6-18-2018

Smith v. Industrial Special Indemnity Fund Respondent's Brief Dckt. 45674

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

KEVIN SMITH, Claimant/Appellant, vs. STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Respondent.	Supreme Court Docket No. 45674

RESPONDENT'S BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO,
THOMAS E. LIMBAUGH, CHAIRMAN

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I. STATEMENT OF CASE

This is an appeal from a decision of the Idaho Industrial Commission which found that the Claimant was not entitled to total and permanent disability benefits from the remaining Defendant, State of Idaho Industrial Special Indemnity Fund (hereinafter "ISIF"). The Employer/Surety settled with the Claimant shortly before hearing. The Claimant injured his left wrist in January of 2007 when he fell on ice and landed on his outstretched hands. Claimant is left hand dominant. He was thirty-four years old and working as a plumber when the slip and fall occurred.

The Industrial Commission found that Smith failed to meet his burden of proof as to total and permanent disability, either by the one hundred percent (100%) method or as an odd-lot worker. The decision found that the Claimant's main impediment to work is his psychological condition which is treatable.

Shortly after relocating from California to Coeur d'Alene, the Claimant slipped on ice while working for his time-of-injury employer Garland Construction Services and sustained an injury to his left hand. This seemingly straight forward case involves a sprain to the wrist and a minor surgical procedure to remove a fragment of bone. Now eleven (11) years later the Claimant remains involved in litigation before the Idaho Industrial Commission and now the Idaho Supreme Court. There is little evidence the Claimant is totally and permanently disabled other than the Claimant's own self-serving testimony. Central to this case is Claimant's propensity to be untruthful. Both the Idaho Industrial Commission and two Referees found the Claimant not credible.

The Claimant and the Employer/Surety went to the first hearing in 2008 over the issue of whether Claimant was entitled to medical benefits for psychological injuries that allegedly

resulted from the January 2007 industrial accident. (Claimant's Ex. K, p. 358). The Findings made by the Referee at that time indicate that the Claimant was not truthful to his medical providers, abused marijuana and his wrist injury was not the predominant cause of his psychological condition. The Commission held that Claimant was not entitled to benefits for psychological injures pursuant to Idaho Code Section 72-450. Dr. Ronald Klein, Ph.D Psychologist, who performed a psychological evaluation of the Claimant at the request of the employer/surety summarized his findings concerning the Claimant's long-term personality and adjustment disorder in 2008 and his lack of credibility:

> CLINICAL IMPRESSIONS:
> Axis I: Adjustment Disorder with anxious and depressed features
> Axis II: Mixed Personality Disorder with emotionally dependent and narcissistic features
> Axis III: Wrist Injury and previous bilateral heel injuries
> Ads IV: Significant financial, occupational and family functioning stresses
> Axis V: Global Assessment of Function = 45
>
> Neither his adjustment disorder or his personality disorder are causally related to the 01/15/2007 work injury. Rather they are long-standing characteristics of his functioning that were in place by late adolescence and continued to be demonstrated during his early adulthood, all predating January 2007. Having reviewed his records prior to evaluating him in my office. and noting the times when he knowingly gave untruthful statements or deliberately withheld information from treating mental health providers, I felt the two most likely explanations of his behavior were 1) that he was a habitual liar who even gave false information to persons trying to help him, or 2) that he was psychotic and didn't always know what he was saying or the ramifications of what he was saying. However, once I had the chance to sit down with him and evaluate him directly, I realized that neither of those two possibilities were correct. Instead, Kevin Smith functions very much like a child and a maladjusted child at that, impulsive, self-focused, oblivious to others' needs and irritated at being held accountable for his actions. He feels that others misunderstand him and that he doesn't have to participate in adult responsibilities if he really doesn't want to. Examples of all this are found in his records and today's evaluation, and noted in the present report. When he tells a falsehood, he appears to be responding to the impulse of the moment, doesn't appear to focus on the long term implications or ramifications of what he is saying, hopes not to be held accountable for what he says, and when he is held accountable or is challenged about it, reverts to his no/yes/no/I don't know pattern of responding while appearing agitated and

> irritated, with himself and with the person taking him to task. Regarding his participation in legal processes, his verbal statements are of variable reliability and it doesn't appear to be terribly different if he is under oath or not.

ISIF Exhibit 4, p. 66.

Claimant was hired by Garland Construction as a plumber in November of 2006, less than two months prior to the industrial accident. Claimant fell on ice injuring his wrist outside of a remodel job. (Claimant's Ex. 5). The Claimant was seen by Dr. Richard Mattis at North Idaho Family Physicians on the same day as the industrial accident. (Claimant's Ex. 3, p. 1002). The initial CT scan was negative for any acute fracture. (Claimant's Ex. 3, p. 1008). He continued to see Dr. Mattis; on January 23, 2007 indicating he was getting better and was continuing to work at his employer, although not yet at full duty. (Claimant's Ex. 3, p. 1011). Claimant was seen again in February of 2007 and continued working on light duty. (Claimant's Ex. 3, p. 1017).

