BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

KEVIN R. SMITH, Appellant/Claimant vs. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Respondent/Defendant.	SUPREME COURT NO. 45674

OPENING BRIEF OF APPELLANT KEVIN R. SMITH

APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

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STATEMENT OF CASE

(i) Nature of the Case

This is an appeal of the Industrial Commission's denial of total permanent disability benefits to Appellant Keven Smith (Smith) from the Industrial Special Indemnity Fund (ISIF).

(ii) Course of proceedings and disposition

Two hearings were held. The first hearing was held on October 27, 2008, to address Smith's request for treatment of his depression following his January 15, 2007, industrial injury. The Commissioners adopted Referee Alan Reed Taylor's (Taylor) Findings of Fact, Conclusions of Law and Recommendation which held that Smith's wrist injury, while a contributing factor to his psychological condition, was not the predominate cause of his psychological condition. Thereafter Smith dismissed his claim without prejudice while he sought treatment and assistance with his attempt to return to work. Smith's claim seeking total permanent disability benefits was refiled on January 16, 2012. The ISIF was joined as a defendant on January 2, 2014.

The Commissioners appointed a different Referee, Brian Harper (Harper), to oversee the second hearing. Smith and the Employer/Surety reached a proposed settlement for the Commission to review just prior to the second hearing held on May 17, 2016. The Commissioners adopted Harper's Findings of Fact, Conclusions of Law and Recommendation holding that Smith failed to prove he is totally and permanently disabled.[1] The Commissioners subsequently denied Smith's Motion for Reconsideration.

(iii) Statement of Facts

[1] The first hearing and decision will be referred to as 'Taylor' (Agency's Record, p. 64-83) and the second hearing and decision will be referred to as 'Harper' (Agency's Record, p. 143-176) for clarity.

Introductory Overview

Prior to his industrial accident, Smith had suffered crush injuries to both of his heels as a result of a fall. Unable to stand or walk for any extended time, he could no longer work in the construction field. He obtained an apprenticeship as a plumber; an occupation he chose because he would not be required to be on his feet all day. January 15, 2007, he suffered an injury to his dominate left wrist when he slipped and fell while loading his truck. His injury was initially misdiagnosed. After undergoing surgery he realized that he could no longer effectively use his dominate hand. He became extremely depressed and suicidal because of the lack of work prospects because he could no longer effectively use his dominate left hand for work and he was unable to stand for prolonged periods of time. When his wrist injury was rated on December 12, 2007, the IME physician opined that, given Smith's pain and psychiatric intermingling, it was unlikely that he would be able to return to work until his psychiatric issues are addressed.

When Smith's worker's compensation benefits were terminated, he sought work with the help of vocational specialist Dan Brownell, who also assisted him in receiving assistance from the Idaho Division of Vocational Rehabilitation (IDVR). Smith met IDVR's criterion for "Significantly Disabled." IDVR determined that without significant vocational assistance and retraining he would not be able to return to work. IDVR assisted in facilitating an attempt at retraining at North Idaho College, but this effort was unsuccessful. While struggling with school and attempting to obtain psychological care, Smith's wife abandoned him and their children. In need of help with his children and coping with his situation, Smith moved to California to live with his mother and brothers. His psychological condition remains untreated and he survives on minimal Medicare benefits.

(a) **Physical Condition and Employment Prior to Industrial Accident**

After high school, Smith was in the Army for about two years. After his discharge he worked in various construction jobs. He frequently changed jobs which, after his industrial injury, was felt to be because of impulsive conduct. Despite changing jobs he was able to readily obtain work because he "also demonstrated ambition and a strong work ethic." Taylor FFCL&R p. 4, ¶1,3,5. Agency's Record, p. 67.

In July 1997, at age 25 and living in Tahoe with his pregnant wife, he suffered severe crush injuries to both of his heels when a balcony railing at his residence gave way and he fell about twenty feet, landing on his feet. Id. ¶ 6. Agency's Record, p. 67. He was confined to a wheelchair for about a year. His wife became the sole breadwinner and, due to their reduced income, they were evicted from their apartment. They lived in their car with their two-month old daughter before moving into an inexpensive motel. ¶ 6. Agency's Record, p. 67. He was largely unable to ambulate for approximately 18 months after his fall. After his fractures heeled, he continued to suffer ongoing heel pain and had reduced standing tolerance. He could no longer perform general construction. Id. p. 5, ¶ 7. Agency's Record, p. 68. His physician, Dr. Tapper, told him that he "needed to look for a sedentary occupation because he would not be able to stand, walk or climb ladders in the short or long term. Tapper depo. p. 9, l. 22. Exh. I, p. 2-3. Later, in the course of this proceeding, Dr. McNulty rated his physical impairments to his heels as being 22% left and 10% right lower extremities. Exh. AA, p. 648.

While recovering from his heel injuries, Smith and his wife felt that it would possible for him to be a plumber because it had been his experience working in construction that it appeared to him that plumbers didn't have to stand on their feet all day because they spent a great deal of time working while lying under houses or sinks. 2016 Hr. T. p. 44, l. 20-p. 45, l. 16. Smith was

able to obtain on-the-job training as a plumber and, after about three and one-half years, he obtained journeyman plumber status in California. Id. p. 45, l. 20-22; p. 47, l. 22-4. Despite having good and bad days, he pushed through the pain because his daughter "needs a dad to provide." Id. p. 46, l. 4-8. In addition to not being on his feet all day, he was assigned a helper to assist him with carrying heavy items and, if a helper was not available, he was able to use a dolly which he would take with him. Id. p. 84, l. 1-9.

Shortly after completing his apprenticeship he moved to Reno because of the cost of housing in Tahoe. While living in Reno he realized that he didn't want to raise his daughter in a "casino town." He began looking for a family friendly location and visiting several areas he decided to move his family to Coeur d'Alene. Id. p. 45, l. 13-p. 47, l. 12. When he moved to Coeur d'Alene, though he was not licensed as a journeyman in Idaho, he found work within about six days. Id. p. 48, l. 10, p. 49, l. 2.

(b) **January 15, 2007, Industrial Accident**

About a year after he began working as a plumber for Garland Constructions Services, he suffered an industrial accident. He injured his dominate left wrist when he slipped on the ice while loading his truck and fell backwards. Id. p. 49, l. 19-24. He was initially diagnosed and treated for a left wrist sprain without resolution. On April 5th, Smith was seen by the surety's IME physician, Dr. Welch. JT Exh 9, p. 5004. It was his opinion that Smith only suffered a "sprained left wrist." Dr. Welch opined that despite the fact Smith continued to have "some weakness in his left hand" and his treating physician was recommending further testing, that he could "work without restrictions." Id. p. 6008-09. On June 5, 2007, Dr. Peter Jones, a board certified hand and wrist physician, recommended that Smith undergo surgery to remove a bone

fragment in his left wrist. JT Exh. 6, p. 2001.[2] In a report dated two days later, on June 7th, Dr. Welch advised the surety that he realized "I differ from the other physicians" but "in my opinion he is fixed and stable and no further treatment is needed for this industrial injury." JT Exh. 9, p. 5017-19. The surety disregarded Dr. Welch's opinion and Smith underwent surgery by Dr. Jones on July 11, 2007. Jt Exh. 6, p. 2007. A few days after surgery, Smith was fired by Garland. 1st Hr. T. p. 114, l. 12-16.

On August 28th, Dr. Jones restricted Smith to no lifting over 5 pounds and minimal use of his left hand and wrist. JT Exh. 6, p. 2010. Smith attempted a minor plumbing repair in his own home and, to his shock, he was not able to even use a screwdriver with his dominate left hand. He became "very concerned about how to provide for his family given his residual foot limitations and the new limitations of his dominate left hand." Taylor FFCL p. 6, ¶ 11. Agency's Record, p. 69.[3] By September 2007, Smith was borderline suicidal. Taylor, p. 6 ¶ 12. Agency's Record, p. 69. A different IME physician, Dr. Brinkman recommended that Smith receive psychiatric evaluation. The surety sent him to psychiatrist David Wait, M.D. On December 5th, he recommended Smith receive inpatient treatment and additional counseling sessions, but he never received a response from the surety. JT Exh. 13, p. 8001-05.

