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Aguilar v. Industrial Special Indemnity Fund Respondent's Brief Dckt. 45581

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ARTURO AGUILAR, Claimant-Appellant, vs. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant-Respondent.	)	SUPREME COURT NO.: 45581

RESPONDENT'S BRIEF

Appeal from the Industrial
Commission of the State of Idaho

Chairman Thomas E. Limbaugh, Presiding

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STATEMENT OF CASE

Nature of the Case

This is a workers' compensation case involving claimant-Appellant ("Aguilar"), whom was found to have been totally disabled but was unable to prove that the Industrial Special Indemnity Fund ("ISIF") should be liable for any of his total disability.

Procedural History

Aguilar filed a worker's compensation Complaint against his employer-Lowry Excavation/Concrete, Inc. ("Lowry Excavation") and the employer's surety-State Insurance Fund ("SIF") on May 4, 2012. R., p. 1-3. Aguilar claimed on October 3, 2011, he was disabled as a result of operating a jack hammer for Lowry Excavation that resulted in a low back injury. Id.

On November 8, 2013, Aguilar filed a Notice of Intent to File a Workers' Compensation Complaint against ISIF. R., p. 13. Among the pre-existing conditions listed in this Notice was Aguilar's claim that: "In December 2006, Claimant injured his low back while leveling concrete, which eventually necessitated a L4-5 fusion surgery." Id.

On January 17, 2014, Aguilar filed his Complaint against ISIF. R., p. 16. Aguilar again claimed that one of his pre-existing conditions was the December 2006 low back injury. Id.

A hearing was held on July 22, 2015, in Twin Falls, Idaho. Some time around September 9, 2015, Aguilar and Lowry Excavation and SIF reached a settlement. R., p. 20. That settlement was formalized in a Lump Sum Agreement that was entered by the Industrial Commission on October

19, 2015. R., p. 27-38.

Aguilar's claim against ISIF continued with the taking of two post-hearing depositions and briefing. On October 13, 2017, the Industrial Commission entered its Findings of Fact and Conclusions of Law, and Order. R., p. 43-80. The Industrial Commission found that Aguilar was totally and permanently disabled as of the date of the hearing; and that Aguilar had pre-existing impairments of the low back (19%), hypertension (17%), right eye (15%), depression (5%), and diabetes (10%). R., p. 79-80. The Industrial Commission found that Aguilar's pre-existing conditions (eye, hypertension, depression, diabetes) were not vocationally relevant in light of Aguilar's low back condition. The Industrial Commission found that Aguilar's total and permanent disability was due to his low back condition alone without contribution from the other medical conditions. R., p. 76. The Industrial Commission then determined that Aguilar's low back disability was not due to the combined effect of the 2006 and 2011 industrial accidents, but was just as likely due to the 2011 accident alone because Aguilar's work limitations were not materially different after the 2011 accident than they were before the 2011 accident. R., p.67, 78-79. The Industrial Commission concluded that Aguilar failed to meet his burden of proving that the pre-existing conditions were combining with the 2011 accident to cause his total and permanent disability. The Industrial Commission found the evidence showed that it was just as likely as not that the 2011 accident was "wholly responsible for disability referable to Claimant's lumbar spine." R., p. 79.

On November 21, 2017, Aguilar filed his Notice of Appeal. He filed his first brief on March

16, 2018.

Statement of Facts

2006 TREASURE VALLEY CONCRETE ACCIDENT

On December 11, 2006, Aguilar was working for Paul Snyder dba Treasure Valley Concrete as a cement mason and concrete finisher. (ISIF, Ex. 3, pg. 1). While leveling concrete Aguilar injured his lower back. (Id.).

On April 26, 2007, Claimant was seen by Dr. Miers Johnson. Dr. Johnson noted that an MRI showed Aguilar to have a disc protrusion at the L4-5 level of Aguilar's spine. (ISIF Ex. 12, p. 2). Dr. Johnson opined that a fusion at L4-5 was the treatment option of choice. (Id.).

