1-22-2019

Ayala v. Robert J. Meyers Farms, Inc. Appellant's Reply Brief Dckt. 46186

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * *

MARIO AYALA,

Claimant-Appellant,

vs.

ROBERT J. MEYERS FARMS, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants-Respondents

Supreme Court No. 46186-2018

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APPELLANT'S REPLY BRIEF

Appeal from the Idaho State Industrial Commission

Chairman Thomas E. Limbaugh, Presiding

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PRELIMINARY STATEMENT

The citations and argument set-forth within the instant Reply Brief are intended to be supplemental to those within Appellant's Opening Brief. Therefore, the instant Reply Brief will not respond to the various arguments advanced by Respondents' Brief, to the extent that such response would simply duplicate arguments previously made by Appellant.

SUPPLEMENTAL ARGUMENT WITH CITATIONS

I. Regarding Respondents' Statement of the Facts at pages 3-13 of Respondents' Brief

Recognizing that "poetic license" affords certain latitude in arguments and/or representations made upon behalf of a party, it is not counsel's intent to "nit-pick" by contesting factual representations made by Respondents regarding which counsel disagrees. Rather, as Respondents' factual representations are repeated within the Argument portion of their Brief, doing so both at this juncture as well as in response to Respondents' Argument would be repetitive.

II. Response to Certain of the Argument Advanced by Respondents

A. The record is devoid of "substantial and competent evidence" to support the Commission's Finding that Claimant's lumbar condition from and following the 2009 motor vehicle accident was unrelated to that occurrence.

1. Standard of Review

On appeal the Commission's Findings of Fact will be upheld if supported by substantial, competent evidence. However, appellate review requires more than reviewing but one side of the case and, if any evidence is therein found, sustain the Commission's decision and ignore the record to the contrary. ***Ewins v. Allied Security***, 138 Idaho 343, 63 P.3d 469 (Idaho 2003). Defendants argue that the Supreme Court will not re-weigh the evidence or consider whether it would have drawn a different conclusion from the evidence presented. Such is only partially correct. The Court

may apply the law to undisputed facts, *de novo*. ***Martel v. Bulotti***, 138 Idaho 451, 65 P.3d 192 (Idaho 2003). The Court freely reviews whether the Commission's Conclusions of Law are supported by its Findings of Fact and, if not, the Commission's decision is required to be set aside. ***Bortz v. Payless Drug Store***, 110 Idaho 942, 719 P.2d 1202 (Idaho 1986). Further, any challenge of the Commission's application of facts to a statute is a question of law over which this Court exercises free review. ***Smith v. JB Parson Co.***, 127 Idaho 937, 908 P.2d 1244 (1996).

Respondents blindly assert that, "[a]s the factfinder, the Commission is free to determine the weight to be given to the testimony of physicians," citing ***Fife v. Home Depot, Inc.***, 151 Idaho 509, 260 P.3d 1180 (2011). Respondents failed to note that ***Fife*** also held that the determination of whether the Commission's factual findings are supported by substantial and competent evidence is a question of law and, thusly, subject to the Court's free review. The Commission's fact-finding role and freedom to assign whatever weight it wishes to the testimony of physicians is not unfettered. In ***Stevens-McAtee v. Potlatch Corporation***, 145 Idaho 325, 179 P.3d 288 (2008), this Court reviewed the record within the context of both the testimony of that Claimant, which the Commission found lacked credibility, as well as the opinions of the physicians, and determined that "...the record overwhelmingly indicates that McAtee was injured during the work shift on March 9, 2004," overturning the Commission's conclusion (that McAtee had failed to show his disk injury was caused by a compensable accident) as being unsupported by substantial and competent evidence. It is respectfully submitted that upon this Court's review of the record herein, it will reach the same conclusion.

2. The Commission's finding that Claimant's low back presentment from and following the October 6, 2009, motor vehicle accident was unrelated to that event is without support by the record and/or expert opinions.

As noted by Respondents, the level of proof required for showing causation is "a reasonable degree of medical probability... ." However, Respondents failed to note that this Court has defined "probable" as simply "having more evidence for than against." ***Soto v. Simplot***, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1944); and, ***Jensen v. City of Pocatello***, 135 Idaho 406, 18 P.3d 211 (2000).

Respondents assert that Mario's argument that the motor vehicle either caused or aggravated his low back pain "is based upon two false premises: (1) that his back pain before his accident was due to the flu rather than his pre-existing condition (he was assymptomatic) and, (2) that following his accident he had persistent unrelenting low back and leg pain."

Claimant's "back pain" which preexisted the October 6, 2009, motor vehicle accident as compared with and contrasted to his pain following that accident together with his medical presentments and the opinions of the physicians of record herein was discussed within section IV, at pages 10-31 of Appellant's Opening Brief, which will not be repeated hereat. Supplemental thereto, Claimant acknowledges that diagnostic studies established preexisting degenerative disk disease of his lumbar spine. However, certain of Respondents' argument and references to the record must be addressed hereat. First, Mario never represented that his low back had been, at all times, asymptomatic prior to the motor vehicle accident. In fact, upon October 14, 2001, Mario suffered an earlier industrial neck and back injury at Meyers Farms. ***R.***, pp. 407-408. That claim was consolidated with the instant proceedings, but was withdrawn at the commencement of the October 26, 2016, hearing. ***Tr.***, p. 5, LL. 3-11. Mario was referred by PA-C Boothe to chiropractic physician Keiffer for a maximum of five visits for low back pain following that occurrence. Cl. Ex.

2, p. 31. As of November 7, 2001, PA-C Boothe, referred Mario to Dr. Keiffer limited to "cervical neck pain." Cl. Ex. 2, p. 34. Thusly, his low back symptomatology had resolved within a period of less than one week.

Having been a laborer all of his adult life, Mario did experience temporary and transient back aches sporadically. As noted by the ICRD Job Site Evaluation Mario's time-of-injury job involved a work-day in the "10 hours range," during which he lifted objects weighing up to 100 pounds up to thirty-three percent (33%) of the work-day and required climbing, bending/stooping, kneeling, crouching, twisting and crawling for up to thirty three percent (33%) of the work-day. The JSE was reviewed and approved by both Robert Meyers and Mario. Cl. Ex. 27, pp. 711-712. Anyone of Mario's age and engaging in those activities would most certainly be anticipated to experience sporadic back pain.

However, at least for the two years immediately precedeing the 2009 motor vehicle accident, Mario never presented to any medical provider for low back injury or pain, excepting upon September 9, 2009, when he presented to PA-C McCready, with pain in the upper, mid and lower portions of his back together with other complaints/symptoms for which he was told that he had the flu. Mario described his presentment of September 9, 2009, as "I just feel like I had fever inside of my body." He was nauseous, fatigued, and had an appetite loss with muscle cramps. The nurse's note describes Mario's presentment as being with "body aches/dizzy." Mario was not referred for a lumbar MRI, CT or even an x-ray, but for "labs," and was advised that if his symptoms did not resolve, he should re-present the following week. However, he did not, "[b]ecause I didn't need to go back." ***Tr.***, p. 80, L. 6-p. 81, L. 23; Cl. Ex. 3, pp. 136-138.

Of note, during the two years prior to the October 6, 2009, motor vehicle accident, Mario presented to Glenns Ferry Health Center (GFHC) upon September 14, October 30 and November 20, 2007; upon June 11, July 4 and September 30, 2008; and, upon February 25 and March 10, 2009, without a single reference within the records of low back symptomatology. Cl. Ex. 3, pp. 116-133.

Upon October 5, 2009, Mario re-presented to PA-C McCready with a chief complaint of a persistent recurring cough. PA-C McCready noted a "history of pneumonia." Mario denied "...difficulty walking; limited range of motion; muscle pain or cramps; recent trauma or injury; and, weakness of muscles or joints." PA-C McCready noted "wheezes on expiration in the upper airways." Under "Musculoskeletal" Mario's back was not mentioned but his right knee demonstrated "...grinding at the lateral aspect of the ...lateral joint line." Concededly, PA-C McCready's Diagnosis included obesity, asthma-unspecified and back pain. However, nowhere within the dictation of/for October 5, 2009, was Mario's weight discussed. Rather, the diagnosis of obesity and back pain was obviously "carried-over" from September 9, 2009. Cl. Ex. 3, pp. 141-143, and 137. PA-C McCready's September 9 and October 5, 2009, records were reviewed by Mario's neurosurgeon, Dr. Reedy, at the request of Defendants' counsel. Mr. Augustine's December 17, 2015, correspondence to Dr. Reedy attached PA-C McCready's dictation of September 9 and October 5, 2009, with his representation that "...Mr. Ayala (had) complained of low back pain which was persistent and moderate and for which he was prescribed Naprosyn... ," and that it was Dr. Montalbano's opinion that those presentments were by reason of preexisting low back pain, such that Mario's low back presentments following that accident would not be related thereto. Cl. Ex. 17a, p. 576; and, 5e(1), pp. 186a-186b. Dr. Reedy's response advised that, even accepting that Mario

> ...had a back ache prior to his accident and was treated with Naprosyn, does not preclude the fact that the exacerbation of the accident led to persistent unrelenting pain in the back and leg, with neurogenic claudication-like symptoms and he clearly has pathology to demonstrate the validity of those claims. ...(and that) ...the motor vehicle accident flared up his preexisting condition (and) is directly related to the need for surgery, (likening the accident) to the straw that broke the camel's back and that (Mario's) back needs to be fixed as a result of his motor vehicle accident in 2009.

Cl. Ex. 5e, p. 186.

