6-5-2018

McGivney v. Aerocet, Inc. Appellant's Brief Dckt. 45700

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE McGIVNEY, Claimant/Respondent, vs. AEROCET, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants/Appellants, and QUEST AIRCRAFT, Employer, and FEDERAL INSURANCE COMPANY, Surety, Defendants/Respondents.	SUPREME COURT NO. 45700 I. C. 2011-011043 2014-019179

APPELLANTS' BRIEF

****

APPEAL FROM
THE IDAHO INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS E. LIMBAUGH, CHAIRMAN, PRESIDING

****

Attorney for Appellants
Aerocet, Inc., and State Insurance Fund

H. James Magnuson, ISB No. 2480
1250 Northwood Center Court, Suite A
P.O. Box 2288
Coeur d'Alene, ID 83816-2288

Attorney for Respondents Quest Aircraft and Federal Insurance Company	Eric S. Bailey 1311 West Jefferson P.O. Box 1007 Boise, ID 83701-1007
Attorney for Respondent George McGivney	Starr Kelso 1621 North 3rd Street, Suite 600 P.O. Box 1312 Coeur d'Alene, ID 83816-1312

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes, Rules, Treatises

I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This is two worker's compensation cases consolidated into one proceeding. The 2011 case relates to an accident of May 6, 2011, with employer Aerocet, Inc. ("Aerocet"), and the surety State Insurance Fund ("SIF"). The second case involves an accident of March 5, 2014, relating to employer Quest Aircraft ("Quest") and the surety Federal Insurance Company ("Federal") both filed by George McGivney.

B. COURSE OF PROCEEDINGS:

McGivney filed his Worker's Compensation Complaint against Aerocet and SIF on November 24, 2014. AR 1. Claimant filed his *pro se* complaint against Quest and Federal on July 28, 2014. AR 133.

The Industrial Commission assigned both proceedings to Referee Michael E. Powers. Claimant filed a motion to consolidate both proceedings. Aerocet/SIF objected to consolidation on grounds that the 2011 claim is straightforward and it would be unnecessary to complicate it with a subsequent claim with a different employer. AR 21-22. Noting the objection, Referee Powers entered an Order of May 19, 2015, consolidating the two separate proceedings. Claimant filed a Request for Calendaring. AR 28. Aerocet responded requesting various issues be heard specifying, "The above issues all relate to I.C. 2011-011042." AR 33.

On November 8, 2016, Referee Powers conducted a hearing in Coeur d'Alene on the issues of:

On November 8, 2016, Referee Powers conducted a hearing in Coeur d'Alene on the issues of:

1. Whether Claimant's condition is due in whole or in part to a preexisting condition not work related;

2. Whether Claimant is entitled to reasonable and necessary medical care, and the extent thereof;

3. Whether Claimant is entitled to total temporary disability (TTD) benefits, and the extent thereof;

4. Whether Claimant is entitled to permanent partial disability based on medical factors;

5. Whether Claimant is entitled to permanent partial disability benefits (PPD) and the extent thereof;

6. Whether apportionment for a preexisting condition pursuant to Idaho Code §72-406 is appropriate; and

7. Whether Claimant is entitled to an award of attorney fees from Quest.

In addition, the Commission addressed the issue between Aerocet and Quest as to Quest's entitlement to reimbursement from Aerocet for any benefits paid by Quest.

Referee Powers prepared and signed Findings of Fact, Conclusions of Law and Recommendation on October 12, 2017. The Referee's finding 58 states:

> Claimant's pre-existing "mild" osteoarthritis did not even warrant an impairment rating in 2011. This Referee does not find it reasonable to, at this late date, attribute 50% (or 90% per Dr. Fuller) of Claimant's current situation to that condition. While the Referee appreciates that there are no medical opinions to the contrary, there is nonetheless no legal basis upon which to base such an apportionment under the facts of this case. (Footnote deleted.)

FFCLR at 18. The Referee's conclusion of Law 4 states: "4. Apportionment of any benefits paid or payable by Quest between Quest and Aerocet is not appropriate." *Id.* at 19.

The Commission entered its own Findings of Facts, Conclusions of Law and Order on December 22, 2017, not adopting the Referee's recommendations. The Commission concluded that Claimant is entitled to permanent partial impairment of 21% lower extremity, disability of 50% whole person inclusive of impairment, medical expenses incurred for Claimant's left knee arthroplasty and treatment subsequent thereof, and time loss benefits following Claimant's June 25, 2014, left knee arthroplasty surgery. The Commission further concluded that such benefits should be apportioned equally between Quest and Aerocet. The Commission made no separate finding of Claimant's disability from the Aerocet injury.

C. STATEMENT OF FACTS:

The Commission made the following factual findings.

1. Claimant was 55 years of age and residing in Priest River at the time of the hearing.

2. Claimant has a GED, which he earned in 1990. Claimant also took approximately one year of general education courses at Southwest Oklahoma State University in 1994. Claimant worked as a certified nursing aid (CNA) in Kansas, Oklahoma, and Arizona, but is not currently certified and has not been for at least 15 years. Claimant struggled with alcoholism and "bounc[ed] around working under the table, doing odd jobs," such as security, roofing, and fast food. Claimant got sober in 2003 and moved to Idaho at around the same time.

3. Claimant began working for Aerocet in Priest River on April 12, 2004. "Aerocet is the world's leader in manufacturing composite airline floats, certified aircraft floats." HT, p. 24.

4. Claimant was originally hired to fabricate cargo pods for Cessna aircraft. Shortly thereafter, Aerocet's mechanic quit so Claimant, who had experience in assemblies, assumed the role of mechanic assembling and installing all of Aerocet's hydraulics in the landing gear of their amphibious floats. Claimant was also charged with being the quality inspector for the machine shop where he would inspect in-house fabricated parts. Claimant's wage was $16 per hour when he was injured.