SIF had Aguilar see Dr. Kenneth Little for a second opinion exam. That second opinion examination occurred on May 24, 2007. (ISIF Ex. 14, p. 1). Dr. Little believed the MRI showed a moderate broad based disc protrusion at L4-5. (ISIF Ex. 14, p. 2). Dr. Little's impression was low back pain, bilateral L5 radiculitis secondary to L4-5 disc protrusion, annular tear, and bilateral subarticular lateral recess compression. (Id.). Dr. Little recommended a laminectomy and fusion as the viable treatment options for Aguilar. (ISIF Ex. 14, p. 3).

On June 11, 2007, Dr. Johnson performed a laminectomy, facetectomy, diskectomy and fusion with cage instrumentation at the L4-5 level of Aguilar's spine. (ISIF Ex. 11, p. 1).

After Aguilar's surgery Dr. Johnson placed Aguilar on restrictions, and very early on Dr. Johnson made it clear that Aguilar would not return to concrete work. "I spoke with his case

manager at this appointment. We discussed his future prospects. I feel it is unlikely he will return to an occupation as strenuous as concrete work." (ISIF Ex. 12, p. 7).

On May 30, 2008, Dr. Little sent a letter to the SIF examiner and he expressed the opinion that Aguilar would not be able to tolerate concrete work. (ISIF Ex. 14, p. 6). Dr. Little recommended an FCE to determine Aguilar's work capacity. (Id.). Dr. Little's opinion that Aguilar would not be able to return to concrete work was forwarded to the Industrial Commission Rehabilitation Division Consultant. (ISIF Ex. 7, p. 18).

The FCE recommended by Dr. Little was performed on July 10, 2008. (ISIF Ex. 15). The therapist who performed the FCE noted: "Consistency of effort and corresponding validity criteria were monitored throughout testing." (ISIF Ex. 15, p. 3). The therapist noted that Aguilar did not plan on returning to work because of his work restrictions. (ISIF Ex. 15, p. 8). At the time of this evaluation Aguilar had not worked for a period of 19 months. (Id.). The FCE put Aguilar's safe lifting ability at 14 pounds on an occasional basis, 7 pounds on a frequent basis, and 3 pounds on a consistent basis. (ISIF Ex. 15, p. 9).

Shortly after the FCE was completed Dr. Johnson recommended limitations of 17 pounds occasionally, 7 pounds frequently, and 3 pounds constantly. (ISIF Ex. 12, p. 19). Dr. Johnson also recommended that Aguilar avoid bending, twisting, and repetitive lifting type activities. (ISIF Ex. 12, p. 22). Dr. Johnson commented that without schooling "it may be difficult to place him in a job." (ISIF Ex. 12, p. 21). Dr. Johnson also rated Aguilar's impairment at 18% of the whole person. (ISIF

Ex. 12, p. 20).

On August 14, 2008, Aguilar informed the Industrial Commission Rehabilitation Division Consultant, Teresa Ballard, that sedentary work is most appropriate for him, but he was unable to sit or stand for any extended period of time. (ISIF Ex. 7, p. 20).

On August 21, 2008, Aguilar filed a Worker's Compensation Complaint against Paul Snyder. (ISIF Ex. 5). Aguilar alleged that his low back fusion had resulted in total permanent disability. (Id.).

On January 6, 2009, Dr. Johnson responded to a request for limitations by the Idaho Division of Vocational Rehabilitation. According to Dr. Johnson, Aguilar was substantially impaired from obtaining employment and Aguilar was to limit bending/twisting/stooping. Aguilar was also limited in his ability to sit or stand, and his lifting was limited to 25 pounds on an occasional basis, 15 pounds on a frequent basis, and 5 pounds on a continuous basis. (ISIF Ex. 12, p. 26). (Note these recommendations are a full two years post-accident).

