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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE MCGIVNEY, Claimant/Respondent vs. AEROCET, INC., Employer, and STATE INSURANCE FUND, Defendants/Appellants, and QUEST AIRCRAFT, Employer, and FEDERAL INSURANCE COMPANY, Surety, Defendants/Respondents.	SUPREME COURT NO. 45700

RESPONSE BRIEF OF RESPONDENT GEORGE MCGIVNEY

APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

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STATEMENT OF CASE

(i) Nature of the Case.

This is an appeal from the decision of the Idaho Industrial Commission in the consolidated hearing of the 2011 George McGivney (hereafter McGivney) v. Aerocet, Inc./Idaho State Insurance Fund claim (hereafter Aerocet) and the 2014 George McGivney (hereafter McGivney) v. Quest Aircraft/Federal Insurance Company claim (hereafter Quest).

(ii) Course of Proceedings

Overview. Aerocet asserts that it was err for the Commission to consolidate the claims for hearing and thus a more detailed Course of Proceedings is believed to be in order. Aerocet was provided every opportunity to litigate McGivney's claim against it separately from McGivney's claim against Quest. While McGivney's motion to consolidate was pending, and prior to Aerocet making or filing an objection to the motion to consolidate, Aerocet, without objection, willingly participated in the joint deposition of McGivney. Also, even though the order consolidating the two claims specifically permitted Aerocet to reassert its objection to consolidation if Aerocet later determined that separation was warranted, Aerocet never requested that the consolidation order be reconsidered either by the Referee or the Commissioners.

May 6, 2011 Aerocet accident. On January 12, 2012, after McGivney's treating physician released him to return to work performing activities as tolerated and provided him an impairment rating, Aerocet filed a "Summary of Payments" with the Commission. Clmt Exh.12, p. 5; FFCL&Order ¶40. Aerocet has never filed a Notice of Change of Status as required pursuant to I.C. §72-806 and IDAPA 17.02.08.061.01 when there is a "denial…or cessation of medical or monetary compensation benefits to which the worker might…ultimately be entitled." On November 24, 2014, McGivney filed a Complaint against Aerocet for additional

compensation. R p. 1. In relevant part, Aerocet's December 11, 2014, Answer asserted the following two affirmative defenses:

> "3. Defendants deny that Claimant's condition is a result of an accident arising out of and in the course of his/her employment and, therefore, deny that he/she is entitled to any benefits. R p. 5.
>
> "4. Defendants further allege that Claimant's current condition is the result of subsequent activity and, therefore, not related to the alleged injury." **(**emphasis added) R p. 5.

May 5, 2014 Quest claim. McGivney filed a pro se Complaint against Quest on July 28, 2014. R p. 133. On August 12, 2014, Quest filed its Answer. R p. 139. In relevant part, Quest's Answer admitted that Claimant's condition "was caused partly" by his 2014 accident. It also raised as an affirmative defense the issue of whether its responsibility for McGivney's left knee injury should be limited because of his 2011 injury to his left knee pursuant to I.C. §72-406. R pp. 139-140.

Scheduling Deposition of McGivney. On April 24, 2015, Quest served Notice that it was deposing McGivney on May 12, 2015, at 10:30 a.m. On April 28, Aerocet served Notice that it was deposing McGivney on the same day at the same time. Aerocet's Notice was sent not only to McGivney's attorney but also Quest's attorney.

April 29, 2015, Motion to Consolidate. McGivney filed a Motion to Consolidate the 2014 Quest claim with the 2011 Aerocet claim which stated in part:

> "It is submitted that it is in the best interest of justice that this case be consolidated with the SIF case I.C. No. 2011-011043 [Aerocet] so that the Commission can determine which surety is responsible for Claimant's injuries and order that surety to provide benefits. Due to the intertwining facts, it is in the best interest of the parties to present all evidence to the Commission for a global resolution. Consolidating this case with I.C. No. 2011-011043 [Aerocet] would also serve judicial economy be [sic] saving the Referee(s) and Commissioners time in review complex and intertwining records and testimony." R pp. 6, 142-143.[1]

[1] The Agency Record has two 'file' stamp dates; April 29, 2015 (R p. 6); May 1, 2015 (R p. 141)

On **April 29, 2015**, Quest filed a Notice of Non-Opposition to the motion to consolidate. R p. 19.

On **May 12, 2015**, McGivney was deposed by both Aerocet and Quest in a joint deposition that was separately noticed in each claim for the same date and time. R Exh List Clmt Exh 11, Def Exh 10, and Def Exh 22. Aerocet did not assert at said deposition that it had any objection to the motion to consolidate or that it had any objection deposing McGivney simultaneously with Quest.

On **May 14, 2015**, Aerocet filed an objection to the motion to consolidate with the Commission. In view of Aerocet not making any objection to the joint deposition of McGivney, it would appear that since the certificate of service indicates the Aerocet's objection was placed in the regular U.S. Mail on May 12th, that it was not mailed until sometime after the deposition of on May 12th. R p. 22. The objection did not claim it was prejudiced by the consolidation, it merely stated that, "It is unnecessary to duly complicate I.C. 2011-011043 with a subsequent case with a different employer." Id.

On **May 18, 2015**, McGivney filed his response to Aerocet's objection to consolidation. In part, the response states:

> "Even though Claimant's Motions to Consolidate had not yet been granted or denied, Claimant made himself available to both employers and sureties to have his deposition taken on May 12, 2015. Defendants' [Aerocet] attorney did not inform Claimant there was an objection to consolidating his two claims and he participated in the deposition on May 12th…Claimant's attorney did not receive, and was not made aware of, the objection until May 14, 2015. Defendants' [Aerocet] actions are inexplicable to the Claimant." R p. 25.

May 19, 2015 Order to Consolidate. The Referee ordered that the Aerocet and Quest claims be consolidated for hearing into a single proceeding because it "could result in judicial economy." Significantly, the Referee further ordered:

> "As the matter unfolds, counsel for State Insurance Fund may renew his objection if warranted." R p. 26.

June 24, 2015, Notice of Hearing. The Commission scheduled the consolidated hearing for January 6, 2016. R 38.

September 14, 2015, Motion for an Order pursuant to I.C. §72-313. McGivney filed a Motion to compel Quest and its surety to pay medical benefits and TTD and PPI compensation. It states in part:

> "The Quest accident is most recent in time. Responsibility for McGivney's medical care and temporary total disability benefits are issues of dispute between the two employer/ sureties. If Quest/Federal Insurance Company is ordered to pay [these benefits and compensation] this matter will be in a position for it to be re-scheduled for determination of all issues…" Additionally, (while in all likelihood Quest/Federal Insurance Company will not consider it necessary) the Commission may protect its interest in receiving reimbursement, should Aerocet/State Insurance Fund ultimately be determined to be the responsible party, by requiring a security deposit pursuant to I.C. §72-313. R pp. 42-43.

Response to I.C. §72-313 Motion. Quest did not respond to the motion. However Aerocet, even though the motion was not directed at it, responded by merely stating:

> "These Defendants maintain that all benefits related to the May 2011 injury were provided to Claimant." R pp. 45-46.

September 28, 2015, Order Granting Claimant's Motion. The Referee granted McGivney's **I.C. §72-313** motion. On October 13, 2015, Aerocet filed a Motion for Clarification of the Order because it stated that Aerocet had also not filed a response denying liability. On October 28, 2015, an Amended Order Granting Claimant's Motion reflecting that Aerocet had filed a response was entered. R pp. 47-52.

December 10, 2015, McGivney's Motion to Vacate the Hearing. This motion sought to vacate the hearing and set a status conference for the purpose of rescheduling the hearing. R p. 54. It states in part:

"1. This case involves two separate industrial accidents that involved Claimant McGivney's left knee. The consolidated hearing will determine the extent that each of the two respective employer/sureties is responsible for the condition of Claimant's left knee, permanent partial impairment and disability in excess of impairment… Unfortunately, the Defendants Quest Aircraft, Employer, and Federal Insurance Company, have not as of the date of this motion, scheduled an evaluation to determine the percentage of permanent partial physical impairment…Without, and until the PPI evaluation is completed and reviewed, the parties cannot properly submit evidence to the Commission of the amount of PPI and disability in excess of PPI that is attributable to each respective industrial accident." R pp. 54-55.