On December 12th the surety required that Smith be examined again by its IME physician, Dr. Welch, whose earlier opinion it had disregarded when it authorized surgery by Dr. Jones. Dr. Welch noted Smith's left wrist had a loss of flexion, loss of full radial deviation, and loss of full ulnar deviation. He rated his left wrist impairment as 9% of the left upper extremity. JT Exh. 9, p. 5041. Also, even though he had rated his impairment, he stated that he anticipated

[2] "JT Exhibit" refers to the exhibits in the first hearing which were submitted jointly by Employer/Surety and Smith.

[3] "Taylor" refers to the April 27, 2009 Findings of Fact, Conclusions of Law, adopted by the Commissioners (Agency's Record, p. 64-83).

he would not be stable for another six months. Dr. Welch also recommended psychiatric care and anti-depressants including a psychiatric IME and vocational intervention. JT Exh. 12, p. 00013-14; JT Exh. 9, p. 5041. In a departure from what he stated back in April 2007, Dr. Welch opined now that Smith could not return to his pre-injury position as a plumber. In fact, in his December 12th report, he opined:

> "Given his pain and psychiatric intermingling I think that he will not be able to return to work until the psychiatric issues are addressed." Id. p. 542.

Instead of providing a psychiatric IME or further treatment with Dr. Wait and counselor Emily Hart, M.ED., L.C.P.C., the surety terminated benefits on December 13, 2017. Their chart notes document that further treatment from them was terminated because "workmen's comp no longer covered plan." Jt Exh. 14, p. 11011. He was referred to the Idaho Department of Health & Welfare, Region 1, for psychological assistance. Unfortunately, the treatment was not available at the regularity necessary for him to improve. Jt Exh 15, p. 12004; Rehenberg depo. p. 32, l. 12-18. Exh. I, p. 212.

(c) **Idaho Division of Vocational Rehabilitation.** In February 2008, without workers' compensation benefits and unemployed, Smith sought assistance seeking work from the Idaho Division of Vocational Rehabilitation (IDVR). He was found eligible for its services. Exh. D, p. 19-21. On August 19, 2009, IDVR confirmed that Smith has "an impairment (disability), which causes a substantial impediment (barrier) to employment, and requires Vocational Rehabilitation services to achieve an employment outcome." Exh. D. p. 24. On October 27, 2009, the IDVR's evaluation of Smith was:

- "Has severe physical/mental disabilities"
- "medicals rec'vd by Dr. Jones regarding the wrist injury. Kevin has been given a release to return to work with restrictions of only minimal use of his left hand."
- "meets the criterion for Significantly Disabled as detailed by the IDVR Field Manual eligibility guidelines…Has a physical impairment, which seriously limits one or more

functional capacities in terms of an employment outcome." Exh D, p. 27-26.

IDVR developed a formal "Individualized Plan for Employment" for Smith. Id. p. 30. Because of his lack of transferable skills the IDVR facilitated an attempt at retraining by attending North Idaho College. IDVR provided him a laptop computer and, "as a result of his wrist limitations," he was also provided "Dragon Naturally Speaking Software," because he was physically unable to perform writing with his dominate left hand. Id. p. 33-34; p. 44. The 'Dragon' program was not received well by some of his North Idaho College professors. He was downgraded for using the program because "it sounds like you are talking as opposed to a written paper." He was also failing chemistry and doing poorly in math. Hr. T. pp. 50-52.

While struggling with school, Smith's marriage was also failing. His wife abandoned him and their two children. Smith knew that he needed help because he needed help with the chores and driving. After discussing his situation with his mom, brothers, and sisters, he moved to be with them in California so that they would be able to help him. Id. p. 53, p. 54, l. 2; p. 56, l. 4.

Procedural Background

(a) **First (Taylor) Hearing—October 27, 2008**. The only issue was whether Smith was entitled to benefits for psychological injuries pursuant to I.C. §72-451. Two psychologists, Dr. Rehnberg on behalf of Smith and Dr. Klein on behalf of the employer/surety, testified. Referee Taylor's recommended Findings of Fact and Conclusions of Law were adopted by the Commissioners. Taylor discounted Dr. Klein's opinions because if "Claimant's wrist injury had no impact on his psychological condition, it is difficult to explain why he rebounded from his heel fractures but not after his wrist injury. Taylor p. 13, ¶ 32. Agency's Record, p. 76. He also discounted Dr. Rehnberg's opinions. He found that, because Rehnberg had not felt it necessary to review all of Smith's medical records, he "was not in a knowledgeable position to determine

whether Claimant's industrial wrist injury was the predominate cause of his present psychological condition. Id. p. 15, ¶ 37. Agency's Record, p. 78. Taylor found that while Smith's "psychological condition is genuine and requires treatment," that Smith had not established his wrist injury was the predominate cause of his psychological condition and he was denied treatment. Id. 17, ¶ 44. Agency's Record, p. 80.

(b) **Second (Harper) Hearing Scheduled**. On December 6, 2012, this hearing was initially scheduled for July 18, 2013. It was vacated when the ISIF was joined as a defendant. On July 28, 2015, the newly assigned Referee, Brian Harper, rescheduled it for May 17, 2016.

(c) **April 25, 2016, Pre-hearing telephone conference.** It was determined that the Commission's Judicial Rules of Practice and Procedure Rule 10 deadline for the production of proposed exhibits would be extended, but that the extension was "specifically limited to 'voc rehab' reports. Harper Hr. T. p. 12, l. 2-5.

(d) **Second Hearing—May 17, 2016.** Just prior to the hearing, Smith reached a proposed settlement, pending the Commissioners' approval, with the Employer/Surety. Harper Hr. T. p. 12 ¶ 32.

(e) **ISIF's Proposed Exhibit 17.** Smith's proposed Exhibits A through Z and AA through DD were admitted without objection. Id. p. 8, l. 15. ISIF's proposed exhibits 1 through 16 were admitted without objection. ISIF then offered an additional, previously undisclosed, exhibit, Exhibit 17. Smith objected to ISIF's proposed exhibit 17. His objection was based on the ISIF's failure to comply with JRP&P Rule 10, surprise, and prejudice. (Appendix #1)

ISIF initial response was that the document had been provided to it by Smith in discovery. ISIF then conceded that it was not sure how it came into possession of it. ISIF's attorney offered to go to the parking lot to look in his vehicle to see if there was information

there as to where it had come from. Smith's undersigned attorney offered to contact his office to ascertain "what this document is or where it came from or if we ever received it." When asked by Harper to describe the prejudice caused by the late disclosure of the proposed exhibit, Smith informed him that the late disclosure of ISIF's intention to offer proposed exhibit 17 was prejudicial because Smith would have requested a continuance to locate this person, obtain information regarding the person's education and training, and interviewed the numerous other psychologists and counselors that have evaluated Smith to vet the report. Harper p. 12, p. 13, l. 18-p. 14, l. 17.

Harper gave no heed to, and did not address, the offers of both parties' counsel to investigate the origin of ISIF's proposed exhibit 17. Instead Harper went directly to the fact that the ISIF had missed the Rule 10 deadline and that Smith had sufficiently addressed the prejudice suffered as a result of its late disclosure as a proposed exhibit.

> "During our prehearing, we talked about extending the deadline for Rule 10, but my recollection was that that was specifically limited to voc rehab reports." Id. p. 12 l. 2-5…All right. I'm going to exclude the report. I recognize that mistakes can happen; however, some errors are harmless. In other words, okay, so you missed it by a few days, it doesn't really impact anything. I think Mr. Kelso has put on the record additional efforts that would have been undertaken had this—been—Now—So I think that's the risk that both sides run when they're putting their exhibits together. So I'm going to exclude Exhibit 17." Id. p. 14, l. 18-p. 15, l. 3.