By March of 2007, the Claimant had been referred to hand specialist, Dr. Peter Jones of Coeur d'Alene, ID. (Claimant's Ex. 3, p. 1021). Dr. Jones' initial impression was scapholunate ligament tear and avulsion fracture off the lunate bone. (Claimant's Ex. 6, p. 2001). Dr. Jones recommended surgical exploration of the wrist with excision of the lunate fracture fragment and repair of the ligament.

An independent medical exam was performed by Joseph D. Welch, MD who made a diagnosis of a sprained left wrist with a CT finding of an old lunate chip fracture, nothing acute. (ISIF Ex. 10, p. 121). Dr. Welch indicated that he would recommend holding off on surgery and indicated that more time needs to go by to see if the Claimant could improve further. (ISIF Ex. 10, p. 122).

The Claimant underwent a second independent medical evaluation by Dr. Welch in June of 2007 and again reiterated that the Claimant did not have an acute injury to the left wrist as a

result of the industrial accident. (ISIF Ex. 11, p. 130). The diagnosis remained the same of an old chip fracture.

The Claimant saw Dr. Jones in June of 2007 who was equivocal as to whether or not the avulsion fracture was as a result of the industrial accident or predated it. (Claimant's Ex. 6, p. 2006). Surgery was performed by Dr. Jones on July 11, 2007 and he identified a fracture fragment off the lunate bone that was excised. The scapholunate ligament however was intact and repair was not necessary. (Claimant's Ex. 6, p. 2007).

The Claimant was last seen a final time by Dr. Peter Jones in November of 2007 (10 months after the industrial accident) who indicated that the Claimant was slowly improving with regard to his wrist range of motion and wrist pain. The last release from Dr. Jones was a temporary release from September to November of 2007 which indicated the Claimant could return to his employment with no lifting over five pounds and minimal use of the left hand and wrist. (Claimant Ex. 6, p. 2012). This appears to be the last information concerning restrictions directly related to the Claimant's wrist.

A third IME was performed by Dr. James Brinkman who indicated in September of 2007, nine months after the industrial accident, that the Claimant was able to return to work with restrictions of not lifting anything greater than 10-20 pounds with both hands and 10 pounds with the left on an occasional basis. He also indicated that six (6) months post surgery, which would be in December of 2007, the Claimant should be returned to work without restrictions. (Claimant's Ex. 9, p. 5033). Since the Claimant was not at maximum medical improvement according to Dr. Brinkman, he deferred an impairment rating. Dr. Brinkman also indicated that the scapholunate fracture fragment was not the result of the January 2007 injury but was more

probable than not, an exacerbation. (Claimant's Ex. 9, p. 5032). However, Dr. Brinkman noted that the Claimant appeared almost suicidal during the September 2007 exam.

The final independent medical evaluation in this case occurred in December 2007 by Dr. Joseph Welch. Dr. Welch provided the Claimant with a 9% impairment of the left upper extremity. Dr. Welch continued to have doubts as to whether or not the lunate fracture was caused by the industrial accident:

> I believe that the physical injury was one of a sprain to the left wrist and probably a pre-existing or, one could argue, aggravated lunate fracture. He is now status post surgery. I think that it would be reasonable to accept that as industrial related.

Claimant's Exhibit 9, p. 5041.

Dr. Welch indicated that the Claimant would not be able to return to work until his psychiatric issues were addressed. (ISIF Ex. 13, p. 155).

Nevertheless, after significant medical treatment and a total of four independent medical evaluations it is clear that the Claimant had a wrist strain and possibly, but only possibly, a lunate fracture fragment that was excised during surgery.

The Claimant received substantial mental health assistance, including referral to psychiatrist David B. Wait (Claimant's Ex. 13) ongoing treatment at Region 1 Mental Health, including working with Emily Hart, M.Ed and a licensed clinical social worker, Jill Megow, LCSW. (Claimant's Ex. 14 and 15).

A report from Region 1 Mental Health (Claimant's Ex. E) indicated in August 2008, a diagnosis of major depression but also noted cannabis abuse, personality disorder with compulsive, histrionic and anti-social features. The report also noted that Claimant refused medications and that the marijuana was of concern and exacerbating the Claimant's mood

difficulties. (Claimant's Ex. E, p. 68). Also noted in the report was concern that the ongoing litigation was complicating the Claimant's recovery. (Claimant's Ex. E, p. 68).

The Claimant continued to use the services of Region 1 Mental Health throughout 2008 and into 2009. The Claimant reported legal charges in Oregon also involving marijuana possession. (Claimant's Ex. E, p. 99).

