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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

Bryan Oliveros,

Claimant, Appellant

vs.

Rule Steel Tanks, Inc., *Employer*, and Advantage Workers Compensation Insurance Co., *Surety,*

Defendants, Respondents

SUPREME COURT NO. 45782

(Idaho Ind. Comm. No. 08-024772)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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STATEMENT THE CASE

1. NATURE THE CASE

This is a worker's compensation case. Liability under the Idaho Workers Compensation Act was admitted. In 2008, when Appellant Bryan Oliveros was a high school student between his junior and senior years, he had a summer job with Respondent Rule Steel Tanks, Inc., operating a metal press that shaped pieces of steel. He was injured on July 30, 2008, his second day of work, when the fingers of his dominant right hand were caught in the metal press, resulting in a traumatic amputation of portions of all four fingers. Appellant appeals from two decisions of the Idaho Industrial Commission following separate hearings. The first of the two decisions on appeal is the Commission's Findings of Fact, Conclusions of Law and Order, filed November 2, 2012. Regarding that decision, Appellant challenges the determination that he was not entitled under Idaho Code § 72-432 to medical care in the form of prostheses for his amputated fingers.

The second decision appealed from is the Commission's Findings of Fact, Conclusions of Law and Order, filed August 25, 2017, and the associated Order on Claimant's Motion for Reconsideration. Regarding the underlying decision and the decision on reconsideration, Appellant challenges the determinations that (1) Appellant's permanent partial disability was less than his permanent impairment of 32% whole person; and (2) that he was not entitled under Idaho Code § 72-450 to retraining benefits regarding a pharmacy technician program that he put successfully put himself through after the Respondent declined to pay for any retraining. At the time of the second hearing on February 22, 2017, Appellant remained employed by Albertson's in its corporate offices as a third-party coordinator processing claims for pharmacies when there was an issue at the point of purchase.

Regarding the retraining determination, Appellant contends the Commission committed

two errors. First, it erred as a matter of law by failing to apply the correct legal standard in determining the issue under Idaho Code § 72-450 of whether Appellant, "after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity[.]" Second, it committed error by abusing its discretion under Idaho Code§ 72-450 in determining whether to "authorize or order such retraining[.]" The Commission essentially concluded that under Idaho Code § 72-450 a young person with no history of skilled employment is not eligible for retraining, and that "there is no provision for rewarding individuals like Claimant who pull themselves up after a life-changing accident."

Regarding the permanent partial disability determination, Appellant contends the Commission erred by disregarding this Court's precedent holding that benefits for permanent partial impairment under Idaho Code § 72-422 are distinct from and not subsumed within benefits for permanent partial disability under Idaho Code § 72-424. Appellant also contends that the Commission abused its discretion in arbitrarily rejecting the testimony of Appellant Oliveros's vocational rehabilitation expert, Douglas N. Crum, and arbitrarily concluding that Appellant Oliveros has a "nonmedical" permanent partial disability of 25%. *R.* 213.

Regarding the determination regarding prostheses, Appellant contends the Commission committed error by arbitrarily relying upon the testimony of Dr. Gross in the face of evidence that his testimony was inherently unreliable.

Appellant Oliverosrequests that this Court reverse the Commission's determination regarding Appellant's claim for prosthetic medical care; reverse the Commission's determination that he is not entitled to retraining benefits and reverse the Commission's determination that he did not sustain permanent partial disability in excess of permanent impairment.

2. THE COURSE OF PROCEEDINGS BELOW

Two hearings were conducted before the Idaho Industrial Commission, one regarding

claimant's entitlement to medical benefits in 2012, and one regarding retraining and permanent disability benefits in 2017. All benefits sought at the hearings were denied.

3. STATEMENT OF FACTS

In this case, a high-school student, Appellant Bryan Oliveros, had his fingers chopped off while performing a summer job. This case once again presents an issue of law upon which this Court has twice overturned the Idaho Industrial Commission.

(A) *FACTS IN THE RECORD: APPELLANT OLIVEROS'S PRE-RETRAINING WORK HISTORY*

As noted by the Commission, on July 30, 2008 Appellant Oliveros was still in high school when he suffered the traumatic loss of his fingers. *R.* 4, *Vol.* 1. At that time, he worked part-time in a fast food restaurant earning between $7.00 and $7.50 per hour. During his summer vacation in 2008, he started a temporary summer job at Rule Steel Tanks, Inc., which also employed his father. There Appellant Oliveros earned seven dollars an hour. On his second day at work, Appellant Oliveros caught the fingers of his dominant right hand in a metal press resulting in a traumatic amputation of portions of all four fingers on his dominant hand, associated crush injuries and some degloving injuries on what remained of his fingers. Following several surgeries, Appellant Oliveros emerged with a right hand that included an uninjured thumb and portions of each of his four fingers.

(B) *FACTS IN THE RECORD: THE ACCIDENTAL AMPUTATION OF APPELLANT OLIVEROS'S FINGERS*

In 2008, Bryan Oliveros was a high school student whose only work experience was some part-time work in a fast-food restaurant. During his summer vacation, Appellant Oliveros started a summer job at Rule Steel Tanks, where his father worked. Mr. Oliveros's job was operating a metal press that shaped pieces of steel. On Mr. Oliveros's second day of work, July 30, 2008, he caught the fingers of his right hand in the metal press, resulting in a traumatic

amputation of portions of all four fingers on his dominant hand, associated crush injuries, and some degloving injuries on what remained of his fingers. *R.* 131, *Vol.* 1.

Mr. Oliveros was transported by ambulance to the emergency room where Dominic Gross, M.D., a hand surgeon, was on call. Dr. Gross performed several surgeries, and Mr. Oliveros was left with a right hand that includes an uninjured thumb, and portions of each of his four fingers. *R.* 131-132, *Vol.* 1. As a result of the industrial injury to his dominant hand, Mr. Oliveros has very little grip or capacity for fine dexterity, *A.* 033, was excluded from all heavy-duty work and was severely restricted with respect to all work involving fine motor skills in his dominant hand. See, generally, *A.* 273-280.

(C) *FACTS IN THE RECORD: PERMANENT PARTIAL DISABILITY AS OF MAXIMUM MEDICAL IMPROVEMENT*

After Appellant Oliveros reached Maximum Medical Improvement from his injury, in an effort to rebuild his life as best he could, he investigated a number of vocational options. At his own expense, Bryan retained vocational rehabilitation counselor Douglas Crum and met with him on September 18, 2009. Mr. Crum concluded that without retraining, Bryan had suffered a loss of labor market access of approximately 80% and a permanent partial disability of 75%. See, Vocational Rehabilitation Report of Douglas N. Crum, November 16, 2009, *A.* 29 - 36.[1] Nothing in the record before the Commission contradicted Mr. Crum's analysis of Bryan's loss of labor market access.

(D) *FACTS IN THE RECORD: APPELLANT OLIVEROS'S VOCATIONAL ASSESSMENT AND REQUEST THE RESPONDENT PAY FOR RETRAINING*

In July 2009 Appellant Oliveros was seen by vocational rehabilitation consultant Douglas

[1] Although Claimant submitted to a vocational evaluation by Bill Jorden, an expert of Respondent' choice, Mr. Jorden was not called to testify by the Respondent. Thus, Mr. Crum's opinions regarding loss of labor market access and permanent partial disability is uncontradicted, unrebutted and unimpeached.

N. Crum C.D.M.S. for evaluation. Mr. Crum produced a report which included medical, education, and work histories, labor market analysis, and analysis of Appellant Oliveros's pre- and post-injury wage-earning capacity and a discussion stating that without retraining Appellant Oliveros had a permanent partial disability of 75%. *A.* 029 – *A.* 035. Mr. Crum's report noted that at the time of his evaluation, Appellant Oliveros was attending Nampa High School and expected to graduate in May 2010. *A.* 032. Mr. Crum noted:

> At the time of the July 30, 2008, industrial injury, Mr. Oliveros was in very good health, capable of performing medium and heavy physical-demand activities requiring frequent to continuous use of the bilateral upper extremities for gross and fine work with his hands. As a result of the industrial injury to his dominant hand, Mr. Oliveros uses the extremity mostly as a helping hand, as he has very little grip or capacity for fine dexterity.

A. 033. Mr. Crum concluded that Appellant Oliveros had lost access to 80% of the labor market that was available to him at the time of his injury. *A.* 034. Mr. Crum concluded that claimant needed retraining and that without retraining he had suffered a 75% disability. In reaching this conclusion, Mr. Crum reasoned as follows:

> At the time of the subject injury, Mr. Oliveros was between his junior and senior years of high school, performing a summer job. Mr. Oliveros' time-of-injury position paid $7.00 per hour on a full-time basis. As far as I know, Mr. Oliveros did not receive any employer-supported benefits.
>
> In my opinion, it does not make sense to use the time of injury wage Mr. Oliveros as a baseline for a pre and post-injury wage-earning capacity comparison. According to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately $28,763 for male high school graduates. The average wage for a male worker with a bachelor's degree is $50,916.
>
> As a result of the subject industrial injury, Mr. Oliveros will not be able to perform jobs similar to the work his father performs, i.e. manual laboring positions. He simply does not have the manual dexterity to do those kinds of jobs.
>
> In my opinion, under the current circumstances, it is appropriate to propose that Mr. Oliveros be provided with 2 years (104 weeks) of retraining benefits so that he can either complete an associate degree in a physically compatible career field or use that as a basis to go on to a higher degree.

* * *

> In my opinion, the above retraining program should be considered Mr. Oliveros' best means of mitigating the dramatic loss of function of all four fingers on his dominant right hand. Without retraining, it is my opinion that Mr. Oliveros will have a very difficult time finding and maintaining any sort of good-paying job in his labor market.
>
> Without retraining, it is my opinion that Mr. Oliveros' would reasonably experience permanent partial disability, inclusive of impairment, of approximately 75%.

A. 034.

On December 3, 2009, Appellant Oliveros's counsel provided Respondent's adjuster with a copy of Mr. Crum's report requesting authorization for retraining. *A.* 037 – *A.* 38. The surety declined to authorize any retraining. In the Idaho Industrial Commission's *Findings of Fact, Conclusions of Law and Recommendation* of July 27, 2017, *A.* 195 – *A.* 215, it makes no findings concerning Appellant Oliveros's December 2009 attempt to obtain retraining.