Neurosurgeon Michael Hajjar, to whom Mario was referred by Dr. Reedy, reviewed PA-C McCready's October 5 and September 9, 2009, dictation as well as Mario's medical records for the two years prior to the motor vehicle accident and advised that,

> ...there is one previous note which notes back pain. There is no followup for this event that predates the accident. Based on the information that was provided including general body aches, report of fever and other issues, this sounds more like a flu like illness or viral prodrome versus any type of mechanical back issues. No additional spinal work up was provided but rather typical medication. Mario was then instructed to follow up as needed but he never did follow up for this issue.
>
> Therefore, I believe that this medical record ...supports Mario's contention and it all supports Mr. McCready's contention that the back issues are related to the work accident.

Cl. Ex. 10c., pp. 472e and f. Dr. Hajjar's opinion was following review of Dr. Montalbano's October 8, 2015, dictation and constituted a direct and clear rebuke of Dr. Montalbano's no causation opinion. Recall, Dr. Montalbano was best man at Dr. Hajjar's wedding; they went to the same residency program; Drs. Montalbano and Dr. Hajjar are in the same medical practice; and, Dr. Montalbano respects Dr. Hajjar as an "imminently qualified neurosurgeon." ***Montalbano Depo.***, p. 60, LL. 8-21.

PA-C McCready's September 9 and October 5, 2009, dictation was also reviewed by Dr. Richard Hammond, a board certified neurologist who examined Mario upon five separate occasions. Upon review of the September 9, 2009, records, Dr. Hammond testified that Mario's presenting complaints together with his course of treatment reflected that Mario presented with a systemic condition, such as a cough or cold. ***Hammond Depo.***, p. 17, L. 6-p. 20, L. 13.

Recall, Dr. Montalbano is a neurosurgeon whereas Dr. Hammond is a board certified neurologist. Dr. Hammond explained that neurologists are

> ...diagnosticians, (who) help to determine where an injury is or a lesion is and hopefully the – how the lesion occurred, (and) ...would be more likely to see a patient more closely in time to the accident than a neurosurgeon. ...(and) see the nerve root impingements, back strains, neck strains long before (neurosurgeons) do.

Hammond Depo., p. 7, LL. 3-22.

Dr. Hammond was provided with PA-C McCready's January 19, 2016, Questionnaire, (Cl. Ex. 6a, at p. 348) and agreed that Mario's presentments of September 9 and October 5, 2009, were not by reason of a significant injury to or condition of his low back and that, but for a subsequent accident, Mario would not thereafter be reasonably anticipated to present with significant low back issues requiring medical attention, as recommended by Drs. Reedy, Hajjar and himself. ***Hammond Depo.***, p. 22, L. 7-p. 24, L. 5.

Dr. Hammond explained that Mario's presentment with pain in the upper, mid and low back, on September 9, 2009, was "muscular," whereas his presentment following the accident was not. PA-C McCready had noted mild spasms along Mario's entire back. Only muscles span the entire back region. Dr. Hammond noted that following the motor vehicle accident Mario's complaints changed to encompass that, if he stood too long his legs went numb, which was the one constant

from and following the motor vehicle accident which the medical records prior to the accident were devoid of. ***Hammond Depo.***, p. 20, L. 14-p. 22, L. 6. Dr. Hammond had "no doubt" that Mario's low back complaints from and following the motor vehicle accident were related to that event. ***Hammond Depo.***, p. 42, L. 11-p. 43, L. 7.

The issue of medical causation in conjunction with the significance of the September 9 and October 5, 2009, dictation of PA-C McCready was also presented to PA-C McCready upon three separate occasions. Counsel's November 5, 2015, correspondence to PA-C McCready attempted to accurately set forth Mario's medical presentments for relevant periods prior to the October 6, 2009, accident, specifically referencing September 9 and October 5, 2009, as well as his presentments following that occurrence together with Dr. Montalbano's October 8, 2015, report, thusly emphasizing the importance of Mario's condition at the time of those two presentments. Unfortunately, PA-C McCready did not respond to that correspondence. The December 14, 2015, correspondence requested that PA-C McCready respond to the November 5, 2015, correspondence and noted the importance of PA-C McCready's opinions. Again, no response was forthcoming by PA-C McCready. Counsel's January 5, 2016, correspondence again set-forth the same two issues; advised that absent PA-C McCready's response, counsel would most likely be required to take his deposition; and, to facilitate ease of response, submitted a Questionnaire for completion. PA-C McCready's response was that prior to the October 6, 2009, motor vehicle accident, Mario had not presented with conditions or symptomatology indicative of a significant low back injury or condition; and, that based upon Mario's September 9, and/or October 5, 2009, presentments, but for an accident following October 5, 2009, PA-C McCready would not have reasonably anticipated that

Mario would thereafter present with low back issues requiring medical attention as recommended by Drs. Reedy and Hajjar. Cl. Ex. 6.a., p. 348.

In rejecting PA-C McCready's opinions, the Commission speculated that, "[i]t is unclear whether PA-C McCready's reply represents his actual opinion, or was simply his way to buy some peace...," noting that counsel had advised PA-C McCready that absent response via the Questionnaire, counsel would take PA-C McCready's deposition. In this regard the Commission ignored the obvious, that it would have been just as easy for PA-C McCready to have indicated his disagreements with the issues set forth upon the Questionnaire, which would have assured that Mario's counsel would not have contacted him again. The Commission's rejection of PA-C McCready's opinions was also without discussion of the fact that the completed Questionnaire had been reviewed by Drs. Reedy, Hajjar and Hammond, who each concurred therewith. Lastly, and most significantly, the Commission failed to acknowledge, let alone discuss, Mario's testimony at hearing describing his presenting symptoms of September 9 and October 5, 2009, regarding which, on September 9, 2009, PA-C McCready told Mario that he had the flu; and, that upon October 5, 2009, Mario presented without back symptomatology. ***Tr.***, p. 80, L. 5-p. 82, L. 14. Mario testified, clearly and positively, that immediately prior to the October 6, 2009, motor vehicle accident, there was nothing wrong with his back and he was able to conform to the physical requirements of his employment, without difficulty. ***Tr.***, p. 82, L. 15-p. 85, L. 12.

It is obvious that the Commission rejected Mario's testimony as not being credible. Recall, the Commission reassigned this claim to itself following hearing before Referee Powers, and thusly was without observational credibility regarding Mario, and deprived Mario of the benefit of Referee Powers' observational credibility made during the hearing. Recall, Morgan Meyers testified that

Mario was "definitely" honest. ***Tr.***, p. 191 LL. 8-19. Further, Respondents' IME physician, Dr. Harris, found Mario's presentment to be without pain behavior and that there was no suggestion of symptom magnification. Cl. Ex. 20a, pp. 602-608.

Respondents also advance Dr. Harris' no causation opinion, the basis of which was thoroughly discussed at pages 14-16 of Appellant's Opening Brief and will not be here repeated at length, other than to remind the Court that Dr. Harris' opinion was upon a review of records provided by the Fund; and, the Fund's August 30, 2012, correspondence to the doctor, which misrepresented that prior to Mario's first presentment to Dr. Reedy he did not have back complaints; and, that following Mario's first presentment to Dr. Reedy he did not have back complaints up to Dr. Harris' August 15, 2011, IME report, and was thusly "set-up" by the Fund.

At page 19 of Respondents' Brief, Respondents falsely represent that, "Dr. Reedy based his causation opinion on his assumption that the Claimant was 'asymptomatic until the time of the MVA which precipitated the need for intervention." In doing so Respondents clearly ignored Dr. Reedy's report responsive to Mr. Augustine's December 17, 2015, correspondence, which attached the September 9 and October 5, 2009, records of PA-C McCready; represented that Mario had then complained, upon each presentment, of persistent and moderate low back pain for which he was prescribed Naprosyn; and, attached Dr. Montalbano's report expressing that Mario's low back was symptomatic prior to the 2009 accident and that Mario's subsequent presentment would be unrelated to that event. Dr. Reedy's January 7, 2016, response expressed that, even assuming that Mario had presented with a back ache upon September 9 and/or October 5, 2009, "...does not preclude the fact that the exacerbation of the accident led to persistent unrelenting pain in the back and leg, with

neurogenic claudication-like symptoms and (Mario) clearly has pathology to demonstrate the validity of those claims." Cl. Ex. 5e, p. 186.

Respondents' Brief emphasized that Dr. Montalbano had not been advised that Mario may have had low back symptomatology prior to the motor vehicle accident and that upon his review of the September 9 and October 5, 2009, records, his October 8, 2015, report expressed that,

> [a]fter reviewing the additional medical records provided to me via your office, it is quite clear that Mr. Mario G. Ayala was symptomatic in terms of low back pain on at least two separate occasions. He was evaluated for low back pain on September 9, 2009 and then once again on October 5, 2009. ...within these two visits ...Mr. Ayala started on treatment on two separate occasions for low back pain and even received a prescription for a nonsteroidal anti-inflammatory agent in order to manage such pain.
>
> After reviewing these additional records, it is quite clear that Mr. Ayala was symptomatic in terms of low back pain prior to the motor vehicle accident of August 6, 2009.

Dr. Montalbano then reversed his July 8, 2015, opinion that, "...the etiology of (Mario's) symptomatology would be related to that motor vehicle accident," and opined that "...Mr. Ayala's current symptomatology is of a degenerative condition and not attributed to his motor vehicle accident." Cl. Ex. 21.b., pp. 639-640.