5. As part of his job, Claimant was required to ascend and descend 15 or 16 fairly steep wooden stairs 30 to 40 times a day. On May 6, 2011:

> I was going down the stairs, and I was just a few steps from the bottom, and I just - - I felt something in my knee go. I didn't fall. I was carrying something, and I don't recall what it was. It wasn't very heavy. And I was able to kind of walk it off, but it just kept catching and locking, and, I mean, it was - - it was really painful. Everyone was gone, so I didn't - - I didn't even get to report it until the next day.

HT. p. 39.

6. While Claimant acknowledged that he had previous left knee problems, "discomfort and aggravation," he never sought medical care and attributed the condition to "old age." *Id.*, p. 40.

7. Claimant came under the care of Douglas P. McInnis, M.D., a board certified orthopedic surgeon, who he first saw on July 13, 2011. Dr. McInnis gave Claimant a choice between arthroscopic meniscus surgery, which could alleviate Claimant's mechanical symptoms, and a partial arthroplasty, which would address Claimant's progressive arthritis; Claimant chose

to proceed with the former.[1] Dr. McInnis performed a left knee arthroscopic medial meniscus repair and debridement on September 12, 2011. Claimant understood that he would still have problems with his left knee in the future due to the progressive degeneration of his arthritis, which was described as "fairly mild" at that time.

8. Post-surgery, Claimant returned to work under restrictions generally assigned for an arthroscopic surgery; that is, no stairs and if it hurts, do not do it.

9. After about two weeks back to work at Aerocet, Claimant accepted a job with Quest, a "sister company," as the receiving inspector lead in the quality department. Claimant had considered leaving Aerocet for some time as he was having problems with the fumes and resins in his work area. Claimant made approximately $16.50 per hour at Quest with occasional overtime, and he received a medical and dental plan as part of his benefits.

10. For about his first year at Quest, Claimant's left knee felt like a "toothache" that would only resolve with rest. His knee would become sore whether he was walking or sitting.

11. On March 5, 2014:

> I was upstairs. I was having a meeting with my quality manager, John Jacobson at that time, and I had had - - in my hand I had some paperwork, drawings and

---

1 Dr. McInnis' testimony does not support the Referee's statement that Dr. McInnis gave Claimant a choice between arthroscopy and arthroplasty. Dr. McInnis unequivocally recommended that Claimant undergo arthroscopy. Depo. of Douglas McInnis, M.D., p. 9, ll. 2-6. On the issue of a knee replacement, Dr. McInnis testified:

> Q. Did you ever recommend a total knee replacement during the course of your treatment for Mr. McGivney?
> A. I do not believe that I did.
> Q. Pardon?
> A. I do not believe that I did.
> Q. Okay. And did he have an existing arthritic condition at that time?
> A. It was fairly mild, but yes.
> Q. Okay. Do you recall ever discussing a knee replacement with him?
> A. No. I mean, other than perhaps very much in passing.

Id. at p. 9, l. 18 – p. 10, l. 10.

> certifications if I recall. And as I was going down the stairs I was looking at one, and I kind of overstepped a step. My heel hit the next step, and I came down hard on the next step, and that's when I jarred everything.
>
> * * *
>
> So I felt it, but I really didn't give it much thought. I thought, you know, I got to be more careful. Watch - - you know, watch what you're doing. And on the way home, it really started hurting. And by the time I got home, it had swollen up to a pretty good size.

HT., p. 49.

12. Claimant self-referred to Jeffrey Lyman, M.D., an orthopedic surgeon practicing in Coeur d'Alene. On June 25, 2014, Dr. Lyman performed a left knee medial unicompartmental arthroplasty. Claimant's private health insurer paid for the procedure but was eventually reimbursed by Quest. The denial of Claimant's claim created some animosity between Claimant and Quest; nonetheless, Claimant continued his employment until his surgery. Post-surgery, Claimant attempted to return to work with restrictions; however, due to a combination of an adverse reaction to gabapentin and a stressful work environment, after a couple of days he opted to use some more family medical leave and eventually resigned.

13. Claimant is currently employed by his wife through the United States Postal Service pursuant to a rural mail delivery contract worth about $51,000 a year gross and $21,000 to $27,000 net. Claimant drives his own 1997 Ford Explorer that he converted into a right-hand drive and to which he made many alterations and modifications to fit his needs. At six feet, three inches tall, Claimant's work space is cramped. His left knee swells and aches when sitting in one place too long while delivering mail and when he is required to get in and out of his vehicle to deliver packages, etc. Claimant's route is 104 miles long and takes between four and five hours, depending on the weather and time of year (more deliveries in the summer) to complete.

Claimant's wife also has a mail delivery contract and Claimant does most of the maintenance on their two mail delivery vehicles.

14. Claimant described his physical limitations regarding his left knee as of the time of the hearing as follows:

> Yeah. There's a lot of things that I can't do that I used to do. You know, there's - - I have to - - I do a lot of our own maintenance on our - - rigs to save us money, and there's a lot of times I have to get on my hands and knees. Getting down there are [sic] hard. Getting back up is even harder. Once I'm down there, I pretty much have to roll onto one side to push myself up. I don't have the range of motion or - - actually, or the strength in it [left knee] like I used to have.
>
> I can't - - I can't hike as much as I would like to. Can't walk. After a certain distance, we have to turn around and go to the house.
>
> If we - - if we ride four wheelers up on the trails, I can't - - I can't be on a bike very long. My leg can't stay in that position.
>
> But getting on my hands and knees is the hardest. Trying to work off a ladder, like if I'm painting something on my house, it's difficult.