December 14, 2015, Aerocet's Objection to Motion to Vacate. Aerocet asserted that:

"the only issue calendared for hearing with respect to these Defendants is whether the Claimant is entitled to permanent partial disability in excess of permanent impairment and the extent thereof as it relates to the Aerocet accident. That issue is ripe for hearing as scheduled on January 6, 2016."

Aerocet did not assert that it would be prejudiced by vacating and rescheduling the hearing and it did not reassert an objection to the consolidation of the two cases. The hearing was and reset it for December 22, 2015.

November 8, 2016 Hearing. Aerocet did not renew its objection to the two claims being consolidated at the hearing. It did not renew its objection or seek review of the order consolidating the hearing in its post-hearing brief. Additionally, Aerocet did not file an I.C. §72-718 post-decision motion for reconsideration or request for rehearing.

(iii) **Statement of Facts**[2]

McGivney's job duties for Aerocet required him to walk up and down stairs numerous times through the work-day. Friday, May 6, 2011, near the end of his work shift as he was walking down the stairs, Claimant felt something "go" in his left knee which caused him

[2] While Appellant Aerocet's Brief's Statement of Facts consists essentially of copying paragraphs 1-50 of the Commission's decision, it should be noted that Aerocet's footnotes are not the same as the those in the Commission's decision.

significant pain. He attempted to return to work on Monday, May 9th but his pain increased when he tried to walk up and down the stairs.

McGivney came under the care of orthopedic surgeon Dr. McInnis. Dr. McInnis gave Claimant a choice between arthroscopic meniscus surgery, which could alleviate Claimant's mechanical symptoms, and a partial arthroplasty. He opted for arthroscopic surgery. He understood that he would still have problems with his left knee in the future due to the progressive degeneration of his arthritis. FFCL&O ¶7.

Aerocet's Answer to the Complaint *denied* that McGivney's injury was caused, even partly, by an accident even though it paid for his medical care and a 2% permanent partial impairment, R p. 4.

Following surgery, he returned to work at Aerocet on light duty under restrictions as generally assigned for an arthroscopic surgery; that is, no stairs and if it hurts, do not do it, for two weeks. FFLC&O ¶8. As a result, his light duty job required him to spend a lot of time at a desk and he had to get up and move around because of the discomfort in his knee. Hr. T. p. 47, l. 1-21. After surgery, McGivney received a call from Quest, where he had previously submitted an application, asking him to interview for a job. He determined that he was ready for a change, primarily because the "fumes" from the resins was affecting him. FFCL&O ¶9.

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. FFCL&O ¶10. On March 5, 2014, after leaving a meeting with his manager, he started walking down the stairs and in doing so, he overstepped one step which caused his left heel to hit on the next step jarring his left leg. He immediately felt stabbing pain in his left knee. He sought medical care. It was recommended he undergo surgery. Because his claim was denied when it was recommended

that he undergo a left partial unicompartmental knee arthroplasty and he was receiving no TTD benefits, he was required to use about six weeks of FMLA from the date of his surgery until he attempted to return to work. FFCL&O, p. 6, fn 2.

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. FFCL&O ¶12.

Claimant is currently employed by his wife through the United States Postal Service pursuant to a rural mail delivery contract. 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. 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. FFCL&O ¶13. He has difficulty working on his mail delivery vehicle and he can no longer hike or even walk for more than a short distance. Hr. T. p. 70-72.

Issues on Appeal

1. Whether Aerocet failed to preserve its objection to consolidation for review on appeal?
2. Whether the Commission properly determined and apportioned McGivney's permanent and disability?
3. Whether McGivney is entitled to an award of costs and attorney fees on appeal pursuant to I.A.R. 11.2?

Standard of Review

The Court exercises free review over questions of law over a decision of the Commission. *See Ogden v. Thompson,* 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). With respect to questions of fact, the Court's review is limited to determining whether substantial and competent evidence supports the decision. See *Matter of Wilson,* 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). If the Commission's findings of fact are supported by substantial and competent evidence, they will not be disturbed on appeal. *See Reedy v. M.H. King Co.,* 128 Idaho 896, 920 P.2d 915 (1996). The Court's review of Commission decisions is limited to a determination of whether the findings of fact are supported by substantial and competent evidence." *Boley v. State,* 130 Idaho 278, 280 939 P.2d 854, 856 (1997); **I.C. §72-732 (1).** Substantial evidence is more than a scintilla of proof, but less than a preponderance. *See Boley,* 130 Idaho at 280, 939 P.2d at 856. It is relevant evidence that a reasonable mind might accept to support a conclusion. Id.; *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 975 P.2d 1178 (1999).

Court "views all the facts and inferences in the light most favorable to the party who prevailed before the Commission." *Boley,* 130 Idaho at 280, 939 P.2d at 856 (citing *Smith v. J.B. Parson Co.,* 127 Idaho 937, 908 P.2d 1244 (1996). It is within the Commission's province to decide what weight should be given to the facts presented and conclusions drawn from those facts. *See Seamans v. Maaco Auto Painting & Bodyworks,* 128 Idaho 747, 918 P.2d 1192 (1996). The Commission's conclusions on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous. See *Wheaton v. Indus. Special Indem. Fund,* 129 Idaho 538, 928 P.2d 42 (1996).

Argument

1. Aerocet failed to preserve its objection to consolidation for review on appeal.

The law is well settled that "interlocutory orders issued by a referee that are not approved or adopted by the Commission are not final decision or orders and are thus not appealable. *Peterson v. Farmore Pump & Irrigation*, 119 Idaho 969, 971, 812 P.2d 276, 278 (1991).

On April 29, 2015, McGivney moved to have both of his left knee claims consolidated for hearing. R, p. 6-18. On April 29, 2015, Quest filed a notice stating it did not object to consolidation for purposes of hearing. R. 19.

On May 12, 2015, while McGivney's motion to consolidate was pending and with no known objection to the two claims being consolidated for hearing, McGivney was deposed by both Aerocet and Quest in the same deposition. Clmt's Exh. 11. Aerocet did not lodge any objection to McGivney being jointly deposed by both sets of employer/surety Defendants in the same deposition. On May 14, 2015, the Aerocet Objection to Claimant's Motion to Consolidate was received by the Commission. The certificate of service reflects, even though Aerocet didn't lodge any objection to the joint deposition, that it was sent by regular U.S. Mail on May 12th. R, p. 22.

The Referee granted McGivney's Motion to Consolidate, stating that "consolidation could result in judicial economy." Aerocet fails to inform the Court that the consolidation order also specifically left the door open for Aerocet to renew its objection to consolidation:

> "As the matter unfolds, counsel for State Insurance Fund [Aerocet] **may renew his objection if warranted.**" R. p. 26. (emphasis added)

Aerocet did not file a prehearing motion with the Referee renewing its objection to the interlocutory order consolidating the two claims for purposes of hearing. Also, Aerocet did not file a prehearing motion for reconsideration of the consolidation order with the Commissioners.

At the commencement of the hearing the Referee inquired whether any party had any objection(s) to the issues as he had just identified. Aerocet did not renew its earlier objection to the consolidation of the cases for hearing and it did not raise any objection to the issues identified by the Referee. Aerocet informed the Referee that there were no other issues than those that he identified. Hr. T. pp. 4-8. When the Referee inquired whether any party had an objection to any of the exhibits offered by any party, Aerocet responded that it had no objection. Hr. T. p. 9, l. 19-20; p. 13, l. 2. When it filed its post-hearing brief, Aerocet did not seek reconsideration of the order granting consolidation.

I.C. § 72-506(2) provides that a referee's interlocutory order is deemed an order of the Commission and is appealable only if it is approved and confirmed by the commission. The Commission's Findings of Fact, Conclusions of Law and Order does not mention Aerocet's objection to consolidation or the order consolidating the two claims. Following the filing of the Commission's decision, Aerocet did not seek reconsideration of the order granting consolidation by the Commissioners by filing an I.C. § 72-718 motion for reconsideration or a motion for rehearing.