(E) *FACTS IN THE RECORD: APPELLANT OLIVEROS'S SELF-FUNDED VOCATIONAL RETRAINING*

Left to his own devices, Appellant Oliveros obtained a GED in 2009 after missing too much school due to his injury to graduate with his classmates. *R*.199, *Vol.* 2. Appellant Oliveros attended Lewis-Clark state college in Lewiston for an academic year. *A*. 282. Appellant Oliveros worked briefly after his accident part-time at a local Dairy Queen and for about half a year at a Verizon call center earning somewhere between $9.50 and $10.50 an hour, however Appellant Oliveros was unemployed by December 2011. After that, he unsuccessfully sought work at numerous banks for a teller position, call centers, and for jobs operating machines. *R.* 199, *Vol.* 2. Appellant Oliveros decided to retrain himself as a pharmacy technician and completed a course of study and an internship in May 2013, receiving a Pharmacy Technician certificate. Appellant Oliveros financed his Pharmacy Technician education with the grant, student loans

and financial help from his parents. Appellant Oliveros was not employed and did not earn income during the period of his retraining. *R.* 199, *Vol.* 2.

About two months after obtaining his Pharmacy Technician certificate Appellant Oliveros began work at Terry Riley pharmacy in Nampa as a Pharmacy Technician starting at $11.80 per hour. Appellant Oliveros worked there for two years. Appellant Oliveros then went to work at TigerDirect temporarily doing telephone sales making $14.50 per hour. *R.* 200, *Vol.* 2.

After applying at numerous pharmacies and banks, Appellant Oliveros worked at KeyBank from February through September 2016 for $11.50 per hour and was released after a customer filed a complaint against him relating to a mistake that he had made. *R.* 200, *Vol.* 2, *A.* 242.

In December 2016 claimant found employment at Albertson's pharmacies corporate offices in Boise working as a third-party coordinator processing claims for pharmacies when there was an issue at the point of purchase. There claimant made since $15.87 per hour plus health, dental, vision, and 401 (K) benefits after three months. There were multiple opportunities for advancement with Albertson's. Claimant continued to be employed there at the time of the February 22, 2017 hearing. *R.* 200, *Vol.* 2.

(F) *FACTS IN THE RECORD: THE DENIAL OF PROSTHETIC FINGERS FOR OLIVEROS'S TRAUMATICALLY AMPUTATED FINGERS*

Embarrassed by the unsightly appearance of the stumps of his fingers (see, *A.* 288), in December 2009, Appellant Oliveros requested that the surety authorize an evaluation of Mr. Oliveros for prosthetic finger replacements. Correspondence on this topic was carried on between Mr. Oliveros's counsel and Pinnacle Risk Management between December 3, 2009, and November 17, 2010. *A.* 37-44. Defense Counsel contacted Dr. Gross who stated that he could

not recommend partial finger prostheses because they would not improve function. *R.* 64, 132-133, *Vol.* 1.

Claimant sought an independent expert evaluation from Advanced Arm Dynamics, a national corporation that specializes only in the prosthetic rehabilitation of individuals with upper limb absence or loss. Claimant was seen by MacJulian Lang, the Clinical Director of Advanced Arm Dynamics, a company that specializes in upper extremity prosthetic rehabilitation. Mr. Lang held a Bachelor of Science in mechanical engineering from Cornell University, a certificate degree from Cal State University Dominguez Hills in both prosthetics and orthotics, had completed two one-year residencies in both prosthetics and orthotics, and was certified in prosthetics and orthotics by the American Board for Certification. *A.* 208. Mr. Lang sent Dr. Gross a detailed report on April 1, 2011, recommending prosthetic fingers which he indicated would improve grasping and dexterity and provide necessary protection for residual anatomy. Lang's report contains photographs which may be helpful to this court in understanding the nature of Mr. Oliveros' disfigurement and what the prosthetic fingers looked like. Mr. Lang's report makes it clear that the prosthetic fingers would improve function. *A.* 222.

After stating that he could not prescribe prosthetic fingers because they were not functional, Dr. Gross had conversations with the Respondent's representatives and apparently changed his opinion to a degree. Dr. Gross wrote claimant's counsel indicating that he would prescribe the prosthetic fingers <u>if</u> (and only if) Appellant Oliveros settled his case. Dr. Gross stated that he would "be happy to write for the prostheses should he choose to have them as part of a settlement in this case." *R.* 100, *Vol.* 1. On November 8, 2011, the Respondent agreed to pay for prosthetic fingers in the context of the settlement. *R.* 68, *Vol.* 1. This offer was declined by Mr. Oliveros who felt that he was being forced to settle his case prematurely to obtain the

much-needed prostheses.

Because Dr. Gross had indicated that he would write a prescription for prosthetic fingers if claimant were willing to settle this case, claimant's counsel wrote him on December 10, 2011 requesting that since Dr. Gross had committed in a prior letter to writing a prescription for the prostheses if Claimant settled this case, that Dr. Gross do so immediately so that prescription could be presented to the surety in connection with the settlement demand and Mr. Oliveros could seek other sources of funding to obtain the recommended prostheses. *A.* 373. Dr. Gross declined to do so. Nevertheless, Dr. Gross testified that he would support Mr. Oliveros's desire to obtain prosthetic fingers for cosmetic purposes, "But if you're saying it's a cosmetic thing, I don't have a problem with it. And if Bryan wants it for cosmetic, I'm okay with that." *Gross Depo. p.* 57 1n. 8-10, *A.* 358. Dr. Gross and the Respondent Surety were, essentially, forcing Appellant Oliveros into a position where he would have to settle his case to obtain the partial finger prostheses. Of course, since the Respondent had denied retraining this would have meant that AO would have had to drop his claim for that benefit. In his deposition, Dr. Gross admitted that whether or not claimant got prosthetic fingers as part of a settlement was not of his concern. His excuse for his conditioning his willingness to write the prescription on Appellant Oliveros's settlement of this case was "we were just hopeful that you guys would figure out what you wanted to do." *A.* 361. The logical inference from this testimony is that Dr. Gross was supporting the Respondent Surety in the effort to see whether or not prosthetic fingers could be dangled over the head of Appellant Oliveros to get him to settle his case.

(G) *FACTS IN THE RECORD: APPELLANT OLIVEROS MITIGATED THE EFFECTS OF HIS INJURY THROUGH HIS SELF-FUNDED RETRAINING*

At the February 22, 2017 hearing, Appellant Oliveros presented evidence that as a result of his self-funded retraining his permanent partial disability was reduced from 75% to 55%.

Based upon the evidence presented from vocational rehabilitation expert Douglas Crum, Appellant Oliveros contended that his disability should be rated at 75% or, if Respondent were held to be required to reimburse Appellant Oliveros for his self-funded retraining, 55%. The uncontradicted and unimpeached evidence in the record is that Claimant sustained a 75% permanent partial disability as a result of the accident in this case, without factoring in mitigation of that disability resulting from Claimant's self-financed retraining as a pharmacy technician. *A.* 279.

Mr. Crum's testimony and opinions regarding the need for retraining were based upon the functional capacity evaluation reported by Leah Padaca, ATC-L, *Ex. 2 - Crum 4-7-2016 Report p.* 1, *A.* 281, and Dr. Gross's restrictions, *Ex. 2 - Crum 4-7-2016 Report p.* 2, *A.* 282. At the hearing and on appeal, Appellant Oliveros contends that the Respondent should not get the benefit of his retraining program. The uncontradicted vocational expert testimony at the 2017 hearing before the Commission was that Appellant Oliveros had initially sustained a 75% disability which was reduced to 55% as a result of the retraining program) unless they paid for it.

At the 2017 hearing Douglas Crum testified and both his original vocational report of November 16, 2009, and his updated report of April 7, 2016, were admitted into evidence. *A.* 250 – *A.* 269, *A.* 273 – *A.* 280, *A.* 281 – *A.*285. Mr. Crum performed an evaluation of Mr. Oliveros's pre- and post-injury labor market access, using the Boise metropolitan statistical area labor market. This labor market is comprised of Ada and Canyon Counties. *A.* 277. Based on this analysis, considering Mr. Oliveros's pre-injury education, language skills, vocational skills, work history, and presumed pre-injury capacity for medium to heavy work, it appears that Mr. Oliveros had access to approximately 7.3% of the jobs in the labor market. Repeating the above analysis by factoring in the functional limitations caused by amputation of all four fingers of Mr.

Oliveros's dominant right hand, considering the restrictions given by Dr. Gross, Mr. Crum concluded that without retraining Mr. Oliveros had access to approximately 1.4% of the jobs in this labor market. This represented an 80% reduction in labor market access. *A.* 276 – *A.* 277.

Mr. Crum testified that in his opinion in Mr. Oliveros's case, loss of access to the labor market was based upon his loss of functional capacities due to his impaired dominant hand. There was no loss of access to the labor market due to an intellectual component because that remained constant. *2017 Hearing Trans. p.* 146 *l.* 2 - *l.* 24, *A.* 267. Mr. Crum testified that the fact that a young person does not have much of a job history does not mean that they do not have a loss of access to the labor market. Loss of access to the labor market in such a case is based on the pre-and post-injury physical capacities of the person.

The methodology used in the field of vocational rehabilitation counseling involves some assumptions normally made to evaluate the loss of access to the labor market. In Mr. Oliveros's case, Mr. Crum did look at what Mr. Oliveros's father had done historically. Had Mr. Oliveros's father been a Ph.D. professor or a medical doctor, that might have changed Mr. Crum's analysis. *2017 Hearing Trans. p.* 138 *l.* 16 - *p.* 139 *l.* 18, *A.* 265. Mr. Crum testified that nevertheless, Mr. Oliveros's pre-injury intellectual aspirations are relevant to what he might be retrained in. Mr. Oliveros might have been able to find a well-paid job in construction or in similar work, but he was not going to be able to do so after this accident and would need some sort of assistance to get them back to where he would have the means to go to college. *2017 Hearing Trans. p.* 93 *l.* 6 - *l.* 22, *A.* 253.