On April 7, 2009, Dr. Johnson revised Aguilar's lifting limits down to 20 pounds on an occasional basis. (ISIF Ex. 12, p. 27).

On May 19, 2009, Consultant Ballard received correspondence from the SIF attorney seeking comment on Aguilar starting a lunch wagon business. (ISIF Ex. 7, p. 25). The Industrial Commission closed its rehabilitation file on July 15, 2009, because Aguilar had reached a settlement with the employer/surety. (ISIF Ex. 7, p. 27). Consultant Ballard noted that Aguilar had not found

work (31 months post-injury). (Id.).

On July 24, 2009, Aguilar was seen by Nurse Practitioner Tamara Bethel who did a comprehensive exam, and with respect to Aguilar's eyes noted no lesions, eye discharge or other abnormality. (ISIF Ex. 16, p. 8).

Aguilar's Lump Sum Settlement was approved by the Industrial Commission on August 5, 2009. (ISIF Ex. 2, p. 10). Aguilar received $83,902.50 to settle his claim. (ISIF Ex. 2, p. 6).

Shortly after obtaining his Lump Sum Settlement (September 25, 2009), Aguilar reported to Nurse Practitioner Bethel that he was working and his back "feels fine." (ISIF Ex. 16, p. 10).

2011 LOW BACK INJURY LOWRY EXCAVATION/CONCRETE

On October 3, 2011, Aguilar was injured while working for Lowry Excavation. (ISIF Ex. 4, p. 1). Aguilar was performing construction labor work, and he injured his back lifting a jackhammer. (Id.).

This is how Aguilar described his job with Lowry Excavation/Concrete:

"Q. Do you have to lift heavy weights at Lowry?

A. Yes.

Q. How heavy of objects do you have to lift?

A. There are different weights.

Q. What would be the heaviest weight?

A. I think about 90 pounds.

Q. And how often would you have to lift 90 pounds in a day?

A. I don't understand.

Q. How many times would you lift something that weighed 90 pounds in a day?

A. Sometimes three or four times.

Q. Do you have to do a lot of bending in that job?

A. Yes.

Q. Do you have to do a lot of lifting on a repetitive basis?

A. Yes." (ISIF Ex 1, p. 10, l. 1 - 22 of page 26 of Depo. Tr.).

Aguilar described his accident as follows:

"Q. Tell us what happened at Lowry that caused your injury.

A. I was breaking cement.

Q. How were you breaking cement?

A. With a jackhammer.

Q. Is a jackhammer heavy?

A. 90 pounds.

Q. And how often would you have to use the jackhammer in your job?

A. It would depend on if we had to break the old cement in order to lay new one.

Q. If you were breaking the old cement, would you use the jackhammer or sledgehammers?

Or what would you use to break the old cement?...

THE WITNESS: We would use both.

Q. So go ahead and tell me what happened on this day that you injured yourself.

A. The day I hurt my back?

Q. Yes.

A. I was breaking the cement. I started at about 9:00. At about 11:00 the hammer got stuck, and I tried to lift it in order to get it out. That's when I felt pain in my back." (ISIF Ex. 1, p. 11, l. 25 - 3, pages 30 -31, Depo. Tr.).

Aguilar went on to testify that after the day of his accident (October 3, 2011) he had remained unemployed up to the time of his deposition (August 21, 2014). (ISIF Ex. 1, p. 11, l. 10 - 23, Depo. Tr.).

On December 1, 2011, the Industrial Commission Rehabilitation Division conducted an initial interview via Consultant Ruiz. During that interview Aguilar told Consultant Ruiz that he did not have any other physical handicap, chronic disease, or other disability that restricted or limited his physical activity or working conditions. (ISIF Ex. 8, p. 1). Aguilar also told Consultant Ruiz that everything is labor intensive physical work with his time of injury employer, and he did not think there was any light duty work. (ISIF Ex. 8, p. 2).