HT., pp. 70-71.

15. Claimant does not believe he can continue with his mail route due to his left knee and leg pain. He applied for a job as quality inspector at a business in Spokane, but was turned down. He has not applied for any other jobs.

MEDICAL TESTIMONY

Douglas P. McInnis, M.D.

16. Dr. McInnis is a board certified orthopedic surgeon who has practiced in Coeur d'Alene for the past 14 years. His practice of late has focused on adult reconstruction of the hip and knee.

17. Dr. McInnis had not seen Claimant for several years prior to the taking of his deposition, but had reviewed his medical records to refresh his memory. Dr. McInnis first saw Claimant on July 13, 2011, for a torn medial meniscus in his left knee. See, Aerocet Ex. 1, p. 1. Dr. McInnis, upon examination and review of diagnostic studies, recommended arthroscopic surgery to address Claimant's torn meniscus:

> I would not use the word "cure," but the recommendation for arthroscopy would be purely recommended on the belief and assumption that the arthroscopy could improve, if not resolve, the mechanical symptoms in their entirety. And frequently no other means of treatment will resolve those mechanical symptoms. As opposed to the aching and swelling that a lot of 50-year-old people have in their knee just from the fact that they're 50.

Dr. McInnis Depo., p. 9. (Footnote deleted.)

18. Dr. McInnis noted that Claimant had "very mild" arthritis in his left knee.

19. Dr. McInnis briefly discussed with Claimant a knee replacement:

> No. I mean, other than perhaps very much in passing. The nature of my discussion with such a patient would be that, in truth, arthritis is not simply wear and tear. There's genetics. There's occupational history. There's recreational history. Lots, if not most, 50-year-old people do not have the same pristine knee they had when they were born, and many of those degenerative changes are present, and it's logical to assume that these degenerative changes would continue to progress throughout the patient's lifetime.
>
> When injury is added to that more or less natural deterioration, that injury may be addressed arthroscopically, as this one was. The arthroscopy is intended to address the effects of that injury while remaining cognizant of the fact that there were degenerative changes present before.
>
> <u>And it's quite possible that I might have mentioned, logically, if your knee continues to deteriorate, presumably at some point, rather far down the line, this may result eventually in a knee replacement. I may have mentioned such a thing. I certainly didn't focus on it</u>.

Dr. McInnis Depo., pp. 10-11. (Emphasis supplied.)

20. Dr. McInnis testified that Claimant reached MMI as a result of his meniscus tear on November 17, 2011. Dr. McInnis rated Claimant's left knee at 2% of the left lower extremity without apportionment for any preexisting arthritic condition. He assigned no permanent physical restrictions. Dr. McInnis could not say whether Claimant's pre-existing arthritis was ratable at that time.

21. Dr. McInnis was unaware at the time of his deposition that Claimant sustained another left knee injury in 2014. Dr. McInnis could not say to a reasonable degree of medical probability that a meniscal repair will lead to a total knee replacement in time. He did discuss with Claimant the option of a total knee replacement:

> So the talk about arthroplasty is that, listen. You're a 50-year-old man. Your knee is deteriorating. You've got this injury on top of a preexisting condition, and the injury's certainly not going to help the preexisting condition. If the preexisting condition continues to deteriorate, the knee replacement will eventually be the, quote/unquote, definitive treatment for arthritis, the timing of which is dependent on a host of factors unique to each individual patient.

Id., p. 20-21. (Emphasis supplied.)

22. When asked if he thought the meniscal surgery he performed hastened the need for a unicompartmental surgery or total knee replacement in the future, Dr. McInnis responded:

> I wouldn't say hastened the need for. Certainly the medial meniscectomy is one of a thousand contributing factors that could result in that outcome. Based on the information I have in front of me, to be perfectly truthful, I'm surprised to hear that he's had a unicompartment arthroplasty. I had no knowledge of it till you mentioned it, and based on what I've got, I'm surprised to hear that.

Id., p. 26.

Stephen Fuller, M.D.

23. Dr. Fuller is a board certified orthopedic surgeon living in Lake Oswego, Oregon. He is also a member of the American College of Forensic Medicine, which is a group that specializes in the forensic analyses of medical files, etc. He has performed meniscectomies and TKRs, "too numerous to count," however, he has not performed any surgeries since 1988. He has performed IMEs since 1988, mostly for insurance companies. Dr. Fuller Depo., pp. 6 and 37. His IME report may be found at Quest Ex. 12.

24. Dr. Fuller conducted an IME at Quest's request on May 28, 2014. He talked with Claimant at the same time that he reviewed various medical records. *See*, pp. 4-7 of his May 28, 2014, report at Quest Ex. 12. Dr. Fuller also reviewed standing x-rays of Claimant's knees as discussed in a June 25, 2014, addendum to his earlier report.

25. Claimant informed Dr. Fuller that he had a good, but not complete, recovery from Dr. McInnis's meniscectomy. He has waxing and waning of pain in his left knee. Claimant estimated his recovery at between 80 and 90 percent and believed his less than full recovery was due to the arthritis discovered in 2011. Dr. Fuller testified that a partial meniscectomy would not save a knee from the further progression of Claimant's underlying arthritis. Claimant is also bow-legged which creates additional forces in the medial compartment that can cause progressive wear and persistent aching. Dr. Fuller agrees with Dr. McInnis that taking out the meniscus would not necessarily relieve Claimant's left knee pain, but would improve his mechanical symptoms.

26. Dr. Fuller agrees with Dr. McInnis's 2% left lower extremity PPI rating which he states is standard for a partial meniscectomy.