Mr. Crum's initial report documents the reasons that Claimant required some kind of retraining, having been excluded from all heavy-duty work by his injury and being severely restricted with respect to all work involving fine motor skills in his dominant hand. See,

generally, *A*. 273-280. Mr. Crum testified that Mr. Oliveros was significantly limited with respect to the manual work that might have given him substantial pay without retraining. The functional goal was to move Mr. Oliveros to a job where he would not have to perform manual labor jobs that required a lot of fine dexterity with his right hand. *2017 Hearing Trans. p.* 95 *l.* 9 - *p.* 96 *l.* 1, *A*. 254. In his 2009 vocational evaluation report, Mr. Crum outlined a retraining program to mitigate Appellant Oliveros's disability which was proposed to and turned down by the Respondent:

> In my opinion, the only way that Mr. Oliveros will be able to successfully mitigate the effects of the July 2008 industrial injury is through education. Ideally, Mr. Oliveros should seek a bachelor's degree. This would give him a better chance of being able to earn a good wage in the future. In his current state, it is my opinion that Mr. Oliveros will probably not be able to find a job in excess of approximately the federal minimum wage which is currently $7.25 per hour.
>
> In my opinion, under the current circumstances, it is appropriate to propose that Mr. Oliveros be provided with 2 years (104 weeks) of retraining benefits so that he can either complete an associate's degree in a physically compatible career field or use that as a basis to go on to a higher degree.

A. 278.

Mr. Crum testified that he updated his initial vocational report on April 7, 2016, based upon additional information showing the outcome of Claimant's retraining. Mr. Crum felt that his 2009 projections were vindicated because the retraining at the Milan Institute in pharmacy technology did result in employment, a significant increase in hourly wages, and a modest increase in labor market access for Mr. Oliveros. Mr. Oliveros's retraining allowed him to develop skills such as customer service, cashiering, and the ability to use a computer more which further reduced labor market access loss from 80% to 55%. *2017 Hearing Trans. p.* 98 *l.* 3 - *l.* 15, *A*. 255; *2017 Hearing Trans. p.* 102 *l.* 13 - *p.* 105 *l.* 5, *A*. 256; *2017 Hearing Trans. p.* 106 *l.* 6 - *l.* 19, *A*. 257. Mr. Crum testified that it is more probable than not that Mr. Oliveros would not have restored his wage-earning capacity without his retraining. *2017 Hearing Trans. p.* 105 *l.* 23

- *p.* 106 *l.* 5, *A.* 256 - *A.* 257.

Appellant Oliveros's retraining program developed transferable skills equipping him to obtain jobs previously unavailable to him in addition to jobs as a pharmacy technician. Mr. Crum testified that although Mr. Oliveros obtained specific training as a pharmacy technician, this only reduced his labor market access loss from 80% to 77%. However, Mr. Crum testified that if he considers the additional jobs that Mr. Oliveros has access to now because of his retraining experience in clerical customer-service-type work, his labor market access loss is reduced to 55%. *2017 Hearing Trans. p.* 106 *l.* 20 - *p.* 108 *l.* 2, *A.* 257. Mr. Crum testified that Mr. Oliveros's training in the pharmacy technology program, which included customer service training, was helpful in is obtaining his jobs at Tiger Direct and Key Bank. *2017 Hearing Trans. p.* 129 *l.* 6 - *p.* 130 *l.* 12, *A.* 262 – *A.* 263.

Appellant Oliveros's pharmacy technician training program was instrumental in allowing him to obtain his present position with benefits far greater than what he was able to earn at the time of his injury. At the Milan Institute, Mr. Oliveros learned "Anything that has to do with the pharmacy world. From different types of drugs, there are classes, generic brand, classifications, just different things that you can use in the pharmacy world." *Respondent's Ex. 2 - Second Depo of Bryan Oliveros p.* 19 *l.* 23 – *p.* 20 *l.* 16, *A.* 341. Importantly, the body of knowledge that Mr. Oliveros acquired at the Milan Institute is required to do his job at Albertson's, regardless of where it might be obtained. *2017 Hearing Trans. p.* 79 *l.* 15 – *p.* 80 *l.* 12, *A.* 250. Mr. Crum's summary of the benefits of Claimant's retraining is set forth at *Ex. 2 – Crum 4-7-2016 Report p.* 2-3, *A.* 282 – *A.* 283.

ISSUES PRESENTED ON APPEAL

1. ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S ARBITRARY AND CAPRICIOUS DISREGARD OF CONTROLLING IDAHO SUPREME COURT PRECEDENT REGARDING THE IDAHO SUPREME COURT'S INTERPRETATION OF IDAHO CODE § 72-425 AND

CONTROLLING IDAHO SUPREME COURT PRECEDENT CONCERNING PERMANENT IMPAIRMENT AND PERMANENT DISABILITY BENEFITS

1.1 Did the Idaho Industrial Commission err as a matter of law in its interpretation of Idaho Code § 72-425?

1.2 Did the Idaho Industrial Commission err as a matter of law by disregarding the precedent of the Idaho Supreme Court laid down in *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014) and reiterated in *Davis v. Hammack Mgmt*., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017) concerning the distinction between benefits recoverable for permanent partial impairment defined by Idaho Code § 72-422 and benefits recoverable for permanent partial disability defined by Idaho Code § 72-423?

1.3 Did the Idaho Industrial Commission err as a matter of law in effectively concluding that the Idaho Supreme Court intended to overrule *sub silentio* the basis of its holding in *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014) by its decision in *Mayer v. TPC Holdings, Inc.,* 160 Idaho 223, 370 P.3d 738, (2016**)** and ignoring the fact that the Idaho Supreme Court affirmed the basis of its holding in *Corgatelli* in its decision in *Davis v. Hammack Mgmt*., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017)?

2. ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S 2017-2018 ORDERS REGARDING CLAIMANT'S ENTITLEMENT TO RETRAINING BENEFITS

2.1 Did the Idaho Industrial Commission err as a matter of law in construing/applying Idaho Code § 72-450?

2.2 Did the Idaho Industrial Commission err as a matter of law in failing to give Idaho Code § 72-450 the liberal construction to which the Claimant is entitled?

2.3 Did the Idaho Industrial Commission err as a matter of law in concluding that the claimant failed to prove that he was entitled to reimbursement and corresponding total temporary disabilities under Idaho code section 72 – 450?

2.4 Did the Idaho Industrial Commission abuse its discretion in concluding that the claimant failed to prove that he was entitled to reimbursement and corresponding total temporary disabilities under Idaho code section 72 – 450?

2.5 Did the Idaho Industrial Commission err as a matter of law in determining Appellant Oliveros's permanent disability based upon a successful retraining program, while also determining that claimant was not entitled to reimbursement for the training program?

2.6 Did the Idaho Industrial Commission abuse its discretion in determining Appellant Oliveros's permanent disability based upon a successful retraining program, while also determining that claimant was not entitled to reimbursement for the training program?

3. ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S 2017-2018 ORDERS REGARDING CLAIMANT'S ENTITLEMENT TO PERMANENT DISABILITY BENEFITS

3.1 Did the Idaho Industrial Commission err as a matter of law in construing/applying Idaho Code § 72-430?

3.2 Did the Idaho Industrial Commission abuse its discretion in concluding that the claimant failed to prove that he was entitled to permanent partial disability benefits in excess of the 32% whole person impairment benefits previously paid?

4. ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSIONS 2012 ORDER DENYING APPELLANT OLIVEROS PARTIAL FINGER PROSTHESES UNDER IDAHO CODE § 72-432.

4.1 Did the Idaho Industrial Commission abuse its discretion in concluding that the claimant failed to prove that he was entitled to partial finger prostheses as a medical benefit under § 72-432?

5. IS APPELLANT OLIVEROS ENTITLED TOATTORNEY FEES ON APPEAL UNDER IDAHO APPELLATE RULE 41?

Appellant Oliveros requests an award of attorney fees on appeal pursuant to Idaho Appellate Rule 41 and Idaho Code 72-804. Most recently, this court, citing *Hoskins v. Circle A. Constr., Inc*., 138 Idaho 336, 343, 63 P.3d 462, 469 (2003), has held that an appellant who prevails in part on appeal is not entitled to attorney fees on appeal. *Page v. McCain Foods, Inc*., 145 Idaho 302, 312, 179 P.3d 265, 275, (2008). However, in *Hoskins*, there was a cross-appeal on which the respondent prevailed. Here there is no cross-appeal, because the Idaho Industrial Commission ruled against AO on every issue. While it makes sense that no attorneys fees should be awarded in a case in which both parties prevail on some of their issues, a party should not be foreclosed from being awarded attorney's fees on appeal when justified simply because only some of his issues were prevailing. The fact that only some issues were successful on appeal can be taken into account when determining an appropriate attorney fee award under Idaho Appellate Rule 41(d). In this case, the most important issue is whether or not the Idaho industrial commission is bound by this court's prior decisions in *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014) and *Davis v. Hammack Mgmt*., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017).

Because *Corgatelli* was not followed by the Idaho industrial commission in *Davis*, this Court had to hear another appeal construing the relevant statutes contained in Title 72, Chapter 4 of the Idaho Workers Compensation Act. This Court's opinion in *Davis* reaffirms the basis of its holding in *Corgatelli* in no uncertain terms. The defense bar, and perhaps the Idaho Industrial Commission, obviously disagree with this Court's reasoning in *Corgatelli* and *Davis*. Nevertheless, to the extent that Respondents oppose Appellant Oliveros's challenge to the Idaho Industrial Commission's failure to follow *Corgatelli* and *Davis*, they do so "without reasonable ground" which is the standard for an award of attorney's fees under Idaho Code § 72-804.

ARGUMENT

1. SUMMARY OF APPLICABLE LAW

The standard of review in cases appealed from the Industrial Commission is set forth in Idaho Code § 72-732 provides that this Court overturn a decision of the Industrial Commission where:

> (1) The Commission's findings of fact are not based on any substantial competent evidence;
>
> (2) The Commission has acted without jurisdiction or in excess of its powers;
>
> (3) The findings of fact, order or award were procured by fraud;
>
> (4) The findings of fact do not as a matter of law support the order or award.

The standard of review based on Idaho Code § 72-732 has been interpreted by this Court:

> When this Court reviews a decision of the Industrial Commission, it exercises free review over questions of law, but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. Because the Commission is the fact finder, its conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly erroneous. This Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. Whether a claimant has an impairment and the degree of permanent disability resulting from an industrial injury are questions of fact.

Funes v. Aardema Dairy, 150 Idaho 7, 10-11, 244 P.3d 151, 154-155, (2010).