After his ruling, Harper informed the parties that he was not returning the excluded exhibit to the ISIF and represented:

> "I will keep a copy of it in case there's an appeal. We've made the mistake in the past of giving those back, and the next thing you know somebody says, 'I want to appeal that, you should have let it in, and we don't even have it. So I'll keep it I will not consider it, I haven't read it, I don't intend to." Id. p. 15, l. 4-9.

(f) **Post-Hearing Depositions.** The depositions of the parties' respective vocational experts were taken post-hearing. Dan Brownell testified on behalf of Smith. His report is Exhibit

DD. His specialty is "job seeking and job development." Brownell depo. p. 13, l. 23. He has assisted persons with job placement for the past 45 years. He worked with the Industrial Commission Rehabilitation Division until his retirement from it, after 29 years. More recently he has worked with the Union Gospel Mission in Coeur d'Alene and Spokane developing their job placement program. Id. p. 5-13. He was directly involved assisting Smith from November 2010 through mid-2012. He attended many meetings with Smith and helped him working with IDVR and obtaining his Dragon dictation program. Id. p. 31-32. He worked with Smith "as a vocational rehabilitation person would in the course of evaluating and attempting to assist" an injured person. Id. p. 37. Mr. Brownell after noting that "no physician has opined, or even suggested that Mr. Smith is a malingerer," opined as follows:

> "It is my opinion to a reasonable degree of vocational probability that Mr. Smith's limitations caused by his traumatic industrial wrist injury, when combined with his pre-existing physical limitations due to his heel injuries and his pre-existing psychological condition as impacted by his industrial injury, are of such a disabling nature that he has no reliable access to jobs in either the Coeur d'Alene or the Apple Valley labor markets. Given the combined magnitude of Mr. Smith's physical limitations and psychological condition, it is my opinion to a reasonable degree of vocational probability that there is no reasonable likelihood that Mr. Smith would be able to obtain employment in any labor market that may be considered."
>
> "It is my opinion, to a reasonable degree of vocational probability, that but for the combined effect on Mr. Smith of his preexisting physical limitations caused by his injuries to his heels and his pre-existing psychological condition, as impacted by his industrial injury, with his physical limitations caused by his industrial injury, he would have been employable after his left wrist in some reasonably reliable job." Exh DD, p. 680.

Brownell testified that about 90 percent of the time, generic job requirement information, such as the DOT (Dictionary of Occupational Titles), does "not match the specific job" being evaluated. He emphasized that in order to make a suitable job placement, a consultant must:

1. Go out and actually meet with employers;
2. Do a specific job site evaluation;
3. Do a specific job task analysis. Brownell depo. p. 15-16.

Brownell critiqued the report of the ISIF's vocational witness, Mr. Jordan, as follows:

- The Idaho Occupational Employment and Wage Survey of 2015, at page 22, does not identify any open specific open job and references no actual job openings.
- It does not identify the physical job requirements of the types of jobs identified.
- It does not contain any information that would tell one whether or not Smith could perform that type of job category.
- The information from California does not provide any information about an actual open job.
- It does not provide any specific job description for any specific job.
- It does not state when a job in a category of jobs was open.
- It does not describe physical duties of the job categories. Brownell depo. p. 19-28.

Mr. Brownell further explained that after one interview and review of medical records, such as was done by Mr. Jordan, a vocational witness cannot state with any degree of reliability whether a person would be employable. Id. p. 30.

Mr. Jordan speculated that, since Dr. Jones and Brinkman had not updated (e.g. changed) their physical restrictions, that it was his belief that their respective restrictions must have only been temporary. Jordan depo. p. 18, l. 12-20.

When Jordan was asked to point to <u>any</u> physician that released Smith to return to work, (e.g. as of the time of his post-hearing deposition) Jordan testified:

> "I don't have any information on any release." And "I'll just say, I cannot see anything that releases him." Jordan depo. p. 72, l. 3-p. 73, l. 24.

Jordan testified that the "jobs" he identified were "sample types of jobs, they were not actual jobs but rather 'job categories' that are available in Idaho and California." Id. p. 38, l. 3-25. He asserted that he had job descriptions in his file but none are in evidence. Id. p. 43, l. 13. His opinion was:

> "I believe that he could look for a job and obtain a job that would be compatible… [and he recommended] that "he should follow the advice of his counselors…[and] …that he follow through with vocational rehab." Id. p. 45, l. 4, l. 17; p. 46, l. 15.

(g) **<u>Post-hearing briefs</u>.** Both parties submitted post-hearing briefs. The ISIF did not move the Commissioners to overturn Harpers' order excluding ISIF's proposed exhibit 17. In

fact, ISIF's vocational witness, Mr. Jordan, had testified that he was not considering the excluded proposed ISIF exhibit 17. Id. p. 46, l. 4-10. As would be expected, because said exhibit 17 had been excluded, neither counsel asked him any questions pertaining to Thaworn Rathana-Nakintara, M.D. or the references to this person in his report. The ISIF did not assert any argument, or make reference, to Thaworn Rathana-Nakintara, M.D.

(h) **Harper's July 7, 2017 Findings of Fact, Conclusions of Law and Recommendation (FFCL&R) adopted by Commissioners.** In quite a startling turn of events, not only did Harper do exactly what he had expressly stated he would not do, e.g. read and fully considered ISIF's excluded Exhibit 17, but he affirmatively sought out a method to do so which he could assert permitted him to do so. He settled on Idaho Rule of Evidence Rule 703; a rule which prior thereto appears to have never been referenced in an Industrial Commission decision. (Appendix #3) Harper also relied upon his personal interpretation of a Functional Capacity Evaluation report that "appears to be internally inconsistent, or if it is not inconsistent, its unfamiliar form makes it difficult to accurately interpret," and that "no one familiar with the report was deposed." However, he was determined that he was going to proceed to "interpret it to the best of his ability." Harper p. 26 ¶ 72. Agency's Record, p. 168. Also, based upon pure speculation, Harper found that if in the future Smith was able to obtain proper psychological treatment that he should be able to obtain employment sometime in the future. Harper determined that Smith failed to prove he is totally and permanently disabled, either by the 100% method or as an odd-lot worker.

(i) **November 22, 2017, Commissioners' Order Denying Reconsideration.** The Commissioners "declined to revisit our original order approving the Referee's proposed Findings of Fact, Conclusions of Law and Order."

ISSUES ON APPEAL

Whether the Commission erred in holding that Smith was not totally and permanently disabled either by the 100% method or as an odd-lot worker and not entitled to benefits from the ISIF?

STANDARD OF REVIEW

In an appeal from the Industrial Commission,

> The Court reviews "whether the Commission's findings of fact are supported by substantial and competent evidence," but freely reviews its legal conclusions. *Shubert v. Macy's W., Inc.*, 158 Idaho 92, 98, 343 P.3d 1099, 1105 (2015), abrogated on other grounds by *Chavez v. Stokes***,** 158 Idaho 793, 353 P.3d 414 (2015). "Substantial and competent evidence is relevant evidence which a reasonable mind might accept to support a conclusion." *id*. "We will not disturb the Commission's findings on the weight and credibility of the evidence unless those conclusions are clearly erroneous," *id*. nor will this Court "re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented." *Watson v. Joslin Millwork, Inc.*, 149 Idaho 850, 854, 243 P.3d 666, 670 (2010). All facts and inferences are viewed in the "light most favorable to the party who prevailed before the Commission." *Hamilton v. Alpha Servs*., 158 Idaho 683, 688, 351 P.3d 611, 616 (2015). However, workers' compensation laws are liberally construed "in favor of the employee, in order to serve the humane purpose" behind the law. *Estate of Aikele v. City of Blackfoot*, 160 Idaho 903, 908, 382 P.3d 352, 357 (2016)

ARGUMENT

The Commission erred in determining that Smith was not totally and permanently disabled either by the 100% method or as an odd-lot worker and awarding him benefits from the ISIF.