27. Dr. Fuller believes that the failure to address Claimant's bow-leg on the left in 2011 is responsible for the eventual "surrender" of his medial compartment. Dr. Fuller would have performed the same surgery as did Dr. McInnis, but would have also addressed Claimant's knee mal-alignment from his bow-legs. He compared not addressing Claimant's mal-alignment to putting more air in a tire that is not properly aligned and expecting the addition of air to cure the problem.

28. Dr. Fuller has doubts regarding whether Claimant's 2011 industrial accident caused, by itself, the need for surgery: Probably not. If you look at the history, he was simply coming downstairs, which is a normal physiological mechanism, and he didn't report any history of a misstep or a twist. The casting mechanism to tear a meniscus is a running back going through the line and he loads and twists his knee and he tears the meniscus. And so extrapolating that into the industrial arena, loading and twisting will tear a meniscus, but it won't cause arthritis. Dr. Fuller Depo., pp. 20-21.

29. Dr. Fuller opined that Claimant's 2014 accident was but a "...temporary flare of the preexisting condition, meaning, that there was preexisting arthritis, preexisting bowleg and preexisting anticipated chewed-up meniscus." *Id.*, p. 22. However, Dr. Fuller explained that Claimant's 2014 accident could have caused the meniscal tear repaired at surgery - - it could go either way and it was "certainly a possibility" that the accident caused the meniscal tear.

30. Dr. Fuller does not believe that Claimant's 2014 accident accelerated or objectively worsened his pre-existing arthritis, although his 2011 accident may well have.

31. Dr. Fuller disagrees with Dr. McNulty's 50-50 apportionment between Claimant's two accidents, "Well, I'd probably apportion 90 percent to preexisting arthritis, because all of the

surgical indications existed prior to the work injury. I would probably apportion 10 percent to the work event as a precipitating cause." *Id.*, p. 26.

32. Dr. Fuller agrees with Dr. McNulty's 21% lower extremity PPI which he deems to be the standard for total knee replacements because the *Guides* do not provide a PPI rating for partial knee replacements. Because the criteria for establishing a PPI for a total knee replacement based on ADLs and function, it does not really matter whether a knee is totally versus partially replaced. Dr. Fuller would also apportion this PPI rating on a 90% preexisting, 10% accident basis. Dr. Fuller would apply the same apportionment to medical benefits.

33. Dr. Fuller also agrees with Dr. McInnis that physical restrictions are generally not appropriate for a partial medial meniscectomy, which in and of itself is a relatively minor procedure. Post-unicompartmental surgery, Dr. Fuller opined that the only restriction, as such, that he would impose would be to avoid using ladders.

34. Dr. Fuller does not know why Claimant is continuing to complain of left knee pain and sees no reason why he cannot continue his employment as a mail carrier. He disagrees with Dr. McNulty's 2-hour walking restriction as well as kneeling and repetitive squatting. Dr. Fuller did not examine Claimant post-unicompartmental knee surgery.

John McNulty, M.D.

35. Dr. McNulty is a board certified orthopedic surgeon who has practiced in St. Maries since 1998. Quest asked Dr. McNulty to examine Claimant and review pertinent medical records. He authored an IME report dated February 26, 2016. See, Quest Exhibit 17.

36. Dr. McNulty recorded Claimant's complaints on the date of his examination:

> And that is in my Current Complaint section at the bottom of page 1. He mentioned he is improved from his knee arthroplasty surgery. He's still having some discomfort in the back of his knee. He's having trouble with squatting and kneeling. He has some soreness in his knee with standing and walking for - - after an hour. And those were the main problems. He still has some aching at night.

Dr. McNulty Depo., p. 6.

37. Dr. McNulty testified that Claimant's unicompartmental left knee surgery had gone well:

> Yes, even though - - and I didn't get to see the postoperative radiograph after the unicompartmental. His knee was well aligned. He had good movements but he was still having some pain. And even though a doctor does a good surgery, a technically good surgery, not everyone gets 100 percent outcome, and I think that's what happened with Mr. McGivney.

Id., p. 7-8.

38. Dr. McNulty was aware that Dr. Fuller posited that Claimant's current symptoms may be the result of a mal-alignment due to Claimant's bowlegs. While Dr. McNulty did not review any post-surgery diagnostic studies such as x-rays, he did not detect any mal-alignment on his physical examination.

39. Dr. McNulty believed Claimant's mail delivery job to be appropriate for him given his understanding of that job.

40. Based on Claimant's subjective complaints and the results of his physical examination, Dr. McNulty restricted Claimant from walking/standing for more than two hours continuously, limited squatting, but approved the occasional use of ladders. Dr. McNulty did not see anything abnormal regarding Claimant's pre-existing arthritis on his 2011 left knee x-ray (there was no contemporaneous right knee x-ray for comparison) and agreed with Dr. McInnis that Claimant could be released to activities as tolerated following his meniscectomy in 2011.

41. Dr. McNulty would expect that the Grade 2 arthritis found in Claimant's left knee in 2011 would continue to progress at a rate greater than what may have been present in Claimant's right knee due to his left knee injury. Dr. McNulty's expectation proved to be true by the 2014 weight bearing x-rays that demonstrated a decreased joint space of the left knee as compared to the right and was considered to be a Grade 4 at that time. Dr. McNulty also opined that Claimant's 2014 accident caused some additional tearing of Claimant's left knee medial meniscus according to the left knee MRI and Dr. Lyman's operative report.