The Claimant was referred to the Industrial Commission Rehabilitation Office in Coeur d'Alene and had his initial interview in October of 2007. (ISIF Ex. 1, p. 2). A job site evaluation was submitted to Dr. Joseph Welch in December of 2007, who did not approve the job site evaluation of service technician plumber because the psychiatric issues involving depression needed to be addressed. (ISIF Ex. 1, p. 13). Dr. Welch noted that the restrictions were not permanent and were largely psychiatric. (ISIF Ex. 1, p. 14). The records of the Industrial Commission Rehabilitation Department also demonstrate numerous attempts by consultant Reed to contact the Claimant, which were to no avail. February 4, 2008 the Claimant failed to show for his scheduled appointment. (ISIF Ex. 1, p. 15). In June of 2008, the Claimant again failed to show for his scheduled appointment. (ISIF Ex. 1, p. 16). The Claimant's case was closed by the ICRD office because the Claimant indicated he did not wish to pursue employment and that he was planning to enter inpatient mental health treatment. (ISIF Ex. 1, p. 16). The Claimant's case was reopened by the ICRD office in December of 2008 when the Claimant contacted consultant Reed and asked for assistance with vocational issues. An appointment was scheduled and again the Claimant failed to show for his scheduled appointment. (ISIF Ex. 1, p. 18).

The first hearing in this case occurred in October of 2008 and the Referee issued his decision in April of 2009 which was adopted by the Industrial Commisison. The Referee noted that the Claimant was dishonest with his medical providers on several occasions. The Referee

found that, while the Claimant's psychological condition was genuine, the Claimant did not prove by clear and convincing evidence that the wrist injury was the predominant cause of his psychological condition. (Claimant's Ex. K, pp. 374-375).

The Referee also noted that based upon testing by Dr. Rehnberg, the Claimant tested in the top 20% nationally for intelligence. (Claimant's Ex. K, p. 371). In Dr. Rehnberg's opinion, the Claimant is capable of college level training. The Referee also noted that Dr. Rehnberg administered SIMS testing to Claimant which revealed a score of 18, suggestive of malingering. (Claimant's Ex. K, p. 371).

The Claimant's wife testified that Claimant smoked marijuana almost daily while living in Reno and maybe almost daily while living in Lake Tahoe. (Claimant's Ex. K, p. 362).

On the issue of credibility, the Commission adopted the Referee's findings:

> Claimant has been dishonest with his medical providers on several occasions regarding several subjects. His lack of credibility restrains the weight given to his complaints and the weight which can be given to medical opinions rendered in reliance upon the credibility of his complaints.

Claimant's Ex. K, p. 373.

> Having observed Claimant at hearing, and carefully examined the record herein, the Referee finds that Claimant is not a credible witness. Claimant's two positive marijuana tests at MHS, his charge for possession of marijuana in Oregon, and finally his admission on August 4, 2008, that he was struggling with quitting marijuana indicate that Claimant has not been truthful about the extent of his marijuana abuse. Claimant has also been intentionally untruthful with several of his counselors on multiple occasions, including Emily Hart, Dr. Waite, Dr. Parkman, and also to a lesser extent Drs. Rehnberg and Klein, regarding his past residences, past and current drug abuse, and exposure to past physical abuse. Taken collectively, these instances of dishonesty indicate that Claimant fabricates, at least occasionally, when he perceives it is to his advantage to mislead.

Claimant's Ex. K, p. 366.

Beginning in the fall of 2009, with the assistance of the Idaho Department of Vocational Rehabilitation, the Claimant began attending North Idaho College. After two years, the Claimant had completed 47 credits of college level classes. (ISIF Ex. 8, p. 110). At hearing, the Claimant acknowledged that he was 13 credits short of an AA degree. (Tr. p. 71 (05/17/16)).

In February of 2011 he was treated in the emergency room at Kootenai Medical Center extremely stressed due to finding out his wife was cheating. (Claimant's Ex. J, p. 344).

The Claimant returned to California in 2012 (Tr. p. 721 (05/17/16)) after he separated from his wife. He was hospitalized for depression in San Bernardino, California in August of 2012. (Claimant's Ex. W). At that time, he was voluntarily admitted with a depressive disorder, the treatment involved was prompted by having problems with his spouse and the ongoing divorce. He was seen in California at Desert Behavioral Health. (Claimant's Ex. X). Most of the treatment in California seemed to be focused on his divorce and his feelings towards his former spouse, Julie. (Claimant's Ex. X).

Other post accident medical treatment include a sprained ankle playing baseball (Claimant's Ex. J, p. 373) a visit with an orthopedic surgeon in April of 2011 concerning a right shoulder injury that occurred while moving furniture. (Claimant's Ex. P, p. 419). Interestingly, in Dr. King's physical examination of the Claimant, he noted no major deformity and functional range of motion and strength of the left upper extremity, including the shoulder and elbow. (Claimant Ex. P, p. 420). The chart note also indicates that the Claimant continues to engage in throwing and overhead activities. (Claimant Ex. P, p. 419). Also in 2011, he reported upper back pain caused by lifting a tire and sleeping on a sofa. (Claimant's Ex. Q).

