

Based on the foregoing, Mr. Andrews respectfully requests that the Court reverse the May 10, 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 14 day of November, 2016.

COOPER & LARSEN, CHARTERED

By _____
REED W. LARSEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of November, 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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