Two issues arise regarding Dr. Montalbano's current no causation opinion. The first is whether Dr. Montalbano's perception that Mario's presentments to PA-C McCready upon September 9 and October 5, 2009, is accurate such that, upon each of those dates, Mario presented to PA-C McCready by reason of low back pain; was started on treatment for low back pain; and, received a prescription to manage such pain. Clearly, Dr. Montalbano was wrong in these regards. The Court is referred to Appellant's Opening Brief at pages 16-23 as well as earlier within the instant Reply Brief, where the basis for Dr. Montalbano's position in these regards was thoroughly discussed and

discredited. However, even if Mario had presented with symptoms involving his lower back prior to the October 6, 2009, motor vehicle accident, the question arises whether such would prove adequate as basis for Dr. Montalbano's reversal of opinion. Simply stated, it would not.

Dr. Montalbano's earlier affirmative causation opinion was responsive to counsel's correspondence of June 22, 2015. Cl. Ex. 17.a.(1), pp. 577-581. Page 3 of that correspondence disclosed that Mario had undergone IME by Dr. Mark Harris who, upon records review, noted that Mario "...did present prior to the October 6, 2009, motor vehicle accident with sporadic complaints of low back symptomatology." Page 4 of that correspondence notes that, "[i]n summary..., Mr. Ayala did present with occasional symptoms involving his low back prior to the motor vehicle accident." Page 5 of counsel's correspondence requested the doctor's opinion whether Mario's post-accident presentments were by reason of that event, advising that the accident

> ...need not be the only cause for Mr. Ayala's current need for low back procedures or medical treatment. Rather, if that accident exacerbated a pre-existing low back condition such that Mr. Ayala's need for treatment was advanced in time sooner than would have otherwise been medically anticipated had the motor vehicle accident not have occurred, then Mr. Ayala's need for lumbar procedures is causally related to the motor vehicle accident for purposes of the Fund's responsibility.

Page 5 of that correspondence advised that should the doctor "...have questions or wish to discuss this issue with (counsel) please call." In his deposition, Dr. Montalbano agreed that counsel's correspondence of June 22, 2015, advised that Mario had low back complaints prior to the accident, and that prior to authoring his July 8, 2015, report (expressing affirmative causation opinion) he did not contact counsel or request additional data or records. ***Montalbano Depo.***, p. 72, L. 7-p. 73, L. 11.

The second issue involving Dr. Montalbano's no causation opinion is that, even if Mario presented with low back complaints upon September 9 and October 5, 2009, whether that presentment carried-over from and following the motor vehicle accident unaffected by that occurrence, such that Mario's subsequent need for medical care would be solely related to preexisting causes. The answer is, absolutely not.

As above-noted, immediately following the accident Mario reported a back injury to his employer, which was recorded upon the First Report of Injury. Cl. Ex. 25.b., pp. 673-674. Upon December 21, 2009, Mario notified the Fund that his legs "went numb" upon standing. Cl. Ex. 25.b., pp. 673-674; 25.b.(1), pp. 674a, b(1), and c. This complaint was noted throughout the records of Dr. Reedy (Cl. Ex. 5, p. 150); Dr. Hajjar (Cl. Ex. 10, pp. 469-470); Dr. Montalbano (Cl. Ex. 17, pp. 569-570); and, Dr. Hammond (Cl. Ex. 9, pp. 464-467).

Clearly, Mario did not present with these symptoms prior to the motor vehicle accident. Dr. Montalbano testified that without a "significant amount of narrowing of the spinal canal" it is not possible for one presenting as does Mario, upon consideration of his degenerative arthritis and spondylolisthesis, that standing would result in lower extremity numbness. ***Montalbano Depo.***, p. 23, LL. 1-7. Dr. Montalbano testified that there is no difference between neural foraminal narrowing and foraminal stenosis. In each case, you are talking about "narrowing." ***Montalbano Depo.***, p. 61, LL. 13-17. Upon Dr. Montalbano's review of Mario's diagnostic studies, it was his opinion that the same were absent indication of nerve root compression or central canal stenosis. ***Montalbano Depo.***, p. 12, L. 10-p. 13, L. 22. However, he is the lone voice expressing such opinion. Following Dr. Reedy's review of the diagnostic studies he believed that Mario presented with

a "... translation/anterolisthesis of L5-5 and significant bilateral foraminal stenosis at 5-1," for which Mario was a candidate for fusion. Cl. Ex. 5, p. 172. Dr. Hajjar expressed that the diagnostic studies

> "...demonstrate an anterolisthesis at the L4-5 level that measures about 4 mm. This is likely degenerative in nature and it worsens with flexion. There is moderate bilateral lateral recess stenosis and foraminal stenosis at the L4-5 level and at the L5-S1 level. *There is impingement of both the L4 nerve root and the L5 nerve root.* There is also moderate facet arthropathy at both levels."

(Emphasis added.) Cl. Ex. 10, p. 470. It was by reason of that presentment that Dr. Hajjar recommended an L4-S1 decompression and stabilization. *Id* at 471.

Dr. Hammond testified that Mario's CT myelogram, demonstrating anterolisthesis of L4 and L5 with significant bilateral L5-S1 stenosis, indicated that,

> ...the L5 nerve root, the neural foramen was closed off. And so the spinal canal is where all of the nerve roots reside. And I believe the report said that that only had mild stenosis. But as the nerves run out to the side and they run through the canals, as that vertebrae moved forward, that the top vertebrae actually closes off that neural foramen, closes off that hole, so that the nerves get pinched. And so (Mario) had multiple nerve roots being pinched by the anterolisthesis.

Hammond Depo., p. 15, L. 21-p. 16, l. 14. Dr. Hammond advised that, looking "...at the entire picture with regard to the history, the presentment, the findings from other doctors, and then you make a decision as to the most probable etiology or cause," which he testified was from the October, 2009, motor vehicle accident. ***Hammond Depo.***, p. 16, L.15-p. 17, L. 5.

The Commission determined that the testimony and records of the medical providers did not establish that Mario's back pain with which he presented on September 9, and October 5, 2009, was simply a manifestation of a systemic illness, such as the flu, reasoning that the medications prescribed by PA-C McCready were typically prescribed for musculoskeletal complaints, and that there was no documentation of the flu in his notes. In doing so the Commission failed to

acknowledge that Mario's symptoms upon September 9, almost line for line, were a perfect match with the Centers for Disease Control and Prevention discussion of "Flu Symptoms & Complications." Referencing the same, it states that,

> [p]eople who have the flu often feel some or all of these symptoms:
> Fever or feeling feverish - chills (with a footnote advising that not everyone with the flu will have a fever)
> Cough
> Sore throat
> Runny or stuffy nose
> Muscle or body aches
> Headaches
> Fatigue (tiredness)
> Some people may have vomiting and diarrhea, though this is more common in children than adults.

Montalbano Depo., Ex. 2.

From PA-C McCready's September 9 records, Mario presented with body aches; an "internal fever"; had nausea but denied vomiting ; appetite loss; fatigue; and, muscle cramps. Rhetorically speaking, exactly what about Mario's September 9, 2009, complaints were incompatible with the flu? Dr. Montalbano (a neurosurgeon who does not diagnose, treat or see patients with the flu except incidentally) was the only physician advocating that Mario's September 9 presentment was by reason of "low back pain" as opposed to a systemic illness, such as a cold or flu? Significantly, Mario was referred for lab tests as opposed for any diagnostic studies indicative of a musculoskeletal/low back issue. One must question the scale used by the Commission in weighing this evidence.

On October 5, 2009, Mario presented for symptoms involving a cough; a history of pneumonia; and, "... joint pain; muscle aches; which is mild." The musculoskeletal examination was absent reference to Mario's back, while noting his right knee presented with "grinding at the lateral

aspect (of) the joint line." Naprosyn was prescribed, which Dr. Montalbano conceded could be prescribed for knee pain. ***Montalbano Depo.***, p. 90, LL. 3-17. Dr. Montalbano also conceded that, referencing PA-C McCready's September 9, 2009, dictation, there was nothing providing basis that the low back should be perceived to be more significant than the upper or mid back in review of Mario's presentment with pain in the upper, mid and low back. ***Montalbano Depo.***, p. 80, LL. 3-7.

The Commission's decision and Respondents' argument emphasizes that Mario's medical records fail to support that Mario suffered from "persisting and unrelenting low back pain" following the motor vehicle accident. Most certainly, Mario did not complain of low back pain upon each and every presentment to his providers. At hearing, Mario explained that when presenting to Drs. Hessing and Clawson he did not complain of his back, because they were not "back doctors." Conversely, when presenting to Dr. Hammond, a "back doctor," he did discuss his back. ***Tr.***, p. 94, L. 23-p. 95, L. 17; and, p. 139, L. 19-p. 140, L. 19, respectively. Confirming this, no one can dispute that upon February 3, 2011, Mario experienced significant left upper extremity symptomatology, when he presented to Dr. Hessing status-post surgery and was referred for therapy. Cl. Ex. 8, p. 437. Yet, <u>on that same date</u> Mario presented to Glenns Ferry Health, with those records being absent of any left upper extremity complaint. Cl. Ex. 6, pp. 267-268.

In ***Wegner v. Coeur d'Alene Power Tools***, I.C. 2012-031071, filed May 19, 2015, the Commission was presented with a similar claimant, whose was complaint specific when presenting to his physicians, and a medical provider's office whose records were oft-times inaccurate, exactly the same as Glenns Ferry Health. Regarding the medical provider's records, the Commission noted

> ...examples of inaccuracies involve such entries as listing no joint pain, when the very reason Claimant was at Dr. Greendyke's office was due to joint pain. On the May

> 31, 2013, visit, Claimant presented to discuss his back pain. The symptom review notes 'no backache.'

