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McGivney v. Aerocet, Inc. Respondent's Brief 2 Dckt. 45700

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GEORGE McGIVNEY, Claimant/Respondent, v. AEROCET, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants/Appellant, and QUEST AIRCRAFT, Employer, and FEDERAL INSURANCE COMPANY, Surety, Defendants/Respondents.	)	**SUPREME COURT NO. 45700-2018**

RESPONDENTS (QUEST AIRCRAFT) BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERED BY THE IDAHO INDUSTRIAL COMMISSION ON THE 22nd DAY OF DECEMBER, 2017

Chairman Thomas E. Limbaugh, Presiding

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal by Defendants Aerocet, Inc. and State Insurance Fund from a decision of the Idaho Industrial Commission in a consolidated workers' compensation claim for two cases filed by Claimant George McGivney (McGivney). The first case involves a claim by Claimant against his Employer Aerocet, Inc. ("Aerocet") and its Surety State Insurance Fund ("SIF") for a left knee meniscal injury suffered on May 6, 2011. The second case involves a claim by McGivney against Employer Quest Aircraft Company, Inc. ("Quest") and its Surety Federal Insurance Company ("Federal") for left knee meniscal injury suffered in an accident on March 5, 2014.

B. FACTUAL AND PROCEDURAL HISTORY

Ultimately, the facts of the case are not complex. McGivney suffered a left knee injury on May 6, 2011, a medial meniscus tear, a result of which he underwent surgery. At the time of that surgery, a more invasive total knee procedure was contemplated but not undertaken. Instead, Dr. McInnis performed an arthroscopy with meniscus debridement and repair. He cautioned, however, that the arthroscopy was only a temporary fix and would not change the ultimate prognosis or natural history of McGivney's underlying arthritis, which would eventually require a total knee replacement. McGivney was found MMI on November 17, 2011, and thereafter he was assigned a 2% lower extremity impairment. Neither McGivney nor Aerocet/SIF requested a Hearing or settled the claim thereafter, and no disability determination was made by the

Industrial Commission.

McGivney changed jobs to Quest in October 17, 2011, and then suffered a new left knee injury on March 5, 2014. This new injury resulted in additional damage to the medial meniscus, and ultimately McGivney sought surgery again. The surgeon opted to perform a unicompartmental knee replacement surgery to repair the new damage as well as address the preexisting, progressive degenerative issues. As a result of this surgery, McGivney was assigned a 21% lower extremity PPI rating, which was apportioned by the surgeon and an IME physician - 50% to the 2011 injury and 50% to the 2014 injury.

McGivney filed Complaints against Aerocet/SIF and Quest/Federal, and thereafter filed a Motion to Consolidate the two claims. AR 1-18. Quest/Federal filed Defendants' Notice of Non-Opposition to McGivney's Motion to Consolidate on April 29, 2015. AR 19-20. McGivney's deposition was taken on May 12, 2015, and Counsel for both Aerocet/SIF and Quest/Federal attended and participated in the deposition. Aerocet/SIF served its Objection to McGivney's Motion to Consolidate also on May 12, 2015, although it is notable that the footer to the Objection was incorrectly labeled "Notice of Taking Deposition Duces Tecum." AR 21-22. On May 15, 2015, McGivney filed a Response to Defendants' Objection to McGivney's Motion to Consolidate, indicating McGivney was not made aware at the time of the deposition that there was any objection to consolidation of the claims. AR 23-25. The Commission issued its Order to Consolidate on May 19, 2015. AR 21-22.

On September 11, 2015, McGivney filed a Motion for payment of benefits by Quest/Federal pending a determination of liability pursuant to Idaho Code §72-313. AR 40-43.

As raised by McGivney in the motion for consolidation of the claims, McGivney reasoned therein that either Aerocet/SIF or Quest/Federal was responsible for the knee replacement surgery and related time-loss benefits, and the issue of dispute was liability as between the two Employer/Sureties. In its responsive pleading, Aerocet/SIF maintained no benefits were due in relation to the 2011 injury. AR 44-46. The Commission issued its Order Granting McGivney's Motion for payment of benefits pending a determination of liability pursuant to Idaho Code §72-313. AR 47-48, 51-52. As a result of this Order, Quest/Federal was ordered to pay Claimant's benefits, which was done. (See AR 161, Footnote 1).

Referee Powers conducted a Hearing in Coeur d'Alene on November 8, 2016. At the Hearing, the Referee and parties clarified the issues before the Industrial Commission. Hearing Transcript ("Tr.") pp. 4-7. The issues were also summarized in the Brief of Defendants Aerocet, Inc. and State Insurance Fund, filed June 8, 2017. ("Appellants' Brief"). The issues at Hearing were whether and to what extent McGivney's condition was due in whole or in part to a preexisting condition, whether and to what extent McGivney as entitled to worker's compensation benefits and the extent thereof, apportionment for a preexisting condition, reimbursement to Quest pursuant to Idaho Code §72-313, and whether McGivney was entitled to an award of attorney fees. Any objections to consolidation of the claims did not arise during the Hearing or in Aerocet/SIF's Brief.