When the Claimant consulted Dr. Roger C. Ehlert in April of 2011 he was in shock and deeply grieving relationship issues with his wife. The diagnosis was shock, situational depression, major rage. Dr. Ehlert met with the Claimant for 20 one hour outpatient visits. (Claimant's Ex. R, p. 423). Dr. Ehlert noted in February 2012:

> Generally, his self-care improved over 20 one hour outpatient visits. He would be capable of managing his own funds, understanding written documents, and following treatment plans. His intelligence was a least average. He had many strengths and we focused upon these strengths and the development of emotional resiliency as part of the treatment plan.

Claimant's Exhibit R, p. 423

The Claimant also sought counseling through North Idaho College. This again was in 2011 and again the Claimant appeared to be upset, in tears, and was in a crisis situation related to marital issues. (Claimant Ex. T, p. 431).

Claimant's psychological care and mental health treatment after he returned to California in 2012 focused on situational depression and rage related to the divorce from his wife. (Claimant's Ex. R, p. 423).

Claimant was treated by Dr. Puri a psychiatrist in Victorville, California in 2012, complaining that his wife cheated on him and left him and that he has been depressed. (Claimant's Ex. V, p. 464). The Claimant also began counseling with Desert Behavioral Health. (Claimant's Ex. X). He presented as agitated, tearful and on edge. (Claimant's Ex. X, p. 584). The focus of the counseling involved family issues, including his children and former spouse. An annual exam done in March of 2014 in California indicated that the Claimant had decreased energy levels and stress brought on by an ongoing family situation involving his wife. (Claimant's Ex. Y, p. 610).

Psychiatrist Thaworn Rathana-Nakintara, MD noted in 2012 that the Claimant's prognosis was good and that he "would have no difficulties to be able to handle the usual stresses, changes and demands of gainful employment." R. p. 215

There are no records of any medical treatment concerning the Claimant's left wrist since he returned to California in 2012, nor his lower extremities.

The Claimant admitted that in the four years he had been in California, he made one trip to Victorville College. (Tr. p. 72 (2116)). He further admitted that he first contacted California Vocational Rehabilitation 6-8 weeks prior to the Idaho Industrial hearing in 2016. (Tr. p. 73 (05/17/16)). The Claimant further admitted that he had only been registered with the job service in California for two months prior to the hearing in 2016. (Tr. p. 74 (05/17/16)). The Claimant admitted at hearing that he had not applied for any jobs since he returned to California. (Tr. p. 92 (05/17/16)).

Basically in the four years the Claimant has been in California, he performed no job search, did not contact a college until shortly before the hearing in 2016 and had not registered for the job service. The Claimant disputed the results of the functional capacity evaluation at the time of the hearing, indicating that he wasn't present for 7 ½ hours and disputed the measurements of his standing, walking or sitting. (Tr. p. 79 (05/17/16)). He also denied lifting any weights. (Tr. pp. 80-81 (05/17/16)). He even suggested that the FCE results were for someone else.

The Claimant hired Dan Brownell as a vocational witness who provided a report and post hearing deposition which indicated that in his opinion, the Claimant was totally disabled as an Odd-Lot worker based on futility. (Brownell Dep. 35:16). Mr. Brownell admitted that he used the 2007 physical restrictions from Drs. Jones, Brinkman, and Welch. (Brownell Dep. 36:21).

Mr. Brownell went on to indicate that if the Claimant only had a wrist injury, he would still be employable. (Brownell Dep. 38:16). Mr. Brownell does not explain in his report or anywhere in his deposition how the bilateral heel injuries impact the Claimant or contribute to his disability. Moreover, there is no information in the record as to restrictions related to the Claimant's bilateral heel injuries. The Claimant admitted that he was successful as a plumber for 10 years. (Tr. p. 83 (05/17/16)). He admitted that he had no treatment for his heels since the late 1990s. (Tr. p. 84 (05/17/16)). He admitted to doing heavy work as a plumber, including installation of water heaters and removing sinks. (Tr. p. 83 (05/17/16)). The evidence is that for 10 years after his bilateral heel injuries he successfully performed work as a plumber.

On cross examination, Mr. Brownell admitted that the Claimant was only 13 credits shy of an AA degree. (Brownell Dep. 49:22-24). Mr. Brownell further admitted that the Claimant was intelligent and that completing an AA degree would make the Claimant more competitive. (Brownell Dep., p. 49:11-12). After a somewhat extended colloquy, Mr. Brownell admitted that the Claimant was able to obtain a skilled plumbing position with on the job training. (Brownell Dep. 52:7-13).

Mr. Brownell completely discounted the functional capacity evaluation done at the Claimant's attorney's request. He admitted that if the functional capacity evaluation was valid, that the Claimant could perform medium duty work. (Brownell Dep. 60:13-17). He further admitted that if the report were valid, it would not be futile for the Claimant to search for work. (Brownell Dep. 60:18-21). Mr. Brownell admitted that a second functional capacity evaluation would have been a good idea. He further admitted that the temporary medical restrictions he used from Drs. Brinkman, Welch and Jones were nine or ten years old. (Brownell Dep. 61:18-21). Mr. Brownell admitted that he recommended that the Claimant connect with Vocational

Rehabilitation in California. (Brownell Dep. 62:1-5). Mr. Brownell further admitted that as of 2016, Mr. Smith had not been formally accepted into California Vocational Rehabilitation. (Brownell Dep. 62:15-18).