The Notice of Appeal filed by Aerocet states that it is challenging the consolidation of the two claims for hearing. It states the issue as follows:

> "The Commission errs in matter of law in consolidating I.C. 2014-019179 with I.C. 2011-011043;" R, p. 156 ¶ 3 (d)

Aerocet, however, modified the wording of this issue in its brief as follows:

> "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." Aerocet Br. p. 18.

This issue merely restates Aerocet's objection to consolidation by asserting the Commission erred by not deciding the 2011 injury claim separately.

Even if this issue can be viewed as a different issue than consolidation, Aerocet makes no argument that it suffered prejudice or how the Commission should have adjudicated the 2011 injury separately and prior to apportionment. Aerocet makes no assertion that if there had been two separate hearings that the exact same exhibits would not have been admitted, that the exact same hearing testimony would not have been received, and that the exact same post-hearing depositions would not have been taken and made part of the record.

Even if there had been two hearings, pursuant to I.C. §72-406 each respective employer/surety is only liable for the disability attributable to the accident that was suffered in its employment and therefore the two-step process to apportion the impairment and disability was required. The apportionment analysis in each separate hearing would have been the same.

> "First the Commission must determine the claimant's disability when considering the pre-existing physical impairment(s) and the subsequent injury, and second it must then apportion disability between the injury and the pre-existing impairments." *Christensen v. S.L. Start & Associates, Inc*., 147 Idaho 289, 292, 207 P.3d 1020, 1023 (2009).

Aerocet's "Conclusion" reveals that it has no dispute with the two claims being consolidated for hearing. It is just upset that the Referee reached a different decision than the Commissioners. Indeed, Aerocet does not ask the Court to reverse the Commission's decision and remand this matter to the Commission to hold a separate hearing on its claim but, rather, it makes the remarkable request of asking the Court to order the Commission to abrogate its statutory duty to determine the claims and defer in total to the Referee's recommendation:

> "reverse the Commission Order and remand the 2011 proceeding to the Commission [and order it] to *adopt the Referee's conclusion*." (emphasis added) Br. p. 28.

2. The Commission properly determined and apportioned McGivney's permanent impairment and disability

On September 12, 2011, McGivney underwent left knee surgery for his Aerocet industrial injury. On October 3, 2011, Dr. McInnis released McGivney to return to light duty work and restricted him from climbing stairs, squatting, or bending, At the next appointment he was "encouraged to continue to increase activity level as comfort dictates." Clmts Exhibits 3, p. 17.

Aerocet's surety requested an impairment rating from Dr. McInnis. On November 23, 2011 he filled in the blanks on its form that McGivney's left knee condition was fixed and stable and that he had suffered a permanent impairment rating of 2% impairment of his left lower extremity. Aerocet asserts, as a matter of law, that when Dr. McInnis provided this opinion on November 23, 2011, that the disability analysis for McGivney's 2011 claim "was *ripe* for evaluation at that time" and that the Commission's disability analysis "*has* to be based upon" Dr. McInnis's November 23, 2011 opinion. (emphasis added) Br. pp. 21, 24. As a result, Aerocet further asserts that the Commission "had *no alternative*" but to determine his disability as of November 23rd and that McGivney failed to establish any disability in excess of impairment because he returned to work. Br. p. 24. (emphasis added)

Ripe

The word "ripe" is a legal term of art. The ripeness doctrine requires that the person asserting that a matter is "ripe" has the burden of proving:

> (1) The case presents definite and concrete issues;
> (2) That a real and substantial controversy exists; and
> (3) That there is a present need for adjudication.
> *City of Boise v. Keep the Commandments Coalition*, 143 Idaho 254, 258 141 P.3d 1123, 1126 (2006).

Even if it were to be 'presumed' that the first two burdens were met in 2011, there was no "present need for adjudication." There was no case pending before the Commission.

McGivney had not filed a "Complaint" with the Commission seeking an adjudication of any issue. The first time that there was a "present need for adjudication" arose was when McGivney's November 21, 2014, Complaint was filed. R p. 1. Prior to the filing of the Complaint, there is no evidence that an event had occurred that could arguably be deemed as triggering a present *need* for adjudication.

Aerocet's own actions dispel the existence of a present need for adjudication. The "Summary of Payments" dated January 16, 2012, filed with the Commission, makes no assertion that there existed a present need for an adjudication. In fact, the Commission's 'stamp' specifically documents that jurisdiction was retained by the Commission until the statute of limitations expired. Clmts Exhibit 12, p. 5. Also, since there is no evidence that the State Insurance Fund filed a "Form 8" notice of the cessation of benefits per Idaho Code §72-806, any statute of limitation provisions of I.C. §72-806 that could have otherwise potentially become applicable at some point in time were tolled by operation of I.C. §72-604. *see* IDAPA 17.02.08.061.01; *Austin v. Bio Tech Nutrients,* IC 2008-038504, Filed 3/26/2018 (Appendix).

Permanent Impairment

"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. I.C. §72-422. A determination of physical impairment is a question of fact for the Commission. The Commission, in conducting a permanent impairment evaluation, is not limited to record or opinion evidence of a physician requested to give a permanent impairment rating. *Soto v. J.R. Simplot,* 126 Idaho 536, 539, 887 P. 2d 1043, 1046 (1994).

It is not unusual for subsequently obtained medical testing and evaluations to reveal that, in fact, the medical condition had not stabilized and surreptitiously progressively gotten worse. *Colpaert v. Larson's Inc*., 115 Idaho 825, 771 P.2d 46 (1989); *Hernandez v. Phillips*, 141 Idaho 779, 782, 118 P.3d 111, 114 (2005). *See also, Harrison v. Osco Drug, Inc.*, 116 Idaho 470, 473, 776 P.2d 1189, 1192 (1989).

Two Idaho statutes inherently provide for the reality that a claimant's post-injury condition may continue to progressively deteriorate after an impairment rating is provided. Neither statute is specifically applicable in this matter, but each bears mention.

I.C. §72-706 (2) recognizes that a condition may progressively deteriorate. It provides that if benefits have been paid, a claimant is entitled, for a period of at least five (5) years since the date of the accident, to seek "further compensation" in the event the injury progressively deteriorates.

> "When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award."

I.C. §72-719 provides in relevant part as follows:

> "(1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the Commission may…review any order or agreement or award upon any of the following grounds:
>
> (a) Change in the nature or extent of the employee's injury or disablement;"

The determination by the Commission of the extent of permanent impairment suffered by McGivney as a result of his 2011 industrial injury was not necessary until McGivney filed a

Complaint regarding his March 5th industrial accident with the Commission on November 24, 2014. R p. 1.

Based upon the bilateral knee x-rays taken shortly after McGivney's 2014 accident, Dr. McNulty thoroughly and persuasively described how McGivney's left knee condition had, in fact, not been fixed and stable but rather was in the process of progressively deteriorating at the time of Dr. McInnis' evaluation in 2011. 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. FFCL&O ¶41.

The Commissioners clearly set forth their close review of the medical record and the solid basis for their giving the opinions of Dr. McNulty, regarding stability, impairment rating, and apportionment, weight over Dr. McInnis' opinions, based on radiographic evidence documenting the deterioration in McGivney's left knee subsequent to the opinion of Dr. McInnis.

> "Dr. McInnis originally proposed that following the 2011 meniscectomy, Claimant was entitled to a 2% lower extremity rating…Dr. McNulty acknowledged that this 2% rating was appropriate *at the time it was issued.* (emphasis added) However, Dr. McNulty ultimately concluded that half of Claimant's current 21% lower extremity rating should be apportioned to the 2011 accident. Explaining his reasoning, he testified that the 2011 meniscectomy destabilized Claimant's left knee, and caused the progression of arthritic changes in the medial compartment of the left knee much faster than would otherwise have happened. Proof of this acceleration is found in the bilateral knee x-rays performed after the 2014 accident. These films demonstrate much more severe degenerative arthritis in the left medial compartment as compared to the right medial compartment…Based on these findings, Dr. McNulty believes it appropriate to apportion Claimant's impairment on a 50-50 basis as between the accident of 2011 and the accident of 2014…Dr. Lyman, the surgeon who performed

> Claimant's left knee arthroplasty, concurs with this analysis.
>
> While we recognize that following the 2011 accident Claimant was given only a 2% lower extremity rating, and released without limitations/restrictions, the ***important point*** *is* that Claimant's left knee condition continued to deteriorate following the date of Dr. McInnis' rating, ***and that this deterioration has been persuasively linked to the 2011 accident.*** By the time of the 2014 accident, Claimant's medial compartment arthritis had significantly progressed to Grade III-IV changes, with the two areas of complete cartilage loss. *The accident-caused* ***progression of Claimant's left knee condition between 2011 and 2014 amply supports the apportionment scheme arrived at by Dr. McNulty."*** R. p. 128-29 ¶70. (emphasis added).