The Commission entered its Findings of Fact, Conclusions of Law, and Order on December 22, 2017, not adopting the Referee's recommendations. ("IC Decision"). AR 109-132. Pursuant to that Decision, the Commission determined the following: McGivney suffered a 21%

lower extremity permanent partial impairment (PPI), which was apportioned 50% to the 2011 injury (Aerocet/SIF) and 50% to the 2014 injury (Quest/Federal); Medical benefits incurred in relation to a June 25, 2014, left knee arthroplasty surgery and subsequent treatment, and related time loss benefits following surgery should be apportioned 50/50 between Aerocet/SIF and Quest/Federal; McGivney suffered a 50% disability (PPD) inclusive of impairment, and said disability should be apportioned equally between Aerocet/SIF and Quest/Federal; and, McGivney was not entitled to an award of attorney fees. Pursuant to this Order, Quest/Federal has continued to pay McGivney his awarded benefits. Aerocet/SIF has paid nothing.

The issues before the Idaho Industrial Commission boiled down to which of the two Employers/Sureties were responsible for the surgery performed in 2014, and apportionment of impairment and disability between the two industrial accidents. The gist of the appeal is Appellants assert they owe no benefits. Aerocet/SIF challenge the Commission's apportionment of any permanent impairment (PPI) to the 2011 accident above a 2% PPI previously paid, the finding of liability by Aerocet/SIF for payment of any medical or time-loss benefits subsequent to November 17, 2011, and the award of any disability relating to the 2011 accident and injury. Respondents Quest/Federal asserts the Industrial Commission properly consolidated the two cases, and properly made a determination as to the extent to which the respective Employers/Sureties were liable for benefits. Quest/Federal further assert the Commission's Decision is supported by substantial and competent evidence, and Appellants' arguments are merely a request for this Court to re-weigh the evidence. Accordingly, the Commission's Decision should not be disturbed on appeal. Quest/Federal seeks an award of attorney fees

pursuant to I.C. §72-804.

II.

ISSUES PRESENTED ON APPEAL

The issues presented on appeal by Aerocet and SIF include the following:

1. Whether the Commission erred as a matter of law in applying I.C. §72-422, 72-425, and/or 72-432 to determine permanent impairment and permanent disability for the 2011 and 2014 injuries?
2. Whether the Commission erred as a matter of law in consolidating I.C. 2011-011043 with I.C. 2014-019179 and by failing to adjudicate McGivney's disability from the 2011 injury separate from the total disability and prior to apportioning the same?
3. Whether the Commission erred as a matter law in applying ***Brown v. Home Depot***, 152 Idaho 605, 272 P.3d 577 (2012) in determining McGivney's disability in excess of impairment at the time of hearing rather than at the time McGivney reached maximum medical improvement in connection with his 2011 injury?
4. Whether the Commission erred as a matter of law in apportioning disability between the 2011 and 2014 injuries?

Respondent raises the additional issue of entitlement to attorney fees as against Appellant pursuant to I.C. §72-804.

III.

THE STANDARD OF REVIEW

In reviewing an appeal from the Industrial Commission, the Court will uphold the

findings of the Commission if they are supported by substantial and competent evidence in the record. Idaho Code §72-732; ***Lethrud v. State***, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). Evidence is "substantial and competent" if a reasonable mind might accept such evidence as adequate and sufficient to support a conclusion. ***Reiher v. American Fine Foods***, 126 Idaho 58, 60, 878 P.2d 757, 759 (1994). The Court will not disturb the Commission's findings on the weight and credibility of the evidence unless the conclusions are clearly erroneous. ***Shubert v. Macy's W., Inc.***, 158 Idaho 92, 98, 343 P.3d 1099, 1105 (2015). The Court will not re-weigh evidence. ***Watson v. Joslin Millwork, Inc.***, 149 Idaho 850, 854, 243 P.3d 666, 670 (2010). The Court's review is limited to a review of the questions of law. ***Brown v. Home Depot***, 152 Idaho 605, 610, 272 P.3d 577, 582 (2012), citing **Art. V, §8 of the Idaho Constitution**. The interpretation of a statute is a question of law over which this Court extends free review. ***Carrier v. Lake Pend Oreille School Dist. #84***, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006).

IV.

ARGUMENT

Aerocet/SIF essentially request this Court re-weigh the evidence and re-decide the findings of the Industrial Commission. Appellants contend the Commission erred as a matter of law at essentially every step of the proceeding, first challenging the Commission's consolidation of the claims, then ignoring the Commission's detailed analysis and consideration of the medical evidence to challenge the well-reasoned conclusion that McGivney's need for medical treatment and the resulting impairment and disability were the result of the combination of McGivney's

2011 and 2014 industrial injuries, and finally disputing the award of impairment and disability and apportionment of benefits between the 2011 and 2014 injuries.