Compare Mario's records with Glenns Ferry Health. The August 30, 2010, dictation notes chronic back pain whereas the review of symptoms for the same date "denies" back pain. Cl. Ex. 6, pp. 244-245. The November 1, 2010, dictation notes "a ringing in his ear, and a loss of hearing," with the CC/HPI stating, in the very next paragraph "denies" hearing loss and ringing in the ears. *Id* at p. 257. The July 16, 2013, record reports no history of neck or back surgery yet, on the same page, "past surgical history" reports back and cervical surgeries. Mario's chief complaint on that date was neck pain. However, under Musculoskeletal, it "denies" neck pain. *Id*, pp. 343-344.

Respondents' Brief addresses Mario's IME examination by Dr. Harris of July, 2010. The August 2, 2010, report, is at Cl. Ex. 20.b., pp. 602-608. Respondents emphasize that this report failed to document low back pain upon Mario's pain diagram or medical questionnaire. Recall that Dr. Harris is not a "back doctor," and his examination "...focused on the neck, bilateral shoulders, and arms. *Id*, p. 605. Throughout Dr. Harris' reports, he noted that Mario's presentments were absent nonphysiologic findings, significant pain behavior or symptom magnification. Further, much of Dr. Harris' August 2, 2010, IME report was in error and failed to mesh with Mario's medical records. Dr. Harris noted that "[t]he patient completed questionnaires and a pain inventory... ." Counsel finds it somewhat odd that Mario was able to accurately complete the same when he obviously could not in August, 2011. Counsel references Dr. Harris' subsequent IME report at Cl. Ex. 20.d., at pages 613-626. Upon that presentment Mario's Pain Disability Index was not ratable due to blank columns; and, his Pain Disability Questionnaire was not scored, as it was not completed accurately. *Id*, p. 616. The August 2, 2010, report states that Mario's complaint at the ER

immediately following the motor vehicle accident included "...a stiff neck, numbness in the neck, (and) left shoulder pain,... ." However, none of those complaints were recorded within the ED dictation. Cl. Ex. 4, pp. 144-148. Page 2 of this report notes that Mario "...has not been able to see the hand surgeon (to whom) he's been referred...," when he had never been referred to a hand surgeon. Page 3 of the report notes that Mario has "...difficulties with grabbing anything. He works on a farm and cannot lift as much as he would like. He has difficulty with his daily tasks as well." Yet, in the very next paragraph, Dr. Harris notes that Mario "...is full time back to work. He reports no work restrictions at this time." At page 5, the Oswestry Function Test was noted to have a score of "severe disability," which most certainly is not compatible with a return to work without restrictions. Recall, the same report notes Mario's presentment was without symptom magnification or nonphysiologic findings. Counsel further finds it inconsistent that this report, regarding a July, 2010, IME, noted Mario's presentment without back symptomatology whereas Mario's presentment to GFHC upon July 21, 2010, noted a chief complaint of back pain. Cl. Ex. 6, pp. 231-233.

As clearly shown, Mario's medical records from more than one provider are inconsistent and inaccurate. Certain of the blame falls upon the providers. However, another source for the confusion is simply that Mario is not proficient in speaking or understanding English and becomes confused, especially in a "formal" environment. As clear example, Mario's January 6, 2011, records from Glenns Ferry Health reflect that the provider required that Mario's daughter verbalize understanding of his medical instructions to Mario. Cl. Ex. 6, p. 262. Such is also illustrated by the fact that, during Respondents' employment expert's interview of Mario, Mr. Jordan advised that the interpreter wasn't needed "very often," explaining that, "I think (Mario) understood most of the questions that I had." ***Jordan Depo.***, p. 12, L. 19-p. 13, L. 5. Clearly, it follows that if Mario

understood "most of the questions" that Mr. Jordan had, he failed to understand the others. The same would certainly be true in the conversations Mario had with his medical providers.

Lastly, regarding the issue of low back causation, page 24 of Respondents' Brief alleges that, "[t]he most significant complaint, which was the most damning to his claim, was that his complaint of a new onset of low back pain in 2011 to his personal physician that he did not attribute to his motor vehicle accident or other precipitating event." As response, counsel again emphasizes that the records of GFHC are riddled with errors, inaccuracies and miscommunications. Further, there is the issue of Mario's ability to communicate accurately with his providers, as immediately above-demonstrated. Directly addressing the significance of the December 1, 2011, notation of PA-C McCready, Mr. McCready's dictation of August 30, 2010, noted Mario's "chronic back pain." Cl. Ex. 6, p. 244.

The fact is that from and following Mario's immediate complaint to Mr. Meyers of back injury through current, he has consistently complained of symptomatology. One symptom which was not present prior to the accident but can be traced through the date of hearing herein is numbness in his legs if Mario stands for longer than 20 to 30 minutes. He so advised the Fund's claims representative upon December 21, 2009, and again upon June 7, 2010 (Cl. Ex., pp. 674b(1) and (2)); Dr. Reedy upon December 21, 2009 and December 5, 2011 (Cl. Ex., p. 150 and p. 168, respectively); his ICRD Consultant upon May 12, 2010 (Cl. Ex., p. 692); Dr. Hammond upon September 10, 2010, and, October 1, 2013 (Cl. Ex. 9, p. 457-468); Dr. Miers Johnson upon September 11, and October 10, 2013 and January 23, April 28, and September 22, 2014 (Cl. Ex. 13, pp. 496-525); Glenns Ferry

Health upon September 26, 2014 (Cl. Ex., p. 546); Dr. Shoemaker upon October 6, 2014 (Cl. Ex., p. 538); and, Dr. Montalbano upon October 15, 2014 (Cl. Ex., p. 569).

Drs. Reedy, Hajjar and Hammond each relate Mario's symptomatology and need for surgery to the October 6, 2009, motor vehicle accident. Although Dr. Montalbano's most recent opinion is that Mario's presentment post accident is related to preexisting degenerative disk disease, he testified that it is not possible for an individual to stand and experience numbness in their legs "...in the absence of any significant amount of narrowing of the spinal canal," which is consistent with the opinions of each of the other providers. Further, illustrating the extent to which Dr. Montalbano was willing to go to support his no-causation opinion, not having reviewed Mario's hearing testimony Dr. Montalbano "invented" facts which are inconsistent with the record. Dr. Montalbano testified that Mario presented with an antalgic gait related to low back pain which PA-C McCready failed to record. Dr. Montalbano explained that, "[w]ell, when I have back pain, I have an antalgic gait. It hurts when I walk. I think it's safe to assume that (Mario's) got an antalgic gait.' ***Montalbano Depo.***, p. 117, LL. 5-23. Actually, this testimony severely compromises Dr. Montalbano's causation opinion. According to Dr. Montalbano, Mario presented with an antalgic gait upon September 9 and October 5, 2009, because if he was then suffering from low back pain, the antalgic gait necessarily followed. Conversely, if Mario did not have an antalgic gait upon September 9 and/or October 5, 2009, he did not then present with significant low back involvement. PA-C McCready's records for September 9 and/or October 5, 2009, did not document an antalgic gait. In fact, the October 5, 2009, record affirmatively documents absence of any difficulty walking. Cl. Ex. 3, p. 142. There is absolutely no credible evidence of record which supports the basis for Dr. Montalbano's no

causation opinion, being that on September 9 and October 5, 2009, Mario presented with and was treated for low back pain as opposed to the flu.

Recently, in ***Stevens-McAtee***, *supra*, this Court reaffirmed that, "[w]hen an injury occurs on an employer's premises, the presumption arises that the injury arose out of and in the course of employment." In the instant case, Mario was operating the farm's truck traveling to Mountain Home for the sole purpose of obtaining a part to repair farm equipment. Yet, the Commission failed to acknowledge or discuss the presumption to which Mario was clearly entitled.

B. The Commission's Finding that Claimant suffered but 40% permanent partial disability of the whole person is clearly in error

1. Claimant presents as, prima facie, totally and permanently disabled.

Respondents' Brief argues that, "[c]ritical to the Commission's finding was that the claimant was performing an actual job that is likely to continue, that he is an older worker, and that he has suffered no wage loss."

The Commission noted that an odd-lot worker is one that is so injured that he is unable to perform services other than those limited in quality, dependability or quantity, such that a reasonably stable market for such services does not exist, citing ***Boley v. State Industrial Special Indemnity Fund***, 130 Idaho 278, 989 P.2d 854 (1997). The Commission also recognized that an odd-lot worker need not be physically unable to do anything worthy of compensation, but who is so handicapped that he will not be regularly employed in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or super-human effort on his part, citing ***Lyons v. Industrial Special Indemnity Fund***, 98 Idaho 403, 565 P.2d 1360 (1977). ***R.***, ¶ 93, p. 185. After reviewing the record, the Commission found that Mario's

Functional Capacity Evaluation was the best prognosticator of his limitations and would be used as a guide in evaluating Mario's disability from all causes combined. ***R.***, ¶¶ 104 and 105, pp. 190-191. As Respondents did not appeal the Commission's decision, Respondents' arguments attacking the validity of the FCE findings are without effect.

The Commission considered Mario's non-medical presentment as being that,

> Claimant is an older worker of Hispanic extraction who, while bilingual, has limited education and limited ability to read and write in either English or Spanish. He has limited computer skills, but is able to use a computer to perform some parts of his current job, ie: searching for replacement parts. He has some transferrable vocational skills; he can weld, and has some abilities relating to repair and maintenance of farm and other equipment. He also has abilities in the area of heavy equipment operation. As foreman at Meyers Farms, he has necessarily acquired some skills as a supervisor; he supervises and delegates work to two subordinates. Claimant's past relevant work experience has largely been in the agricultural field, although he has done some work in the remote past in the manufacturing environment. Based on his job at Meyers Farms, Claimant has a demonstrated ability to assume responsibility for the day-to-day operation of a relatively large farming operation. His skills are somewhat unique to the Meyers Farm's operation; the Bruneau Farm has unique soil characteristics which make irrigation challenging.