42. Given that Dr. McInnis removed 50% of Claimant's medial meniscus in 2011 and that he had another accident in 2014 resulting in an additional meniscus tear, Dr. McNulty would not have proceeded with a unicompartmental surgery:

> Looking at his x-rays and reviewing his MRI, he does have a meniscal tear, and I think this was fairly evident before the surgery. As noted in the conclusion of my records, it is a worker's compensation case and trying to make a determination of permanent aggravation of preexisting left knee condition - - I think that's important in this scenario - - and I would have treated him initially with a knee arthroscopy, and removed the meniscal tear that was as a result of the most recent injury. Sent him to physical therapy. Maybe treated him with injections for a while and then see how he does.
>
> So even though he's got Grade 4 changes, there are a lot of patients who have Grade 4 changes and don't need a unicompartmental arthroplasty. So the - - not that Mr. McGivney would have been as good as new after the surgery I propose, but I think he would have gotten by for a while, I should say, had a chance to get by for a while without doing the arthroplasty right away.
>
> He's only 53 when he gets his arthroplasty and those don't last forever. He's going to need another arthroplasty.[2] I would have tried to push him out longer before doing that type of surgery. That's my opinion.

Dr. McNulty Depo., pp. 14-15.

---

2 Dr. McNulty declined to "guess" how long it would be before Claimant would need another arthroplasty.

43. Dr. McNulty testified that Claimant's 2014 accident was "probably" a permanent aggravation of his pre-existing medial compartment arthritis; however, he would most likely have needed a compartmental arthroplasty at some point anyway, but probably not just three months post-2014 accident. Dr. McNulty also testified that Claimant's 2011 accident hastened the need for his unicompartmental arthroplasty, but could not say by how much.

44. Dr. McNulty testified that he would apportion Claimant's impairment at 50% to the 2011 accident/injury, and 50% to the 2014 accident and injury:

> There is no road map or algorithm how to figure that out. There's a book from the AMA. The author is Mel - - Melhorn, and I think it's - - I get the title wrong - - the Evaluation - - Guides to the Evaluation of Disease and Injury Causation.[3]
>
> So it gives you just an idea that there's no set way doing it, and I think - - you know, my reasoning for apportioning 50/50 is, I've looked at MRIs, I've looked at the X rays, and I've also looked at the treatment, and that's the best I can do. This is not a - - this is a judgment call, and it's the best that I can come up with and justify.
>
> * * *
>
> I guess the thing in Mr. McGivney's case, I looked at the x-rays on 5/28/14, and I compared the right and the left knees, and I saw advanced changes in the left knee compared to the right, and I - - my reasons for apportioning 50/50 is that he had Injury No. 1. His knee got worse radiographically, which is easy to see comparing the left and right knees, and that was the major factor in determining his need for arthroplasty.
>
> So absent - - absent Injury No. 1, X-ray right knee looks the same as X-ray left knee, I would have done Dr. McInnis' - - what Dr. McInnis did. So the reasoning, again, for my apportionment is that the first surgery had a significant affect on the deterioration of his left knee, radiographically easy to see, resulting in the arthroplasty surgery. So that's how I figured that out.

Id., pp 18-19; 24.

---

3 Dr. McNulty utilized this "guide" rather than the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Ed. in his apportionment analysis.

45. In response to Dr. Fuller's 90/10 apportionment, Dr. McNulty testified:

> I can understand how he - - how he came to that. And the reason I would not go with that 90/10 is that I - - I don't see that he - - you know, that we can justify that with any certainty. We jumped the gun, at least in my opinion, on the unicompartmental, so I can't agree with that. I think the 50/50 is the best I can do. I think that's the fairest.

Id., pp. 19-20. Dr. McNulty would also apply his 50/50 apportionment to medical benefits.

46. Dr. McNulty agreed that Dr. McInnis's 2% lower extremity without apportionment for Claimant's 2011 accident was accurate at the time given. He opined that Claimant's arthritis at the time of Dr. McInnis's rating would have been 0%.

47. Claimant was also diagnosed with anxiety, thyroid disease, and Wolff-Parkinson-White syndrome. No doctor has assigned restrictions related to these conditions.

DISCUSSION AND FURTHER FINDINGS

Pre-existing condition (arthritis):

48. The Commission finds, based on the records of Drs. McInnis and McNulty, that Claimant suffered from some degree of progressive mild degenerative arthritis in his left knee that preexisted his 2011 accident/injury rated at 0% PPI.

Permanent Partial Impairment (PPI):

49. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code §72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of

the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code §72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

50. The Commission finds that Claimant has suffered a 21% lower extremity PPI as assigned by Dr. McNulty and agreed to by Dr. McInnis for his left knee. *See*, CE 17, pp. 689-690. A 21% lower extremity rating equates to 42 weeks of benefits as calculated pursuant to Idaho Code §72-428. AR 162-174.

II. ISSUES PRESENTED ON APPEAL

1. Did the Commission err as a matter of law in failing to adjudicate Claimant's disability, if any, from the 2011 injury separate from the total disability and prior to apportioning the same?

2. Did the Commission err as a matter of law in failing to determine Claimant's disability in excess of impairment, if any, as of the time Claimant reached maximum medical improvement?

3. Did the Commission err as a matter of law in applying *Brown v. Home Depot*, 152 Idaho 605, 272, P.3d 577 (2012) in determining Claimant's disability in excess of impairment, if any, from the 2011 injury?

4. Did the Commission err as a matter of law in apportioning disability?

III. STANDARD OF REVIEW

In an appeal from the Commission:

> ...this 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 reviewed 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. *Id.*

Estate of Aikele v. City of Blackfoot, 160 Idaho 903, 908, 382 P.3d 352, 357 (2016).

IV. LEGAL ARGUMENT

A. The Commission erred as a matter of law in failing to adjudicate Claimant's disability, if any, from the 2011 injury separate from the total disability found and prior to apportioning the same.