On December 28, 2011, Aguilar was seen by Dr. Samuel Jorgenson. Aguilar told Dr. Jorgenson that his back pain was preventing him for being able to work. (ISIF Ex. 20, p. 1). Dr. Jorgenson's impression was L3-4 disk herniation and left lumbar radiculopathy. (ISIF Ex. 20, p. 2).

On April 24, 2012, Dr. Jorgenson opined that Aguilar's symptoms and upcoming surgery were based on the 2011 accident and not the pre-existing low-back injury. (Claimant's Ex. I, p. 294-295). Aguilar was symptom free prior to the 2011 accident. (Id.).

On May 15, 2012, Dr. Jorgenson performed a fusion at the L3-4 level of Aguilar's spine. (ISIF Ex. 20, p. 8).

On March 12, 2013, Dr. Little opined that Aguilar's lifting limit would be 50 pounds, and he would have given him the same lifting limit for the 2006 injury and surgery. (ISIF Ex. 14, p. 10).

On April 1, 2013, Consultant Ruiz made contact with Lowry Excavation/Concrete. Consultant Ruiz was told that the employer did not have any modified work for the Aguilar. "Employer states concrete work is very labor intense." (ISIF Ex. 8, p. 24).

On June 11, 2013, Aguilar told Consultant Ruiz that he did not take steps necessary to obtain his GED, and he had not started his resume. Aguilar told Consultant Ruiz that he was still interested in starting his own business and cater Mexican food at special functions. (ISIF Ex. 8, p. 35).

On July 12, 2013, Dr. Jorgenson opined that Aguilar was not working due to his ongoing symptoms (back pain), and Dr. Jorgenson stated that those symptoms were "directly related to the industrial injury dated October 3, 2011." Aguilar was limited to light duty work with alteration between standing and sitting with no significant bending, lifting, or twisting. (ISIF Ex. 20, p. 26).

On October 14, 2013, Aguilar saw Dr. Tyler Frizzell as an IME physician retained by his counsel. Aguilar told Dr. Frizzell he made a full recovery from the 2006 injury (Claimant's Ex. M,

p. 386). Dr. Frizzell noted "he states prior to the October 3, 2011, event he was able to do everything. He was not having any back issue for a long time." (Claimant's Ex. M, p. 389).

On December 11, 2013, a Functional Capacity Exam was performed by Brett Adams. Mr. Adams found Aguilar's work level to be sedentary to light. (Claimant's Ex. P, p. 438).

VOCATIONAL EXPERTS

Dr. John Janzen was retained by ISIF to perform a vocational analysis of Aguilar's employability. His report was admitted into evidence as ISIF Exhibit 9, and the transcript of his post-hearing deposition taken on April 6, 2017, was filed with the Commission. Dr. Janzen found that following Aguilar's 2006 back injury and based on the opinion of Aguilar's chief medical provider (Dr. Johnson) and the Functional Capacity Exam, Aguilar was limited to light duty work. (ISIF Ex. 9, p. 4). Dr. Janzen compared the restrictions given Aguilar for the 2011 accident and found them to be comparable to what Aguilar had for the 2006 accident. (Id.). Dr. Janzen also noted that Aguilar's status as an undocumented worker posed a significant limitation to Aguilar's employability. (Id.).

On December 24, 2014, Dr. Janzen authored an additional report. Using Dr. Greenwald's limitations regarding the two low back accidents, Dr. Janzen noted that the only difference was a 40 pound lifting limit after the 2011 accident compared to her opinion that there would have been a 50 pound lifting limit after the 2006 accident. Dr. Janzen again opined that this 10 pound difference in lifting limits was not significant as both placed Aguilar in the light medium exertion category for

work. (ISIF Ex. 9, p. 6).