(a) Smith is Totally and Permanently Disabled under the 100% Method

The time of the hearing is the crucial point at which a claimant's permanent disability is to be permanently settled. In determining the extent of disability, account shall be taken of all the claimant's personal and economic circumstances at the time of the hearing. Idaho Code §72-430 (1); *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). The plain language of Idaho Code section 72-425 requires the measurement at the time of the hearing of claimant's "present and probable future ability to engage in gainful activity." The

word ‘present’ implies that the Commission is to consider the claimant’s ability to work as of the time evidence is received. *Mayer v. TPC Holdings, Inc*., 160 Idaho 223, 370 P.3d 738 (2016). A claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997).

At the time of the second hearing, Smith had permanent impairment ratings from his preexisting bilateral crushed heels of 22% left lower extremity and 10% right lower extremity, which impairments made him unable to stand or walk for prolonged periods of time. Smith also had a 9% permanent impairment of his left upper extremity due to his industrial accident which, the IDVR documented restricted him to minimal use of his left hand. Exh. D, p. 28. Also, at the time of the second hearing, Taylor had already concluded that Smith’s “psychological condition is genuine and requires treatment.” Id. 17, ¶ 44. IDVR had determined that Smith’s “work history and educational background do not provide transferable skills” that would permit him to obtain employment without vocational rehabilitation assistance. The IDVR also determined Smith was “significantly disabled.” The IDVR documented Smith’s condition of, “DSM IV Dx of MDD severe, recurrent will pose a barrier to continued FT employment without ongoing assistance.” Exh. D, pp. 20, 25, 27. Notably, even the employer/surety’s IME physician, Dr. Welch, opined that he believed Smith “would not be able to return to work ‘until [Claimant’s] psychiatric issues are addressed.” Harper p. 27, ¶ 75. Agency’s Record, p. 169.

Dan Brownell, Smith’s vocational expert, opined as follows:

> “My professional opinions on Mr. Smith’s employability are based upon, and consistent with, the accepted methodology that I adhered to throughout my twenty nine plus years as a vocational consultant with the ICRD and in my private vocational practice since that time. It is my opinion to a reasonable degree of vocational probability that Mr. Smith’s physical limitations caused by his traumatic industrial wrist injury, when combined with his pre-existing physical limitations due to his heel injuries and his pre-existing psychological condition as impacted by his industrial injury, are of

> such a disabling nature that he has no reliable access to jobs in either the Coeur d'Alene or the Apple Valley labor markets. Exh. DD, pp. 679-680

Mr. Jordan conceded that Smith had been "restricted from returning to work at some point in time after his industrial accident" and that "I don't have any information on any release. I'll just say I cannot see anything that releases him." Jordan depo. p. 72, l. 3-p. 73, l. 24.

Mr. Jordan only identified "job categories", not actual open jobs. He also presented no information that detailed the job duties of the "job categories" which is necessary to determine whether Smith would be able to perform, or be trained to perform, them. Jordan depo. p. 38; p. 43, l. 2-17. *See Rodriquez v. Consolidated Farms*, LLC, 390 P.3d 856, 863 (Idaho 2017).

The Harper decision found that Smith suffered the "various restrictions for his physical injuries." Harper also found that Smith will "have a difficult time finding employment unless and until his psychological issues are treated" and that Smith's "psychological overlay is a significant disability, which if not treated would make it difficult for Claimant to pursue employment." Harper p. 15 ¶ 44, p. 30, ¶ 84. Agency's Record, p. 157, 172. Harper further acknowledged that:

> "[Mr. Brownell] notes that unless and until Claimant's psychological condition is ameliorated it would be futile for Claimant to look for work." Mr. Jordan concedes that subjectively Claimant paints a grim picture for his chances at future employment." Harper p. 31 ¶ 86. Agency's Record, p. 173.

Nonetheless, Harper failed to find that Smith was totally and permanently disabled under the 100% method because:

> "By all accounts, his significant psychological problems…have remained until now inadequately treated. However, should Claimant elect to treat his psychological issues there is nothing in the record suggesting he could not overcome his current psychological state and return to the workforce." Harper p. 30 ¶ 83. Agency's Record, p. 172.

At the time of the hearing, Smith's psychological condition had not been properly treated, had not been overcome, and he had not returned to the workforce. Instead of determining

Smith's disability as of the time of the hearing, the Commission inexplicably speculated that, if he obtains the psychiatric care that he has not obtained during the eleven years since his industrial accident, he should be able to return to the workforce at that time and thus he is not totally and permanently disabled under the 100% method.

(b) Smith is also Totally and Permanently Disabled under the Odd-Lot Method

A claimant may establish a prima facie case of odd-lot status as a matter of law where "the evidence is undisputed and is reasonably susceptible to only one interpretation." *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 407 n. 2, 565 P.2d 1360, 1364 n. 2 (1977). Substantial evidence is more than a scintilla of proof, but less than a preponderance. In short, it is relevant evidence which a reasonable mind might accept to support a conclusion. *Kinney v. Tupperware Co.,* 117 Idaho 765, 769, 792 P.2d 330, 334 (1990). "Competent evidence" is relevant evidence that is admissible at trial. *Rossi v. State of Deleware*, 140 A.3d 1115, 1119 (Del. 2016). Supreme Court review of Industrial Commission decisions is limited to a determination whether the findings of fact are supported by substantial and competent evidence. I.C. § 72-732 (1) *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994); *Snyder v. Burl C. Lange, Inc.*, 109 Idaho 167, 169, 706 P.2d 56, 58 (1985).

If the evidence of the degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places a claimant prima facie in the odd-lot category, the burden is on the defendant to show that some kind of work is regularly and continuously available to the claimant. *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977) citing 2 Larson's Workmen's Compensation Law §57.61 p. 10—136 (1975). (Appendix #6)

Smith introduced evidence of (1) obvious physical impairment consisting of crushed bilateral heels preexisting his industrial accident, (2) limited use of his dominate left hand as a result of his industrial accident, and (3) evidence of his personal circumstance of his mental condition.

A claimant is an "odd-lot worker" if:

(a) The worker is "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

(b) The worker is not regularly employable "in any well-known branch of the labor market—absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

Total permanent disability under the odd-lot doctrine may be established in any one of three ways:

1. By showing that the claimant has attempted other types of employment unsuccessfully.
2. By showing that the claimant or vocational counselors or employment agencies on his on his behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

Smith has not asserted that he met the "first prong" because he had not attempted other types of employment after his industrial injury.

Inexplicably, the Harper "Odd-Lot Analysis" erroneously asserts that Smith limited his proof to "meet[ing] his burden by utilizing the third prong under the *Lethrud* test." Harper p. 27 ¶ 74. Agency's Record, p. 169. To the contrary, Smith specifically introduced evidence and submitted argument of his total permanent disability under the odd-lot doctrine under the "second prong" by showing that Smith, on his own and with vocational counselors on his behalf, searched for other work and other work is not available. *See* Opening Br. p. 21-23.

(c) Smith met his "Second Prong" *prima facie* burden of proof

At the first hearing, Smith's wife testified:

> "He's applied at many places. We live close to Sherman Avenue [Coeur d'Alene], so he thought he'd find something within walking distance. So he has gone up and down the boulevard and filled out applications, to no avail. We haven't heard even a phone call from anybody. He tried many places…And he applied from everything from gas stations to motels too…there was a grocery store there. He tried to get something so he could help support his family." 2008 Hr. T. p. 47, l. 16-p. 48, l. 3.

Smith was found eligible for assistance through the Idaho Division of Vocational Rehabilitation (IDVR or VR). Exh. D, p. 19. The determination of whether a person is eligible for IDVR services, is "based upon a physical/mental impairment which results in a substantial impediment to employment and requires VR Services to prepare for, secure, retain or regain employment." *Id*. p. 25. The Eligibility Determination states he has a "Most Significant Disability" with the rationale for the receiving a "Disability Priority" rating being that he (1) Has severe physical mental disabilities, (2) [that] Limit mobility for employment outcome, (3) [that] Limits work tolerance, (4) Requires extended period of time for VR services, and (5) Requires Multiple VR Services. *Id p. 20-21*. IDVR's analysis of Smith documents:

> "…client is considered most significantly disabled. No prolonged walking or standing, frequent ad lib position changes. Client will need to be retrained into a field that will offer client a livable wage. He will require assistance with placement and an adjustment. Client will require counseling and guidance with employment issues as well as mental health counseling. In addition, a DSM IV Dx of MDD severe, recurrent will pose a barrier to continued FT employment without ongoing assistance." Id.