Claimant filed his complaint against Aerocet and SIF on November 24, 2014, regarding an injury of May 6, 2011. AR, 1. Subsequently Claimant filed a Motion to Consolidate the Aerocet proceeding with a 2014 proceeding for an injury at employer Quest Aircraft that occurred on March 5, 2014. *Id.* at 7. Aerocet objected to consolidation noting:

> ...this matter is a straightforward case wherein the Surety provided knee surgery and related medical benefits recommending by Douglas McInnis, M.D.,

> Claimant's treating physician. Dr. McInnis released Claimant to his prior job with the Employer and gave Claimant a 2% lower extremity impairment, which was paid by the Surety. Claimant returned to his prior job with the Employer, and worked until he resigned for no reason connected to the work injury.
>
> It is not necessary to duly complicate I.C. No. 2011-011043 with a subsequent case with a different employer.

Id. at 22. Noting Quest's objection, the Industrial Commission Referee entered an Order to Consolidate on May 19, 2015, finding, "...consolidation could result in judicial economy." *Id.* at 26.

Claimant filed a Request for Calendaring on May 13, 2016. *Id.* at 88. Aerocet filed a response specifically noting issues pertaining to its 2011 injury for hearing including disability in excess of impairment, if any. *Id.* at 91-92. The Commission issued a Notice of Hearing on June 21, 2016, listing various issues in the consolidated proceeding including disability in excess of impairment. *Id.* at 97.

"In general, the consolidation of two cases does not have the effect of merging the two cases into a single action. Rather, "consolidation is permitted as a matter of convenience and economy in administration, but not change the suits into a single cause, or change the rights of the parties..." *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-98, 53 S.Ct. 721, 727-728, 77 L.Ed. 1331 (1933). *Jones v. Jones*, 117 Idaho 621, 624 (1990). (Emphasis added.) The U.S. Supreme Court in *Johnson* noted, "...consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson* at 496-497. *Johnson* was premised upon the concept that procedural rules cannot modify substantive rights.

This concept was engraved in statute one year later by Congress' passage of the Rules Enabling Act. 28 U.S.C. §2072.

Aerocet/SIF are entitled to a separate determination of Claimant's disability in excess of impairment, if any, from the 2011 injury to the same extent as if the 2011 claim was not consolidated.

Instead of separately evaluating disability for the 2011 injury, the Commission wrongly concluded:

> A two-step analysis is appropriate in impairment and disability evaluations and requires, "(1) evaluating the claimant's permanent disability in light of all his physical requirements, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of permanent disability attributable to the industrial accident. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

AR, 175. *Horton* is applicable for determination of disability for the 2011 injury only as herein described. *Horton* involves determining disability in a permanent and total disability case involving the Idaho Second Injury Fund and determining disability for a work injury with subsequent impairment. The Court determined that impairments after the work injury but before a disability evaluation were not factors for consideration under I.C. §72-430. *Horton* is applicable to determination of the disability from the 2011 injury only to the extent that subsequent impairments and injury are not to be considered under I.C. §72-430 for the 2011 injury disability evaluation.

The Commission erred in not approaching this as a nonconsolidated case and ignoring the separate rights of the Appellants for the 2011 injury.

B. The Commission erred as a matter of law in failing to determine Claimant's disability in excess of impairment, if any, and applying Idaho Code §72-425 as of the time Claimant reached maximum medical improvement.

Idaho Code §72-425 states:

> "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in section 72-430, Idaho Code.

The disability evaluation for the 2011 claim has to be based upon Claimant's permanent impairment at the date of maximum medical improvement and by the factors set forth in Idaho Code §72-430. None of the factors in Idaho Code §72-430(1) relate to additional disability for the 2011 injury. I.C. §72-430(1) matters include the nature of physical disablement, disfigurement, cumulative effect of multiple injuries, occupation of employee, age at the time of accident and diminished ability of the employee to compete in the open labor market within a reasonable geographic area. The Commission failed to determine disability in excess of impairment, if any, for the 2011 injury. It found medical evidence established that Claimant had a 2% lower extremity impairment for the 2011 accident. Claimant's preexisting arthritis at the time of impairment was 0%. FFCL and Order, #46 AR 122. Based upon that, it should have concluded, as the Referee did, that Claimant had a 0% disability in excess of impairment as he quit his job at Aerocet and promptly found new employment with Quest. In the Quest employment, Claimant was making more than he made at Aerocet.

A disability evaluation views the medical factor of impairment as of medical stability.

> Specifically, under I.C. §72-423, "permanent disability" has been defined as the condition that results "when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no

> fundamental or marked change in the future can be reasonably expected." *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 967, 751 P.2d 113, 115 (1988). Under I.C. §72-422, "permanent impairment" is defined as "any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation...." I.C. §72-422.
>
> Medical stability, or maximal medical rehabilitation, must be established before it can be determined if a claimant has suffered a permanent disability.[1] I.C. §72-422 to -23. Idaho does not provide a definition for "maximal medical rehabilitation" or "stability" within its worker's compensation statutes. Although not binding on this Court, a look at how other states, such as Oregon and New Mexico, define these terms is informative.[2]
>
> ---
>
> 1. I.C. §72-422 refers to "**maximal medical rehabilitation,**" whereas I.C. §72-423 states, " 'Permanent disability' or 'under a permanent disability' results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and **no fundamental or marked change in the future can be reasonably expected.**" I.C. §72-423 (emphasis added).
>
> 2. Oregon defines "medically stationary" as "no further material improvement would reasonably be expected from medical treatment, or the passage of time." *Clarke v. SAIF Corp.*, 120 Or. App. 11, 852 P.2d 208 (1993); New Mexico defines "maximum medical improvement" as "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by a health care provider." *Smith v. Cutler Repaving*, 126 N.M. 725, 727, 974 P.2d 1182, 1184 (1999). Medical stability sets the time at which a temporary impairment or disability ends and a determination of a permanent disability occurs. *Tsosie v. Industrial Comm'n of Arizona*, 183 Ariz. 539, 905 P.2d 548, 549 (1995); *see also Blue Mesa Forest v. Lopez*, 928 P.2d 831, 833 (Colo.App. 1996).