The fact that the preexisting condition related to a previously "stable" industrial injury is irrelevant to the issue of apportionment, and Appellants' arguments are not supported by the Statute or precedent. The facts remain that McGivney's impairment and disability were not adjudicated in 2011 or at the time he was MMI, and his condition which may have been stable at some time prior to his 2014 injury did degenerate and did contribute to McGivney's need for subsequent surgical intervention, additional impairment, and disability in excess of impairment. As such, the Commission had jurisdiction to determine the nature and extent of McGivney's entitlement to benefits. Quest/Federal respectfully submit that the Industrial Commission properly consolidated the claims, properly made a determination as to McGivney's permanent impairment rating and disability at the time of the Hearing, and then properly made its determination as to the extent to which McGivney's permanent impairment and disability should be apportioned as between his most recent industrial injury and his preexisting condition.

A. McGivney's 2011 and 2014 claims were necessarily and appropriately consolidated, and the Commission's Decision and method of apportioning benefits are supported by substantial and competent evidence.

In the present case, Aerocet/SIF take issue with the Commission's consolidation of McGivney's two claims involving injuries to his left knee that occurred less than three (3) years apart. The medical evidence in the case demonstrates that McGivney had preexisting arthritis in

his left knee, and he suffered essentially the same physical injuries from his two industrial accidents – that being a meniscal tear in 2011 and additional tearing of the same meniscus in 2014. However, by 2014 McGivney had interim deterioration of his prior compromised knee condition, and thus, rather than pursue another simple meniscal repair surgery, the treating surgeon proposed a more extensive total knee surgery to be undertaken to address the totality of the damage to the left knee. Despite these undisputed facts, Aerocet/SIF argue the Commission's consolidation of the claims was done out of administrative convenience, and the assessment of disability and apportionment of liability robbed them of their rights to a separate determination of the 2011 claim on its own substantive merits. Appellants' argument is flawed for several reasons, and as such, the Commission's Decision should not be disturbed on appeal.

Certainly, it is presumed there was indeed some element of "administrative convenience" as viewed by the Industrial Commission. The "convenience" lies not just with the Industrial Commission, but also the Claimant. Under the Aerocet/SIF procedural proposal, Mr. McGivney would have been required to undergo two separate Hearing dates. Aerocet/SIF does not present us any argument that somehow McGivney's testimony would have been different between the two sets of Hearing dates. Additionally, Mr. McGivney would have been subjected to paying testifying experts twice for offering post-hearing deposition testimony subsequent to each Hearing. Mr. McGivney would have been required to write two post-hearing briefs to present to the presiding Referee. In turn, the Referee would have been required to sit through two separate Hearings to listen to the same Lay and Expert witness testimony (presented twice) - once again with no facts being presented by Aerocet/SIF that any such testimony would have differed from

what we see actually happened in this case. On top of all this, if there had indeed been two separate Hearings conducted there would be the distinct possibility of inconsistent results as to McGivney's entitlement to various benefits. Assuming that Aerocet/SIF might tell this court that the chances of getting inconsistent results from two separate Hearings would have been extremely unlikely, then the obvious response from this Respondent would be the rhetorical question: Then why is there a problem with consolidation if the results would be the same?

McGivney's 2011 claim was not adjudicated or settled. McGivney was certainly entitled to explore additional benefits as permitted under the Statute. McGivney made a timely claim for additional benefits for his 2011 injury claim, and as such the Commission not only had jurisdiction, but was required, to make a determination as to benefits McGivney may have been entitled to said injury, including any additional medical treatment, time loss, impairment, and disability, and any apportionment therefor. **Idaho Code §§72-406, 72-707**.

Likewise, Aerocet/SIF could have explored its exposure for disability benefits between 2011 and 2014. The record is devoid of any such activity on the part of Aerocet/SIF.

Aerocet/SIF claims that the 2011 case was "a straightforward case" and that "it [was] not necessary to duly complicate I.C. No. 2011-011043 with a subsequent case with a different employer, [I.C. No. 2014-019179]. Quest/Federal would posit the following in response: What more compelling set of facts would support consolidation than two distinct industrial injuries to the exact same part of the anatomy of a worker performing the same occupational duties for two separate employers? The fact remains that the cases were necessarily intertwined both in medical and legal causation. McGivney suffered two accidents and the treating surgeon, as well

as an Independent Medical Evaluator, related the need for medical treatment and resultant impairment to each of the two accidents. Consolidation of the two accident claims was not merely a procedural convenience, and it is ridiculous to argue that consolidation of the two claims somehow changed the rights/obligations of the parties pursuant to the provisions of Title 72, Idaho Code. In this case, consolidation was necessary for the Commission to make a reasoned determination as to McGivney's entitlement to statutory benefits. As was his right, McGivney filed Complaints on both claims within the parameters of the time limitations set forth in I.C. §72-706(2). It just so happened that in exercising this procedural "right" as against Aerocet/SIF, Mr. McGivney had, in the interim, suffered a second industrial injury to the same portion of the left knee. The substantive rights of the parties were duly considered by the Industrial Commission. The Commission then provided substantial and competent evidence in support of its determination as to the respective liability of each of the two Employers/Sureties. Based upon the well-reasoned opinions of medical personnel. Accordingly, the Commission properly consolidated the 2011 and 2014 claims, and as will be discussed further herein, the Decision and method of apportioning disability was supported by substantial and competent evidence.