"[A]n arbitrary and capricious act by the Industrial Commission amounts to an abuse of the Commission's discretion." *Cheung v. Pena*, 143 Idaho 30, 34, 137 P.3d 417, 421, (2006) citing *Curr v. Curr*, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993). "Black's Law Dictionary (5th ed. 1979), defines arbitrary and capricious as the '[c]haracterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle.'" *Dexter v. Idaho State Bar Bd. of Comm'rs*, 116 Idaho 790, 794, 780 P.2d 112, 116, (1989). An arbitrary action has been defined as "a refusal to consider the evidence introduced or to make essential findings without supporting evidence." *Ready-to-Pour v. McCoy*, 95 Idaho 510, 516, 511 P.2d 792, 798, (1973) (dissent) citing *Inland Motor Freight v. United States*, 36 F.Supp. 885, 887 (D. Idaho 1941).

Arbitrary and capricious action is not simply an abuse of discretion, it is of constitutional dimension. The Idaho Equal Protection Clause forbids state discrimination that reflects no rational policy, but which is simply arbitrary and capricious action. *Thompson v. Engelking*, 96 Idaho 793, 801, 537 P.2d 635, 643, (1975). Quoting *Baker v. Carr*, 82 S.Ct. 691 (1962), stated:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action

Caesar v. Williams, 84 Idaho 254, 266, 371 P.2d 241, 248, (1962).

2. THE IDAHO INDUSTRIAL COMMISSION'S ARBITRARY AND CAPRICIOUS DISREGARD OF CONTROLLING IDAHO SUPREME COURT PRECEDENT REGARDING PERMANENT IMPAIRMENT BENEFITS AND PERMANENT DISABILITY BENEFITS

Appellant Oliveros's entitlement to permanent disability was determined as a result of the February 22, 2017 hearing. *Findings of Fact, Conclusions of Law, and Recommendation*, *R.*

195 – *R.* 215, *Vol.* 2; order, *R.* 216 – *R.* 217, *Vol.* 2; *Order on Claimant's Motion for Reconsideration, R.* 222-230, Vol. 2. The Idaho Industrial Commission held that Appellant Oliveros had a "nonmedical" disability of 25% and a medical disability of 32%, but that he could only be paid for his medical disability. Appellant Oliveros submitted that the nonmedical disability found by the Idaho Industrial Commission must be paid as an additional benefit to the medical disability (permanent partial impairment) pursuant to this Court's holdings in *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014) and *Davis v. Hammack Mgmt*., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017). The *Findings of Fact, Conclusions of Law, and Recommendation* adopted by Order of the Idaho Industrial Commission (*R*. 216-217, *Vol.* 2) and *The Order on Claimant's Motion for Reconsideration* contain the following conclusions:

> When considering the totality of the evidence, and ignoring for now Claimant's PPI rating and benefits paid, which will be discussed below, it does not appear Claimant has suffered a loss of more than 30% of his *applicable* labor market, and no loss of earning capacity. Since earning capacity is of minor relevance when compared to loss of job market, the Referee finds Claimant's non-medical PPD is 25%.

R. 213, *Vol.* 2. Emphasis supplied.

> Claimant has failed to prove he is entitled to payment of additional benefits for PPD not (*sic*.) in excess of the 32% PPI benefits previously paid under Idaho Code§ 72-428.

R. 214, *Vol.* 2. Emphasis supplied.

> Claimant argues he is entitled to PPD benefits even if they do not exceed his impairment rating and corresponding benefits paid thereunder, citing as authority *Davis v. Hammack Mgmt.,* 161 Idaho 791, 391 P.3d (2017). While *Davis* dealt with the Commission's jurisdiction to enforce a compensation agreement, ruling that the Commission lacked jurisdiction to approve the proposed stipulation, the latest word specifically on the issue at hand is *Dickinson v. Adams County,* 2017 IIC 0007 (March 21, 2017). *Dickinson* is controlling law on this issue.

R. 213, *Vol.* 2. Emphasis supplied.

> As explained by *Dickinson* "permanent impairment," is actually only payable as a component of disability-less-than-total under Idaho Code § 72-428. Impairment is not a separately owed and payable benefit apart from PPD. Disability paid under the heading of

> "permanent partial impairment" or PPI is included, and credited against any payment made under PPD. Sometimes PPD will be larger than PPI, since PPD includes those non-medical factors that impact Claimant's ability to be gainfully employed, and sometimes it will not. Here PPD is not greater than the PPI rating previously given. Since Claimant has been paid "impairment," benefits, which are actually disability benefits, of 32% whole person, a finding of 25% whole person PPD is subsumed within the 32% whole person benefit previously paid. Claimant is entitled to the larger of the disability components, which in this case is the PPI payments previously paid.

R. 213-214, *Vol.* 2. Emphasis supplied.

In its *Order on Claimant's Motion for Reconsideration, R.* 222-230, Vol. 2, the Idaho Industrial Commission adopted the conclusion of law that these cases had essentially been overruled or limited by the Idaho Industrial Commission's own decision in *Dickinson v. Adams County,* 2017 IIC 0007 (March 21, 2017) which it declared to be "the latest word specifically on the issue at hand" and "controlling law." *R.* 213, *Vol.* 2. On reconsideration, stating that "*Corgatelli* cannot not be reconciled with certain language appearing in the subsequent case of *Mayer v. TPC Holdings, Inc*., 160 Idaho to 23, 370 P,3d 738 (2016). This reasoning conflicts with the fact that subsequent to this Court's decision in *Mayer*, and indeed subsequent to the Idaho Industrial Commission's own decision in *Dickinson*, this Court issued its opinion in *Davis v. Hammock Management,* 161 Idaho 791, 391 P.3d 1261 (2017). *Davis* held:

> The main thrust of Claimant's argument is that the provision in the Stipulation granting Employer credit for previously paid PPJ benefits was invalid under this Court's decision in *Corgatelli,* that the *Corgatelli* decision applies here, that the Commission therefore erred in approving the Stipulation, and that the PPI credit should either be invalidated or the Stipulation voided. In *Corgatelli,* the Court observed: "Examining worker's compensation law as a whole . . . this Court finds that there is no statutory basis for the Commission to award [the employer] a credit for permanent physical impairment benefits previously paid to *Corgatelli.*" *Id.* at 292, 335 P.3d at 1 1 55. Claimant contends that the Commission erred as a matter of law in failing to apply *Corgatelli* to invalidate the credit.
>
> The issue in this case boils down to whether an action by the Industrial Commission that is not within its statutory authority or jurisdiction can stand. If we were to allow the Commission to take action that is not encompassed within its statutory jurisdiction, that would permit it to do what we cannot ourselves do. In *Corgatelli,* we stated that "[a]s a purely statutory scheme, the Court cannot judicially construct

> a credit for employers into worker's compensation law." *Id.* at 292, 335 P.3d at 1155. We held that no provision of the worker's compensation law provides for such a credit. *Id.*

Davis, 161 Idaho at 795, 391 P.3d at 1265. Emphasis supplied.

As argued by Appellant Oliveros below:

> As Respondent point out, the rulings in *Corgatelli* and *Davis* depart from the interpretation of the statute that defense counsel have followed for years, because for years lawyers and Commissioners have misinterpreted the statute. No doubt the Idaho Supreme Court's interpretation of the relevant statutes is a bitter pill for defense counsel to swallow. That may even be true for some members of this Honorable Commission. However, that is not justification for the Idaho Industrial Commission to fail to follow clear precedent established by the Idaho Supreme Court.

A. 426.

Whatever the Idaho Industrial Commission may think of this Court's decision in *Corgatelli* and *Davis*, it is bound by the doctrine of *stare decisis* to follow them. Indeed, this Court itself recognizes that obligation:

> Stare decisis requires that this Court follow "controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Owens, 158 Idaho 1, 4-5, 343 P.3d 30, 33-34 (2015).

Hoffer v. Shappard, 160 Idaho 868, 883, 380 P.3d 681, 696, (2016).

If *Corgatelli* and *Davis* remain "controlling law," the Idaho Industrial Commission must be reversed on this issue and Appellant Oliveros is entitled to be paid for his nonmedical disability in addition to his permanent impairment benefits.

3. THE IDAHO INDUSTRIAL COMMISSION ABUSED ITS DISCRETION AND MISAPPLIED THE LAW IN ITS DETERMINATION OF APPELLANT OLIVEROS'S NON-MEDICAL DISABILITY

(A) *APPLICABLE LEGAL STANDARDS*

In reviewing a decision from the Industrial Commission, the Idaho Supreme Court exercises free review over questions of law, but reviews questions of fact only to determine

whether the Commission's findings are supported by substantial and competent evidence. *Hughen v. Highland Estates*, 137 Idaho 349, 48 P.3d 1238 (2002). Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Id*. *Uhl v. Ballard Med. Prods., Inc*., 138 Idaho 653, 657, 67 P.3d 1265, 1269, (2003). Discretionary decisions are reviewed using a three-part test: "(1) whether the Commission correctly perceived the issue as one of discretion, (2) whether it acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) whether it reached its decision by an exercise of reason." *Flowers v. Shenango Screenprinting, Inc*., 150 Idaho 295, 297, 246 P.3d 668, 670 (2010) (quoting *Super Grade, Inc. v. Idaho Dep't of Commerce and Labor*, 144 Idaho 386, 390, 162 P.3d 765, 769 (2007)).

(B) *PLAINTIFF'S VOCATIONAL EXPERT PROVIDED THE ONLY TESTIMONY CONCERNING THE EXTENT OF HIS DISABILITY*

The Idaho Industrial Commission abused its discretion in determining that Appellant Oliveros had a "nonmedical disability" of only 25%. This conclusion is not substantial and competent evidence," but rather speculation on the part of the Commission. The conclusion was not reached by an exercise of reason because the Commission dismissed the substantial and competent evidence of the analysis of Appellant Oliveros's qualified vocational rehabilitation expert and then arbitrarily concluded that Appellant Oliveros had a "nonmedical disability" of only 25% without the support of any reasoning. Even assuming that the Commission's reasoning offered to justify its rejection of the conclusions of Mr. Crum meets the criteria for an exercise of discretion, its conclusion that Appellant Oliveros had a "nonmedical disability" of only 25% does not.