Dr. Janzen testified that following the 2006 accident Aguilar was a light duty worker based on Dr. Johnson's restrictions. (Janzen Depo. Tr., p. 12, l. 3 - 8). Dr. Janzen noted that when Dr. Little had been asked about what lifting limit he would have given Aguilar for the 2006 accident, Dr. Little's response was 50 pounds. (Janzen Depo. Tr., p. 13, l. 9 - 13). Dr. Janzen further noted that Dr. Little's lifting limit for the 2011 accident was the same as a 2006 accident, 50 pound lifting limit. (Janzen Depo. Tr., p. 13, l. 14 - 22).

With respect to Dr. Friedman's limits on work based on Aguilar's diabetes, Dr. Janzen opined that the impact on Aguilar's work was "very minimal." (Janzen Depo. Tr., p. 15, l. 1 - 10). Dr. Janzen stated that checking blood sugar four times a day, and having access to a restroom would not impact Aguilar's employability. (Id.).

Finally, with respect to Aguilar's eyesight, Dr. Janzen noted that the record was devoid of a visual condition that would have limited Aguilar's employability, nor would it effect his activities of daily living. (Janzen Depo. Tr., p. 16, l. 3 - 15).

Dr. Janzen testified that when the Industrial Commission Rehabilitation Division closed its file related to the 2006 accident, the Consultant was considering Aguilar's work capacity as light duty, specifically no lifting over 20 pounds and no twisting or excessive bending. (Janzen Depo. Tr., p. 17, l. 1 - 10). (See Dr. Johnson's last opinion on lifting limits recorded on April 7, 2009, 20 pounds on an occasional basis and avoid repetitive lifting.) (ISIF Ex. 12, p. 27).

Dr. Janzen compared the FCE performed in 2008, and the FCE performed in 2013 and found the outcome of both were very similar. (Janzen Depo. Tr., p. 17, l. 21 - 24). Aguilar's prior work history consisted of very heavy and heavy duty work. (Janzen Depo. Tr., p. 18, l. 10 - p. 19, l. 19). Aguilar had some skills with driving a tractor, but there are no employers who just employ someone to drive a tractor. (Id.). Dr. Janzen testified that because Aguilar is an undocumented worker, and based on his work history, the work that makes up Aguilar's labor market is heavy labor work. (Janzen Depo. Tr., p. 20, l. 10 - 25).

Dr. Janzen summarized his opinion when he testified as follows: "No. He had the same type of limitations prior to this accident (2011) as what is reported after the accident. The same type–further, the same type of jobs that he qualified for before this accident would be the same type of jobs qualified for after, and there is no difference in his limitations compared to before this accident and after this accident." (Janzen Depo. Tr., p. 21, l. 10 - 19).

Delyn Porter is Aguilar's vocational expert. Mr. Porter testified that Aguilar's work history consisted of concrete construction type jobs and farm labor type jobs. (Porter Depo. Tr., p. 16, l. 21 - p. 17, l. 3). Mr. Porter noted that the type of work Aguilar had performed was very physically demanding. (Porter Depo. Tr., p. 17, l. 4 - 8). The Dictionary of Occupational Titles identified concrete finisher as heavy physical demand with requirement of low back use. (Porter Depo. Tr., p. 17, l. 20 - p. 18, l. 2). Farm and ranch laborers are heavy physical demand work according to the DOT. (Porter Depo. Tr., p. 23, l. 13 - 14).

ADDITIONAL ISSUES ON APPEAL

1. Was the Industrial Commissions findings of fact related to Aguilar's back condition being the cause of Aguilar's total and permanent disability supported by substantial and competent evidence?

2. Was the Industrial Commission's finding that Aguilar's pre-existing conditions did not combine with his 2011 accident to cause total and permanent disability supported by substantial and competent evidence?

3. Is Aguilar's argument regarding the Lump Sum Settlement Agreement relevant to this Court's analysis?

4. Should Aguilar's attorney be sanctioned with an award of attorney fees in favor of ISIF pursuant to Idaho Appellate Rule 11.2?