The IDVR identified Smith's impairments as being physical impairments due To accident/injury, psychosocial impairment due to anxiety disorder, and psychosocial impairments due to depressive and other mood disorders. The IDVR identified the following regarding Smith as being "Impediment to Employment":

> "Difficulty coping with emotional demands of work
> Difficulty coping with stress on the job
> Difficulty maintaining emotional stability

Lack of self-esteem/self-confidence
Limited ability – bend/knee/sit/stand/stoop/twist
Limited lifting ability
Limited marketable or transferrable skills
Limited stamina or work tolerance
Limited work speed
Needs frequent ad lib position changes
No prolonged walking or standing
Unable to meet physical requirements of job
Physical limitations involve the condition of his heels, and he is diagnosed with MDD recurrent and severe. See section 2." Id.

The IDVR determined that Smith had a "Serious Limitation" to being able to work which included (1) Depression, (2) being "unable to sustain a continued or prolonged paced movement of the arms, hands, or fingers over the course of a typical 8 hour work day [due to], (3) having "severe feet problems" resulting in his being "unable to sustain a continued or prolonged standing", and (4) being "unable to sustain consistent physical or mental work effort over the course of a typical 8 hour day, 5 day work week, 52 week year". Id. pp. 22-23.

On August 19, 2009, IDVR confirmed that he was "found to have an impairment (disability), which causes a substantial impediment (barrier) to employment, and requires Vocational Rehabilitation services to achieve an employment outcome." Exh. D. p. 24. On October 27, 2009, the IDVR stated:

- "Has severe physical/mental disabilities"
- "medicals rec'vd by Dr. Jones regarding the wrist injury. Kevin has been given a release to return to work with restrictions of only minimal use of his left hand."
- "meets the criterion for Significantly Disabled as detailed by the IDVR Field Manual eligibility guidelines…Has a physical impairment, which seriously limits one or more functional capacities in terms of an employment outcome." Exh D, p. 27-26.

IDVR adopted an "Individualized Plan for Employment" for Smith. Id. p. 30. As part of the plan, IDVR provided him a laptop computer and, "as a result of his wrist limitations," he was also provided with the computer program, "Dragon Naturally Speaking Software," because he

was physically unable to perform writing with his dominate left hand. Id. p. 33-34; p. 44. The 'Dragon' program Smith received to help with school was not received well by some of his North Idaho College professors. He was downgraded because they told him "it sounds like you are talking as opposed to a written paper." He was also failing chemistry and doing poorly in math. Hr. T. pp. 50-52.

Dan Brownell testified on behalf of Smith as a vocational expert. His specialty is "in job seeking and job development." Brownell depo. p. 13, l. 23. He has assisted persons with job placement for about 45 years. He worked with the Industrial Commission Rehabilitation Division until he retired after 29 years therefrom and more recently he works with the Union Gospel Mission in Coeur d'Alene and Spokane developing their current job placement program. Id. p. 5-13.

Mr. Brownell was directly involved in assisting Smith as a vocational rehabilitation person would in evaluating and attempting to assist an injured person in obtaining work. From November 2010 through mid-2012, Mr. Brownell attended many meetings, helped Smith in working with IDVR, and was instrumental helping Smith obtain the Dragon dictation program. Id. p. 31-32. Mr. Brownell testified that his work with Smith was done "as a vocational rehabilitation person would in the course of evaluating and attempting to assist an injured person. Id. p. 37.

While struggling with school, Smith's marriage was also failing. His wife left him alone with his two children. He knew that he needed his family's help because he needed help with chores and driving and mentally. After talking to his mom, brothers, and sisters, he moved to be with them in California so they could help him. Id. p. 53, p. 54, l. 2; p. 56, l. 4. Because of the

nature of Smith's disabilities and lack of transferrable skills, the job types in the Coeur d'Alene labor market are essentially the same as available in Happy Valley, California.

Smith presented evidence fully establishing that, despite the fact that he searched for work on his own and received the professional assistance of Dan Brownell as well as the Idaho Division of Vocational Rehabilitation in searching for work, no other suitable work was located or available for him. ISIF introduced no evidence to the contrary. Inexplicably, Harper makes no mention of the Idaho Division of Vocational Rehabilitation's efforts.

(d) Smith met his "Third Prong" *prima facie* burden of proof

The report and testimony of Dan Brownell, as well as the reports and findings of the IDVR consultants, establish that any further efforts by Smith to find suitable work would be futile.

Idaho Division of Vocational Rehabilitation Counselor, Mike Wood initially determined Smith was eligible for its Services on February 21, 2008. He categorized him as having a "Most Significant" disability. He found Smith eligible for IDVR services "based upon a physical/mental impairment which results in a substantial impediment to employment and requires VR Services to prepare for, secure, retain, or regain employment." Exh. D, p. 21. He determined that Smith:

> "He will require assistance with placement and an adjustment. Client will require counseling and guidance with employment issues as well as mental health counseling. In addition, a DSM IV Dx of MDD severe, recurrent will pose a barrier to continued FT employment without ongoing assistance." Exh. D, p. 20.

The next IDVR counselor Roxanne Egeland that worked with Smith in 2009, also determined that he was "eligible for VR Services based upon a physical/mental impairment which results in a substantial impediment to employment and requires VR Services to prepare for, secure, retain, or regain employment." Exh. D, pp. 24-25. It was her conclusion that Smith has impairments which "seriously limit one or more functional capacities in terms of

employment outcome; whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended time." Id. p. 26. She further determined:

> "His work history and educational background do not provide transferrable skills, which would not lead to suitable employment without VR assistance."

Dan Brownell noted that no physician opined, or even suggested, that Mr. Smith is a malingerer." He stated his opinion as follows:

> "My professional opinions on Mr. Smith's employability are based upon, and consistent with, the accepted methodology that I adhered to throughout my twenty nine plus years as a vocational consultant with the ICRD and in my private vocational practice since that time. It is my opinion to a reasonable degree of vocational probability that Mr. Smith's physical limitations caused by his traumatic industrial wrist injury, when combined with his pre-existing physical limitations due to his heel injuries and his pre-existing psychological condition as impacted by his industrial injury, are of such a disabling nature that he has no reliable access to jobs in either the Coeur d'Alene or the Apple Valley labor markets." Exh. DD, pp. 679-680.

(e) The Burden of Proof was erroneously not Shifted to ISIF

Once a claimant makes a *prima facie* showing that he or she is "not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part," the burden of proof shifts to the ISIF. The ISIF has the "dual evidentiary burden." First it must be established that a "kind of suitable work" in a "well-known branch of the labor market" exists and is "regularly and continuously available" in that market." Second, the ISIF must establish that an actual job of that type exists within a reasonable distance from claimant's home as of either the time of injury or the time of the hearing. *Rodriquez v. Consolidated Farms*, LLC, 390 P.3d 856, 863 (Idaho 2017).

After Smith met his *prima facie* burden of proof of his odd-lot status under the second and third methods, the burden should have been, but was not, shifted to the ISIF. Inexplicably the ISIF was not required to come forth with evidence establishing that some suitable work for him

existed, that the suitable work is regularly and continuously available to the claimant, and that there exists an actual open job suitable for him that is within a reasonable distance from his residence. ISIF didn't, and it couldn't, meet its burden of proof. It failed to present any evidence that met or rebutted Smith's prima facie showing.

Harper's FFCL&R specifically acknowledged, but failed to address the ISIF's failure to meet its burden, by acknowledging that:

> "Mr. Brownell's main criticism of Mr. Jordan's report was that the latter did not identify specific, open jobs available to Claimant within his work restrictions." Harper p. 18-19, ¶ 54. Agency's Record, p. 160-161.

