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

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RECEIVED  
IDAHO SUPREME COURT  
COURT OF APPEALS

2014 JUL 26 AM 10:24

**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

GEORGE McGIVNEY,

Claimant/Respondent,

vs.

AEROCET, INC., Employer, and STATE  
INSURANCE FUND, Surety,

Defendants/Appellants,

and

QUEST AIRCRAFT, Employer, and  
FEDERAL INSURANCE COMPANY,  
Surety,

Defendants/Respondents.

SUPREME COURT NO. 45700

I. C. 2011-011043

2014-019179

**APPELLANTS' REPLY BRIEF**

\*\*\*\*\*

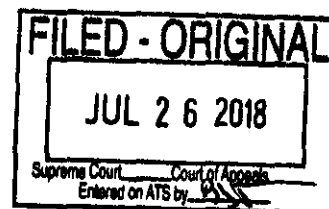
APPEAL FROM  
THE IDAHO INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS E. LIMBAUGH, CHAIRMAN, PRESIDING

\*\*\*\*\*

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## I.

### INTRODUCTION

The Idaho Supreme Court (“Court”) exercises free review over questions of law interpreted by the Idaho Industrial Commission (“Commission”). Recognizing that this standard of review grants no deference to the Commission’s interpretation of statutes or case law, the Respondents have characterized this appeal as one in which Appellant has merely asked the Court to reweigh the evidence. However, Appellant is simply asking the Court to determine if the Commission’s Findings of Fact, Conclusions of Law, and Order in consolidating the quantification of disability for the 2011 and 2014 injuries impermissively merged the separate cause of actions for the two injuries and the substantive rights and obligations of Appellants with parties to the 2014 claim. Additionally, the Commission erred in relying on *Horton v. Garrett Freightliners, Inc.*, 115 Idaho 912, 772 P.2d 119 (1989) for quantifying total disability and apportioning a part of that to Appellants. Further, the Commission erred in relying on *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2018) and Idaho Code §72-430 in determining Claimant’s subsequent 2014 injury was a factor in quantifying disability from the 2011 injury. Notably, Respondents spent substantial time discussing procedural consolidation but missed the issue raised by Appellants that the Commission’s method of consolidating the determination of disability for the 2011 and 2014 injuries merged the disability issue into a single cause of action, changing the rights of Appellant.

## **II. ARGUMENT**

**1. That the Commission erred is a matter of law when it consolidated the issue of determination of disability.**

The rights and obligations between Respondent McGivney and Appellants are due to Appellant Aerocet's employment of Respondent McGivney. As a part of that relationship, injuries caused by an accident arising out of and in the course of McGivney's employment are covered by workers' compensation laws. Idaho Code §72-102(18)(a). The benefits for an injury are those caused by a particular work accident. The liability for the worker's compensation benefits for the 2011 injury is limited to those under Idaho Code caused by the 2011 accident. Disability for the 2011 injury is primarily 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 resulting from the work injury. Idaho Code §72-425. The Commission erred in not determining disability benefits Appellants were responsible for caused by the 2011 accident separate, apart and unrelated to the 2014 accident. Likewise, liability arose on the part of Respondent Quest for the 2014 injury caused by the 2014 accident. But for the 2014 accident, McGivney's medical treatment after the 2014 accident would not have been necessitated at that time. When the Industrial Commission merged the total disability from both accidents together, it combined the cause of action for the 2011 disability claim and the cause of action for the 2014 disability claim together, which is impermissible under procedural consolidation. *Jones v. Jones*, 117 Idaho 621, 624 (1990). As such, the Court should remand the matter back to the Commission

for further findings of facts and conclusions of law on Appellant's liability for disability for the 2011 injury without regard to the 2014 injury.

**2. The Commission erred in the matter of law in apportioning liability.**

The function of Idaho Code §72-313 is to provide the injured worker with benefits while the Commission makes a determination between two sureties as to which surety's policy covers the accident giving rise to the work-related injury.

Idaho Code §72-313 allows for reimbursement between employers or sureties: "When the issue is finally resolved, the employer and surety held not liable shall be reimbursed for any such payments by the employer or surety held liable..." (Emphasis added.)

As set forth herein and in Appellants' Brief, Appellants are only liable for the specific disability caused by or resulting from the 2011 accident. The intervening accident of 2014 is a separate cause of action and gives rise to separate liability which liability is a matter between Respondent McGivney and Respondent Quest. There is no legal authority for the Commission to ascribe liability for the disability, medical benefits or time loss caused by the 2014 injury to Appellants. Idaho Code §72-313 does not provide a legal right or authority for the Commission to award benefits to a claimant that are not covered by an employer's insurance policy. Here Appellants are only responsible for the results of the accident of 2011.

**3. Appellants reallege prior arguments in Appellants' Brief without repeating the same herein.**



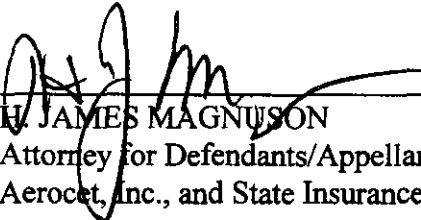
### **III. RESPONDENTS' CLAIMS FOR ATTORNEY'S FEES**

Appellants raise substantial issues of a legal nature. This is a unique case with complicated issues regarding the effect of consolidation, appropriate method for calculating disability from a prior or subsequent injury and apportionment. As such, Respondents are not entitled to attorney's fees herein.

### **IV. CONCLUSION**

The Court should remand this matter back to the Industrial Commission with instructions to determine Claimant's disability caused by the 2011 injury without regard to the 2014 injury, as what was caused by the subsequent 2014 accident is not proper for consideration of disability under Idaho Code §72-425 and §72-430 for the 2011 accident.

RESPECTFULLY SUBMITTED this 25 day of July, 2018.

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

**AFFIDAVIT OF MAILING**

STATE OF IDAHO            )  
  )ss.  
County of Kootenai        )

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

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

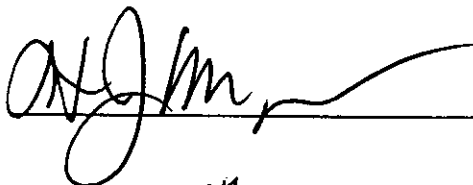
Starr Kelso  
Kelso Law Office  
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Eric S. Bailey  
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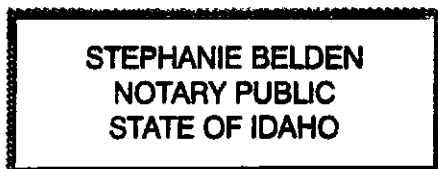
by depositing in the United States mail, with postage prepaid, two true copies of said Appellants' Reply Brief on the 25<sup>th</sup> day of July, 2018, addressed to said attorneys as hereinabove set forth.

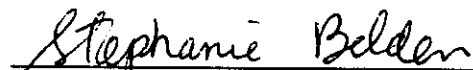
Further, on said date, a copy of of Appellant's Reply Brief was sent via email to, and the original and seven copies of said Appellants' Reply Brief were sent via prepaid Federal Express, addressed to:

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

  
\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this 25<sup>th</sup> day of July, 2018.



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