ATTORNEY FEES ON APPEAL

ISIF request an award of attorney fees pursuant to Idaho Appellate Rule 11.2.

ARGUMENT

The Industrial Commissions findings of fact related to Aguilar's back condition being the cause of Aguilar's total and permanent disability is supported by substantial and competent evidence.

When reviewing a decision of the Industrial Commission, this Court exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Industrial Commission's findings. *Stolle v. Bennett*, 144 Idaho 44,

47-48 156 P.3d 545, 548-549 (2007). Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion. Id. It is more than a scintilla of proof, but less than a preponderance. Id. All facts and inferences will be viewed in the light most favorable to the party who prevailed before the Industrial Commission and the Industrial Commission's conclusions regarding credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. Id.

As the finder of fact the Industrial Commission determines credibility and is allowed to draw reasonable inferences from the evidence. *Browning v. Ringel*, 134 Idaho 6, 15, 995 P.2nd 351, 360 (2000). Unless clearly erroneous, this Court will not disturb the Commission's conclusions on the credibility and weight of evidence. *Stolle v. Bennett*, supra. This Court will not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Stolle v. Bennett*, supra.

What was clearly shown in the record before the Industrial Commission was that Aguilar's treating doctors were of the opinion that Aguilar's limited function was related to his back. What is also clear is that both Vocational Experts agreed that Aguilar's labor market consisted of unskilled, heavy to very heavy work. Dr. Janzen testified that as an undocumented worker Aguilar's labor market consisted of hard manual labor. Aguilar was operating a 90 pound jackhammer busting concrete for two hours when his 2011 injury occurred. When Aguilar's employer contacted Consultant Ruiz she was told that the work was very physical and no modified duty existed.

The Industrial Commission took a very reasonable view of the case before them. It is really not complicated, if there had never been a 2006 accident and Aguilar's's case rested on the 2011 accident alone, Aguilar's restrictions from Jorgenson and Frizzell took him out of his labor market entirely and he would not be able to find any work regardless of what happened prior to the 2011 accident.

Aguilar's diabetes did not combine with his back injury to cause total disability. Dr. Janzen noted the use of a restroom and taking short breaks to check blood sugar does not prevent Claimant from working in his prior field. Aguilar testified that he did not remember the diabetes causing him any problems with work. (ISIF Ex. 1, p. 18, l. 5 - 17 of page 59 of the Claimant's Depo. Tr.). Aguilar testified that when he takes his medicine his diabetes is controlled. (ISIF Ex. 1, p. 18, l. 5 - 12 of page 59 of the Claimant's Depo. Tr.). Aguilar's blurred vision in his right eye is not the reason Claimant cannot work in the construction/farm labor market. At the time of Aguilar's deposition he did not list his eye sight as a physical problem. (ISIF Ex. 1, p. 18, l. 19 of page 58, l. 1 - 4 of page 59 of the Claimant's Depo. Tr.). Nothing in the record shows depression or hypertension caused problems on the job for Aguilar. The medium level lifting restriction given Aguilar (post-2011 accident) related to hypertension is irrelevant considering the limits placed on Aguilar's working ability related to his back. The reason Aguilar could not find work in his labor market is because his physicians opined that it would not be safe for Aguilar to do anything beyond light duty work and that is because of Aguilar's back. The Industrial Commission had ample evidence supporting its

finding that Aguilar's back was the reason he could not find work.

The Industrial Commission's finding that Aguilar's pre-existing conditions did not combine with his 2011 accident to cause total and permanent disability is supported by substantial and competent evidence.

Aguilar bore the burden of proving four elements to apportion liability to ISIF under Idaho Code Section 72-332. Those four elements are: (1) a pre-existing impairment; (2) that pre-existing impairment was manifest; (3) that pre-existing impairment was a subjective hindrance to employment; and (4) the pre-existing impairment and the subsequent injury combined to result in total and permanent disability. *Bybee v. Indus. Special Indem. Fund*, 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996).