ISIF's vocational witness, Mr. Jordan, conceded that Smith had been "restricted from returning to work at some point in time after his industrial accident" and that "I don't have any information on any release. I'll just say, I cannot see anything that releases him." Jordan depo. p. 72, l. 3-p. 73, l. 24.

Mr. Jordan failed to identify any specific suitable jobs that were open and located within a reasonable distance from his residence.

> Q. (Mr. Callery) "What types of jobs did you think were suitable for the claimant based upon your review of the case?
> A. (Mr. Jordan) He could do things like cost estimator, teacher assistant, home health aid, security guard, combined food prep and serving worker…new loan clerks, order clerk, inspector…"
> Q. (Mr. Callery) Are those actual—are those job categories, as opposed to actual jobs?
> A. (Mr. Jordan) These are jobs that were taken from the occupational employment and wage survey, 2015…
> Mr. Kelso: Objection, nonresponsive. He didn't answer whether they were actual job openings.
> Q. (Mr. Callery) Were these actual jobs that were advertised as open, or are they job categories?
> A. (Mr. Jordan) These are job categories that are available in the State of Idaho, and they are also available in the State of California, similar types of jobs." Jordan depo. p. 38.

When asked, whether he had any of the job duty requirements for any of the job categories he identified, Mr. Jordan testified, "I do, yes." However, Jordan ultimately had to concede that they were not in his report or evidence but, rather, was left to make the unsubstantiated assertion that "I have listed all of the job titles, and I have the—all of the descriptions in my file." (emphasis added). Jordan, depo. p . 43, l. 2-27.

(f) It was error to utilize Judicial Initiative

Harper's recommendation that "Claimant has failed to prove he is totally and permanently disabled, either by the 100% method or as an odd-lot worker" was reached by (1) doing precisely what he stated on the record that he would not do; fully considering and relying on the ISIF's proposed excluded Exhibit 17, (2) determining that it was up to him as Referee to interpret "to the best of his ability" a Functional Capacity Evaluation report which he acknowledged to be "internally inconsistent, or if it is not inconsistent, its unfamiliar form makes it difficult to accurately interpret" most notably because "the lifting conclusions appears to conflict substantially with the testing data" which "data *appears* legitimate" (emphasis added), (3) finding that if Smith should "elect to treat his psychological issues, there is nothing in the record suggesting he could not overcome his current psychological state and return to the workforce" sometime in the future, and (4) by inappropriately requiring Smith's mental condition to be a "permanent condition" and the basis for ISIF apportionment. FFCL&R pp. 23-24, Fn 7; p. 26, ¶ 72; pp. 27-¶ 74-p.31, ¶ 87. Agency's Record, p. 165-166, 168, 169, 173.

(1) **ISIF's Proposed Exhibit 17.** Smith's proposed Exhibits A through Z and AA through DD were admitted without objection. Harper Tr. p. 8, l. 15. ISIF's proposed exhibits 1 through 16 were admitted without objection. ISIF then stated that it was offering an additional exhibit, which it identified as a proposed exhibit at the start of the hearing, number 17. Smith

objected to ISIF's proposed exhibit 17, on the basis that "it's pretty clear" that it's after the Rule 10" compliance deadline. Harper Tr. p. 13, l. 7-8. Smith's objection to the proposed exhibit 17 was based on the Judicial Rules of Practice and Procedure (JRP&P), Rule 10, which requires each party to disclose all proposed exhibits at least 10 days before the hearing. The Commissioners Order Denying Reconsideration states that the "basis for Smith's objection was that he had not seen the report before, and that its admission would constitute a prejudicial and unfair surprise." Order, p. 4. Agency's Record, p. 241. To the contrary, the basis of Smith's objection was the failure of ISIF to comply with JRP&P Rule 10. The fact that Smith had not seen the report before and the unfair surprise it presented was the explanation of the prejudice to Smith if it was admitted into evidence despite the failure to comply with Rule 10. Harper Tr. p. 13, l. 6-7. Smith explained the late disclosure of ISIF's intention to offer proposed exhibit 17 was prejudicial and that if it had been produced as part of ISIF's Rule 10, Smith would have requested a continuance to locate this person, obtain information regarding her education and training, and interviewed the numerous other psychologists and counselors that have evaluated Smith to vet the statements and reliability of the report. Harper Tr. p. 12, p. 13, l. 18-p. 14, l. 17.

ISIF initially responded by asserting that the document had been provided to it by Smith in discovery. ISIF then conceded that it was not sure how it came into possession of it. Smith's undersigned attorney offered to contact his office to ascertain "what this document is or where it came from or if we ever received it." Harper Tr. p. 13, l. 2-5. ISIF's attorney offered to go to the parking lot to look in his vehicle to see if there was information there as to where it had come from. Id. p. 11, l. 6-9.

While the Commissioners Order Denying Reconsideration asserts that there was an "ambiguous state of affairs that led the Referee to exclude the document, against the possibility

that the document had not been exchanged in discovery," that is not supported by the hearing transcript. In fact, Harper paid absolutely no heed too, and did not even acknowledge and address the respective offers of counsel to investigate the origin of ISIF's proposed exhibit 17. Instead, he held that the ISIF had missed the Rule 10 deadline, that Smith had sufficiently addressed the prejudice to Smith as a result of the late disclosure if it was admitted, and made his ruling based upon Rule 10:

> "During our prehearing, we talked about extending the deadline for Rule 10, but my recollection was that that was specifically limited to voc rehab reports." Id. p. 12 l. 2-5…All right. I'm going to exclude the report. I recognize that mistakes can happen; however, some errors are harmless. In other words, okay, so you missed it by a few days, it doesn't really impact anything. I think Mr. Kelso has put on the record additional efforts that would have been undertaken had this—been—Now—So I think that's the risk that both sides run when they're putting their exhibits together. So I'm going to exclude Exhibit 17." Id. p. 14, l. 18-p. 15, l. 3.

After excluding the exhibit, Harper announced that he was not returning the exhibit to ISIF.

> "I will keep a copy of it in case there's an appeal. We've made the mistake in the past of giving those back, and the next thing you know somebody says, 'I want to appeal that, you should have let it in, and we don't even have it. So I'll keep it I will not consider it, I haven't read it, I don't intend to." Id. p. 15, l. 4-9.

During the final post-hearing deposition of Mr. Jordan, he testified that he was <u>not</u> referring to the excluded report in his opinion testimony. Jordan depo. p. 46, l. 1-10. During briefing ISIF at no time moved for the information contained in Exhibit 17 to be considered by the Commission pursuant to Rule 703 of the Idaho Rules of Evidence.

When the decision was finally filed, it was quite unexpected to see that Harper had utilized excluded Exhibit 17 as the basis, in fact the only basis, for his finding that Claimant was employable. Even though there are numerous other subsequent psychological evaluations of Smith in the record, Harper inexplicably referenced it as being the "most current." In part, that

may have been because he identified it as being dated April 22, 2014, when the proposed exhibit 17 is dated April 22, 2012. While, as detailed in Claimant's Reply Brief on His Motion for Reconsideration (Agency's Record, p. 218-237), the ISIF submitted its own testimony that the date was inaccurate in Mr. Jordan's report, there is no testimony or evidence that supports that fact.

Harper erroneously found that the report of Rathana-Nakintara, M.D., was "of a type typically relied upon by experts in their field of expertise. IRE 703. [and] This report so qualifies…" FFCL&R p. 23-24, footnote 7. Agency's Record, p. 165-166. There is no legal basis, and Harper undertook no effort to support, this conclusory assertion. Before any report of Rathana-Nakintara, M.D. could be considered, he/she would have to be properly qualified as an expert. In other words, facts must be introduced, at least by curriculum vitae or testimony, into evidence establishing that he/she possessed sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. *IHC Hosp. v. Board of Commrs.*, 108 Idaho 136, 697 P.2d 1150 (1985); *Marty v. State of Idaho*, 122 Idaho 766, 768, 838 P.2d 1384, 1186 (1992). There is no evidence as to what qualifications Rathana-Nakintara, M.D. may possess. There is no evidence establishing that Rathana-Nakintara, M.D. possesses any expertise in psychology, or any field. Expertise cannot be presumed to exist in the absence of any evidence.