B. The issue of McGivney's disability referable to his respective industrial injuries was properly before the Commission, and properly determined and apportioned by the Commission.

Aerocet/SIF argues McGivney's claim was "done" when McGivney was deemed medically stable following his 2011 injury. They assert no further impairment is due once a

rating is assigned by a treating physician, and that disability, if any, should be assigned at the time the impairment rating was issued. Interestingly, Aerocet/SIF provided no vocational evidence in support of their position as to disability (or lack thereof), but insist that even though no disability determination was made in 2011, or at any time before 2014, McGivney's return to work necessarily implied he had no disability. To imply that Aerocet/SIFs would be entitled to "stop time" and preclude any further analysis of their liability by the Commission is neither equitable, nor supported by any statutory language in Title 72, Idaho Code or case law.

Idaho Code §72-422 provides:

> 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 evaluation***. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing fact to, but not necessarily an indication of, the entire extent of permanent disability.
> [Emphasis added].

Neither the Statute nor case law suggests that permanent impairment is permanently fixed in time and cannot be modified based on any change of condition.[1] In fact, Statute provides that "[t]he employer shall provide for an injured employee such reasonable medical [care] . . . as may be reasonably required by the employee's physician . . ." as long as the need for treatment is reasonably related to the claimed industrial accident. **Idaho Code §72-432(1)**. It is axiomatic that additional medical treatment may lead to an increase or possibly reduction in impairment

[1] The Respondent would also direct the Court to I.C. §72-719 which specifically allows the Industrial Commission, upon petition or its own review, to "make an award ending, diminishing or increasing the compensation previously agreed upon or awarded..." Thus, even assuming for sake of argument that Appellant's position is correct; nothing would have precluded McGivney from seeking a modification as to permanent impairment within 5 years of the date of the 2011 accident.

rating and/or permanent restrictions. In this case, McGivney made a timely claim for impairment and disability benefits referable to his 2011 injuries, and the Commission made the determination of impairment and disability following McGivney's medical stability.

"Maximum Medical Improvement" (more commonly referred to as MMI) can be more clearly understood in looking to the definition of the same in the AMA Guides to the Evaluation of Permanent Impairment, 6th Ed. (2009), p. 26:

> There can be some scenarios with individuals now at MMI but with potential for future progression of their disease. For example, an individual exposed to asbestos who is currently stable with perhaps some current objective findings that are unlikely to change in the next 12 months but with a potential for malignancy in the distant future. Nevertheless, these individuals can be rated based on the current findings with the notation of a potential for progression in the distant future.
>
> Thus, MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment. Therefore, MMI is not predicated on the elimination of symptoms and/or subjective complaints. Also, MMI can be determined if recovery has reached the stage where symptoms can be expected to remain stable with the passage of time, or can be managed with palliative measures that do not alter the underlying impairment substantially, within medical probability.
>
> Maximum Medical Improvement does not preclude the deterioration of a condition that is expected to occur with the passage of time or as a result of the normal aging process; nor does it preclude allowance for ongoing follow-up for optimal maintenance of the medical condition in question. (emphasis added).

Aerocet/SIF has cited and reviewed this Court's decision in *Horton* coming to the

conclusion that particular decision is not applicable in this case because, unlike *Horton*, McGivney's injury was fixed and stable. Aerocet/SIF Brief p. 23, *citing* ***Horton v. Garrett Freightlines, Inc.***, 115 Idaho 912, 772 P.2d 119 (1989) and ***Horton v. Garrett Freightlines, Inc.***, 106 Idaho 895, 684 P.2d 297 (1984). Although McGivney was found medically stable in 2011 and assigned a permanent impairment rating, like the *Horton* case, his industrial condition was noted, even at that time, as having a component of progressive degenerative changes that required further medical treatment. McGivney eventually needed additional medical treatment which the treating physician and IME physician related, in part, to the 2011 accident and injury.