The Commission is not bound to accept one side's medical opinion evidence over conflicting contrary medical evidence or the opinion of any particular doctor that a patient's condition is stable and ratable. *Paulson v. Idaho Forest Industries, Inc*., 99 Idaho 896, 591 P.2d 143 (1979), citing *Graves v. American Smelting & Refining Co.,* 87 Idaho 451, 394 P.2d 290 (1964). The Commission is the ultimate evaluator of impairment**.** *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

A finding or award of a referee is not final and binding on the Commission. The findings of a referee are only recommendations that are submitted to the Commissioners for their review and decision on whether or not to adopt them as their own. §72-506, §72-717. A referee's recommended findings and awards are not those of the Commission unless the Commissioners approve and confirm them. *Zapata v. J.R. Simplot Company*, 132 Idaho 513, 975 P.2d 1178 (1999). The findings of fact made by the referee were merely recommendations to the Industrial Commission. Upon reviewing those findings, it could either adopt them or enter its own findings. The Commission is not required to explain why it did not adopt findings recommended by the referee. *Lorca-Merono v. Yokes Washington Foods, Inc*., 137 446, 455, 50 P.3d 461, 470 (2002).

Disability

A determination by the Commission as to the degree of permanent disability resulting from an industrial injury is a factual question. *See Sund v. Gambrel*, 127 Idaho 3, 5, 896 P.2d 329, 331 (1995); *Thom v. Callahan*, 97 Idaho 151, 157, 540 P.2d 1330, 1336 (1975). (observing that the degree of permanent disability is a factual question committed to the particular expertise of the Commission.) As such, it will not be disturbed on appeal when supported by substantial and competent evidence. *See* Sund, 127 Idaho at 5, 896 P.2d at 331. *Zapata v. J.R. Simplot Company*, 132 Idaho 513, 516, 975 P.2d 1178, 1181. (1999).

The progressive deterioration of McGivney's left knee condition following his May 6, 2011, industrial accident and subsequent surgery, came to an abrupt end on March 5, 2014, when he suffered the Quest industrial accident and he underwent left knee medial unicompartmental arthroplasty. The condition of McGivney's knee immediately prior to his March 5th injury became the point of maximum medical improvement for the determination of his permanent impairment due to his May 6, 2011, industrial accident.

Aerocet asserts that I.C. §72-425 requires that McGivney's disability "has to be" based on, and determined "at the date of," Dr. McInnis' November 2011, impairment rating. Contrary to *Davaz v. Priest River Glass Co., Inc*., 125 Idaho 333, 870 P.2d 1292 (1994). This assertion by Aerocet appears to be based upon, but without citation to, *Stoddard v. Hagadone Corp., 147 Idaho 186, 207 P.3d 162 (2009).* The Court however rejected Aerocet's assertion in its decision in *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

> "[T]he disability rating is a measure of the claimant's 'present and probable future ability to engage in gainful activity.' The word 'present' implies that the Commission is to consider the claimant's ability to work as of the time evidence is received. There is no 'present' opportunity for the Commission to make its determination apart from the time of hearing." Id.

Brown clarified that *Stoddard* only was meant to emphasize that no disability determination can be made prior to the determination of permanent impairment and that "it is the claimant's personal and economic circumstances at the time of the hearing, not at some earlier time, that are relevant to the disability determination." *Brown*, 125 Idaho at 609, 272 P.3d at 609. Given the progressive deterioration manifested by his Quest injury, the extent of disability McGivney suffered as a result of his May 6, 2011, accident is as it is found to have existed just prior to the Quest injury. However, since no Complaint had been filed asking the Commission to determine disability and, since "it is the claimant's personal and economic circumstances at the time of the hearing, not at some earlier time, that are relevant to the disability determination," the time for determination of the extent of McGivney's disability due to his 2011 accident is the hearing date.

The assessment of disability under Idaho workers' compensation law is to be calculated according to "the actual or presumed ability to engage in gainful activity is reduced or absent because of medical factor of permanent impairment and pertinent nonmedical factors as provided in I.C. §72-430. *Tarbet v. J.R. Simplot Company,* 151 Idaho 755, 264, P.3d 394 (2011); Graybill v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel,* 127 Idaho 3, 7, 896 P.2d 329 333 (1995).

The Commission's determination that McGivney's disability rating was 50% of the whole person, inclusive of his 21% lower extremity impairment, is supported by substantial and competent evidence. The Commission made findings regarding McGivney's age, educational background, employment history, occupation at the time of injury, nature of the physical disablement, subsequent impairment, work limitations, geographic area labor market, his

personal and economic circumstances, and his immediate and future ability to obtain work. The Commission's disability determination was that, while McGivney was able to obtain a comparable wage in a quality assurance position based on his work history and that he would likely impress other potential employers with his ability to learn and work hard, "all other factors reduce Claimant's employability: his work restrictions, his age, his lack of formal education, his spotty work history prior to 2004, and the fact that no matter where he works, he will most likely have to commute." The Commission further emphasized that McGivney's lack of formal education and physical work restrictions would make it difficult for him to be able to earn a comparable wage without education and within his restrictions, even if he is willing to drive to Spokane for the position. FFCL&O ¶ 66.

The Commission's determination of the degree of permanent disability resulting from an industrial injury is a factual question committed to the particular expertise of the Commission. *McCabe v. J-Ann Stores,* Inc., 145 Idaho 91, 175 P.3d 780 (2007). The Court will not try the matter anew by weighing the evidence and acting similar to a trial court. The Court is neither concerned that a referee's recommendation was not adopted by the Commission nor will the Court consider whether it would have reached the same conclusion based upon the evidence presented. *Riggs v. Estate of Standless,* 127 Idaho 427, 901 P.2d 1328 (1995); *Pomerinke v. Excel Trucking Trans.,* 124 Idaho 301, 305, 859 P.2d 337, 341 (1993).

Apportionment of Disability

Once the evidence was received at the time of the hearing it was also necessary to apportion his disability between his 2011 and his 2014 industrial injuries. I.C. §72-406. *Christensen v. S.L. Start & Associates, Inc.,* 147 Idaho 289, 292, 207 P.3d 1020, 1023 (2009).

In *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989), the Court established a two-step analysis for apportioning disability:

> (1) Evaluate 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) Apportion the amount of permanent disability attributable to the industrial accident.

Unlike *Weygint v. J.R. Simplot Company*, 123 Idaho 200, 206, 846 P.2d 202, 204, (1993), The Commission clearly set forth its rationale for its apportionment of McGivney's disability between the 2011 Aerocet accident and the 2014 Quest accident.

> "As to the issue of whether Claimant's disability should be apportioned between the 2011 and 2014 accidents, we conclude that the medical evidence referenced above supports a similar apportionment of disability over and above impairment. The principal reason for performing the left knee arthroplasty was to address the profound medial compartment damage noted in 2014. As both Dr. McNulty and Dr. Lyman have indicated, Claimant's medial knee arthritis was the product of both the 2011 and 2014 accidents. While Claimant may have been able to return to his time-of-injury job following the 2011 accident this fact does not denigrate our conclusion that Claimant's current disability is referable to significant medial compartment arthritis caused by both the 2011 and 2014 accidents. While we recognize that arguments could be made to support a different outcome, like Dr. McNulty and Dr. Lyman, we believe that ours is the fairest approach. Therefore, Claimant's disability over and above impairment is apportioned equally between Aerocet and Quest.

The Commission is presumed by its experience to be able to judge the causative factors in a particular case, and be allowed a degree of latitude in making apportionment**.** *Reiher v. American Fine Foods*, 126 Idaho 58, 2, 878 P.2d 757, 761 (1994). The Commission explained the rationale for its apportionment of McGivney's disability. Its evaluation of the evidence relative to the apportionment of McGivney's disability establishes that it is based upon substantial competent evidence justifying the apportionment equivalent to its apportionment of physical impairment.