It was error for Harper, through judicial initiative, to *sua sponte* utilize Rule 703 of the Idaho Rules of Evidence as a vehicle to import the information in excluded Exhibit 17 into his decision making analysis. *See Deon v. H&J, Inc*., 157 Idaho 665, 668-69, 339 P.3d 550, 553-54, (2014) citing *Arizona v. California,* 530 U.S. 392, 412-13 (2000). Harper's consideration of Exhibit 17 was a departure from the principle of "party representation" which is basic to our

system of adjudication. *See Arizona v. California*, 530 U.S. at 412-13 (2000). Harper's error in relying on the excluded exhibit, and asserting that Mr. Jordan had also, was compounded by the fact that Mr. Jordan testified that he was not referring Exhibit 17 in his opinions and testimony. Indeed, Harper acknowledged that, without the information contained in the excluded proposed exhibit 17, there was literally no evidence in the record that Smith was employable. As the Referee stated:

> "Mr. Jordan acknowledged that if one were to rely on Claimant's subjective perception of his work capacity and his psychological status, he would more likely than not be totally and permanently disabled." FFCL&R p. 23, ¶ 65. Agency's Record, p. 165.

Even if Mr. Jordan had based his opinion, in part, upon the excluded exhibit 17, (which he testified he did not do) he would have been required to testify as to the specific basis of his for relying on the inadmissible evidence and, while using said inadmissible evidence, reach an opinion through his own independent judgment. *Doty v. Bishara*, 123 Idaho 329, 336, 848 P.2d 387, 394 (1992). Since he testified he did not base his opinion on the excluded Exhibit 17, Mr. Jordan did not testify as to "the specific basis of his relying on the inadmissible evidence."

An expert witness may not serve as a mere conduit for an excluded opinion of another claimed expert witness "when the expert who does testify [in this case Mr. Jordan] lacks the requisite qualifications to render the opinion of the claimed expert witness in his own right." *Keller Lorenz Co., Inc., v. Insurance Associates Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977). There is no evidence that Mr. Jordan is qualified to render any psychological opinion "in his own right" and, again even if he was so qualified, Mr. Jordan testified that he did not rely on Rathana-Nakintara, M.D.'s information. Jordan depo. p. 46, l. 1-10. Since there is no evidence that Mr. Jordan "in his own right" possesses the "requisite qualifications" to render a psychological opinion, the Rathana-Nakintara, M.D.'s report, as a matter of law, cannot be an expert opinion of

the type relied on by a person in Mr. Jordan's field. Harper should not have utilized the information in it.

Harper's *sua sponte* importation of the excluded information is at odds with Idaho case law. The appellate courts of this state have consistently held that before a court addresses the merits, it must first determine the admissibility of objected to evidence as a "threshold question." *See Montgomery v. Montgomery*, 147 Idaho 1, 6, 205, 650, 655 (2009). When a party objects to the admissibility of offered evidence, the court must first make a threshold determination as to the admissibility of the evidence before proceeding to the ultimate issue. *See Ryan v. Beisner*, 123 Idaho 42, 45, 884 P.2d 24, 27 (Id. App. 1992). In order for excluded evidence to be considered under IRE 703, the "probative value" of the evidence must be balanced against the "prejudicial effect" if the evidence is admitted. IRE 703, IRE 403. (Appendix 2) The "balancing test" requires that the "degree of relevance and materiality of the evidence" must be balanced against whether it will be given "undue weight" or "where its use results in an inequity. Davidson v. Beco Corp., 114 Idaho 107, 110, 753 P.2d 1253, 1256 (1987).

Harper's footnote provides no analysis of the "probative value" versus the "prejudicial effect" of considering and relying on the information in the excluded Exhibit 17. Harper, after agreeing at hearing that Smith had established his prejudice, failed to mention that but, rather, merely made a conclusory assertion that is devoid of analysis:

> "the undersigned finds the probative value of the report in the context of Mr. Jordan's analysis substantially outweighs its prejudicial effect." FFCL&R p. 24. Agency's Record, p. 166.

While the Order Denying Reconsideration supports Harper's judicial initiative importing the excluded exhibit, the Order seemingly appears to reflect a recognition of the impropriety of Harper's conduct and inexplicably makes two significant assertions of fact that have absolutely

no support in the evidentiary record.

> 1. "ISIF exhibit 16 is Mr. Jordan's report of May 12, 2016. That report contains several references to a psychological evaluation performed by Thaworn Rethana-Nakintara, M.D. That psychological report is dated April 22, 2012, although it is erroneously described by Mr. Jordan as being dated April 22, 2014." (emphasis adde) Order p. 4. Agency's Record, p. 241.

There is no evidence in the record that Mr. Jordan's reference to a report dated April 22, 2014, is in fact an erroneous reference to a report dated April 22, 2012. The assertion that the two referenced reports in Mr. Jordan's report are one-in-the-same first appeared in a footnote in the ISIF's Response to Smith's Motion for Reconsideration. ISIF Resp. Br. p. 5. Agency's Record, p. 204. The impropriety of ISIF's attorney inserting what is, in effect, testimony changing the record in a brief was extensively addressed in Claimant's Reply Br. p. 8-9. Agency's Record, p. 225-226. Despite Smith's disclosure the inappropriate assertion of fact, the Order as set forth above, without any testimony by Mr. Jordan, or any other support, accepts the ISIF footnote statement as a proven fact.

2. The Order's discussion supporting Harper's conduct regarding the excluded exhibit, also asserts, as a proven fact, that:

> "In its August 10, 2017 response to Claimant's Motion for Reconsideration, the ISIF affirmatively stated that subsequent investigation has revealed to the ISIF that exhibit 17 was in fact provided to the ISIF by Claimant in the course of pre-hearing discovery." Order, p. 5. Agency's Record, p. 242.

The ISIF's Response Brief asserted that "In actuality, the report was included in the Claimant's voluminous discovery response to the ISIF and had been available to both the Claimant and the ISIF many months before the hearing." ISIF Resp Br. p. 5. Agency's Record, p. 204. Not only is this assertion is no different that ISIF's counsel's assertion at hearing, which was subsequently withdrawn to be "There's a possibility it came from [employer/surety attorney] Bauman…but it could have come from Bauman. But I think it came from Mr. Kelso's office."

Harper Tr. p. 11, l. 2-9. Contrary to the Order's assertion that ISIF "affirmatively stated" that at some time after the hearing it undertook a "subsequent investigation" and that the investigation "revealed" that exhibit 17 "was in fact" provided to the ISIF by Smith, there is no assertion by the ISIF that it undertook such a "subsequent investigation."

In an attempt to justify Harper's consideration of the excluded exhibit, the Order Denying Reconsideration asserts that Harper's comments make it clear he "would have been inclined to admit the document had it been Claimant who provided it to ISIF" and that the response to Smith's Motion for Reconsideration, "the ISIF affirmatively stated that subsequent investigation has revealed to the ISIF that exhibit 17 was in fact provided to the ISIF by Claimant in the course of pre-hearing discovery." Order, p. 5. Agency's Record, p. 242.

(2) **Harper exceeded authority by interpreting the FCE report**

The Court has previously had occasion to instruct that neither a Referee nor the Commissioners may use their own lay understanding of a medical document which requires specialized expertise to understand and interpret. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 302 P.3d 718 (2013).