Testifying on behalf of Defendant ISIF was William Jordan, vocational expert. Mr. Jordan, in his deposition testimony, and in his report (ISIF Ex. 16) indicated that most of the medical information concerning the Claimant's wrist injury, including information from Drs. Brinkman, Welch and Jones, came in 2007. (Jordan Dep. 20:14-17). Mr. Jordan indicated that the Claimant didn't have any permanent restrictions from a physician (Jordan Dep. 20:22-25). Mr. Jordan indicated that the functional capacity evaluation done in California in 2014 was the most up to date medical information available regarding the Claimant. (Jordan Dep. 21:5-7).

Interestingly, when the Claimant was interviewed by Mr. Jordan in 2016 for the purposes of this case, the Claimant continued to misrepresent his background in the United State Army. (Jordan Dep. 34:11-15). Mr. Jordan indicated that if the Claimant completed an AA degree that would assist him in finding employment because it demonstrates to an employer that they have a person they can work with and develop. (Jordan Dep. 35:5-13). The summary portion of Mr. Jordan's report concludes:

> Certainly, if one relies on the Evaluee's perception of his capacity and his psychological status, it is not likely he would be capable of any forms of employment, and a declaration of total and permanent disability could be considered by the Idaho Industrial Commission, however, the analysis of permanent disability is clouded by the fidelity issues the Evaluee has demonstrated throughout the course of the claim. As reflected in the records, his ongoing propensity to provide inconsistent reports to various providers and the frank dishonesty he has shown during the process makes it difficult to sort out the issues. [emphasis added]. That said, there are no medical opinions in the file information that reflects the Evaluee is incapable of working. While he had a manifest pre-existing impairment with respect to his bilateral ankles, and it was a hindrance to his employment, he was still able to engage in and maintain gainful employment after that injury. Likewise, while he may have had a pre-existing personality disorder, there is no evidence of any prior psychological issues that

were manifest/resulted in his inability to secure and maintain gainful employment. The most recent psychiatric evaluation outlines the Evaluee is capable of working with respect to his psychological condition. In fact, the counseling that he has received in both Idaho and California typically focused on pursuit of a vocational objective and/or employment as a means to assist him in becoming a functional member of the community. There is no documented permanent partial impairment concerning the psychological issues. Just as with the ankle injuries, there are no physician documented restrictions for the 2007 wrist injury. The Evaluee's FCE of 2014 reflects a worsening of his left wrist condition, but does not reflect limitations that would render him incapable of any and all work. He is not restricted in any way with regard to his right upper extremity, and he demonstrated a capacity to stand and walk for 6-8 hours out of an 8 hour day. In fact, the recommendations in that FCE report reflected that he would be capable of returning to work as a Plumbing Service Technician. The Evaluee himself has indicated that he felt he could do the Service Manager work (if he did not have to go out into the field.) Those types of opportunities exist, especially in the Evaluee's current California labor market. In addition, there are a number of other types of occupations for which he would be qualified to perform such as plumbing and construction material supply sales, customer service work, etc. (as outlined above in the labor market section of this report.)

As such there is no combination of pre-existing impairment with the subsequent injury to cause total disability.

ISIF Ex. 16, p. 224-225.

II. ARGUMENT

A. Standard of Review

"When reviewing a decision by the Industrial Commission, the Supreme Court exercises free review over the Commission's conclusions of law, but will not disturb the Commission's factual findings if they are supported by substantial and competent evidence." *Serrano v. Four Seasons Framing*, 157 Idaho 309, 314, 336 P.3d 242, 247 (2014) (quoting *Knowlton v. Wood River Med. Ctr.*, 151 Idaho 135, 140, 254 P.3d 36, 41 (2011)); *see* Idaho Code Section 72-732. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Page v. McCain Foods, Inc.*, 145 Idaho 302, 305, 179 P.3d 265, 268 (2008) (quoting *Ewins v. Allied Sec.*, 138 Idaho 343, 346, 63 P.3d 469, 472 (2003)). "This Court views all facts and inferences 'in the light most favorable to the party who prevailed before the

Commission.' " *Id.* (quoting *Taylor v. Soran Rest., Inc.*, 131 Idaho 525, 527, 960 P.2d 1254, 1256 (1998)). "This Court will not re-weigh the evidence and '[t]he Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless they are clearly erroneous.' " *Serrano*, 157 Idaho at 314, 336 P.3d at 247 (alteration in original) (quoting *Knowlton*, 151 Idaho at 140, 254 P.3d at 41).