The Evidence Supporting Appellant Oliveros's Vocational Rehabilitation Expert's

Opinion Was Substantial and Competent

Appellant Oliveros presented evidence from vocational rehabilitation expert Douglas N. Crum. Facts relating to the evidence presented regarding Mr. Crum's analysis of the extent of Appellant Oliveros's disability, and the need for and effect of his retraining, are set forth above. See, *p.* 3 – *p.* 13 above. Briefly, Appellant Oliveros was a high school student at the time of the traumatic amputation of his fingers and his only significant job experience was working in a fast food restaurant cooking and cleaning. He had no management or supervisory experience. *A.* 277. Appellant Oliveros had also done some landscaping work consisting of mowing grass, repairing sprinklers, doing some side work, and planting trees. *A.* 277. Appellant Oliveros retained vocational rehabilitation expert Crum, who analyzed the medical records and restrictions given to Appellant Oliveros by Dr. Gross, Appellant Oliveros's prior work history, Appellant Oliveros's access to the labor market both pre-and post-injury and came up with a retraining plan. Mr. Crum considered the restriction of Dr. Gross to work involving no fine manipulation, and his impairment rating of 53% of the upper extremity. *A.* 275.

Mr. Crum also considered the evaluation of Beth Rogers, MD, who noted on June 25, 2009 (approximately 11 months after the accident), that Appellant Oliveros had pain psychology and stated that he was actively suicidal and had depression." *A.* 275. Mr. Crum noted that Mr. Oliveros had a very disfigured right hand of a kind likely to handicap him in procuring and holding employment. *A.* 278. Appellant Oliveros testified that this disfiguration of his hand had made it three times harder for him to get a job. *2011 Hearing Trans. p.* 18 *l.* 3-7. *A.* 005. (Appellant Oliveros testified at the 2011 hearing concerning psychologist Michael McClay, Ph.D.'s 2008 report stating that Appellant Oliveros is actively suicidal. He testified that he was concerned about his appearance in the future and employability, that he stopped dating after the accident for a year or two because his hand "grossed" girls out, and that he noticed that people

would not engage with him when they saw his disfigured hand. *A.* 008-009.)

The Respondent Failed To Put On Any Evidence Of Its Vocational Expert's Opinions, And The Commission Arbitrarily Determined The Size Of Appellant Oliveros's Loss Of Access To The Labor Market In The Absence Of Substantial And Competent Evidence Rebutting Mr. Crum's Testimony

As noted by the Commission, "Respondent retained, but did not utilize, a vocational rehabilitation expert." *R.* 207, *Vol.* 2. Even setting aside the obvious inference that Respondent's vocational rehabilitation expert must have found Appellant Oliveros's permanent disability to have been at least that found by Mr. Crum (or he would have been called to testify by the Respondent), the record reflects that Respondent put on no evidence in the form of an expert opinion as to the extent of Appellant Oliveros's loss of access to the labor market or permanent disability.

The Idaho Industrial Commission helped the Respondent out by quibbling with Mr. Crum's testimony regarding his conclusions, either by misstating the record, or by engaging in speculation. Despite having declared that it accepted Mr. Crum's factual testimony as true, *R.* 209, the Commission actually rejected most of it. For example, as noted by the Commission, Mr. Crum testified that at the time of his injury the claimant had access to 7.3% of the jobs in his labor market in Ada and Canyon Counties, and that post-accident, without retraining the claimant had access to only 1.4% of the jobs in his labor market. *R.* 206. Mr. Crum presented evidence that this represented an 80% reduction in labor market access. *A.* 255, 256, 278, 279, 284. This was not an opinion; 80% is what one gets when one divides Appellant Oliveros's pre-accident relevant labor market of 7.3% of the jobs in his labor market by 1.4% of the remaining jobs in his labor market. From this, and the fact that Appellant Oliveros had no loss of earning capacity based on his prior minimum-wage job, Mr. Crum concluded in his 2009 report that Appellant Oliveros had a permanent partial disability of approximately 75%. Mr. Crum's

opinion that Appellant Oliveros had a permanent partial disability before retraining of approximately 75% was an opinion, but his testimony regarding the size of the labor market lost was a fact cited by the Commission, though it characterized it as an opinion. *R.* 206. Similarly, Mr. Crum's second report states the facts relating to the size of Appellant Oliveros's post-retraining labor market as a matter of fact:

> According to the Idaho Department of Labor publication Idaho Occupational Employment and Wage Survey 2015 there are approximately 607 Pharmacy Technicians in the labor market. Compared to the general run of occupations that Mr. Oliveros could have performed on a preinjury basis (7.3% or approximately 20,367 jobs), even adding all of the Pharmacy Technician jobs back into his labor market[.]

A. 284

There is no evidence in the record as to the size Appellant Oliveros's relevant labor market other than the evidence given by Mr. Crum. No motion was made (pursuant to Idaho Code § 67-5251 or otherwise) by anyone for the Commission to take administrative notice of the size of any labor market in the case. Mr. Crum's evidence as to the size of the relevant labor markets based on statistical information was either evidence of the facts, or there was no evidence of the size of the labor market for the Commission to base its ultimate conclusion upon:

> When considering the totality of the evidence, and ignoring for now Claimant's PPI rating and benefits paid, which will be discussed below, it does not appear Claimant has suffered a loss of more than 30% of his *applicable* labor market, and no loss of earning capacity. Since earning capacity is of minor relevance when compared to loss of job market, the Referee finds Claimant's non-medical PPD is 25%.

R. 213.

As the Commission noted in its assessment of claimant's "nonmedical" PPD, loss of earning capacity was of minor relevance when compared to a loss of job market. Thus, it is unclear from where the Commission drew its conclusions that Appellant Oliveros had lost only 30% of his applicable labor market. Either (1) the Commission relied on Mr. Crum's calculation

of the size of Appellant Oliveros's applicable labor market but arbitrarily concluded that Appellant Oliveros had only lost 30% of that market, or (2) the Commission arbitrarily found that Appellant Oliveros lost access to 30% of his applicable labor market in the absence of any evidence of the size of the labor market at all. In either event, it could not have reached its conclusions as to Appellant Oliveros's percentages of loss of access to the labor market in nonmedical PPD through an exercise of reason. The Commissions conclusions regarding the size of claimant's lost access to his applicable labor market and the extent of his "nonmedical" were arbitrary and capricious, arrived at as the result of an abuse of discretion.

(C) *THE IDAHO INDUSTRIAL COMMISSION MISAPPLIED IDAHO CODE § 72-450*

At the 2017 hearing, Mr. Crum testified that as a result of his accident, Appellant Oliveros would not be able to do any sort of "higher-payed, manual-labor-type jobs or repetitive – or jobs requiring repetitive bilateral hand movements." *2017 Hearing Trans. p.* 132 *l.* 2-15. *A.* 263. Mr. Crum reported in 2009 that as a result of his injury, Appellant Oliveros would not be able to perform manual laboring positions, because "He simply does not have the manual dexterity to do those kinds of jobs. There is no doubt that the severe injuries to Mr. Oliveros' dominant hand will severely impact his vocational options for the rest of his life. … In my opinion, the only way that Mr. Oliveros will be able to successfully mitigate the effects of the July 2008 industrial injury is through education." *A.* 278.

Mr. Crum's initial report documents the reasons that Claimant required some kind of retraining, having been excluded from all heavy-duty work by his injury and being severely restricted concerning all work involving fine motor skills in his dominant hand. See, generally, *Ex.* 1 - *Crum 11-18-2009 Report, A.* 273-280. Mr. Crum testified that Oliveros was significantly limited concerning the manual work that might have given him substantial pay without

retraining. The functional goal was to move Mr. Oliveros to a job where he would not have to perform manual labor jobs that required a lot of fine dexterity with his right hand. *2017 Hearing Trans. p.* 95 *l.* 9 *-p. 96 l. 1. A.* 254.

Mr. Crum recommended a course of retraining for Appellant Oliveros that included going back to school to get an Associate degree. *A.* 278. A copy Mr. Crum's report was sent to Carol Carr of Pinnacle Risk Management (adjuster for the Respondents) on December 3, 2009, along with a request for retraining benefits. *A.* 037. This request was essentially ignored, (see, *Summary of Requests for Authorization Reimbursement for Retraining*, 2017 Hearing Exhibit 12. *A.* 303.

Appellant Oliveros returned to high school but did not graduate with his class. About two years after his accident Appellant Oliveros obtained a GED. Financing his own retraining, in the fall 2010, Appellant Oliveros attended Lewis and Clark State College for two semesters and one summer semester at a full-time basis taking general business classes. *A.* 282. In the spring of 2013, Appellant Oliveros began to study to become a pharmacy technologist, first at Carrington College in Boise, and then at the Milan Institute in Nampa Idaho where he earned a significant certificate of completion of pharmacy technology. *A.* 282. After this education, Mr. Crum found that as a result of Mr. Oliveros is retraining is labor market access loss had declined to 55%, *A.* 284, and his wage-earning capacity had risen to $15.57 per hour based on the average wage for pharmacy technician. *A.* 285.

Idaho Code § 72-450 provides:

> 72-450. RETRAINING. Following a hearing upon a motion of the employer, the employee, or the Commission, if the Commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the Commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled

> employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case may be. The period of retraining shall be fixed by the Commission but shall not exceed fifty-two (52) weeks unless the Commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks. An employer and employee may mutually agree to a retraining program without the necessity of a hearing before the Commission.

The Commission misinterpreted Idaho Code § 72-450 by confusing what might be the fancied aspiration of an eager young worker before an accident, with what is needed to restore his earning capacity after an accident. Essentially, in the absence of any supporting authority, the Commission held that if a person dreamed of doing something before an accident he or she cannot receive retraining benefits to pursue that dream after an accident, even if the evidence shows that it is necessary.

Appellant Oliveros put on evidence that he was evaluated by Mr. Crum in November 2009 who recommended, based upon his lack of job skills and the restrictions, that he be retrained. See, generally, *A*. 277-279. Mr. Crum's report contains the following:

> At the time of the July 30, 2008, industrial injury, Mr. Oliveros was in very good health, capable of performing medium and heavy physical-demand activities requiring frequent to continuous use of the bilateral upper extremities for gross and fine work with his hands.
>
> As a result of the industrial injury to his dominant hand, Mr. Oliveros uses the extremity mostly as a helping hand, as he has very little grip or capacity for fine dexterity.
>
> Mr. Oliveros' prior work history had consisted primarily of part-time jobs while attending high school. At the time of the subject injury, Mr. Oliveros was between his junior and senior years. It appears now that he will graduate from high school in May of 2010 rather than May of 2009. At the time of the injury Mr. Oliveros had not established a vocational goal other than he had a general interest in obtaining a business degree or education to become a personal trainer.
>
> Mr. Oliveros is a literate individual and is able to read and write in English and Spanish. Mr. Oliveros is able to perform basic mathematics. Mr. Oliveros has basic computer skills. Mr. Oliveros has no history of supervisory experience.