R., ¶ 107, p. 191. The Commission then determined that Mario's limitations are as follows:

> a. Cervical spine/neck: Limitations ...in waist to floor lifting, waist to crown lifting, lift-carry, elevated activity and forward bend-stand activities.
>
> b. Left upper extremity, status-post left ulnar nerve neurolysis, anterior subcutaneous transposition: Limitations in ...waist to floor lifting, waist to crown lifting, lift-carry and elevated activity.
>
> c. Left shoulder: Limitations in ...waist to floor lifting, waist to crown lifting, lift-carry and elevated activity.
>
> d. Right knee: Limitations in ...walking, waist to floor lift, lift-carry, forward bend-stand and sitting.

R., ¶ 85, pp. 179-180. The Commission further realized that "[t]he real issue is whether there are in fact suitable jobs for Claimant within his limitations/restrictions." ***R.***, ¶ 110, p. 192.

While the Commission acknowledged the testimony of Dr. Nancy Collins, that Mario's labor market was limited to the one position at Meyers Farms in which he was currently employed, it failed to make specific findings regarding Mario's labor market or the extent, if any, to which Mario would be competitive within that labor market. Rather, the Commission rejected the proposition that Mario was entitled to odd-lot status upon its determination that Mario's current employment at/with Meyers Farms was not by reason of a sympathetic employer and/or by or through a superhuman effort on his part. ***R.***, ¶¶ 111-112, pp. 65-67. These determinations by the Commission were addressed within Appellant's Opening Brief, at pages 36-38. Claimant hereby augments the same, as follows:

a. Mario's "superhuman effort": As noted within Appellant's Opening Brief, Mario is fully aware of the importance of his time-of-hearing position at/with Meyers Farms. He is without savings and his housing is a benefit of his employment, such that without his employment at Meyers Farms "...we would never have money to survive, losing a job. I have to work until the day that I can't." ***Ayala Depo.***, p. 39, L. 7-p. 40, L. 4; ***Tr.***, p. 137, LL. 10-20. Mario's non-medical presentments, above-noted, and his family's dependence upon his current position at Meyers Farms provide the motivation by reason of which he is compelled to work and irrespective of resulting pain and/or his exceeding physician-imposed restrictions and/or limitations. Recall, following both the 2009 and 2013 accidents, Mario's physicians advised that he was "off-work." During this time, Mario underwent multi-level discectomies with cervical arthrodesis; left ulnar nerve neurolysis and anterior subcutaneous transposition; and, subacromial decompression, distal claviculectomy and labral/joint debridement with left rotator cuff repair, for his 2009 injuries, and right TKA for his 2013 injury. Yet, with very limited exception, Mario kept working "...because I

feel like it was – it was my – everything was the same. My responsibility was the same. I had to make sure that everything was running. So, I kept on working." ***Tr.***, p. 107, L. 25-p. 108, L. 16; and, p. 109, L. 21-p. 110, L. 14. Such should put into context the office dictation of certain of his physicians that Mario indicated that he had returned to work "full-duty."

As of the date of hearing Mario described his injuries and related symptomatology as being:

(1) Related to his cervical injury: If he stands too long he has pain from his neck up over the back of and to the top of his head. He has difficulty turning/rotating his head, with repetition increasing his pain. Looking up (cervical extension) is worse than looking down (flexion). He has a tingling/numb sensation from his neck down across his shoulders and into his fingers on both sides. He has difficulty lifting things. When pushing and/or pulling, it feels as though something from his neck into his arms is being pulled, such that he must be "really slow."

(2) Regarding his left shoulder: He cannot lift his left hand up over his head. He cannot lift his arm straight away from his body. At hearing, he was noted to be holding his left arm with his right hand due to pain. His left shoulder affects how he carries things. His left arm gets tired faster and he does not have the same grip strength that he had prior to the accident.

(3) The right knee: Upon arising, the right knee does not feel stable. Even assuming he was without other health issues, the right knee limits his ability to squat, stoop, kneel and crouch. He cannot crawl. ***Tr.***, p. 111, L. 8-p. 119, L. 10; and, p. 127, L. 22-p. 131, L. 25. Even with the assistance of his helpers, at the end of the work-day he is exhausted, hurts, and goes home and lays on the carpet. ***Ayala Depo.***, p. 40, LL. 5-15.

Rhetorically speaking, if Mario's dogged perseverance to continue in his employment and irrespective of his pain and limitations does not constitute a superhuman effort, what would.

As above-noted, the Commission found that Meyers Farms was not a "sympathetic employer." Recall, prior to the 2009 motor vehicle accident Mario worked alongside his helpers, doing exactly the same physical activities as did they. As "foreman," pre-injury Mr. Meyers instructed Mario as to what needed to be done and Mario would then explain those instructions to the helpers, and then work alongside the helpers, doing exactly the same things, physically, as did his helpers. ***Tr.***, p. 60, L. 19-p. 64, L. 11.

Prior to the 2009 accident, Mario presented without physical limitations. ***Tr.***, p. 82, L. 15-p. 85, L. 12. Such is to be compared with and contrasted to Mario's employment with Meyers Farms following the industrial accidents.

Mario's current position is by reason of his "institutional knowledge" of the farm's unique irrigation system. Def. Ex. 9, p. 212; ***Jordan Depo.***, p. 41, LL. 9-16. Mario is the only individual qualified to "trouble shoot" the irrigation system. ***Tr.***, p. 179, L. 18-p. 180, L. 4. But for this "institutional knowledge," Mario would be without value to the farm. He is not now employable as a laborer. ***Tr.***, p. 185, L. 20-p. 186, l. 5; and, p. 44, L. 20-p. 45, L. 11. The Commission noted that Mario presents with "minimal reading/writing skills," which was overly optimistic. Morgan Meyers testified that Mario requires the assistance of his daughter to "do the paperwork." ***Tr.***, p. 182, LL. 5-15. Such underscores the fact that it is Mario's knowledge of the unique irrigation system on this one farm by reason of which his employment continues. That knowledge is not transferrable.

To retain benefit from his institutional knowledge, Meyers Farms has allowed Mario "accommodations" which it did not prior to his injuries and which it does not to other employees. Mario is not required to engage in physical tasks which he believes are too difficult for him, and it now takes Mario longer to perform tasks than it did prior to his industrial injuries. ***R.***, ¶ 111, pp. 193-194. The principal of Meyers Farms visits the farm twice a week to give Mario direction. Then, "...it's up to him how he wants to take care of it. If he delegates it or if he does it himself." ***Tr.***, p. 175, L. 22-p. 176, L. 2. Now, the helpers do the heavy work because Mario "...cannot do it anymore." ***Tr.***, p. 161, LL. 4-14. What Mario physically does, he does "differently" than prior to the industrial accidents. Mario "finds a way" to do things. He asks his neighbors or his wife, who is 66 and in ill health, for assistance. Even Mr. Augustine conceded that Mario now "self-accommodates" in how he does his work, and "knows" that the Meyers do not care about how Mario now does his work, only that the work is done. ***Jordan Depo.***, p. 47, LL. 3-9

The above bears a strong resemblance to the facts in ***Christensen v. S.L. Start & Associates, Inc.***, 147 Idaho 489, 207 P.3d 1020 (2009), where that claimant was able to find work,

> ...because she wanted to work, was dogged in her efforts, had excellent skills to offer, had the good luck to find ...work, and just possibly, because some employers were willing to make accommodations in order to have the benefits of her skills. ...but being a sympathetic employer does not mean that the employee is pathetic or in need of charity, merely that the employer is willing to make accommodations that are out of the ordinary in order to obtain an employee's beneficial services.
>
> Those who hired Claimant certainly got the benefit of their bargain but, ...the services she could offer an employer were so limited that even the most well-disposed employers had few positions that were suitable. Claimant is the odd-lot worker personified.

To the same extent as the claimant in Christensen, Mario is the odd-lot worker, personified.

2. *The Commission was clearly in error in reducing Claimant's disability from "profound" to but 40% of the whole person.*

Respondents' Brief attempts to make three points. Those points together with Claimant's reply are as follows:

a. Claimant's age: The Commission's decision regarding Mario's permanent disability emphasized that,

> [i]n many cases, the fact that a claimant is an older worker is a factor which tends to support higher disability; everything else being equal, employers are less inclined to hire an older worker, particularly one with some functional limitations. In this case, Claimant's status as an older worker has the opposite effect.

The Commission rationalized that Mario was "...near the end of his work life and holds employment in which he is likely to remain until he retires." ***R.***, ¶ 114, pp. 67-68. Upon that basis the Commission reduced Mario's disability from "...profound, and possibly total and permanent under the odd-lot doctrine... ," to but 40% of the whole person. Augmenting Appellant's Opening Brief are the following decisions wherein the Commission also considered a claimant's age.