B. Claimant Is Not 100% Disabled

The Claimant argues that he is disabled under both the Odd-Lot Doctrine and as a 100% disabled Claimant. "There are two ways in which a claimant can establish a total and permanent disability: (1) by proving that his or her medical impairment and non-medical factors caused him or her to become 100% disabled; or (2) by proving that he or she is an odd-lot employee." *Magee v. Thompson Creek Mining Co.*, 142 Idaho 761, 764–65, 133 P.3d 1226, 1229–30 (2006). Most of the argument in the Claimant's brief is addressed toward the Odd-Lot Doctrine but the Claimant does assert that he is 100% disabled due to his bilateral heel injuries and his left hand injury and psychological condition.

Claimant is clearly not 100% disabled since there is no medical information in the record where any medical provider has indicated that the Claimant cannot return to the work force. In fact, the medical information in the record contains only temporary restrictions from Drs. Brinkman and Welch, and the treating surgeon, Peter Jones who all indicate that the Claimant can return to employment, albeit with restrictions.

The last restriction from Dr. Jones is in November 2007 and indicates that the Claimant could work with minimal use of his left hand and wrist. (Claimant's Ex. 6, p. 2012). Dr. Brinkman indicated that the Claimant was not at maximum medical improvement in September of 2007 and could work with restrictions of 10-20 lbs. lifting and 10 lbs. on the left on an occasional basis.

(Claimant's Ex. 9, p. 5033). He anticipated no permanent restrictions, although he felt the Claimant needed additional time post surgery. (Claimant's Ex. 9, p. 5033). In December of 2007, Dr. Welch indicated that the Claimant needed to have his psychiatric issues addressed before he could return to employment. (Claimant's Ex. 9, p. 5042). There is no indication that Dr. Welch was giving permanent restrictions of any type as a result of the December 2007 exam he performed.

The most recent information on physical capability is a 2014 functional capacity evaluation which indicates that the Claimant can perform medium level work, could return to a position as a plumber and there are no restrictions concerning sit, stand, walk and keyboarding. The Referee and the Commission had questions concerning the 2014 FCE but discounted Claimant's testimony disputing the FCE. The Referee used the raw data from the FCE on grip strength, lifting ability, shoulder and back movement ranges and ankle range of movement. The raw data does not support a finding of an individual who lacks physical capabilities and directly contradicts Claimant's own subjective limitations . The FCE is wholly inconsistent with a finding of 100% disability. (ISIF Ex. 14). With the medical records available in this case, it is clear that the Claimant is not a 100% disabled individual as that concept is understood in Idaho law. In fact, the evidence is that the Claimant can and should return to full time work and that his mental health would improve with employment.

C. Claimant is Not an Odd Lot Worker

The Commission also concluded that Smith failed to meet his status as an odd-lot employee. The odd-lot doctrine expands disability by recognizing that total disability does not mean "the injured person must be absolutely helpless or entirely unable to do anything worthy of compensation" but "[a]n employee who 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 may well be classified as totally disabled." *Bybee v. State, Indus. Special Indem. Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996) (quoting *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965)). The claimant bears the burden of proving a prima facie case of odd-lot status, which requires: (1) that the claimant "attempted other types of employment without success;" or (2) that the claimant, "or vocational counselors or employment agencies on his or her behalf, have searched for other work and other work is not available; or (3) that any efforts to find suitable employment would be futile." *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 83, 29 P.3d 390, 394 (2001).

Under the first method, Claimant was required to show that he attempted other types of employment without success. The evidence shows that Claimant has never been employed since shortly after his industrial accident. Simply put, this method of establishing odd-lot disability is not available in this case since the Claimant has never re-entered the work force.

Under the second method, Claimant is required to show that he, or others on his behalf, searched for work and that none was available. Claimant testified that he has not looked for work since his accident and did nothing to look for work or improve his employability in the four years since he was in California between 2012 and the 2016 hearing. At hearing he admitted he submitted no job applications in California, had not signed up with the employment office, and had only recently contacted Vocational Rehabilitation. In the eleven (11) years since his industrial accident, the Claimant has not filled out a single job application. (ISIF Exhibit 16, p. 218).

The Claimant cites testimony of his wife from 2008 to support his position that he searched for work and could not find it. Yet, after two full hearings and eleven years there is no evidence of an identified place of employment that Claimant has made application for.

The Claimant also refers to Idaho Vocational records from 2008 when he applied for their services. The restrictions used by Vocational Rehabilitation are based on the Claimant's own subjective complaints which lack credibility. The Idaho Department of Vocational Rehab records indicate no prolonged walking or standing, limited bend/kneel/sit/stand/stoop or twist; again all subjective and without any medical documentation.

The question in this case comes down to whether or not it is futile for the Claimant to attempt to find suitable employment in the Apple Valley, California area. The Claimant is a young man, 44 years of age, with a high school education and 47 credits of community college. He tests in the upper 20% of the national population on an intellectual basis. He has demonstrated that he can obtain a skilled position with on the job training as a plumber. He is in a good labor market with numerous job opportunities in southern California. If anything, Claimant is the epitome of someone who is not an Odd-Lot worker. Moreover, the evidence in this case from the 2014 functional capacity evaluation is that the Claimant can in fact perform most physical activities. His only significant restriction being left hand grasping.