A. 277.

> Mr. Oliveros' time-of-injury position paid $7.00 per hour on a full-time basis. As far as I know, Mr. Oliveros did not receive any employer-supported benefits.
>
> According to the Minnesota State Department of Health in a study of census 2000 results, the percent of disabled persons households who lived under the poverty level was nearly 3 times that of non-disabled populations (15% vs. 6%); average individual earnings for disabled persons was 22.8% less ($26,978 vs. $34,951). The percentage of persons with disabilities who are not working was more than twice as high as individuals with no disabilities. Only 39.4% of people with disabilities worked full time on a year round basis. The poverty rate for person with disabilities was noted to be twice as high as the poverty rate for adults without disabilities. The report goes on to indicate that people with disabilities find it more difficult to complete post-high school education because they have less earning capacity than their peers.
>
> There is no doubt that the severe injuries to Mr. Oliveros' dominant hand will severely impact his vocational options for the rest of his life.
>
> In my opinion, the only way that Mr. Oliveros will be able to successfully mitigate the effects of the July 2008 industrial injury is through education. Ideally, Mr. Oliveros should seek a bachelor's degree. This would give him a better chance of being able to earn a good wage in the future. In his current state, it is my opinion that Mr. Oliveros will probably not be able to find a job in excess of approximately the federal minimum wage which is currently $7.25 per hour.

A. 278.

> In my opinion, under the current circumstances, it is appropriate to propose that Mr. Oliveros be provided with 2 years (104 weeks) of retraining benefits so that he can either complete an associate's degree in a physically compatible career field or use that as a basis to go on to a higher degree.
>
> In my opinion, the above retraining program should be considered Mr. Oliveros' best means of mitigating the dramatic loss of function of all four fingers on his dominant right hand. Without retraining, it is my opinion that Mr. Oliveros will have a very difficult time finding and maintaining any sort of good-paying job in his labor market. Without retraining, it is my opinion that Mr. Oliveros' would reasonably experience permanent partial disability, inclusive of impairment, of approximately 75%.

A. 279.

As stated above, Appellant Oliveros requested that the Respondents fund this retraining program, Respondents, in not responding, effectively denied that request. *A.* 303-304. Unwilling to give up, Appellant Oliveros financed his own retraining program. First, he

attended Lewis Clark state college for two semesters and one summer semester. Second, he attended Carrington College in Boise Idaho for about two months was not able to complete the program because of cost. Third, he completed a program at the Milan Institute in Nampa, successfully earning a certificate of completion in pharmacy technology. *A.* 282.

In denying claimant retraining benefits, the Commission reasoned:

> 1. Claimant did not have an established "field, skill, or vocation" at the time of his accident from which he was thereafter precluded due to his injuries. *R.* 202.
>
> 2. His one-plus day's experience at Rule Steel did not imbue Claimant with skills, was not his chosen field, and was never considered by him to be a place where he intended to pursue his vocation. Instead, both pre- and post-accident, Claimant had aspirations to attend college after high school. Claimant's fulfilled desire of attending institutions of higher learning after high school hardly fits the common definition of "retraining into a different field, skill, or vocation." *A.* 202.
>
> 3. The next issue confronting Claimant as regards the language of the statute in question is the fact that he did not need retraining in order to restore his previous earning capacity. At the time of his accident, Claimant had a minimum wage earning capacity. *A.* 202.
>
> 4. Had he not been injured, there is no proof Claimant, without further education, would have likely started his post-high school career at anything other than a low to minimum wage job. While his further education certainly enhanced his earning ability, Claimant's earning capacity was not seriously undermined by his industrial accident, as admitted by Claimant's vocational rehabilitation expert. *A.* 203.
>
> 5. In the present case, Claimant was at a cross roads when confronted with his postinjury permanent disability and no real work skills. He could have lamented his condition, maximized his perceived disabilities and focused on what he could not do. Conversely, Claimant could have resolved to not let his injury define him. Faced with these alternatives, Claimant chose to discover his capabilities, adapt to his situation, further his education, and strive to make a life for himself and his new family. In the process, he incurred substantial educational expenses. *A.* 203.
>
> 6. Respondent should not be required to pay for Claimant's education when it was not pursued as an alternative to what he would have done but for his injuries. Respondent' obligation is defined statutorily, not charitably or equitably. *A.* 204.
>
> 7. Claimant's post-secondary education was not directed by his injury. Claimant had a vision of continuing his education after high school even before his accident. There is nothing in the record to establish that "but for" the accident, Claimant would have chosen a different path after high school. *A.* 204.

> 8. Unfortunately, within the parameters of the Act, there is no provision for rewarding individuals like Claimant who pull themselves up after a lifechanging accident. To require Respondent to pay for schooling that was part of Claimant's preinjury planning even without the accident is not proper. *A*. 204.

In ruling as it did, the Commission misinterpreted Idaho Code § 72-450. First, perhaps most obviously, there is no requirement under Idaho Code § 72-450 and no legal authority that anyone, much less a high school junior, "have an established 'field, skill, or vocation' at the time of his accident from which he was thereafter precluded due to his injuries." The implications of such a rule would appear to be obvious. If such were the case, and unskilled adult worker whose legs were traumatically amputated while working on a farm would not be eligible for retraining. Even more obviously, it is the rare case in which a minor child has a "field, skill, or vocation" at the time of his or her accident. The construction placed on Idaho Code § 72-450 by the Commission essentially leads to the conclusion that children and those at the beginning of their working career are not entitled to retraining benefits under Idaho Code § 72-450. This construction misperceives the condition upon which retraining benefits can be granted, that being, "if the Commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, …" Retraining benefits are available within the discretion of the Commission if (1) an employee is permanently disabled after recovery (2) is receptive to and in need of retraining in another field, skill or vocation (3) to restore his earning capacity. Nothing in the language of the statute requires that the worker have a pre-injury "field, skill or vocation," unless "field, skill or vocation" is construed to exclude unskilled labor. Nothing in the language of the statute would support that construction. Certainly, the Commission has not identified any such authority other than its own, *ipse dixit*.

The Commission concluded that Appellant Oliveros was not entitled to retraining because he had some general aspirations of higher education when he was a junior in high school that were similar to the retraining recommended as an accident-resultant necessity by a well-established certified disability management specialist vocational rehabilitation counselor (see resume of Douglas N. Crum's experience includes working as a field consultant for the Rehabilitation Division of the Idaho Industrial Commission between 1987 and 1984). *A.* 305-306. There is no basis in law or logic for such an interpretation of Idaho Code § 72-450.

The Commission also contends that claimant did not need to be retrained in order to restore his previous earning capacity. In reaching this condition, the Commission ignores all of the testimony and reports of Douglas Crum and concludes merely that at the time of the accident claimant had a minimum wage earning capacity. However, the record shows that while claimant had essentially only received minimum wage as a high school student, his actual capacity to perform work without an education was far greater.

Prior to Appellant Oliveros's retraining, Mr. Crum reported, "At the time of the July 30, 2008 industrial injury, Mr. Oliveros was in very good health, capable of performing medium and heavy physical-demand activities requiring frequent to continuous use of the bilateral upper extremities for gross and fine work with his hands." *A.* 277. The record contains no evidence to the contrary. Before Appellant Oliveros's retraining, Mr. Crum reported,

> In my opinion, it does not make sense to use the time of injury wage (*sic.*) Mr. Oliveros as a baseline for a pre and post-injury wage-earning capacity comparison. According to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately $28,763 for male high school graduates.

A. 278. The record contains no evidence to the contrary. Before retraining, Mr. Crum reported, "In his current state, it is my opinion that Mr. Oliveros will probably not be able to find a job in

excess of approximately the federal minimum wage which is currently $7.25 per hour." *A.* 278. The record contains no evidence to the contrary. Unless this Court is willing to take judicial notice as a fact of the assertion that an intelligent young man "in very good health, capable of performing medium and heavy physical-demand activities requiring frequent to continuous use of the bilateral upper extremities for gross and fine work with his hands" cannot earn more than minimum wage, there is no reasoned basis for the Commission's conclusion that Appellant Oliveros's preinjury earning capacity was limited to minimum wage.

Indeed, Mr. Crum reported, "According to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately $28,763 for male high school graduates." Even using that figure, which is 14 years out of date, assuming an average working year of 2,080 hours the average wage of a male high school graduate equates to $13.83 an hour. In other words, Appellant Oliveros had the capacity to earn $13.83 an hour eventually at the time of his injury in his pre-injury condition, even though he had only earned minimum wage before that. After retraining himself in basic college courses for year and a summer semester and his Pharmacy Technologist training in 2013, claimant obtained positions with Medicap Pharmacy in Nampa Idaho at $14 per hour and Terry Riley clinic in Nampa Idaho at $13 per hour plus100% employer paid health, dental and vision insurance benefits. *A*. 285. At the 2017 hearing, Appellant Oliveros testified that he was then working at Albertson's corporate office as a third-party coordinator handling issues that pharmacy techs were having at their pharmacies making $15.87 an hour. *2017 Hearing Trans. p.* 17 *l.* 3 to *p*. 18. *l*. 21. *A*. 299-300. The evidence was clear that Appellant Oliveros needed retraining to replace his preinjury earning capacity, and that the retraining was effective in accomplishing that. There was no substantial and competent evidence in the record for the

Commission to determine otherwise. The Commission simply arbitrarily denied Appellant Oliveros retraining benefits based upon its misinterpretation of Idaho Code § 72-450.

Again misinterpreting Idaho Code § 72-450, the Commission supported its denial of retraining by stating, "Had he not been injured, there is no proof Claimant, without further education, would have likely started his post-high school career at anything other than a low to minimum wage job." This places an unwarranted gloss upon Idaho Code § 72-450; nothing in the statute or case law limits the determination of wage earning capacity of a high school student to the first job that they can obtain upon graduation.