The evidence reviewed by the Commission was not generated by any one party, and evidence relied upon by the Commission by way of documentation and testimony specifically related to both McGivney's 2011 and 2014 injuries and the resultant permanent impairment and disability for each. As the finder of fact, the Commission can accept or reject various medical opinions, testimony of the parties, and testimony of experts as it sees fit, as long as the Commission provides a reasonable rationale for such decision. In this case, the Commission reviewed hundreds of pages of medical and vocational records, hearing testimony, and expert medical and vocational testimony in coming to its well-reasoned and logical conclusion that McGivney's medical condition following his 2011 injury and medical stability therefor deteriorated prior to the 2014 injury, and that a combination of his 2011 and 2014 injuries contributed to McGivney's need for the particular surgical procedure (knee replacement). The Commission reasoned:

McGivney has been given a 21% lower extremity impairment rating for his left

> knee. Dr. McInnis originally proposed that following the 2011 meniscectomy, McGivney was entitled to a 2% lower extremity rating, with no impairment assigned to McGivney's preexisting left knee arthritis. Dr. McNulty acknowledged that this 2% rating was appropriate at the time it was issued. However, Dr. McNulty ultimately concluded that half of McGivney's current 21% lower extremity rating should be apportioned to the 2011 accident. Explaining his reasoning, he testified that the 2011 meniscectomy destabilized McGivney'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. At the same time, Dr. McNulty and Dr. Lyman proposed that the 2014 accident caused additional trauma to the medial compartment; and had further hastened McGivney's need for the uni-compartmental knee [replacement]. Based on these findings, Dr. McNulty believes it appropriate to apportion McGivney's impairment on a 50-50 basis as between the accident of 2011 and the accident of 2014, with no apportionment to whatever mild degenerative changes McGivney may have had in the left knee prior to the 2011 accident. Dr. Lyman, the surgeon who performed McGivney's left knee arthroplasty, concurs with this analysis. While we recognize that following the 2011 accident McGivney was given only a 2% lower extremity rating, and released without limitations/restrictions, the important point is that McGivney'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, McGivney'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 McGivney's left knee condition between 2011 and 2014 amply supports the apportionment scheme arrived at by Dr. McNulty.

IC Decision pp. 20-21, AR 128-129.

Appellants Aerocet/SIF are simply wrong in asserting that the Commission failed, in its lengthy and reasoned analysis of the evidence in this case, to analyze McGivney's impairment rating from his 2011 injury. Based upon the medical evidence that led to the necessary conclusion that McGivney's knee replacement surgery and the resultant impairment and

restrictions were referable to both the 2011 and 2014 accidents, the Commission then provided its analysis evidence in supporting its finding that McGivney suffered a 21% lower extremity permanent impairment, that he was entitled to 50% disability inclusive of impairment as a result of his left knee condition, and that medical and impairment/disability benefits should be apportioned and liability split evenly 50/50 between the Employers/Sureties responsible for each of the 2011 and 2014 accidents. The Commission further clarified that no impairment or disability was attributed to McGivney's non-industrial arthritis condition which pre-dated both industrial events.

While the permanent impairment rating assigned in 2011 may have been proper at the time, McGivney's medical condition relating to his 2011 injuries deteriorated and required additional medical treatment. McGivney made a timely claim for additional medical treatment, impairment and disability benefits referable to his 2011 injuries, and the Commission properly made the determination of impairment and disability following medical stability.

C. The Commission properly determined McGivney's disability and applied Idaho Code §72-425 as of the time of hearing.

Nothing in Idaho Code §72-425 dictates that disability must be determined on the date that maximum medical improvement has been reached. Permanent impairment is determined upon maximum medial improvement. The plain language of the Statute states permanent impairment is a component of and contributing factor to the extent of permanent disability, thus disability cannot be evaluated until maximum medical improvement. **Idaho Code §72-425.**

Disability is defined by **Idaho Code §72-425** as follows:

> Permanent disability evaluation. - "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 as provided in section 72-430, Idaho Code.
>
> As to a determination of permanent disability, **Idaho Code §72-430(1)** provides:
>
> (1) Matters to be considered. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant . . . (emphasis added).

Although in *Stoddard* the Court stated that the date of MMI was the proper date for a disability analysis, the Court pointed out in *Brown* that the reference in *Stoddard* actually cited I.C. §72-422, which defined permanent impairment. ***Stoddard v. Hagadone Corp.***, 147 Idaho 186, 192, 207 P.3d 162, 168 (2009); ***Brown v. Home Depot***, 152 Idaho 605, 609, 272 P.3d 577, 581 (2012). Thus, the *Brown* Court pointed out, the holding in *Stoddard* was meant to emphasize that disability cannot be evaluated until MMI had been reached. ***Brown***, 152 Idaho at 609.

Aerocet/SIF's narrow interpretation of the *Brown* decision raises a significant dilemma in workers' compensation law. Aside from the fact that I.C. §72-430 (1) specifically identifies that disability is determined by factors "as the Commission may deem relevant . . .", it is not a physician's job to determine apportionment of disability. It is a doctor's job in the workers' compensation setting to evaluate, treat, rate, and restrict a patient. It is within a physician's

expertise to make a determination as to whether a condition and the need for a particular course of treatment was referable to a new injury, or as in this case, referable to a combination of multiple causes. As in this case, a patient may present with injury superimposed on a prior injury or condition that may require the physician to apportion the impairment rating and restrictions.