The Industrial Commission found that the Claimant did not meet the burden of proof to establish either odd-lot or 100% disability:

> 44. No physician has opined Claimant is permanently incapable of employment. Claimant has been given various restrictions for his physical injuries. While 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, no expert has opined that Claimant's psychological condition is not treatable, and therefore a stable, permanent barrier to employment.
>
> 45. Claimant testified that with professional job-seeking assistance he is "very hopeful" he can return to employment. Alternatively, he feels he may be able to finish his college education, which in turn would assist him in finding work. Lack of funds held Claimant back from seeking to finish his education started at North Idaho College. Settlement with the surety in this matter has provided Claimant funds, and he is open to the idea of continuing his education if so advised by his counselor.

> 46. Claimant's heels have not stopped him from obtaining employment. While he subjectively claims his left wrist injury makes it impossible for him to continue as a plumber, he has transferable skills. Also, the true extent of Claimant's current left wrist impairment is not clear from the medical record. At this time, Claimant's greatest impediment to employment is not physical, but psychological. With proper psychological treatment, it is more likely than not that Claimant would or should be able to find employment in the Apple Valley, California labor market, as discussed in greater detail below.

Findings of Fact, Conclusions of Law and Recommendation, R. pp. 157-158.

D. Claimant's Psychological Makeup Was Properly Considered.

The Claimant's contention is that, based on *Ford v. Concrete Placing Company, Inc.*, IC 2005-518336 (November 6, 2014), the Commission is required to consider the psychological status of the Claimant when making a determination of disability. In *Ford* the Commission found that the psychological makeup of a Claimant, who could not interact positively with members of the public, was a factor to consider in determining overall disability. In *Ford* this was more a personality style as opposed to a treatable mental condition. The commission noted that in *Ford* there was no discussion of whether or not the psychological condition was permanent. The Commission stated that it did not consider a temporary psychological condition capable of treatment a factor to be considered in determining permanent and total disability. R. p. 172. The Commission noted as follows:

> By all accounts, the significant psychological problems worsened after his industrial accident, were aggravated by marital issues, and have remained until now inadequately treated.

R. p. 172.

The Commission found that the Claimant's current psychological condition and depression were not a permanent factor to consider, but rather a treatable condition. The Claimant himself testified at hearing that he was open to returning to school with the settlement

money received from the Surety and that he was "very hopeful" he could return to work with help. (Tr. p. 86). Apparently even the Claimant agreed that his return to work attempt would not be futile. The Commission found that the Claimant did not meet his burden of establishing that it would be futile for him to seek employment and therefore he could not be considered totally and permanently disabled pursuant to the odd-lot doctrine. R. p. 173.

Part and parcel of the Commission's decision however is Claimant's lack of credibility. The Commission was not willing to adopt the Claimant's subjective complaints of left wrist pain and immobility causing total disability.

E. ISIF's Proposed Exhibit 17

At hearing the Referee sustained an objection to the admissibility of ISIF proposed Exhibit 17. The Exhibit was never admitted into evidence, but it was used by vocational expert, William Jordan in his report and was directly referenced in his report which was admitted in its entirety as ISIF Exhibit 16. Exhibit 17 actually was furnished to the ISIF in discovery by the Claimant. As such, Claimant cannot complain as to the use of the psychological reports by Mr. Jordan; both on the basis of Idaho Rule of Evidence 703 and on the fact that Mr. Jordan's report in its entirety was admitted as an exhibit.

Idaho Rule of Evidence 703 provides that an expert opinion (such as that of William Jordan) can be based upon facts or data that need not be admissible in evidence in order to admit the opinion of the expert. The only qualification is that the facts or data must be of a type reasonable relied upon by experts in a particular field. This case is replete with psychological and mental health counseling records used by both vocational experts. Both vocational experts referred to the medical and mental health records in their deposition testimony. ISIF Exhibit 17 should have been admitted as evidence since its probative value is helpful to decide the case and

the Claimant is not prejudiced. It was the Claimant who initially located and produced the exhibit and obviously knew about it but chose not to include the exhibit as part of its set of exhibits.

The Referee specifically noted that he did not consider or rely upon the report independently of Mr. Jordan's analysis, but considered Mr. Jordan's analysis in its entirety. Findings of Fact, R. p. 166.

The case law is clear that a trier of fact may, in its discretion, allow an expert to render opinion based in part upon hearsay or other inadmissible evidence. This is allowed as long as the expert testifies as to the specific basis of his opinion and reaches an opinion based upon his own independent judgment. *Doty v. Bishara,* 123 Idaho 329 (1992). Mr. Jordan properly reviewed this report and a large amount of other materials to render an opinion that the Claimant was capable of returning to work and was not totally and permanently disabled.

The report of Dr. Nakintara is only one of numerous psychological evaluations contained in the record. Her report noting that the Claimant would have no difficulty performing work activities is consistent with other psychological reports, all of which indicate that a return to work by the Claimant would actually be helpful.