Similarly, the Commission misinterpreted Idaho Code § 72-450 in holding that Claimant was not entitled to retraining because "[he had a] vision of continuing his education after high school even before his accident. There is nothing in the record to establish that 'but for the accident, Claimant would have chosen a different path after high school." *A.* 204. There is nothing in Idaho Code § 72-450 that disqualifies a person from retraining because he has a "vision" of bettering himself in any way. Whatever Idaho Code § 72-450 means, it does not mean "Anyone having a 'vision' of bettering him or herself before their accident need not apply for retraining benefits."

The Commission's denial of retraining benefits was based on a misinterpretation of Idaho Code § 72-450, was arbitrary, and was not reached through an exercise of reason. The Commission's decision should be reversed and remanded with instructions consistent with this Court's interpretation of Idaho Code § 72-450.

4. THE IDAHO INDUSTRIAL COMMISSION ABUSED ITS DISCRETION IN DENYING APPELLANT OLIVERO PARTIAL FINGER PROSTHESES

While he was still a junior in high school Appellant Oliveros suffered the traumatic amputation of portions of all four fingers of his dominant hand. (The picture to the right (see, *A.* 221) was taken on April 1, 2011 by MacJulian Lang of Advanced Arm Dynamics.) Following the amputation of his fingers, claimant became embarrassed about his appearance and stopped dating. His primary problem was that when making new acquaintances, people were deciding if they even wanted to engage with him because of the appearance of his hand. He was hopeful that if he could get prosthetic fingers of sufficient cosmetic quality, he could get through the "icebreaking stage" with people. Appellant Oliveros was diagnosed Dr. Michael McClay, psychologist, as being actively suicidal. *2011 Hearing Trans.*, *p.* 31 *l.* 6-13 to *p.* 34 *l.* 2, *A.* 008-009.

Appellant Oliveros testified at the hearing in 2011 that due to the profound psychological impact of his disfigurement and its interference with his attempts to find work, *Trans*, *p.* 37 *l.* 1 to *p.* 38 l.1, *A.* 10, he sought partial finger prostheses as a medical benefit under Idaho Code § 72-432. (This disfigurement continued to be a problem for Appellant Oliveros in seeking work. *A.* 240.) On December 3, 2009, Appellant Oliveros, through counsel, requested that the Respondent authorize a trial of partial finger prostheses. *A.* 037. On December 22, 2009, after Appellant Oliveros's initial request was not responded to, Claimant, through his counsel, sent a follow-up request. *A.* 038. On April 30, 2010, Appellant Oliveros's Counsel again requested authorization for consultation with Brownfield's Prosthetics, which, as noted in his letter, had just completed a multi-finger prostheses authorized by the surety in a worker's compensation

case for another client of Seiniger Law with a similar injury. *A.* 039. Again, there was no response.

On August 17, 2010, Appellant Oliveros's counsel again wrote to the surety's representative confirming a telephone conversation May 20, 2010, in which the surety's representative said that he would contact Brownfield's Prosthetics regarding the evaluation. *A.* 040. There was no response to this letter. On September 28, 2010, Appellant Oliveros's counsel again wrote to Respondent's representative inquiring into the status of Appellant Oliveros's request for partial finger prostheses. *A.* 41. Finally, on October 11, 2010, the Respondent's representative responded by advising that he had contacted Dr. Gross's office and was told by an assistant that they did not prescribe prosthetic devices for people "such as Mr. Oliveros." Respondent's representative indicated they had written to Dr. Gross asking whether or not he would prescribe the partial finger prostheses for Mr. Oliveros. *A.* 42.

On November 17, 2010, Respondent's representative sent a letter witha letter from Dr. Gross dated June 17, 2010 enclosed. However, Respondent's representative stated that this letter was in fact not been received until mid-October. *A.* 043-044. Dr. Gross's letter simply stated that he knew of no prosthesis that would improve Mr. Oliveros's function and that he did not routinely recommend them "should the patient have functional use of the hand." *A.* 044. Given that Dr. Gross had declined to make a referral upon the basis that the partial finger prostheses would not add to his hand function, Appellant Oliveros sought out an independent expert evaluation to determine if Appellant Oliveros might be a candidate for prosthetic rehabilitation. *A.* 045. The report, authored by MacJulian Lang, C.P.O., Clinic Dir. of Advanced Arm Dynamics submitted to the Respondent on June 6, 2011, *A.* 047, provided a detailed list of rehabilitation goals, prosthetic requirements, and a prosthetic rehabilitation plan. *A.* 048-053.

On August 30, 2011, Appellant Oliveros's counsel wrote to Dr. Gross regarding clarification to make sure that Dr. Gross understood that the Idaho Worker's Compensation act covered prostheses sought for cosmetic purposes and not just to restore function. *A.* 055-056. Appellant Oliveros's counsel received no response. On November 1, 2011, Appellant Oliveros's counsel again wrote Dr. Gross requesting a response to his earlier letter. *A.* 058.

On November 1, 2011 Dr. Gross wrote to Appellant Oliveros's counsel stating that any prosthesis Appellant Oliveros might get would not improve his function, and although they might be for cosmetic purposes which can be important in a young patient, the patients for whom he had ordered partial finger prosthesis found them cumbersome, awkward and time-consuming to use. Nevertheless, Dr. Gross stated that he "will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case." *A.* 061.

On November 8, 2011 Respondent representative wrote to Appellant Oliveros's counsel stating that he had spoken with Dr. Gross on several different occasions, that Dr. Gross was adamant that Oliveros was not in need of the devices nor were they reasonable and necessary. Nevertheless, the Respondent offered to pay for a "one time shot of these fingers in the context of a settlement." The letter offered no explanation as to how the fingers might be obtained if Dr. Gross refused to prescribe them. *A.* 059.

Appellant Oliveros's counsel again wrote to Dr. Gross on December 10, 2011, quoting Dr. Gross's willingness to write the prescription for the partial finger prosthetics as part of a settlement. Appellant Oliveros's counsel stated that he inferred that Dr. Gross was not categorically opposed to prescribing the prostheses, but simply could not advise the Worker's Compensation surety that they were medically necessary. Appellant Oliveros's counsel stated that given this he requested that Dr. Gross prescribe the prostheses for whatever reason he had in

mind and agreeing to do so in connection with the settlement of the worker's compensation case. Appellant Oliveros's counsel stated that he intended to present it to the surety in connection with the settlement demand and that Mr. Oliveros could also seek other sources of funding to obtain the prostheses. Appellant Oliveros's counsel informed Dr. Gross that even if the surety declined to pay for the prostheses, Mr. Appellant Oliveros wanted to purchase them if only to mask his disfigurement for psychological reasons to make him more comfortable in social situations including job interviews. Appellant Oliveros's counsel indicated that it appeared that funds might be available from other sources for the prostheses even if they were only cosmetic, a factor that remained in dispute. *A.* 373.

On December 19, 2011, Dr. Gross wrote Appellant Oliveros's counsel stating that he had reviewed the request of December 10, 2011. Dr. Gross stated "I have reviewed your request, and find I am uncomfortable prescribing the prosthesis prior to the settlement being reached. As I stated earlier, I am happy to write for it should Bryan wish to use his settlement to purchase a set, but I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and do not want my prescription for the prostheses construed as an agreement to the fact that it is medically necessary." *A.* 381. Dr. Gross made his position even clearer in his deposition testimony when he attempted to claim that multiple prostheses did not make sense. However, Dr. Gross testified that he had not provided multiple prostheses to his other patients for whom he had prescribed finger prosthesis, *Gross Depo. p.* 75 *l.* 2-13, *A.* 363, and when asked whether or not he had any studies to support his testimony concerning the downside of multiple partial finger prostheses he admitted that he did not know of any such studies. *Gross Depo. p.* 77 *l.* 3-23, *A.* 363.

Dr. Gross's opinions were belied by his testimony that if it was his child, Dr. Gross would have supported a trial of the prosthetic fingers:

> Q. Doctor, if you had a child who had these same injuries and that child came to you and said, "Daddy, I want these just because I want to look better. Kids are making fun of me at school," would you support that child in trying to get these?
>
> A. Yes.

Gross Depo. p. 56 ln. 11-16, *A.* 358. Indeed, Dr. Gross testified that he would support Mr. Oliveros's desire to obtain prosthetic for fingers for cosmetic purposes, "But if you're saying it's a cosmetic thing, I don't have a problem with it. And if Bryan wants it for cosmetic, I'm okay with that." *Gross Depo. p.* 57 1n. 8-10, *A.* 358.

Dr. Gross attacked Mr. Lang somewhat viciously during his post-hearing testimonial deposition testimony, taken at the instance of Respondent, on spurious grounds having nothing to do with Mr. Lang's qualifications. Despite the fact that Mr. Lang had an engineering degree from Cornell and additional training and residencies in orthotics and prosthetics, Dr. Gross described Mr. Lang caustically, stating, "The other thing is, is that this gentleman, with all due respect, is not a hand surgeon and is a salesman, and he's saying these things which are unsubstantiated, unfounded." *Gross Depo.*, *p.* 32 *l.* 1-4, *A.* 352. It was evident that Dr. Gross had no basis for this statement because he testified in his testimonial deposition (taken at the instance of the Respondent) that he had not reviewed Lang's deposition, denying that he had received a copy. *Gross Depo*, *p.* 29 .4-18. Exhibit 9 to the deposition of Dr. Gross was a letter from Appellant Oliveros's counsel enclosed with which was a copy of Mr. Lang's deposition provided to Dr. Gross for his review prior to Dr. Gross's deposition. *A.* 376. Dr. Gross went on in his excoriation of Mr. Lang, to misstate Mr. Lang's area of specialization (upper extremities) and justify his complete dismissal of Mr. Lang's recommendations and deposition testimony regarding the efficiency of partial finger prostheses, on the basis that Mr. Lang was not a professional, did not specialize in hands, but also worked on feet (an incorrect assertion as is obvious by the fact that Mr. Lang is the Clinical Director of "Advanced Arm Dynamics," a

company which holds itself out as "specializing in upper extremity prosthetic rehabilitation," *A.* 048-0510) and was just a "salesman" because Mr. Lang's company had allegedly delivered a box of fruit to Dr. Gross's office. *Gross Depo.*, *p.* 32 *l.* 5 to *p.* 33 *l.* 16. *A.* 352. Dr. Gross's hubris, evident in this testimony, and the umbridge that he took at Mr. Lang having the temerity to have an opinion different than his own, must be read to be appreciated. Before Dr. Gross became outraged by Mr. Lang's temerity, or perhaps the process of being cross-examined on his condemnation of Mr. Lang's recommendation without his having taken the time to read Lang's deposition that was sent to him, Dr. Gross testified that he could not say if the prosthetic devices recommended by Mr. Lang would impede the function of the hand. *Gross Depo.*, *p.* 25 *l.* 10-13, *A.* 350.