Dan Brownell, with over 40 years of experience, testified that he had never seen a purported FCE like Exhibit 14. He explained that the many inconsistencies in the report resulted in it being unable to match up with Smith's medically documented functional capabilities. He testified, "In my opinion, to a reasonable degree of vocational probability, the report is not a reliable indicator or Mr. Smith's physical condition." Brownell depo. p. 66, l. 11-13. Mr. Brownell testified that he is not aware of any report by Dr. Jones or Dr. Brinkman that removed or changed the physical limitations they recommended for Smith. Id. p. 699, l. 18-19. Mr. Jordan conceded that he had no understanding what the FCE was actually stating:

• When asked to confirm that the report's representation that the lift testing was inconsistent wouldn't be a correct statement as to what this two arm over shoulder lift states, he testified; "I don't know exactly what he's referring to here." Jordan depo. p. 61, l. 10-17.

• When asked whether the representation that the reported "grip strength measurements" produce a "bell-shaped curve indicating valid maximal effort," he testified; "I don't know exactly how he came up with the bell curve." Id. p. 63, l. 9-10.

• When asked whether the test results reflect a bell curve, he testified, "I guess I would say I don't know whether they do or not. This is something we have to ask the guy that did the test." Id. p. 63, l. 15-17.

• When asked whether he asked the guy who did the test whether or not the test result reflect a bell curve, he testified "No." Id. p. 63, l. 20.

• When asked what the meaning of the language on page 7 of the report which states, "lift/carry restrictions: Cannot lift/carry at a height of three feet to six feet more than N/A pounds for more than one hour per day", he testified, "I don't know exactly what it means." Id. p. 65, l. 21-p. 66, l. 1.

Harper, after acknowledging that no person familiar with what the FCE meant, or with knowledge of how to interpret it, testified, he determined to proceed to do so:

> "Since no one familiar with the report was deposed, the Referee is left to interpret it to the best of his ability." FFCL&R p. 26 ¶ 72. Agency's Record, p. 168.

As part of his determination, without any basis for doing so, the Harper asserted:

"The [raw test] data appears legitimate." (emphasis added).

From there, based upon the Referee's perception of the appearance of the data, he determined that the "raw data" will be considered because it "carries more weight than Claimant's subjective comments to the contrary." FFCL&R p. 27 ¶ 72-73. Agency's Record, p. 168-169.

(3) **It was error to determine disability sometime in the future**

"[T]he time of the hearing is the crucial point at which a claimant's permanent disability is to be permanently settled. *Davaz v. Priest River Glass Co., Inc.,* 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). Under I.C. § 72-425, the permanent disability rating is a measure of the

claimant's "present and probable future ability to engage in gainful activity." The word "present" implies that the Commission is to consider the claimant's ability to work *as of the time evidence is received*. There is no "present" opportunity for the Commission to make its determination apart from the time of hearing. As the Court noted in *Davaz*, it is the claimant's personal and economic circumstances at the time of the hearing, not at some later time, that are relevant to the disability determination. 125 Idaho at 337, 870 P.2d at 1296.

There is no evidence that establishes that Claimant was employable at the time of the hearing. Harper acknowledged that, by all accounts, Claimant's psychological problems "have *remained until now* inadequately treated." (emphasis added). As of the date of the hearing, Claimant' psychological problems had not been adequately treated and thus they had not been resolved. Harper in effect acknowledged, without actually stating, that at the time of the hearing Claimant was not employable by finding:

> "Claimant's psychological overlay is a significant disability, which if not treated would make it difficult for Claimant to pursue employment." FFCL&R p. 30, ¶83. Agency's Record, p. 172.

The assertion that maybe, sometime in the future at some time after the hearing that Smith might be able to afford psychological care, he might receive psychological care that might bring him to a point where he might be employable, when he has not received such treatment or become employable after obtaining such treatment during the *nine (9) years* that have passed since the time of his industrial accident on January 15, 2007, is unfounded. There is no evidence in the record that Claimant's psychological condition was temporary as of the date of the hearing. What evidence that existed was speculative that sometime in the future, if Smith is able to obtain proper treatment, that the treatment may be successful.

(4) **It was error to not determine disability based on Smith's physical impairments and, as a personal circumstance, his time of hearing psychological condition**

In *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012), the Court held that the date for evaluating claimant's "present and probable future ability to engage in gainful activity" is ordinarily the date of hearing. The Court recognized that depending on the peculiar facts of a case, the Commission should be given some leeway in the application of this rule.

The Taylor decision found that his "psychological condition is genuine and requires treatment. Taylor, p. 17 ¶ 43. Agency's Record, p. 80. Taylor also found that Smith's psychological condition appears to be partially related to his industrial wrist injury." Taylor p. 17 ¶ 44.[4] Agency's Record, p. 80.

Harper found that "[w]hile the record contains more than one expert opinion that Claimant will have a difficult time finding employment unless and until his psychological issues are treated." Harper p. 15 ¶ 44. Agency's Record, p. 157. Harper further found that:

> "By all accounts, his significant psychological problems worsened after his industrial accident, were aggravated by marital issues, and have *remained until now inadequately treated*." (emphasis added) Harper p. 30, ¶ 83. Agency's Record, p. 172.

Where a psychological condition is not compensable as a result of an industrial accident, it is to be treated as a personal circumstance which is correctly included in allocating responsibility between the ISIF and the employer/surety. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 849, 748 P.2d 1372, 1380 (1987) (overruled on other grounds). Harper noted that in the case of *Ford v. Concrete Placing Co.*, Inc., IC 2005-518336 (November 6, 2014), the Commission found that "regardless of whether the claimant's psychological condition was a ratable impairment under Idaho Code §72-451, or merely part of his non-medical factors, it must

[4] In the Commissioners' Order Denying Reconsideration, they state that "Referee Taylor concluded" Smith's psychological condition was "worsened by the subject accident." Order p. 8. Agency's Record, p. 245.

be considered when determining the issue of permanent disability." Harper p. 29, ¶ 81. Agency's Record, p. 171. (Appendix #4)

Harper noted that "should Claimant elect to treat his psychological issues, there is nothing in the record suggesting he could not overcome his current psychological state and return to the workplace" and that Smith is "hopeful that now that he has the money to return to mental health and vocational counseling he can get back on his feet emotionally and psychologically, and seek employment." Harper p. 30, ¶ 83, 84. Agency's Record, p. 172.

Harper departed from even giving consideration, as a "non-medical" factor, to Smith's psychological condition because "it does not *appear* from the record" (emphasis added) that his psychological condition is untreatable, it is a "temporary condition" and thus it cannot be "one of the combining factors when determining the "combined with" requirement under Idaho Code §72-332. Harper p. 30-31, ¶ 84. Agency's Record, p. 172-173.

Because Harper found that it "does not appear" that Smith's psychological condition is not treatable, Harper refused to consider his psychological condition, even though at the time of the hearing it was not treated, as a personal circumstance in determining disability. The Commissioners' Order Denying Reconsideration refused to consider Smith's psychological condition at all, even as a personal circumstance, and held that "but for his preexisting conditions [bilateral crushed heels] he would not have been rendered totally and permanently disabled by the effects of the subject accident." Order, p. 9. Agency's Record, p. 246.

Whether Smith's psychological condition was, as the Commission stated, "worsened by the subject accident" or, as Taylor found, "appears to be partially related to his industrial wrist injury," there can be no dispute that, at the time of the hearing, his psychological condition was a significant personal circumstance that had existed at least for about nine (9) years. When Smith's

psychological condition at the time of hearing is taken into consideration, as a personal circumstance, along with his preexisting physical impairments to his heels and his industrial injury physical impairment to his left wrist, there can be no doubt that Smith is totally and permanently disabled. The liability for Smith's total permanent disability benefits should be apportioned between the employer/surety and the ISIF, under the *Carey* formula as elaborated on in Smith's Opening Brief to the Industrial Commission. Appendix #5.

CONCLUSION

The Court should reverse and remand this matter to the Industrial Commission with directions to enter its Order awarding Smith total permanent disability benefits pursuant to *Carey*.

Respectfully submitted this 17th day of May, 2018.

_____/S/_____
Starr Kelso, Attorney for Appellant Smith

Certificate of Service

I hereby certify that two copies of the foregoing Appellant's Opening Brief were served upon the attorney for the Respondent ISIF, with postage prepaid thereon, on the 17th day of May, 2018, as follows:

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_____/S/_____
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