In this case, apportionment of the impairment was based not on a "medical guestimate," but upon the physicians' best assessments of the available medical evidence. *See* Appellants' Brief p. 25. Viewing all of the evidence available, the physicians opined McGivney's need for surgery and the resultant impairment was equally due to McGivney's 2011 and 2014 injuries. Quest/Federal would reiterate that the opinion comes not only from the IME of Dr. McNulty, but also from the treating surgeon, Dr. Lyman. Aerocet/SIF failed to produce any contrary evidence to provide the Industrial Commission with an alternative scenario. The physicians then imposed restrictions relating to McGivney's permanent left knee condition. It is not within a physician's expertise to take the rating and restrictions and then conduct a vocational analysis of non-medical factors that might impact a particular injured workers' ability to be gainfully employed. Honestly, what doctor has the time or inclination to burrow into a patient's background of knowledge, skills, and abilities to perform a disability analysis? The answer is "none." To that point, and for the Commission and the Justices, the question posed is whether and to what extent the impairment and other medical and nonmedical factors results in disability above impairment for each of the separate and discrete industrial injuries to McGivney's left knee.

The issue of disability for the 2011 injury could have been, but certainly was not litigated or settled after McGivney was deemed medically stable in November of 2011. There was no

disability determination at that time, or any time before 2014, yet Aerocet/SIF assert that the Commission at that time would have had "no alternative but to determine as to the 2011 injury McGivney failed to establish any disability in excess of impairment." Appellants' Brief p. 24. Considering the fact that Claimant had a 5 year statute of limitations within which to file a Complaint to put at issue "disability" (see, I.C. §72-706(2)), and then ask for a Hearing to prove his case, Aerocet/SIF's argument is ill-taken as any such deadline would not have run until approximately two years after the second industrial accident occurred. Even if Appellant's were true, and Respondents do not concede that point, the Commission had no choice but to consider all of the available medical evidence relating to McGivney's 2011 injury at the Hearing conducted in November of 2016. The medical evidence clearly proves McGivney's medical condition deteriorated and he required additional medical treatment relating to his 2011 injury. To limit the assessment of McGivney's 2011 injury to condition in 2011 would effectively disregard the impairment that is related to the 2011 injury and thereby falsely manipulate the disability determination. The proper way to evaluate McGivney's 2011 disability in this case, or his "present and probable future ability to engage in gainful activity" per Idaho Code §72-425, was to determine the totality of disability from all causes at of the time of the hearing on November 8, 2016.

This Court in the case of ***Page vs. McCain Foods, Inc.***, 145 Idaho 302 (2008), made it quite clear that the Industrial Commission is required to articulate and evaluate the Claimant's disability not only according to the factors set forth in I.C. §72-430(1), but also to make findings as to permanent disability in light of all of the noted physical impairments, including pre-existing

conditions; and, then apportion the amount of the of permanent disability attributable to a Claimant's industrial accident. This is exactly the type of analysis that occurred in this case. The part that Aerocet/SIF seems to ignore is that the same analysis would have been required to be performed by the Industrial Commission even if the two industrial claims had not been consolidated.

The proper issue and focus at Hearing was: What was McGivney's total disability at the time of Hearing (per *Brown*)?; What percentage of the total disability was referable to each of the industrial injury(ies)?; and, What percentage of disability was referable to any preexisting injury(ies) or condition(s)? The plain wording of the statute does not distinguish or modify that determination based on whether the preexisting injury or condition is the result of degenerative, congenital, or industrial injuries or conditions. Based on all of the evidence available, and based on the physicians' expertise, the physicians opined McGivney's need for knee replacement surgery and the resultant impairment was equally due to McGivney's 2011 and 2012 injuries. Based thereon, the Commission found McGivney was entitled to permanent partial impairment of 21% lower extremity, and disability of 50% whole person inclusive of impairment. The Commission apportioned the impairment and disability as between the 2011 and 2014 accidents, at the same time outlining why there was no impairment or disability attributed to any other preexisting or nonindustrial condition. Aerocet/SIF challenge as to the amount of disability and the amount apportioned to the 2011 injury is "factual" and simply a request that this Court re-hash facts and testimony considered at the Commission level.

As Commission properly determined McGivney's disability and applied Idaho Code §72-425 as of the time of Hearing, the Commission's assessment of impairment and disability should not be disturbed on appeal. Once that determination was made, it is well settled law that a liable Employer/Sureties is responsible for only their proportionate share of the benefits owed.