McGee v. J.D. Lumber, 135 Idaho 328, 332, 17 P.3d 272 (2000).

The Commission erred, failing to determine disability for the 2011 claim as of the date of stabilization and only considering factors set forth in Idaho Code §72-430 in addition to Claimant's impairment.

The Commission failed to analyze Claimant's disability from his impairment from his 2011 injury. Instead, it engaged a circuitous process relying on *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989). *Horton* is applicable for disability evaluation where the Commission has retained jurisdiction because of Claimant's work injury there is a probability that medical factors would produce additional physical impairment in the future. Horton sustained a fracture of his right hip. Horton's physician recommended the case remain open because of arthritis of varying degrees is often associated with a hip fracture such as one Horton sustained. Horton's accident was in 1974. By 1981 a physician he consulted noted significant progressive degenerative changes in Horton's right hip and advised that Horton would require a total hip replacement or another medical procedure within three to five years. *Horton v. Garrett Freightlines, Inc.*, 106 Idaho 895, 684 P.2d 297 (1984). Unlike Horton, McGivney's injury was fixed and stable after Dr. McInnis repaired Claimant's torn meniscus. Dr. McInnis noted preexisting underlying arthritis but did not advise Claimant that he was in need of any other medical care from the work injury.

C. The Commission erred as a matter of law in applying *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012) in determining Claimant's disability in excess of impairment, if any, from the 2011 injury.

The Commission relied on *Brown* in determining Claimant's disability for the 2011 injury stating, "A claimant's disability is to be determined, in most cases, as of the date of the hearing rather than the date of medical stability." AR at 176. That conclusion is broader than what *Brown* holds. *Brown* dealt with what labor market to utilize in measuring disability. The Court stated:

> 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 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.

Id. 609. The Court further stated, "Therefore, we hold that the relevant labor market for evaluating the nonmedical factors under I.C. §72-430 and in determining a claimant's odd-lot worker status is the labor market at the time of the hearing." *Id.* As the Court noted in *Brown*, under *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 207 P.3d 162 (2009), "the proper date for disability analysis is the date that maximum medical improvement has been reached I.C. §72-422." *Stoddard*, 147 Idaho at 192, 207 P.3d at 168. The Court also noted in *Brown*:

> Our holding in *Stoddard* was not meant to contradict or overrule *Davaz*, but to emphasize, contrary to the surety's argument, that no disability determination could be made prior to the determination of permanent impairment, which cannot be evaluated until maximum medical improvement has been reached.

Brown, 152 Idaho at 609.

The issue of Claimant's disability for the 2011 injury was ripe for evaluation when Dr. McInnis gave Claimant a 2% lower extremity impairment rating and released him to return to his prior work without restrictions. Viewing that evidence, the Commission had no alternative but to determine as to the 2011 injury Claimant failed to establish any disability in excess of impairment. The Commission erred in relying on *Brown* in determining that the proper way to evaluate Claimant's 2011 disability was to determine his total disability as of the time of the

hearing and apportion that on medical testimony that was admittedly a medical guestimate[4] rather than utilizing Claimant's impairment and restrictions, if any, from the 2011 injury for the 2011 disability evaluation.

D. The Commission erred as a matter of law apportioning liability.

The Commission apportioned liability between Aerocet and Quest, concluding, "The Commission has jurisdiction to consider Quest's claim for reimbursement pursuant to Idaho Code §72-313, and *Brooks v. Standard Fire Insurance Company*, 117 Idaho 1066, 793 P.2d 1238 (1990)." AR 179. While the Commission may have jurisdiction to consider a claim for reimbursement, Quest has no right to reimbursement for medical benefits resulting from the 2014 accident.

Idaho Code §72-313 provides:

> **Payment pending determination of policy coverage**. Whenever any claim is presented and the claimant's right to compensation is not in issue, but the issue of liability is raised as between an employer and a surety or between two (2) or more employers or sureties, the commission shall order payment of compensation to be made immediately by one or more of such employers or sureties. The commission may order any such employer or surety to deposit the amount of the award or to give such security thereof as may be deemed satisfactory. When the issue is finally resolved, an employer or surety held not liable shall be reimbursed for any such payments by the employer or surety held liable and any deposit or security so made shall be returned.

---

4 On apportionment Dr. McNulty testified:

> A. There is no road map or algorithm how to figure that out. There's a book from the AMA. The author is Mel – Melhorn, and I think it's – I get the title wrong – the Evaluation – Guides to the Evaluation of Disease and Injury Causation. So it give you just an idea that there's no set way of doing it, and I think – you know, my reasoning for apportioning 50/50 is, I've looked at MRIs, I've looked at the X-rays, and I've also looked at the treatment, and that's the best I can do. This is not a – this is a judgment call, and it's the best that I can come up with and justify.

Depo. of John McNulty, M.D., at p. 18, l. 24 – p. 19, l. 10. Dr. McNulty is aware the *AMA Guides*, 6th Ed., provide a methodology for apportionment but did not use the *AMA Guides*. *Id.*, Depo pg. 23-26.