In ***Rodriguez v. Consolidated Farms, LLC, dba Elk Mountain Farms***, I.C. 2010-022129 [redacted], the claimant [redacted] was born in Mexico where he completed the fifth grade, following which he worked to help support his family; was a legal resident of the United States; had an agricultural work history; was bilingual; and, "...was in charge of the irrigation system for the entire operation (of the farm)." Following clinical stability, that claimant declined the employer's offer of employment in a modified position. There, the Commission determined that,

> [a]t the end of the day, it is impossible to ignore the fact that Claimant is essentially an older, uneducated field worker, with severe impairment of dominant upper

> extremity function, who will find it extremely difficult to compete for any of his past relevant employments, or other work for which he is currently suited from a physical standpoint. The Commission finds it difficult to believe that prospective employers, ie, ones with no prior association with Claimant, would preferentially hire Claimant over younger, physically able, unskilled workers. For these reasons, we conclude, as did Referee Powers, that Claimant has made a *prima facie* showing of total and permanent disability under the odd-lot doctrine by the path of futility.

¶ 70, p. 28. In ***Aicher v. State of Idaho, Industrial Special Indemnity Fund***, I.C. 2011-017191 (January 27, 2017) the claimant was 59 years of age at the time of hearing; terminated education following the eleventh grade; and, had worked as a welder for most of his adult career. Following the industrial injury, that claimant returned to work but limited his physical activities. He "...made somebody else do all the – most of the lifting if I couldn't. And I used the crane a lot. ...Like, just reaching over grabbing something like that, I tried to walk over to it. Just trying to be more careful with what I did." ¶ 32, p. 14; and, ¶ 36, p. 15. There, the Commission determined that, "[a]s an older worker, Claimant's opportunities for reemployment are significantly disadvantaged in relation to younger workers who do not have physical impairments." The Commission reasoned that that claimant's career, which was spent almost entirely with one employer, significantly handicapped him in obtaining alternative employment as an older worker and that it would be futile for that claimant to attempt to find suitable employment. Rather, "...the prospects for Claimant gaining reemployment given his significant impairments, work restrictions, limited tranferrable skills, high school education, and status as an older worker, are so minimal as to be virtually nonexistent." (Emphasis added.) ¶ 80, p. 32. The Commission found that claimant to be permanently disabled as an odd-lot worker.

Here, the Commission discounted Mario's disability from "...profound, and possibly total and permanent under the odd-lot doctrine," upon its speculation that, upon consideration of Mario's

status as an older worker and return to employment with/at Meyers Farms (in a concededly modified position) it was probable that Mario would continue in that employment at his current or higher wage until he decided to retire. ***R.***, ¶¶ 114-115, pp. 195-196. In doing so, the Commission clearly ignored the mandate of I.C. § 72-430 that a claimant's permanent disability must be based upon "...the diminished ability of the afflicted employee to compete in an open labor market ...considering all the personal and economic circumstances of the employee,... ." Rather, the Commission discounted Mario's permanent disability upon the basis of his modified time-of-hearing employment with/at Meyers Farms, together with its speculation that that employment would continue at the same or higher wages than as of the date of hearing. Such constitutes clear error. This Court has repeatedly ruled that in determining a Title72 claimant's disability, the Commission must consider all personal circumstances that diminish the ability of the claimant to compete in an open labor market. ***Bennett v. Clark Herford Ranch***, 106 Idaho 438, 680 P.2d 539 (1984); ***Davaz v. Priest River Glass Co.***, 125 Idaho 333, 870 P.2d 1292 (1994); and, most recently, ***Marquez v. Pierce Painting, Inc.***, 164 Idaho 59, 423 P.3d 1011 (2018).

Further, the Commission's speculation that Mario's time-of-hearing modified position would continue at the same or higher wages conflicts with ***McClurg v. Yanke Machine Shop, Inc.***, 123 Idaho 174, 845 P.2d 1207 (1993) and ***Reiher v. American Fine Foods***, 126 Idaho 58, 878 P.2d 757 (1994). In ***McClurg***, the Court determined that the consideration of wage increases by the employer between the date of injury and claimant's subsequent employment with another employer was speculative, reasoning "[w]e cannot ascertain whether claimant would have continued working at Yanke, or whether he would have received the same raises the current employees have received." In ***Reiher***, claimant returned to work for the same employer in a modified capacity, wherein he was

not required to engage in physical activities to the same extent as prior to the accident. This Court determined that,

> [s]uch increases are speculative and unsupported by law unless the claimant is performing the act being used as the test pre-injury and post-injury. In this case, Reiher's employment activity changed after he was injured. Therefore, any future wage increases that he may have received had he remained (in the same capacity of employment as of the time-of-injury) are unascertainable and irrelevant under McClurg.

Obviously, Mario's claim fully supports the logic and reasoning expressed in ***McClurg*** and ***Reiher***, as almost immediately following hearing Meyers Farms reduced Mario's wages by 40%.

A challenge to the Commission's application of a statute to facts of record is a question of law over which the Supreme Court exercises free review. ***Quincy v. Quincy***, 136 Idaho 1, 27 P.3d 410 (2001) citing ***Smith v. JB Parson Co.***, *supra*. Claimant respectfully requests that the Court do so in this case.

b. Mario's consideration of retirement: Respondents argue that the fact that Mario contacted the Social Security Administration to inquire what his retirement benefits would be, "...proves that the Claimant was considering retirement prior to hearing." The record clearly proves otherwise. Mario's contact of the Social Security Administration was following his right TKA, upon May 6, 2014. Mario continued to work following the knee injury right up to his TKA and recommenced working promptly following surgery, just as he did after his 2009 injuries and related surgeries.

Robert Meyers, the owner of Meyers Farms, was infuriated that Mario's TKA fell during the irrigation season and, as Morgan Meyers put it, "...kind of got down on Mario for having the surgery in the middle of irrigation." ***Tr.***, p. 192, L. 6-p. 193, L. 4. Mario contacted the Social Security

Administration regarding retirement benefits should his employment be terminated or otherwise should his treatment by Robert Meyers become unbearable.

c. Mario's labor market: Respondents assert that their employment expert, Mr. Jordan, identified other employers in the area that would benefit from Mario's unique expertise in irrigating the lands around Bruneau such that his labor market was not limited to his current modified position at Meyers Farms. Respondents' Brief misspeaks in two regards. First, Mr. Jordan contacted a single other potential employer in the Bruneau area, not "other employers." ***Jordan Depo.***, p. 60, LL. 11-22.

Secondly, nothing in the record supports that Mario would have any chance at employment with this other individual. There was no position open and, with the exception of advising that the hypothetical applicant was Hispanic, bilingual and had irrigation experience, Mr. Jordan disclosed absolutely nothing regarding Mario's industrial injuries or his related physical restrictions/limitations. ***Jordan Depo.***, p. 152, L. 17-p. 158, L. 3.

d. Claimant's Post-Decision Motions: Upon review of Respondents' Brief it is not believed that, for the most part, there is need for further discussion excess to Appellant's Opening Brief, at pages 38-43, except as follows:

(1) Respondents advance that the workers' compensation system did what it was intended to do, being to pay income and medical benefits during the period of Mario's recovery and thusly assist in his return to gainful employment. Rhetorically speaking, has the Commission been in error in its award of permanent disability excess to impairment to claimants who either had returned to work or retired, referenced both within Appellant's Opening Brief at page 35, as well as above? Most certainly not, under the mandate of I.C. § 72-430, that the disability

award must be upon the consideration of "...the diminished ability of the afflicted employee to compete in an open labor market ...considering all of the personal and economic circumstances of the employee,... ." (Emphasis added.)

(2) That a modification of award pursuant to I.C. § 72-719(1)(a) requires "...that claimant must demonstrate a change in the nature and extent of his physical injury... (as opposed to) a showing of some change in a non-medical factor, alone. ***R.***, pp. 294-295. Even if the Commission's interpretation of I.C. § 72-719(1)(a) is correct, Respondents overlook/ignore that Claimant's Post-Decision Motions were also made pursuant to I.C. § 72-719(3), to correct a manifest injustice. In this regard, the Commission's decision was premised upon assumptions based upon pure speculation which, even during the short period between hearing and the Commission's decision, proved to be short-lived and invalid.

The Commission's assumptions were as follows:

(a) That "...there is no reason to believe that Claimant's job will not continue, or that he will be unable to perform the requirements of that job until he decides to retire." ***R.***, ¶¶ 112-115, pp. 194-196. Following hearing, Mario injured his left knee at work and presents status-post surgery, with his physician recommending left TKA. Absent TKA, Mario's restrictions include preclusion from repeated bending/stooping; from continual standing and/or walking; from lifting greater than 20 pounds; and, specifically, from "climbing into pivots." ***R.***, pp. 209-212. These restrictions/limitations, if followed, preclude Mario from performing services essential to his continued employment at Meyers Farms and render invalid the Commission's speculation that Mario will be able to perform the requirements of that job until he decides to retire.

(b) The Commission's decision assumed that Mario's employment with/at Meyers Farms was "...likely to continue at his current or higher wages... ." However, again, that speculation proved to be short lived. Immediately following hearing Mario's wages were slashed from forty-seven thousand six hundred and ninety dollars ($47,690.00) in 2016 to twenty-seven thousand five hundred dollars ($27,500.00) for 2017. Thusly, totally unrelated to the 2017 left knee injury, this speculation proved invalid.

Most certainly, where the basic premises given by the Commission as basis to reduce Mario's disability award from "profound, and possibly total and permanent" proved invalid even as of the date its decision was released, such fully supports Mario's Post-Hearing Motions for Reconsideration; and, for Modification, pursuant to I.C. § 72-719(1)(a) and/or (3).

(c) Respondents mistakenly assert that Claimant's Post-Decision Motions argued that Mario's restrictions related to his 2017 left knee injury should be considered in his argument that he is totally and permanently disabled. Such is simply untrue. Rather, as an alternative, Mario pointed out that if the Commission's decision stands, he will never be entitled to and Respondents will never be responsible for the differential between the profound and possible total and permanent disability (which the Commission would have awarded but for his current employment and the assumptions thereupon made) and the 40% disability actually awarded, which result would be unconscionable, most certainly constitute a manifest injustice, and conflict with the promise of I.C. § 72-201, being "sure and certain relief for injured workman."