D. Defendants Quest/Federal are entitled to contribution and reimbursement for benefits paid pending determination of McGivney's statutory benefits

Aerocet/SIF concede the Commission has jurisdiction to consider a claim for reimbursement but asserts Quest/Federal have no right to reimbursement. Appellant correctly notes that the Commission issued an Amended Order on October 28, 2015 requiring Quest/Federal to pay contested worker's compensation benefits. McGivney's Motion for An Order Pursuant to I.C. §72-313 Compelling Quest Aircraft (Employer) and Federal Insurance Company (Surety) To Pay McGivney McGivney's Past Due Total Temporary Disability and Medical Benefits (hereinafter "Motion for Payment") was brought under I.C. §72-313, which in the plain language of the Statute provides for reimbursement claims.

Idaho Code §72-313 provides:

> Payment pending determination of policy coverage. Whenever any claim is presented and the McGivney'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. [emphasis added].

McGivney's Motion for Payment specifically raised the issue of Quest/Federal's right to seek, and the Commission's ability to protect that interest in receiving reimbursement "should Aerocet/State Insurance Fund ultimately be determined to be the responsible party..." AR 43. Aerocet/SIF's objection to the Motion for Payment in September of 2015 (AR 42-43), and opposition at this time is based on facts that were weighed and ruled upon by the Commission. The Commission ordered payment of benefits pending a determination of the comparative responsibility of benefits owed as between the two Employers and Sureties pursuant to Idaho Code §72-313. AR 47. The Commission then clarified the Order limiting those benefits payable pursuant to the Motion for Payment pursuant to I.C. §72-313 solely to Quest/Federal. The novel argument that somehow the §72-313 Order to pay benefits is determinative of the ultimate issue before the Commission without a determination of liability, medical causation, necessity or reasonableness of medical care, or any analysis of non-medical factors - on the merits is not supported by the facts or the law.

Although the employer takes an employee as he finds him, the employer is not responsible for any more impairment or disability than is referable to the claimed industrial accident. *See* ***Wynn v. J.R. Simplot Co.***, 105 Idaho 102, 666 P.2d 629 (1983). In the end, whether Aerocet/SIF liked it, or not, they had an open claim from 2011 that subjected them to exposure for additional benefits should McGivney desire the same.

While there have been changes to Idaho's Worker's Compensation statutes since 1990 when this Court heard the case of ***Brooks vs. Standard Fire Ins. Co.***, 117 Idaho 1066 (1990), the concepts of the duties and responsibilities of the Industrial Commission in evaluating a

particular claimant's claim for compensation has not changed since the following was written in the *Brooks'* opinion:

> Aetna further argues that the responsibility for medical expenses and disability benefits should be apportioned between the parties in equal one-thirds based on Dr. Moss' testimony. The Commission must be 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 an apportionment. ***Clark v. Brennan Construction Co.***, 84 Idaho 384, 372 P.2d 761 (1962). In *Clark*, the Claimant suffered from a non-compensable pre-existing back injury, and two subsequent back injuries involving two separate employers and their respective sureties. Following the second injury, the Industrial Accident Board apportioned total temporary disability on the basis of 50% to each employer and surety, and one-third of the hospital and medical expenses to each employer, with the remaining one-third of such expenses to the Claimant, finding it was related to the pre-existing back infirmity. In Clark, this Court recognized that presentation of evidence of the cause, origin and extent of disability was dependent upon testimony from expert witnesses and that it was within the province of the Board to find the causes of disability and to apportion those causes between an industrial injury and a pre-existing injury as well as between successive industrial injuries. Likewise, this Court in ***Wilson v. Gardner Associated, Inc.***, 91 Idaho 496, 426 P.2d 567 (1967), held:
>
> Subsequent to enactment of this provision, [the predecessor to the current Idaho Code § 72-405] this Court has recognized the apportionment of compensation is to be made as between disability caused by or resulting from industrial accident and disability caused by or resulting from pre-existing injury, disease or condition residual from previous injury, and that the ratio of apportionment is for the Board's determination.
>
> 91 Idaho at 502, 426 P.2d at 573.
>
> Apportionment of disability is a factual issue, therefore the Commission is free to accept or reject medical evidence and testimony. *Id.* When apportionment is supported by substantial and

> competent, although conflicting evidence, it will not be overturned on appeal. ***Nigherbon v. Ralph E. Feller Trucking, Inc.***, 109 Idaho 233, 706 P.2d 1344 (1985); ***Lopez v. Amalgamated Sugar Co.,*** 107 Idaho 590, 691 P.2d 1205 (1984); ***Earl v. Swift & Co.***, 93 Idaho 546, 467 P.2d 589 (1970).
>
> ***Brooks v. Standard Fire Ins. Co.***, 117 Idaho 1066, 793 P.2d 1238, (1990)

In this case, McGivney had a 2011 injury, which was treated and for which he received an impairment rating. However, undisputed medical evidence proves McGivney's condition deteriorated between 2011 and 2014. Medical evidence further proves that McGivney's need for unicompartmental knee replacement was due in part to the condition of his knee referable to his 2011 injury. McGivney then suffered a second left knee injury in 2014, and the combination of the 2011 injury, the deterioration of the knee as a result of that 2011 injury, and the new injury suffered in 2014 led the treating physician to perform knee replacement surgery. The Commission analyzed and weighed the medical evidence and expert testimony before it provided detailed reasoning that the objective medical evidence supported apportionment of the need for surgery. Although McGivney was medically stable at one point following his 2011 injury, he did not litigate or settle that claim, and there was no determination at that time of disability. The claim was not "done," but rather, the claim remained open as to any medical treatment or any other benefits deemed referable to his 2011 injury.