Even if the Commission and Mr. Jordan were to completely ignore this psychological report there is substantial evidence to support Mr. Jordan's opinion that the Claimant can return to the workforce despite his psychological issues. Each of the psychologists involved say Claimant's psychological condition would improve if he rejoined the workforce. Ronald Klein, Ph.D., a Spokane, Washington, psychologist hired by the Surety, stated in 2008:

> The panic attacks diagnosed by some are actually periodic anxiety symptoms consistent with his longstanding adjustment disorder. He predictably functions more poorly when out of work because he does not have something outside of

> him to focus on ... the more time he spends out of work the more time he will feel sorry for himself, obsessed about pain, and engage in more child like behaviors.

ISIF Ex. 4, p. 67.

Drs. Marie Parkman and Jennifer Rhodes also indicate Claimant had a personality disorder not otherwise specified with histrionic and antisocial features. ISIF Ex. 15, p. 195. Their report states as follows:

> I have some concerns that what may be complicating this man's recovery is his involvement in current ongoing litigation. It is unclear what the aim of the litigation is and what Kevin hopes to accomplish with it. As is the case with many people who become involved in this type of litigation, their lives do become dysfunctional and paralyzed until the litigation is settled.

ISIF Ex. 15, p. 196.

Tim Rehnberg, Ph.D, a Moscow, Idaho, psychologist who was hired by the Claimant to testify at the first hearing, indicated that the Claimant's prognosis was good if he would reenter employment. Specifically, Dr. Rehnberg stated:

> Mr. Smith's prognosis is good if he can reenter employment and regain some financial stability as long as he is unemployed and struggling financially, he is likely to have ongoing mood difficulties and somatic complaints.

Claimant's prior Ex. A-1.

Roger H. Ehlert, Ph.D. indicated that the Claimant was capable of managing his own funds, understood written documents, and could follow treatment plans. He noted that he was of at least average intelligence and had many strengths. Dr. Ehlert noted that he first came to see the Claimant when he was in shock and deeply grieving relationship issues with his wife. Claimant's Ex. R, p. 423.

F. Functional Capacity Evaluation (FCE) Was Properly Considered

The Claimant argues that the Industrial Commission exceeded their authority in making findings with respect to a functional capacity evaluation performed in March of 2014 at the

request of Mr. Kelso himself. ISIF Ex. 14. The Claimant attacks the results of his own experts FCE and even argued at one point that perhaps the FCE was done for a different person. The FCE in this case is the only information available to the Commission related to the Claimant's physical capacities that was even remotely close in time to the hearing date in 2016. The Commission disregarded the unsigned return to work voucher, but considered the raw data recorded as part of the functional capacity evaluation, including grip strength, shoulder and back movement and ankle range of motion. Since the Claimant returned to California in 2012, there was no updated medical information, other than the functional capacity evaluation.

The Referee and the Industrial Commission did not overstep its bounds in reviewing the actual physical measurements recorded as part of the FCE. In *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750 (2013) the Court held a referee could not form her own unqualified medical opinion relying on evidence outside the record, including the DSM-IV-TR manual. The holding in *Mazzone* is not applicable to the present case where the referee reviewed the results of the Functional Capacity Evaluation that was admitted as an Exhibit at hearing. In *Mazzone* the Court went on to hold that the error was harmless and noted that the Supreme Court will not reverse the Industrial Commission when evidentiary errors are harmless. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596 (1990).

The raw scores considered by the Commission (including upper extremity range of motion, spine range of motion, lumbar spine range of motion, lower extremity range of motion, right and left grip strength) all indicate an individual capable of performing the tested physical activities. The Referee had every right to review the FCE results which were admitted as ISIF Exhibit 14.

III. CONCLUSION

To recover benefits from ISIF, the claimant must satisfy the requirements of Idaho Code Section 72-332(1). This Court has held that this requires the claimant to show: "(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." *Hope v. Indus. Special Indemn. Fund*, 157 Idaho 567, 571, 338 P.3d 546, 550 (2014); *see Bybee*, 129 Idaho at 80, 921 P.2d at 1204. Before apportioning liability to ISIF under Idaho Code Section 72-332, there must be a finding that the claimant is totally and permanently disabled. *Hope*, 157 Idaho at 571, 338 P.3d at 550.

In this case there is substantial and competent evidence to support the Commission's conclusion that Smith is not totally and permanently disabled. In fact, the only evidence of the Claimant's disability is his own self-serving subjective complaints that he is unable to work.

There is substantial and competent evidence in this case to affirm the Industrial Commission's decision that the Claimant did not meet his burden of proof on this issue of total and permanent disability.

DATED this 19 day of June, 2018.

JONES, BROWER & CALLERY, P.L.L.C.

THOMAS W. CALLERY
Attorney for Defendant ISIF

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of June, 2018, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Starr Kelso
PO Box 1312
Coeur d'Alene, ID 83816

- [x] U.S. Mail, Postage Prepaid
- [ ] Hand Delivered
- [ ] Overnight Mail
- [ ] Facsimile transmission to:
- [x] E-mail to:

THOMAS W. CALLERY