This Court has held that,

> [w]hen interpreting the Act, we must liberally construe its provisions in favor of the employee in order to serve the humane purpose for which it was promulgated. The Act is designed to provide sure and certain relief for injured workers and their

> families and dependents. The primary objective of an award of permanent disability benefits is to compensate the claimant for his or her loss of earning capacity. ...Doubtful cases should be resolved in favor of compensation[;] ...the humane purposes which these acts seek to serve leave no room for narrow technical construction.

Marquez, (*supra*). ***Marquez*** emphasized in three separate paragraphs that a claimant's permanent disability is determined upon consideration of a claimant's ability to compete in an open labor market. In that regard, just as the Commission previously did in multiple cases as cited within Appellant's Opening Brief as well as above, a permanent disability award less than total is unaffected by that claimant's return to work or even retirement. Most certainly, the Commission's reduction of Mario's disability award based solely on Mario's return to work in a modified capacity together with assumptions which proved to be both speculative and invalid amply support the Post-Decision Motions.

C. Reassigning this matter from the Referee who presided at hearing to itself over the written objection of Claimant constituted reversible error.

Respondents' Brief argued that the Commission may, even over the objection of a party, reassign a case to itself following hearing presided over by a Referee, as a Referee's Findings are but "recommendations." Doing so ignores I.C. § 72-717, which states that, after assigning the claim for a hearing by a Referee, "...the record of such hearing, together with the recommended findings and determination (of the Referee) shall be submitted to the Commission for its review and decision." (Emphasis added.)

If the argument of Respondents prevails, there would then be absolutely no difference between the Commission assigning a matter to a Referee and, following hearing, reassigning the matter to itself for decision upon the record; and, the Commission requiring that the

parties to submit the controversy to the Commission by their respective exhibits and depositions, with no hearing. In either instance, the parties are deprived of the hearing contemplated by the statutes and the Commission's promulgation of the Judicial Rules of Practice and Procedure.

The Commission "...analyzed the Claimant's substantive credibility by noting that his medical records contradicted his testimony... that it was his practice to only address his most predominant complaint with his treating physicians." ***R.***, ¶¶ 74-75, pp. 172-175. (Emphasis added.) In doing so, the Commission accepted Mario's medical records at GFHC over Mario's hearing testimony, rationalizing that, "[h]aving reviewed Claimant's testimony, ...there is little-if-any support for this proposition in the record." Such illustrates that the Commission did, in fact, consider Mario's observational credibility by reference to his testimony at hearing and rejecting that testimony in favor of certain of the medical records.

It is crystal clear that the Commission's conduct in reassigning this matter to itself following hearing prior to the Referee's proposed Findings, Conclusions and Recommendation exceeded the Commission's jurisdiction; was arbitrary, capricious and an abuse of discretion; and, in violation of Claimant's procedural right of due process.

D. The Commission committed reversible error upon considering medical records excluded from the record

Respondents argue that the excluded medical records from GFHC (Cl. Ex. 3, pp. 45-115), which the Commission specifically considered in reaching its decision, were either "admitted" or, if not, that the consideration of the same constituted "harmless error." Respondents are clearly wrong on both counts.

Respondents' argument that these records were admitted is based upon references within the record to Mario's presentment to GFHC on May 21, 2007, being but 3 pages out of the 69 pages encompassed within the excluded records. *Id*, pp. 113-115; ***R.***, pp. 72-73. Most certainly, the Commission considered these excluded records beyond Mario's May 21, 2007, presentment. Footnote 1, ***R.***, pp. 129-130. Thusly, irrespective of whether the May 27, 2007, records were referenced in the record, the Commission's consideration of the excluded records as a whole constitutes a clear denial of due process pursuant to ***Mazzone v. Texas Roadhouse, Inc.***, 154 Idaho 750, 302 P.3d 718 (2013), citing ***Ohio Bell Tel. Co. v. Pub. Util. Comm'n***, 301 U.S. 292, 302-03, 57 S. Ct. 724, 729-30, 81 L. Ed. 1093, 1100-01 (1937).

However, to clear the air, it is believed unfair that the Court consider Respondents' arguement that references to the May 21, 2007, presentment constitute an admission of the same into the record absent the Court's opportunity to consider those records. For that reason, a true and correct copy of the May 21, 2007, records from GFHC is attached as Addendum A hereto. As noted, Mario was "absent" neurological symptoms, such as numbness into his legs. Under Musculoskeletal, the only symptom is "hip pain." Mario denied "neuroradicular or neuritic pain." X-rays of the right hip demonstrated "...a femoral shaft pin from an old fracture ...(with) no evidence of arthritis or necrosis. The S1 joint is normal." (Emphasis added.) The physician's Assessment was that Mario's right leg being shorter than the left caused, "muscle tendon pain." (Emphasis added.)

Following May 21, 2007, the medical records are without reference to Mario's back until September 9, 2009, when he presented with body aches with pain in his upper, mid and

low back, which every physician (except Dr. Montalbano) reviewing the same, inclusive of the medical provider to whom Mario then presented, noted was by reason of a systemic condition, such as a cold or flu.

Respondents emphasized counsel's November 5, 2015, correspondence to PA-C McCready that upon,

> May 21, 2007: (Mario) presented with complaints involving the right hip and S1 region without recent trauma. Records noted one-quarter inch shortening of the right leg status-post lower extremity fracture dating to 1974, '...causing muscle tendon pain.' Recommendation for a quarter inch shoe lift on the right with mobilization exercises for the right hip.

PA-C McCready was and remains Mario's principal provider with/at GFHC, and therefore had full access to the May 21, 2007, dictation and irrespective of counsel's November 5, 2015, correspondence. This excerpt from counsel's correspondence does not constitute an admission of the actual May 21, 2007, records from GFHC, let alone the entirety of the excluded records considered by the Commission. Respondents, as Title72 Defendants, failed to move for reconsideration of the January 10, 2017, Order to exclude and further failed to appeal any portion of the Commission's April 9, 2018, decision.

With respect to Respondents' argument that the Commission's consideration of the excluded records constituted harmless error, Appellant makes two points. First, the Commission's April 9, 2018, decision made direct references to excluded records which were never referenced in the record. Finding of Fact No. 7 (hereafter "F/F") references Mario's June 23, 2004, presentment "...with a principal complaint of low back pain/soreness in the S1 area." ***R.***, p. 136. Further, the Commission discredited medical opinions favorable to Mario upon the basis that the providers' opinions were without access to the excluded medical records. Within F/F 42, the Commission criticized counsel's

inquiry to Dr. Hajjar for failing to synopsize Mario's presentments to GFHC prior to September 14, 2007, and thusly discredited Dr. Hajjar's causation opinion. ***R.***, pp. 153-154. F/F 58 criticized counsel's correspondence to Dr. Hammond for failing to include a synopsis of records from GFHC which were excluded from the record. ***R.***, p. 163. F/F 72 discredited Dr. Hammond's causation opinion, upon the basis that he was not aware of the GFHC records for the period 2001-2007. ***R.***, pp. 169-171

Secondly, footnote "1" of the Commission's decision (R., pp. 129-130) represents that, "...exclusion of these records (Cl. Ex. 3, pp. 46-115) would not change any aspect of the Commission's decision; as noted, there is other evidence of record which establishes that Claimant did have some pre-injury low back symptoms." Rhetorically speaking, if the excluded records were without consequence to the Commission's decision why would the Commission's decision repeatedly reference the same and specifically discredit the favorable causation opinions of Drs. Hammond and Hajjar upon the basis that the excluded records were not provided to them? Perhaps the Commission is rationalizing that the violation of Mario's procedural due process rights was "slight." However, to the same extent that one can never be "slightly" pregnant or "slightly" dead, there is no such thing as a "slight" violation of one's due process rights.

E. Claimant's entitlement to fees

Respondents' argument that Mario is not entitled to a fee award is solely premised upon the misrepresentation to this Court that Respondents prevailed on each and every issue in this case. They did not. Respondents affirmatively denied that additional Title 72 benefits were due Claimant. ***R.***, p. 4; pp. 414-415; and, ***R.***, Ex. AD 4, at p. 28. The Commission's decision awarded Mario

permanent disability benefits of 40% of the whole person. Thusly, Defendants did not prevail "...on each and every issue in this case."

As set-forth within Appellant's Opening Brief, the conduct of Defendants/Defendants' counsel is also at issue regarding fees. Consistently, Respondents failed to provide their experts with opposing opinion favorable to Mario. ***Montalbano Depo.***, p. 93, L. 13-p. 94, L. 17; p. 97, LL. 1-22; and, ***Jordan Depo.***, p. 89, L. 22-p. 91, L. 6; and, p. 91, L. 7-24. Thusly, Defendants/Defendants' counsel's conduct "set-up" their respective experts' opinions to be in favor of Defendants' position.

In ***Wilson v. Burt's Manufacturing & Sales, Inc.***, I.C. 2012-031070, filed December 8, 2016, the Commission considered similar conduct by the surety, with that surety being the Idaho State Insurance Fund. In that case, the Commission determined that,

> [w]hen a surety knows an expert is relying on questionable data to support opinions favorable to surety's position, the surety is not free to blindly accept those opinions without further inquiry into the questionable data. ...Surety knew of the infirmities of Dr. Price's study, but nevertheless presented the findings to Dr. Chong, who relied on those findings to render his ultimate opinions. This conduct was not reasonable.