Claimant filed a Motion for Order Pursuant to §72-313 Compelling Quest Aircraft (Employer) and Federal Insurance Company (Surety) to Pay Claimant McGivney's Past Due Total Temporary Disability and Medical Benefits. AR 40. Defendants Aerocet/SIF responded to the Motion denying it owed any further benefits. The Commission entered an Order granting the motion which was unopposed by Quest. Ultimately the Commission entered an Amended Order granting Claimant's motion stating:

> The Industrial Commission of the State of Idaho hereby ORDERS that the following benefits are awarded to Claimant:
>
> 1. Past due total temporary disability benefits.
>
> 2. Incurred medical benefits.
>
> 3. Permanent partial impairment benefits.
>
> IT IS FURTHER ORDERED that only Quest Aircraft and its surety, Federal Insurance Company, are liable for payment of the above benefits.

AR 52.

This Court in *Brooks v. Standard Fire Insurance Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990), dealt with issues of the Commission's jurisdiction on an equitable claim of contribution and reimbursement.

Brooks injured his right wrist in a nonemployment related motorcycle accident in the summer of 1983. On November 11, 1983, Brooks slipped while working for Associated Foods as a truck driver at work and injured his right wrist. Brooks sought medical treatment and was diagnosed as having a fractured right wrist that was initially caused by the motorcycle accident but further displaced in the work injury of November 1983. American Insurance Company and Fireman's Fund ("Fireman's Fund") provided worker's compensation insurance to Associated

Foods prior to June 1, 1984. After June 1, 1984, worker's compensation insurance coverage was provided to Associated Foods by Standard Fire Insurance Company and Aetna Casualty ("Aetna"). Brooks continued working as a truck driver and continued experiencing sharp pain in his right wrist which became worse and constant late in the summer of 1984. Brooks returned to Dr. Moss his physician on November 27, 1984. X-rays revealed that Brooks had refractured his right wrist since prior x-rays taken in March 1984. Dr. Moss testified before the Industrial Commission that the new fracture was a culmination of minor injuries. On January 11, 1985, Dr. Moss performed surgery on Brooks' wrist and stabilized the bone by using a graph. Ultimately Dr. Moss released Brooks to return to work on March 16, 1986. Dr. Moss testified that from January 11, 1985, until March 16, 1986, Brooks was totally disabled due to his right wrist fracture. Fireman's Fund paid all medical bills incurred by Brooks for injury to his right wrist from November 1983 to the time of the Commission hearing. Fireman's Fund filed an Application for Hearing with the Industrial Commission requesting a determination of the responsibility of the sureties and claiming reimbursement from Aetna, claiming that Brooks' injury had occurred after Aetna became surety for Associated Foods. The Commission determined it had subject matter jurisdiction over the claim between sureties involving a claim for contribution or reimbursement. *Brooks* is not authority for a claim of apportionment herein as the claim under *Brooks* was for an equitable right of contribution against Aetna. There is no equitable claim for contribution here as the rights are covered under Idaho Workers Compensation Law which provides an adequate remedy of law.

Brooks is inapplicable as Claimant suffered a number of injuries commencing with the motorcycle accident in 1983 for which he ultimately needed medical treatment. He never

achieved medical stability from the portion of the injury that occurred while Associated Foods was insured by Fireman's Fund as that portion of the injury needed continual treatment due to lack of healing or refracture. Here for the 2011 accident McGivney was stable by the time Dr. McInnis gave his 2% lower extremity impairment rating with no work restrictions. Claimant did not suffer a worsening condition. Instead, Claimant had a new separate accident with injury at Quest which resulted in new medical benefits including his unicompartmental knee replacement.[5] Quest when employing McGivney took him as it found him. This Court has frequently said that an employer takes an employee as he finds him; employers have no guarantee that their employees will remain free of all illness, injury or disease. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). Once Claimant was stable and at maximal medical improvement from the 2011 injury, that claim was done except for determination of disability in excess of impairment, if any.

CONCLUSION

The Commission made several legal errors. As a result, the Court should reverse the Commission Order and remand the 2011 proceeding to the Commission to adopt the Referee's conclusion that McGivney sustained no disability in excess of impairment.

RESPECTFULLY SUBMITTED this 5th day of June, 2018.

H. JAMES MAGNUSON
Attorney for Defendants/Appellants
Aerocet, Inc., and State Insurance Fund

5 The Commission had no issue identifying a specific accident at Quest causing a new injury. Finding 11. AR 164.

AFFIDAVIT OF MAILING

STATE OF IDAHO)
)ss.
County of Kootenai)

H. JAMES MAGNUSON, being first duly sworn on oath, deposes and states as follows:

That I am and at all times hereinafter mentioned was a citizen of the United States and a resident of the State of Idaho, over the age of 21 years, and not a party to this action; that I served the APPELLANTS' BRIEF in the above-entitled action upon the attorneys for the Claimant/Respondent and Defendants/Respondents in the above matter as follows:

Starr Kelso
Kelso Law Office
P. O. Box 1312
Coeur d'Alene, ID 83816-1312

Eric S. Bailey
Bowen & Bailey
P.O. Box 1007
Boise, ID 83701

by depositing in the United States mail, with postage prepaid, two true copies of said Appellants' Brief on the 5th day of June, 2018, addressed to said attorneys as hereinabove set forth.

Further, on said date, a copy of of Appellant's Brief was sent via email to, and the original and seven copies of said Appellants' Brief were sent via prepaid Federal Express, addressed to:

Ms. Karel A. Lehrman
Clerk of the Supreme Court
451 W. State Street
P. O. Box 83720
Boise, ID 83720-0101
sctbriefs@idcourts.net

SUBSCRIBED AND SWORN to before me this 5th day of June, 2018.

STEPHANIE BELDEN
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for the State of Idaho
Residing in Coeur d'Alene
Commission Expires 3/8/2022