3. McGivney is entitled to an award of costs and attorney fees on appeal pursuant to I.A.R. 11.2

McGivney requests that the Court award him costs and attorney fees pursuant to I.A.R. 11.2 which provides, in relevant part, as follows:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge, information, and belief after reasonable inquiry is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorney's fee.

Attorney fees can be awarded as sanctions when a party or attorney violates either (a) the frivolous filings clause, or (b) the improper purpose clause. *Sims v. Jacobson,* 342 P.3d 907, 914 (Idaho 2015).

Aerocet did not preserve for consideration on appeal the objection it filed with the referee to McGivney's motion to consolidate the 2011 Aerocet claim with the 2014 Quest claim for hearing. Even though Aerocet modified the wording of the consolidation issue it appears that its argument is really not consolidation but, rather, that it doesn't like the Commission's decision. The relief sought by Aerocet is not a reversal and remand for a 'separate' hearing, but rather, that the Court order the Commission to adopt the Referee's "conclusion."

This appeal has resulted in McGivney having to go without all of the proceeds awarded to him by the Commission in its decision. As a result of many years practicing law and making arguments and filing appeals on what seemed to be legitimate authority and argument when

others may have disagreed, it is difficult for McGivney's undersigned attorney to categorically assert that Aerocet's appeal is incomprehensible, unreasonable, and lacking in law. However, it does at least appear to the undersigned that perhaps Aerocet's appeal could be so characterized and thus be in violation of I.A.R. 11.2. That characterization and determination, however is one that only the ultimate arbiter, the Court, can make.

CONCLUSION

It is respectfully requested that the Court affirm the Commission's decision and award McGivney costs and attorney fees on appeal.

Respectfully submitted this 3rd day of July, 2018.

/S/ Starr Kelso
Starr Kelso, Attorney for Mr. McGivney

CERTIFICATE OF SERVICE:

I hereby certify that on the 3rd day of July, 2018, a true and correct copy of the foregoing RESPONSE BRIEF OF RESPONDENT GEORGE MCGIVNEY was served by regular U.S. Mail, postage prepaid thereon, upon the attorneys for Appellant Aerocet and Respondent Quest.

H. James Magnuson
Attorney at Law
P.O. Box 2288
Coeur d'Alene, ID 83816
Attorney for Appellant Aerocet

Eric S. Bailey
Attorney at Law
P.O. Box 1007
Boise, ID 83701-1007
Attorney for Respondent Quest

/S/ Starr Kelso
Starr Kelso

Table of Contents

17.02.08 – Miscellaneous Provisions

IDAPA 17
TITLE 02
CHAPTER 08

17.02.08 – MISCELLANEOUS PROVISIONS

000. LEGAL AUTHORITY.
These rules are adopted and promulgated by the Industrial Commission pursuant to the provision of Section 72-508, Idaho Code. (4-7-11)

001. TITLE AND SCOPE.
These rules shall be cited as IDAPA 17.02.08, "Miscellaneous Provisions." (4-7-11)

002. WRITTEN INTERPRETATIONS.
No written interpretations of these rules exist. (4-7-11)

003. ADMINISTRATIVE APPEALS.
There is no administrative appeal from decisions of the Industrial Commission in workers' compensation matters, as the Commission is exempted from contested-cases provisions of the Administrative Procedure Act. (4-7-11)

004. INCORPORATION BY REFERENCE.
No documents have been incorporated by reference into these rules. (4-7-11)

005. OFFICE -- OFFICE HOURS -- MAILING ADDRESS AND STREET ADDRESS.
This office is open from 8:00 a.m. to 5:00 p.m., except Saturday, Sunday, and legal holidays. The department's mailing address is: P.O. Box 83720, Boise, ID 83720-0041. The principal place of business is 700 S. Clearwater Lane, Boise, ID 83712. (4-7-11)

006. PUBLIC RECORDS ACT COMPLIANCE.
Any records associated with these rules are subject to the provisions of the Idaho Public Records Act, Title 74, Chapter 1, and Title 41, Idaho Code. (4-7-11)

007. -- 032. (RESERVED)

033. RULE GOVERNING APPROVAL OF ATTORNEY FEES IN WORKERS' COMPENSATION CASES.

01. Authority and Definitions. Pursuant to Sections 72-404, 72-508, 72-707, 72-735 and 72-803, Idaho Code, the Commission promulgates this rule to govern the approval of attorney fees. (4-7-11)

a. "Available funds," means a sum of money to which a charging lien may attach. It shall not include any compensation paid or not disputed to be owed prior to claimant's agreement to retain the attorney. (4-7-11)

b. "Approval by Commission," means the Commission has approved the attorney fees in conjunction with an award of compensation or a lump sum settlement or otherwise in accordance with this rule upon a proper showing by the attorney seeking to have the fees approved. (4-7-11)

c. "Charging lien," means a lien, against a claimant's right to any compensation under the Workers' Compensation laws, which may be asserted by an attorney who is able to demonstrate that: (4-7-11)

i. There are compensation benefits available for distribution on equitable principles; (4-7-11)

ii. The services of the attorney operated primarily or substantially to secure the fund out of which the attorney seeks to be paid; (4-7-11)

iii. It was agreed that counsel anticipated payment from compensation funds rather than from the client; (4-7-11)

iv. The claim is limited to costs, fees, or other disbursements incurred in the case through which the fund was raised; and (4-7-11)

v. There are equitable considerations that necessitate the recognition and application of the charging lien. (4-7-11)

d. "Fee agreement," means a written document evidencing an agreement between a claimant and counsel, in conformity with Rule 1.5, Idaho Rules of Professional Conduct (IRPC). (4-7-11)

e. "Reasonable," means that an attorney's fees are consistent with the fee agreement and are to be satisfied from available funds, subject to the element of reasonableness contained in IRPC 1.5. (4-7-11)

i. In a case in which no hearing on the merits has been held, twenty-five percent (25%) of available funds shall be presumed reasonable; or (4-7-11)

ii. In a case in which a hearing has been held and briefs submitted (or waived) under Judicial Rules of Practice and Procedure (JRP), Rules X and XI, thirty percent (30%) of available funds shall be presumed reasonable; or (4-7-11)

iii. In any case in which compensation is paid for total permanent disability, fifteen percent (15%) of such disability compensation after ten (10) years from date such total permanent disability payments commenced. (4-7-11)

02. Statement of Charging Lien. (4-7-11)

a. All requests for approval of fees shall be deemed requests for approval of a charging lien. (4-7-11)

b. An attorney representing a claimant in a Workers' Compensation matter shall in any proposed lump sum settlement, or upon request of the Commission, file with the Commission, and serve the claimant with a copy of the fee agreement, and an affidavit or memorandum containing: (4-7-11)

i. The date upon which the attorney became involved in the matter; (4-7-11)

ii. Any issues which were undisputed at the time the attorney became involved; (4-7-11)

iii. The total dollar value of all compensation paid or admitted as owed by employer immediately prior to the attorney's involvement; (4-7-11)

iv. Disputed issues that arose subsequent to the date the attorney was hired; (4-7-11)

v. Counsel's itemization of compensation that constitutes available funds; (4-7-11)

vi. Counsel's itemization of costs and calculation of fees; and (4-7-11)

vii. Counsel's itemization of medical bills for which claim was made in the underlying action, but which remain unpaid by employer/surety at the time of lump sum settlement, along with counsel's explanation of the treatment to be given such bills/claims following approval of the lump sum settlement. (4-7-11)

viii. The statement of the attorney identifying with reasonable detail his or her fulfillment of each element of the charging lien. (4-7-11)

c. Upon receipt and a determination of compliance with this Rule by the Commission by reference to its staff, the Commission may issue an Order Approving Fees without a hearing. (4-7-11)