The same evidence that supports the Industrial Commission's finding that Aguilar's back was the cause of his disability also supports the finding that the pre-existing 2006 back surgery did not combine with the 2011 back injury to cause Aguilar's total disability. Aguilar argues he had a total recovery from his 2006 injury, and admits that he was performing very heavy work for Lowry Excavation. The Industrial Commission thought that the timing of Aguilar's recovery was suspicious (as noted above Aguilar had been off of work for a very significant period of time and shortly after receiving close to $84,000.00, Aguilar told his medical provider he was fine), the Industrial Commission took him at his word. Aguilar cannot have it both ways, he cannot say the 2006 injury is impacting his ability to find work, and at the same time argue that he had a full and complete recovery from his 2006 injury that allowed him to go right back into extremely heavy labor.

Aguilar's treating physician, Dr. Jorgenson, specifically stated that Aguilar's problems were directly related to the 2011 accident. Dr. Frizzell supports the conclusion that Aguilar had a complete recovery from his prior accident.

Dr. Janzen testified that Aguilar's limitations from 2006 and the 2011 accidents are remarkably similar. The FCE examinations given Aguilar after the 2006 and 2011 accidents are nearly identical. The physical limitations given Aguilar after both accidents place Aguilar in the light to sedentary level of work. Aguilar's labor market had not changed, his skills had not changed, he was still an undocumented worker who could not speak or write English, and who was only competitive as an unskilled, hard manual labor employee. There is ample evidence in the record to conclude that Aguilar's inability to work is due solely to the 2011 accident and that the 2006 accident is not contributing to Aguilar's disability.

Aguilar's argument regarding the Lump Sum Settlement Agreement is irrelevant to this Court's analysis.

Aguilar spends a great deal of his brief on the Lump Sum Settlement Agreement that was entered into by Aguilar and SIF relating to the 2006 accident. ISIF was not a party or privy to that settlement agreement and is not bound by its terms. Aguilar and SIF were bound by that agreement but not ISIF. See, *Brown v. Indus. Special Indem. Fund,* 138 Idaho 493, 496-497, 65 P.3d 515, 518-519 (2003). ISIF used the Lump Sum Settlement Agreement at the hearing to question Aguilar's credibility. The Lump Sum Settlement Agreement in no way impacts the Industrial Commission's decision that Aguilar's disability is related to his back, and that Aguilar failed to prove that the 2006

injury is combining with the 2011 accident to cause total disability, nor does it impact this Court's analysis, which is whether the Industrial Commission's decision is supported by substantial and competent evidence.

Aguilar's attorney should be sanctioned with an award of attorney fees in favor of ISIF pursuant to Idaho Appellate Rule 11.2.

Aguilar has no legal or factual basis to support his arguments. The appeal is clearly an attempt by Aguilar to rehash the facts. This Court has held that a party in a worker's compensation case may be subject to sanctions if it brings a frivolous appeal. *Stolle v. Bennett,* supra. The Court in *Stolle* cited other precedence for the award of fees if the appealing party is simply asking the Court to re-weigh the evidence. The wasting of judicial resources is considered bad faith by this Court pursuant to Idaho Appellate Rule of Procedure 11.2. Id. ISIF requests an award of fees because Aguilar's appeal lacks a factual or legal basis and his attorney knew that before filing the appeal.

DATED This 10 day of April, 2018.

LUDWIG ◆ SHOUFLER ◆ MILLER ◆ JOHNSON, LLP

By______________________________
Daniel A. Miller,
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of April, 2018, I caused two (2) true and correct copies of the foregoing document to be served upon the following as indicated:

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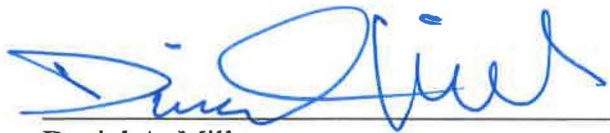

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