By the end of his deposition, Dr. Gross made it clear in his deposition testimony that he had completely lost any semblance of objectivity on the issue of the prosthetic fingers. Notwithstanding the report that he had received from Mr. Lang describing the functional value of prosthetic fingers, Dr. Gross testified "it is absolutely absurd that someone would actually put in for fingers. And to me, any company that would even suggest that and I will go on the record, is ridiculous. It is absolutely ridiculous." *Gross Depo*. *p.* 82 *l.* 14 - *p.* 83 *l.* 11, *A.* 365. These are the very partial finger prostheses that Dr. Gross testified he would support his daughter in obtaining if she was in similar circumstances, in which he cheerily offered to write a prescription for partial finger prostheses if it could be part of the settlement with the Respondent.

Appellant Oliveros moved to take the deposition of Mr. Lang for rebuttal purposes on the grounds that Dr. Gross said testified to an undisclosed opinion during his post hearing testimonial deposition that multiple prosthetic fingers such as those sought by the claimant created problems that single finger prosthesis did not. *R.* 18-26, *Vol.* 1. This motion was

supported by a letter from Mr. Lang indicating that he had knowledge of numerous patients who would use multiple prostheses for fingers for partial finger amputations on a daily basis. (Since such prostheses have to be prescribed, this raises at least the inference that other physicians disagree with Dr. Gross regarding the utility of multiple prostheses.) Despite the justifications contained in its Order Denying Motion To Take Post-Hearing Rebuttal Deposition, this motion was arbitrarily denied by the Idaho Industrial Commission. *R*. 040-043.

In ruling on Appellant Oliveros's motion to take rebuttal deposition of Mr. Lang, the Industrial Commission criticized Claimant for not obtaining an "independent evaluation of the potential efficacy of the prosthesis" if they did not like Dr. Gross' opinion. *R.* 41. As the record demonstrates Appellant Oliveros did obtain an independent evaluation of the potential efficacy of the prostheses and provided Mr. Lang's deposition as evidence of it. To the extent that the Idaho Industrial Commission was suggesting that claimant should have sought an independent evaluation from an orthopedic surgeon, out here in the real world where economic realities figure greatly into the equation, Claimants in a worker's compensation case seldom have the money to obtain an independent medical evaluation to refute an opinion that has never been disclosed prior to a hearing. It is doubtful that it "advances justice" to penalize them for not doing so. The Idaho Industrial Commission arbitrarily and capriciously refused to allow a rebuttal deposition to be taken of Mr. Lang to explore the proposition that multiple partial finger prostheses would impede the function of Appellant Oliveros's hand, raised for the first time post-hearing by Dr. Gross.

The Industrial Commission denied appellant Oliveros's request for prosthetic fingers, relying upon Dr. Gross's testimony stating,

> Nothing in the provisions of Idaho Code § 72-432 would prohibit the Commission from ordering an employer to provide procedures or prosthetic devices that are

> purely cosmetic in purpose. As acknowledged by Respondent, it is well within the ambit of Idaho Code § 72-432 to require an employer to provide, for example, scar revision surgery following an industrial bum or a prosthetic eye following an accident caused loss of an eye. Here, however, we are persuaded by Dr. Gross' s testimony that the prosthetics in question would not improve; and might actually impede, Claimant's residual hand function. While we do not doubt that Claimant would prefer to have a more natural looking hand, this is but one factor we must consider in determining the reasonableness of Mr. Lang's recommendation. The record clearly demonstrates that Claimant has thrived since the industrial accident. He has returned to school and to gainful employment, and in both of these settings he has found ways to deal with his severe injury, not only in terms of his loss of function, but also his disfigurement. Dr. Gross convincingly testified that the prostheses are at best useless, and at worse contribute to an even greater loss of function. We deem these factors to be more important than whatever cosmetic advantage the prostheses may offer. For these reason (sic.) we find that the recommendation made by Mr. Lang for the finger prostheses is not reasonable. Respondent are not obligated to provide the care recommended by Mr. Lang.

A. 139-140. Emphasis supplied. This finding was arbitrary and capricious, and therefore an abuse of discretion. "The weight to be given expert testimony depends, among other things, on the expert's means of knowledge, his competency, extent of experience or study, whether the witness is biased, the facts upon which his opinion is based, and the integrity of the witness." *Stroscheim v. Shay*, 63 Idaho 360, 362, 120 P.2d 267, 268, (1941). First, the Idaho Industrial Commission failed to consider, and did not find any facts concerning the obvious conflict between Dr. Gross stating that he could not recommend prosthetic fingers for functional reasons, and his multiple statements that he would prescribe them if the claimant were willing to settle this case. Second, on cross-examination, Dr. Gross testified that he had never prescribed multiple partial finger prostheses in his practice and was not aware of any articles that discussed any problems with doing so. Clearly, there was no foundation for Dr. Gross's testimony on this, the ultimate issue. Therefore it could not have been substantial and competent. Instead, the Idaho Industrial Commission impermissibly relied upon speculation and conjecture. *Owen v. Burcham*, 100 Idaho 441, 448, 599 P.2d 1012, 1019, (1979).

Further, nowhere in its *Findings of Fact, Conclusions of Law, and Order* denying

Appellant Oliveros the partial finger prostheses as a medical benefit under Idaho Code § 72-432 is there any analysis of Mr. Lang's extensive testimony regarding the benefits of the partial finger prostheses. *A.* 129-141. It is unknown if Idaho Industrial Commission was in lockstep with Dr. Gross in discounting Mr. Lang's expertise on the grounds that he was a "salesman," but it does appear that the Commission was mesmerized by Dr. Gross's status as a "hand surgeon" and completely ignored both Mr. Lang's qualifications and substantial incompetent evidence he gave of the basis for his recommendations. The decision of the Idaho Industrial Commission in this regard was an abuse of discretion.

CONCLUSION

Appellant Oliveros was a high school student when the fingers of his dominant hand were traumatically amputated. It is respectfully submitted that the fact that he has been treated harshly by a system that promises "sure and certain relief" is beyond cavil. That observation, much as it needs to be made, is not the basis of this appeal. The decision of the Idaho Industrial Commission is appealed because the Idaho Industrial Commission erred as a matter of law in construing Idaho Code § 72-425 and Idaho Code § 72-450, and because the Idaho Industrial Commission abused its discretion by arbitrarily and capriciously finding facts not supported by substantial and competent evidence.

The Idaho Industrial Commission erred as a matter of law in its interpretation of Idaho Code § 72-425 by disregarding the precedent of the Idaho Supreme Court laid down in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) and reiterated in *Davis v. Hammack Mgmt.*, 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017) concerning the distinction between benefits recoverable for permanent partial impairment defined by Idaho Code § 72-422 and benefits recoverable for permanent partial disability defined by Idaho Code § 72-423. It

erred as a matter of law in effectively concluding that the Idaho Supreme Court intended to overrule *sub silentio* the basis of its holding in *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014) by its decision in *Mayer v. TPC Holdings, Inc.,* 160 Idaho 223, 370 P.3d 738, (2016) and ignoring the fact that the Idaho Supreme Court affirmed the basis of its holding in *Corgatelli* in its decision in *Davis v. Hammack Mgmt*., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017). This case should be remanded to the Idaho Industrial Commission with instructions to enter its amended order requiring the Respondent to pay Appellant Oliveros his nonmedical permanent partial disability benefits without reduction for the amount of permanent impairment benefits previously paid.

The Idaho Industrial Commission erred as a matter of law in construing/applying Idaho Code § 72-450. The Idaho Industrial Commission erred as a matter of law in failing to give Idaho Code § 72-450 the liberal construction required under the Idaho Workers Compensation Act. The Idaho Industrial Commission abused its discretion in concluding that the claimant failed to prove that he was entitled to reimbursement and corresponding total temporary disabilities for retraining under Idaho Code § 72-450 and by determining Appellant Oliveros's permanent disability based upon his completion of a successful retraining program, while also determining that claimant was not entitled to reimbursement for the training program. The Idaho Industrial Commission's decision on retraining was arbitrary and capricious for the reasons set forth above. The Idaho Industrial Commission's decision in this regard should be reversed and remanded with instructions to reconsider the matter without the erroneous construction placed on Idaho Code § 72-450 discussed above.

The Idaho Industrial Commission abused its discretion in determining Appellant Oliveros's permanent disability based upon a successful retraining program, while also

determining that claimant was not entitled to reimbursement for the training program. It also abused its discretion by arbitrarily and capriciously determining that claimant had a loss of no more than 30% of his applicable labor market in a nonmedical PPD of 25%. These conclusions were speculative and not based upon any evidence cited in the record. The Commission's decision in this regard should be reversed and the issue remanded for determination based upon the facts set forth in the record.

The Idaho Industrial Commission abused its discretion in concluding that the claimant failed to prove that he was entitled to partial finger prostheses as a medical benefit under § 72-430. The Idaho Industrial Commission's decision was arbitrary and capricious and based on speculation in light of Dr. Gross's admission that he had no basis, clinical or in any studies, for testifying that multiple partial finger prostheses would impede the function of Appellant Oliveros's hand, and, by the Commission's failure to find facts concerning Dr. Gross's and the Respondent Surety's attempts to force Appellant Oliveros into a position where he would settle his case. The Idaho Industrial Commission's decision on this issue should be reversed with instructions that it find facts concerning the specific recommendations of Dr. Lang's and the validity of his reasons for making the recommendations for partial finger prostheses, and that in view of Dr. Gross's admitted lack of foundation for his opinion that partial finger prostheses would not function, that his testimony is to be ignored.

DATED July 18, 2018.

/s/ Wm. Breck Seiniger, Jr.
Wm. Breck Seiniger, Jr.
SEINIGER LAW
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CERTIFICATE OF SERVICE

On July 18, 2018, I served the foregoing by fax and the iCourt system on:

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/s/ Wm. Breck Seiniger, Jr.
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