03. Procedure if Fees Are Determined Not to Be Reasonable. (4-7-11)

a. Upon receipt of the affidavit or memorandum, the Commission will designate staff members to

determine reasonableness of the fee. The Commission staff will notify counsel in writing of the staff's informal determination, which shall state the reasons for the determination that the requested fee is not reasonable. Omission of any information required by Subsection 033.02 may constitute grounds for an informal determination that the fee requested is not reasonable. (4-7-11)

b. If counsel disagrees with the Commission staff's informal determination, counsel may file, within fourteen (14) days of the date of the determination, a Request for Hearing for the purpose of presenting evidence and argument on the matter. Upon receipt of the Request for Hearing, the Commission shall schedule a hearing on the matter. A Request for Hearing shall be treated as a motion under Rule III(e), JRP. (4-7-11)

c. The Commission shall order an employer to release any available funds in excess of those subject to the requested charging lien and may order payment of fees subject to the charging lien which have been determined to be reasonable. (4-7-11)

d. The proponent of a fee which is greater than the percentage of recovery stated in Subsections 033.01.e.i., 033.01.e.ii., or 033.01.e.iii. shall have the burden of establishing by clear and convincing evidence entitlement to the greater fee. The attorney shall always bear the burden of proving by a preponderance of the evidence his or her assertion of a charging lien and reasonableness of his or her fee. (4-7-11)

04. Disclosure. Upon retention, the attorney shall provide to claimant a copy of a disclosure statement. No fee may be taken from a claimant by an attorney on a contingency fee basis unless the claimant acknowledges receipt of the disclosure by signing it. Upon request by the Commission, an attorney shall provide a copy of the signed disclosure statement to the Commission. The terms of the disclosure may be contained in the fee agreement, so long as it contains the text of the numbered paragraphs one (1) and two (2) of the disclosure. A copy of the agreement must be given to the client. The disclosure statement shall be in a format substantially similar to the following:

State of Idaho
Industrial Commission

Client's name printed or typed_____

Attorney's name and address_____
printed or typed

DISCLOSURE STATEMENT

1. In workers' compensation matters, attorney's fees normally do not exceed twenty-five percent (25%) of the benefits your attorney obtains for you in a case in which no hearing on the merits has been completed. In a case in which a hearing on the merits has been completed, attorney's fees normally do not exceed thirty percent (30%) of the benefits your attorney obtains for you.

2. Depending upon the circumstances of your case, you and your attorney may agree to a higher or lower percentage which would be subject to Commission approval. Further, if you and your attorney have a dispute regarding attorney fees, either of you may petition the Industrial Commission, PO Box 83720, Boise, ID 83720-0041, to resolve the dispute.

I certify that I have read and understand this disclosure statement.

Client's Signature Date _____

Attorney's Signature Date_____

(4-11-15)

034. -- 060. (RESERVED)

061. RULE GOVERNING NOTICE TO CLAIMANTS OF STATUS CHANGE PURSUANT TO SECTION 72-806, IDAHO CODE.

01. Notice of Change of Status. As required and defined by Idaho Code, Section 72-806, a worker shall receive written notice within fifteen (15) days of any change of status or condition, including, but not limited to, whenever there is an acceptance, commencement, denial, reduction, or cessation of medical or monetary compensation benefits to which the worker might presently or ultimately be entitled. Such notice is required when benefits are reduced to recoup any overpayment of benefits in accordance with the provisions of Section 72-316, Idaho Code. (3-28-18)

02. By Whom Given. Any notice to a worker required by Idaho Code, Section 72-806 shall be given by: the surety if the employer has secured Workers' Compensation Insurance; or the employer if the employer is self-insured; or the employer if the employer carries no Workers' Compensation Insurance. (4-7-11)

03. Form of Notice. Any notice to a worker required by Idaho Code, Section 72-806 shall be mailed within ten (10) days by regular United States Mail to the last known address of the worker, as shown in the records of the party required to give notice as set forth above. The Notice shall be given in a format substantially similar to IC Form 8, available from the Commission and posted on the Commission's website at www.iic.idaho.gov. (4-11-15)

04. Medical Reports. As required by Idaho Code, Section 72-806, if the change is based on a medical report, the party giving notice shall attach a copy of the report to the notice. (4-7-11)

05. Copies of Notice. The party giving notice pursuant to Idaho Code, Section 72-806 shall send a copy of any such notice to the Industrial Commission, the employer, and the worker's attorney, if the worker is represented, at the same time notice is sent to the worker. The party giving notice may supply the copy to the Industrial Commission in accordance with the Commission's rule on electronic submission of documents. (3-25-16)

062. -- 999. (RESERVED)

Subject Index

BRENT AUSTIN, Claimant,

v.

BIO TECH NUTRIENTS, Employer,

and

EMPLOYERS COMPENSATION INSURANCE COMPANY, Surety, Defendants.

No. IC 2008-038504

Idaho Workers Compensation

Before the Industrial Commission of the State of Idaho

March 26, 2018

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Thomas E. Limbaugh, Chairman.

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper. The parties submitted the issue for resolution on stipulated facts with attached exhibits and briefing. Albert Matsuura, of Pocatello, represented Claimant, and Alan Gardner, of Boise, represented Defendants. The matter came under advisement on August 31, 2017. While the matter was under advisement, the parties requested the decision be held in abeyance so they could attempt further settlement negotiations. The proceedings were suspended. On or about February 28, 2018, Defendants requested the Commission reactivate the file and render a decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUE

The sole issue to be decided is whether Claimant's complaint was timely filed under Idaho Code § 72-706(3) so as to preserve his asserted claim for additional payment of non-medical indemnity benefits.

CONTENTIONS OF THE PARTIES

After Claimant filed his complaint, Defendants raised the statue of limitations affirmative defense under Idaho Code § 72-706(3). Claimant argues the one-year statute of limitations was tolled, pursuant to Idaho Code § 72-604, by Defendants' failure to file a required Notice of Change of Status and send proper written notice to Claimant upon the final payment of PPI benefits as required by Idaho Code § 72-806. Alternatively, Claimant argues that under the "liberal construction" requirement, he had one year to file his complaint from the date the last PPI benefit payment would have been paid had Defendants not accelerated the final payment. Under this scenario Claimant's complaint was timely filed.

Defendants argue they were under no obligation to file a Notice of Change of Status when they completed paying Claimant's PPI benefits in full, and furthermore satisfied their obligation under Idaho Code § 72-806. The statute of limitations was not tolled, and Claimant's complaint was not timely filed as a matter of law.

RECORD FOR REVIEW

The record in this matter consists of the stipulated facts, joint exhibits A through H, Defendants' Exhibit 1, Exhibit A to Defendants' Motion for Judicial Notice of Publication of the Idaho Industrial Commission, and legal briefing supplied by the parties.

STIPULATED FACTS

The facts set forth below are taken from the parties' Stipulated Facts.

1. Claimant Brent Austin was injured in the course of his employment with Defendant Employer Bio Tech Nutrients on November 20, 2008.

2. Defendants provided Claimant with medical treatment from November 21, 2008 through June 20, 2014.

3. Claimant experienced no time loss with respect to his November 20, 2008 injury until June 4, 2012.

4. Defendants paid temporary total disability ("TTD") benefits to Claimant for the period June 9, 2012 through July 18, 2014.

5. Claimant was determined by independent medical evaluation to be at maximum medical improvement on June 20, 2014.

6. Defendants advised Claimant by Notice of Claim Status ("NOCS") dated July 18, 2014 that his TTD benefits would stop effective July 18, 2014, based on Dr. Fellars' determination that Claimant was at maximum medical improvement on June 20, 2014. Joint Exhibit A.

7. Additionally, the July 18, 2014, NOCS explained that

Dr. Fellars rated Claimant's permanent partial impairment ("PPI") at 11% of the whole person and that Claimant would be paid $18,694.50 in bi-weekly installments based on $339.90 per week beginning August 1, 2014, until the award was paid in full. Joint Exhibit A.

8. Defendants attached a copy of Dr. Fellars' June 20, 2014, medical report to the July 18, 2014 NOCS. See reference in Joint Exhibit A.

9. Claimant's counsel requested a benefit payment summary from the Surety on October 31, 2014. The Surety mailed a summary of paid benefits that was received by Claimant on November 20, 2014. The summary included an itemization of PPI benefits paid by the Surety through the period ending November 21, 2014. A copy of the PPI payment portion of Surety's benefit summary is provided as Joint Exhibit B.

10. Payment of Claimant's PPI benefits commenced on July 19, 2014, as noted by the initial PPI benefit payment entry on Joint Exhibit B.