McGivney made a timely claim for additional benefits relating to the 2011 claim. Pending a determination of liability for medical treatment as well as related impairment and disability, benefits were paid by Quest/Federal. Payment of benefits pursuant to Idaho Code §72-

313 is intended to protect the injured worker caught between disputes of two insurance companies and allow him to obtain needed medical treatment and time loss benefits during his recovery. It also protects an Employer/Surety if the Commission ultimately determines that Employer/Surety is not responsible for the claimed benefits.

Aerocet/SIF raises factual arguments as to why medical, impairment, and disability benefits should not be apportioned, and suggests that apportionment of the total disability somehow modified their substantive rights. The Commission's award of medical and time loss benefits, impairment and disability is supported by substantial and competent evidence, and as such, the Commission properly determined Quest/Federal is entitled to reimbursement for benefits paid pending the Commission's determination of liability pursuant to Idaho Code §72-313.

V.

CLAIM FOR ATTORNEY FEES

Pursuant to the provisions of I.A.R. 41(a), the Respondents in this matter make application for an award of attorney fees.

Specifically, Idaho Code §72-804, permits "attorney fees on appeal where the employer or its surety unreasonably brought or contested a claim." *Rish v. Home Depot, Inc.*, 161 Idaho 702, 707, 390 P.3d 428, 433 (2017) (quoting Morris v. Hap Taylor & Sons, Inc., 154 Idaho 633, 640, 301 P.3d 639, 646 (2013)). As has been pointed out several different times in the body of this brief, the Appellants are simply asking this court to rehash factual determinations made by the Idaho Industrial Commission. The complaints against the procedural actions of the Industrial

Commission are without any merit whatsoever. None of the issues raised by the Appellants are unique, or of a first impression for decision by this court.

The arguments made by Aerocet/SIF that the Commission somehow erred in addressing permanent impairment and permanent disability in the context of a consolidated set of claims is simply nonsensical for the simple reason that applicable statutes of limitations had not run as against McGivney as of the date of the second industrial accident in 2014 – and in fact, Mr. McGivney had approximately two years after that second accident within which to build a case for seeking an award of additional benefits and asking for Hearing on the same. The State Insurance Fund knew full well that Mr. McGivney's 2011 claim was not "done," or procedurally structured such that he was precluded from seeking any additional benefits. To use this as the basis for presenting such an issue on appeal clearly warrants an award of attorney fees.

Lastly, in regard to the complaints about the Industrial Commission apportioning disability between two separate industrial accidents, Quest/Federal reiterates that no more compelling set of facts can exist for exploring apportionment than a situation where an injured worker has two distinct industrial accidents within a relatively short period of time which resulted in injuries to the exact same portion of the anatomy – both of which resulted in damage to the physical structure the body warranting permanent impairment, and both of which resulted in residual symptomology impacting the injured worker's activities of daily living. Aerocet/SIF has unreasonably brought such arguments before the Court as part of this appeal.

VI.

CONCLUSION

The Commission properly weighed and considered the medical evidence presented on the issues properly before the Commission. It is respectfully submitted that the Industrial Commission's Finding of Facts, Conclusion of Law, and Order dated December 22, 2017 be upheld, and attorney fees and costs be awarded to Respondents.

RESPECTFULLY SUBMITTED this 3rd day of July, 2018.

BOWEN & BAILEY, LLP

ERIC S. BAILEY
Attorneys for Respondent/Defendants Quest Aircraft and Federal Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of July, 2018, I caused two true and correct copies of the within and foregoing instrument to be served upon:

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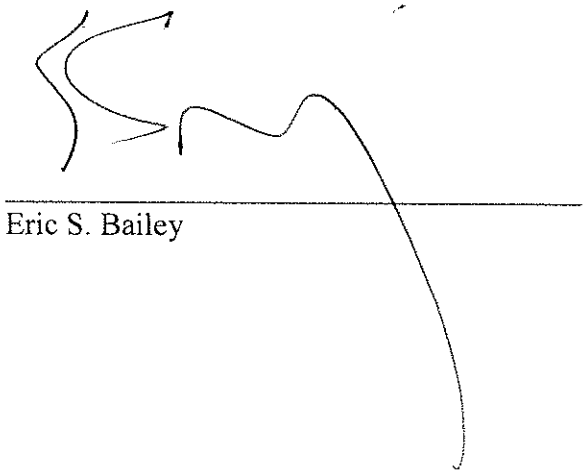

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