11. A copy of Employer/Surety's Summary of Payments dated October 31, 2014, filed with the Commission on November 4, 2014 and approved by the Commission on January 7, 2015, is provided as Joint Exhibit C.

12. Defendants issued the final payment of PPI to Claimant in care of his attorney on June 22, 2015, by check number 270024820 in the amount of $2,379.30. See Joint Exhibit D.

13. The remittance advice attached to check number 270024820 stated a payment description of "Permanent Partial Scheduled/Impairment" and a comment of "PPI Final Payment." See Joint Exhibit D.

14. Check number 270024820, issued June 22, 2015, cleared Defendant Surety's bank on July 10, 2015.

15. In the months of June and/or July 2015, Defendant Surety did not send to Claimant nor file with the Commission any NOCS (IC Form 8) regarding Claimant's PPI benefits.

16. In the months of June and/or July 2015, Defendant Surety did not send to Claimant or Claimant's counsel any written notice regarding Claimant's PPI benefits other than the remittance advice attached to check number 270024820 dated June 22, 2015. See Joint Exhibit D.

17. Claimant filed a complaint in this case with the Commission on July 20, 2016. Joint Exhibit E.

18. In his complaint, Claimant raises the issue of additional TTD benefits and reserves issues of PPI and permanent partial disability ("PPD"). See Joint Exhibit E.

19. In their Answer to Complaint filed with the Commission July 26, 2016, Defendants asserted the affirmative defense "that Claimant is barred by the statute of limitations of 72-706, Idaho Code, as to any indemnity benefits whatsoever." Joint Exhibit F.

20. On September 6, 2016, Defendants provided Answer to Interrogatory No. 3. Joint Exhibit G.

21. Claimant's counsel requested a record of NOCS filed with the Idaho Industrial Commission and, on April 24, 2017, received a report from the Idaho Industrial Commission titled "Change of Status Notices Received for Claim Number 2008-038504." Joint Exhibit H.

DISCUSSION AND FURTHER FINDINGS

22. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, "where the language of a statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction." City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993). Where a statute is plain, clear, and unambiguous, it must be given the interpretation the language clearly implies. If the statute is socially unsound, it is the up to the legislature, not the courts, to correct it. *Verska v. St. Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3d 502 (2011).

23. Claimant raises two central arguments to advance his position. One involves the interpretation and interaction of several statutes; to wit, Idaho Code § 72-706(3), Idaho Code § 72-806, and Idaho Code § 72-604. Claimant reasons that Defendants' failure to send him a formal Notice of Change of Status (NOCS) when the final payment of PPI disability was delivered, as per Idaho Code § 72-806, tolls the running of the one-year statute of limitations set forth in Idaho Code § 72-706(3) by virtue of the tolling sanction found in Idaho Code § 72-604. This argument presupposes that Defendants were required to send Claimant a NOCS when it made its "final payment" of benefits on June 22, 2015, and "willfully" failed or refused to do so.

24. Claimant's second argument asserts that the Commission should consider the date the last payment of benefits would have been due had Surety not made an advance payment of seven weeks' worth of PPI benefit payments in a "lump sum" fashion. That date is no earlier than August 8, 2015. When the August date is used,

Claimant timely filed his complaint.

NOCS ANALYSIS

25. Idaho Code § 72-706 is entitled **Limitation on time on application for hearing** and provides various time limitations for filing a complaint. The applicable provision in this case, Idaho Code § 72-706(3), states in relevant part;

72-706(3). When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury …, the claimant shall have one (1) year from the date of last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits.[1]

Claimant received temporary disability benefits more than four years after his accident. Once a physician determined Claimant had reached MMI, Surety began paying Claimant PPI disability payments, as detailed below.

26. As noted in the stipulated facts and Joint Exhibit (JE) A, Surety determined Claimant was entitled to PPI benefit payments in the sum of $18,694.50, correlated to his 11% whole-person medical impairment. Surety sent Claimant an NOCS dated July 18, 2014 informing him of this fact. Therein Surety stated that TTD benefits were stopping effective July 18, 2014, and PPI payments in the weekly sum of $339.90 would begin on August 1, 2014. Surety informed Claimant in this NOCS that the PPI payments would be paid in bi-weekly installments "until the award has been paid in full." Surety made it clear in the July 18, 2014 NOCS that payment of the PPI benefits would not settle his claim.

27. Surety began making bi-weekly payments on July 19, 2014 in the sum of $679.80, and continued in this fashion until June 22, 2015, at which time it sent Claimant a check in the sum of $2,379.30, which represented seven weekly or 3.5 bi-weekly PPI payments. On the face of the document, there was a notation under the heading "Comment" that the check was a "PPI Final Payment." No further PPI payments were forthcoming from Surety thereafter.

28. Surety's last payment of income benefits occurred on June 22, 2015. Under the provisions of Idaho Code § 72-706(3), it appears that Claimant had until June 22, 2016 to file his complaint, which he did not do. However, as discussed below, the requirements of Idaho Code § 72-706(3) may be tolled under certain circumstances.

Claimant's Arguments

29. Claimant argues that under Idaho Code § 72-806, Surety should have sent Claimant an NOCS when it made its final payment, and its failure to do so tolls the running of the statute of limitation contained in Idaho Code § 72-706(3). In relevant part Idaho Code § 72-806 states;

Notice of change of status. A workman shall receive written notice within fifteen (15) days of any change of status or condition including, but not limited to, the denial, reduction, or cessation of medical and/or monetary compensation benefits, which directly or indirectly affects the level of compensation benefits to which [the worker] might presently or ultimately be entitled.

As stipulated by the parties, Surety did not send Claimant an NOCS when the final PPI benefits payment check in the sum of $2,379.30 (the check) was tendered to, and accepted by, Claimant.

30. Idaho Code § 72-604 provides a sanction for failing to provide *required* NOCS documents. As stated therein;

Failure to report tolls employee limitations. When the employer…willfully fails or refuses to file…the notice of change of status required by section 72-806, Idaho Code, the limitations prescribed in … section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such …notice shall have been filed.

31. If Surety was required to file a NOCS when it sent its final PPI check to Claimant, and willfully failed or refused to do so, the limitations of Idaho Code § 72-706(3) discussed above would not apply, and Claimant's complaint would stand. If Surety was not required to file a NOCS when it concluded its PPI payments, or conversely if it provided Claimant sufficient notice that it would be sending no further PPI checks with the notation on the face of the final benefits check, or if its omission was not willful, then Claimant's complaint was untimely filed, and would be subject to dismissal with prejudice.

32. Claimant first argues Surety had an obligation to provide an NOCS with its final PPI payment because the final payment was in effect a cessation of monetary compensation benefits which directly or indirectly affected the level of compensation benefits which Claimant might presently or ultimately be entitled, thus triggering the requirements of Idaho Code § 72-806. When Surety failed in this obligation, the statute of limitation on filing a complaint was tolled indefinitely.

33. Claimant asserts the need for an NOCS is demonstrated in this case by the fact that various PPI payout dates can be calculated from the documents provided by Surety in discovery. The July 18, 2014 NOCS states the PPI benefits of $18,694.50 would be paid at the rate of $339.90, would begin on August 1, 2014, and would continue bi-weekly until "the award is paid in full." The total PPI benefits

($18,694.50) divided by the weekly benefit amount ($339.90) would mean PPI benefits would be paid for 55 weeks. (18,694.50/339.90 = 55). Fifty-five weeks from August 1, 2014 would make the final payment due on August 21, 2015.

34. In fact, Surety began payments on July 19, 2014, so that the final installment of PPI benefits would have been due on August 8, 2015. Additionally, Surety noted on the check face that final $2,379.30 payment was for benefits through July 3, 2015, when in reality the payment covered the period through August 8. Claimant argues "the confusing and conflicting PPI payout dates that can be derived from the Surety's documents drives home the need for the Surety to provide proper notice of the cessation of Claimant's PPI benefits as required by I.C. § 72-806." Claimant's Opening Brief, p. 7. Surety's failure to comply with the statute tolled the statute of limitations, and thus Claimant's complaint was timely filed on July 20, 2016.

35. Claimant relies on the case of *Mead v. Swift Transportation*, 2015 IIC 0041 (2015) to support his claim. Therein, the defendants argued the claimant's complaint was time barred due to late filing. However, the defendants had failed to file any NOCS in the case before the complaint was filed. The Commission ruled the statute of limitation was tolled by defendants' failure to comply with Idaho Code § 72-806. Defendants' argument that the failure was not willful, but rather was an inadvertent oversight, was rejected because the Commission found the defendants were aware of their legal obligation to submit the required NOCS and had no lawful excuse for failing to do so. Claimant submits that *Mead* is on point and controlling in this matter.

36. Finally, Claimant notes that the notation of "PPI Final Payment" on the check cannot be construed as complying with the provisions of IDAPA 17.02.08.061.02 and .03 which require Surety to send the NOCS to Claimant within ten days from the change of status on an IC Form 8 or one "substantially similar" thereto. Because the outcome of this issue does not depend on whether the notations on the check were substantially similar to IC Form 8, no conclusion is made on this point, although it is noted the check did contain most of the information provided in the Form 8, but not in the same formatting.

Defendants' Arguments

37. Defendants note this issue turns on whether they were legally required to provide an NOCS on a form similar to IC Form 8 following their PPI benefits payment in full on June 22, 2015. They take the position no such notice was required, but even if it was, the information contained on the final payment check, together with the amount of the final check, supplied Claimant with adequate notice of the fact his PPI benefits payments were concluded with payment in full.

38. Defendants argue that Idaho Code § 72-806 requires notice only when the change in status or condition affects the level of compensation benefits to which a claimant might presently or ultimately be entitled. Where a claimant has been properly notified of a fixed amount of impairment benefits which will be paid to the individual, completion of such payments, whether or not accelerated, does not change the level of benefits the claimant is presently or ultimately entitled to. Following Claimant's last PPI payment on June 22, 2015, the level of benefits to which Claimant was entitled did not change. He received exactly what he was told he would receive in the July 18, 2014 NOCS.

39. Defendants point out that if an NOCS is required when the last payment is received on the notion that Claimant's benefits level changed when such payment was made, then an NOCS would be required after each installment payment was made, since each of those payments "decrease" Claimant's level of benefits to which he is entitled going forward. This, of course, would be an absurd reading of I.C. § 72-806. In reality, Claimant's level of benefits did not change; they simply went from being prospective to realized with each payment, and fully realized with the final payment.

40. Defendants point out that the *Idaho Industrial Commission's Certified Idaho Worker's Compensation Specialist Learning Course Student Book* (of which the Referee took administrative notice by Order dated May 19, 2017) lists specific, common circumstances under which a written notice of change of status must be issued. While numerous situations are provided as examples of when a notice is required, completion of PPI benefit payments are not among them. While Defendants concede this list is not exhaustive, they argue that if notice is mandated each time a surety makes a final PPI benefits payment, which is a very common occurrence in worker's compensation cases, one would assume the Commission would have listed the event in their examples.

41. Finally, Defendants distinguish *Mead, supra,* from the instant case. In *Mead,* the Defendants failed to issue *required* notices, and later claimed the omission was simply an inadvertent mistake. Here, Defendants issued all required notices. The reality is that no notice was required under I.C. § 72-806 when the final installment payment was delivered to Claimant.

Legal Analysis and Findings

42. Idaho Code § 72-806 provides:

A workman shall receive written notice within fifteen (15)

days of any change of status or condition including, but not limited to, the denial, reduction or cessation of medical and/or monetary compensation benefits, which directly or indirectly affects the level of compensation benefits to which he might presently or ultimately be entitled. If any change in compensation benefits is based upon a medical report or medical reports from any physician or any other practitioner of the healing arts, a copy of such report shall be attached to the written notice which the workman shall receive. The industrial commission shall by rule and regulation, determine by whom the notice shall be given and the form for such notice. In the absence of a rule governing a particular situation, the employer's insurer, or in the case of self-insurers, the employer, shall be responsible for giving the notice required herein.

Therefore, a worker shall be given written notice of any change of status which directly or indirectly affects the level of compensation benefits to which he is or might be entitled. Given as examples of changes that require written notice are denials, reductions, or cessations of the payment of medical/indemnity benefits. Defendants urge the Commission to conclude that following the receipt of the last payment of PPI benefits, Claimant's "level" of compensation did not change, even though he received no further payments of PPI. Necessarily, because it constitutes one of the identified examples, Defendants must also insist that with the last payment of PPI benefits, it cannot be said that those payments ceased. The argument is not as implausible as it sounds, and is best illustrated by comparing PPI benefits to TTD benefits. TTD benefits are initiated when Claimant enters a period of recovery. They are unbounded on the other end, for it is unknown, at the outset, when Claimant will be determined to be medically stable. When Claimant eventually reaches medical stability, Claimant must be alerted to the fact that TTD benefits will be terminated because Claimant is no longer in a period of recovery.

43. In contrast, when Claimant receives an impairment rating, the amount of Claimant's entitlement to the payment of the rating admitted by Employer is known from the very outset. As in this case, a notice of change of status is issued to announce the commencement of the payment of PPI benefits, and to further alert Claimant to the fact that he is entitled to payment of a sum certain, which will be paid over a period of so many weeks in such-and-such an amount. Therefore, the initial notice of change of status alerts Claimant to both the initiation and cessation of a finite award. If Claimant, or his attorney, is paying attention, he will know when the stated award is paid in full, and he should not need to be reminded of this by another notice of change of status which only reaffirms that which he was told at the outset. In fact, the final check received in this case did remind Claimant that payments were completed.

44. Notwithstanding that a plausible case can be made for treating the payment of a finite PPI award differently from TTD or medical benefits, the statutory scheme does not appear to endorse such a distinction. I.C. § 72-806 must be examined to understand whether, with the last payment of PPI benefits, Claimant's PPI payments ceased, or, more generally speaking, his "level" of benefits was affected.

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

State v. Schulz, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011). "Cessation" is defined as the fact or process of ending or being brought to an end. *Oxford Dictionaries*, available at https://en.oxforddictionaries.com/definition/cessation, last accessed March 20, 2018. The last payment of PPI benefits brought Employer's present obligation to an end. Only by contorting the ordinary meaning of the term "cessation" could it be said that Defendants did not cease paying PPI benefits with the last check; after that check was issued, Claimant received no further payments. Further, we note:

"[A]mbiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous… [W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature."

Melton v. Alt, 163 Idaho 158, 408 P.3d 913, 918 (2018) (internal citations omitted).

45. Moreover, in the broader sense, Claimant's "level" was affected by the issuance of the last check. "Level," in this context, is most clearly synonymous with "amount." *Oxford Dictionaries*, available at *https://en.oxforddictionaries.com/definition/level*, accessed on March 20, 2018. Defendants argue that because Claimant's entitlement to the PPI award was finite, and because he was initially alerted to the fact that there would be an endpoint to the payment of these benefits, his level of

compensation wasn't really affected when those payments came to an end. The end was expected and nothing changed. Again, while this argument is not implausible, there is no support for it in the plain language of the statute. Claimant received periodic payment of PPI benefits, and at some point those payments came to an end. The level (amount) of money he periodically received was therefore "affected" by the receipt of the last payment, for Claimant received no further payments thereafter. Based on the foregoing, the argument that the cessation of PPI benefits did not require Defendants to issue a notice of change of status is rejected.

46. Based on our determination that an Idaho Code § 72-806 notice was required to announce that with the last check, Claimant's PPI payments would cease, we do not reach the other arguments raised by Defendants in connection with Idaho Code § 72-706. Because Defendants did not issue the required Idaho Code § 72-806 notice, the limitation provisions of Idaho Code § 72-706 are tolled by operation of Idaho Code § 72-604.

CONCLUSIONS OF LAW AND ORDER

1. Defendants were required to give Claimant written notice of the cessation of PPI benefits per Idaho Code § 72-806;

2. By operation of Idaho Code § 72-604, failure to give such written notice tolls the limitation provisions of Idaho Code § 72-706;

3. Claimant's complaint is timely; and

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive to all matters adjudicated.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Commissioner, Aaron White, Commissioner

Notes:

[1] The term "application requesting a hearing for additional benefits" is commonly known as a complaint.