¶¶ 81 and 82, p. 26. Upon that basis, the Commission awarded I.C. § 72-804 fees.

In ***Reimer v. Overland West, Inc.***, I.C. 2010-002268, filed August 27, 2018, the surety withheld information from its medical expert that that claimant had reported the accident to a co-worker on the day it occurred and to her supervisor the very next day. The medical expert then expressed that that claimant's lumbar condition was not work related. The Commission there held that, "...significantly, when Surety sought a causation opinion from Dr. Hajjar, it appears to have failed to provide him critical information regarding the claim,... ." ¶ 104, p. 35. The Commission awarded I.C. § 72-804 fees by reason of Title 72 defendants' conduct. Of note, in the instant matter, it was not until Dr. Montalbano's cross-examination upon post-hearing deposition that he was

advised that Mario had reported back injury to his employer on the date of the accident; and, that well prior to the first documentation in the medical records of Mario's complaints of back pain, he told the Fund that he had injured his back and that his legs went numb if he stood on them for too long. Rather, Dr. Montalbano had believed that Mario's first complaint of back pain was three months following the accident. ***Montalbano Depo.***, p. 46, L. 7-p. 47, L. 20.

In ***Salinas v. Bridgeview Estates***, I.C. 2011-014120, filed March 4, 2016, the Commission determined that,

> ...the 'no-holds-barred' mentality which is often a part of civil litigation has no place in workers' compensation proceedings. Unlike civil litigation, which is truly an adversarial-based process, the goal of workers' compensation-to provide an injured employee with those statutory benefits to which the worker is entitled - should be shared by all parties. While honest differences of opinion may well exist when seeking to determine benefit entitlement, attempting to gain an advantage through gamesmanship, hyper-technical application of the procedural rules, subterfuge, harassment in any form, production delay, and similar tactics will not be tolerated.

Page 24 of Respondents' Brief mentions ***Hartgrave v. City of Twin Falls***, 163 Idaho 347, 413 P.3d 747 (2018). Counsel is amazed that Mr. Augustine would cite ***Hartgrave*** within the instant matter. ***Hartgrave*** was lost upon the testimony of Defendants' IME physician, Dr. Tallerico. Dr. Tallerico noted that Mr. Hartgrave was "definitely honest." Had Mr. Hartgrave told Dr. Tallerico something, Dr. Tallerico would have believed him. The State Insurance Fund as surety and Mr. Augustine as Defendants' attorney, did not provide Mr. Hartgrave's deposition as to the on-set of symptomatology to Dr. Tallerico. Upon cross examination Claimant's counsel presented Dr. Tallerico with Mr. Hartgrave's testimony, which Dr. Tallerico refused to consider, stating that his opinions were based upon the records provided by Defendants, and rhetorically inquired why he was not given Mr. Hartgrave's deposition transcript by Defendants. During oral argument before this

Court, Justice Pro Tem Huskey inquired of Mr. Augustine why the Fund had not provided its medical expert with a copy of Mr. Hartgrave's deposition, to which Mr. Augustine replied, "I don't know." As illustrated by the instant case, a more honest response would have been, "because it is the practice of the Fund to withhold facts favorable to the claimant until after the expert has rendered opinions favorable to the defendants."

As evidenced in ***Wilson***, ***Hartgrave*** and the instant claim, the continuing and repeated practice of the Fund (and its attorneys) to obtain favorable opinion from its experts by withholding data opposing their position is not isolated. Such conduct is deceptive and designed to "feed" the Commission with expert opinion opposing compensability. Such continuing practices on the part of the Fund and its counsel cannot be allowed to continue and should not be tolerated by this Court. Such conduct mandates a punitive award of fees.

CONCLUSION

In ***Page v. McCain Foods, Inc.***, 141 Idaho 342, 109 P.3d 1084 (Idaho 2005), this Court noted that,

> Idaho's workers' compensation law is remedial legislation. It is a well-known cannon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature. (Citations omitted). The intent of the Idaho Legislature in enacting the workers' compensation law was to provide 'sure and certain relief for injured workman...'.

This Court has also held that Title 72 must be liberally construed in favor of the employee, in order to serve the humane purpose for which the law was promulgated. ***Murray-Donahue v. Nat. Car Rental Licensee***, 127 Idaho 337, 900 P.2d 1348.

It is within this context that the facts of record must be weighed and the controlling law applied to those facts. It is respectfully submitted that the Commission's April 9, 2018, Findings of Fact, Conclusions of Law, and Order together with its subsequent Orders refusing to revisit the same must be reversed. In this matter, the Commission's Findings, Conclusions of Law, and Orders, to the extent adverse to Claimant, were not supported by substantial and competent evidence of record; failed to set forth specific findings required for meaningful appellate review; were not the result of the correct application of controlling law to facts of record; were in excess of the Commission's jurisdiction, power and/or authority; were arbitrary and capricious, so as to constitute an abuse of discretion; and, in violation of Claimant's procedural due process rights.

Upon any remand, Claimant respectfully requests instruction by the Court such that full re-hearing will not be required, which would result in the "doubling" of Claimant's legal costs, and thusly be an economic burden upon Claimant which he can ill-afford and should not be required to assume. Further, any remand which instructs that the Commission reassign this matter back to Referee Powers will result in Mr. Powers being thrust in the untenable position of "knowing" the award desired by the Commission. Rather, remand should be with this Court's instructions regarding the causal relation of Claimant's low back presentment from and following the 2009 motor vehicle accident to that event; and, the determination of Claimant's current permanent disability pursuant to the correct application of the facts to controlling law, as being "profound," inclusive of whether Claimant presents as entitled to permanent disabled status pursuant to theories of odd-lot upon the established record herein;

and, Claimant's entitlement to fees below pursuant to I.C. § 72-804 as well as upon appeal pursuant to I.A.R. 41.

Respectfully submitted this 22 day of January, 2019.

STEPHAN, KVANVIG, STONE & TRAINOR

By _____
L. Clyel Berry
Attorney for Claimant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a resident attorney of the State of Idaho and that on the 22 day of January, 2019, I served two bound copies of the foregoing document by depositing true copies thereof in the United States mail, postage prepaid, addressed to the following:

Paul J. Augustine
AUGUSTINE LAW OFFICES, PLLC
P.O. Box 1521
Boise, ID 83701

_____
L. Clyel Berry

ADDENDUM A

Encounter Report

MARIO AYALA
[redacted]
Reference ID: AYALA01

Encounter Information
Physician: John Boothe
Date: May 21, 2007
Level: Office/Outpt Visit,Est,Lvl III
Nature: Acute
Status: Signed by John Boothe on May 21, 2007

Review of Systems
General
EXCEPT AS FOLLOWS AND NOTED IN HPI:

Neurological
Neurologic symptoms: Status: Absent.
Numbness: Status: Absent.
Numbness leg(s): Status: Absent.
Numbness of arm: Status: Absent.
Numbness of hand: Status: Absent.
Unilateral weakness: Status: Absent.
Focal Neurologic symptoms: Status: Absent.
Headache: Status: Absent.
Throbbing headache: Status: Absent.

Gastrointestinal
Gastrointestinal symptoms: Status: Absent.
Abdominal pain: Status: Absent.
Nausea and vomiting: Status: Absent.
Melena: Status: Absent.
Hematochezia: Status: Absent.

Cardiovascular
Cardiovascular symptoms: Status: Absent.
Chest pain: Status: Absent.
Palpitations: Status: Absent.
Pre-syncopy: Status: Absent.

Respiratory
Respiratory symptoms: Status: Absent.
Cough: Status: Absent.
Wheezing: Status: Absent.

Shortness of breath: Status: Absent.
Exertional dyspnea: Status: Absent.

Genitourinary
Genitourinary symptoms: Status: Absent.
Dysuria: Status: Absent.
Polyuria: Status: Absent.
Hematuria/dark urine: Status: Absent.
Renal colic: Status: Absent.

Dermatologica
Integumentary symptoms: Status: Absent.

Musculoskeletal
Musculoskeletal symptoms: Status: Absent.
Note: HIP PAIN

Endocrine/Metabolic
Endocrine-metabolic symptoms: Status: Absent.
Weight gain: Status: Absent.
Weight loss: Status: Absent.

Hematological
Hematological symptoms: Status: Absent.
Bruising: Status: Absent.
Bleeding: Status: Absent.

Immunological
Immunological symptoms: Status: Absent.

Psychiatric
Psychiatric symptoms: Status: Absent.

Ophthalmological
Opthamological symptoms: Status: Absent.
Blurring: Status: Absent.
Diplopia: Status: Absent.
Occular pain: Status: Absent.

ENT
Ear,Nose and Throat symptoms: Status: Absent.
Ear pain: Status: Absent.
Hearing loss: Status: Absent.
Sudden hearing loss: Status: Absent.
Rhinorrhea: Status: Absent.
Sore throat: Status: Absent.
Voice change: Status: Absent.
Dysphagia: Status: Absent.

Dental
Dental symptoms: Status: Absent.
Tooth ache: Status: Absent.

Subjective
Main Complaint
Hip pain:
Note: [redacted] FARMER. CO R HIP AND SI AREA PAIN FOR OVER TWO YRS. WITH NO RECENT TRAUMA HE DID HAVE INJURY TO AREA 1974 NO FX. HAS MORE PAIN AFTER INACTIVE SITTING IN TRACTOR THEN TRIES TO WALK HE ALSO HAS PROGRESSIVE PAIN TO LATERAL HIP WALKING IN FIELDS. HE EXPRESSES NO NEURORADICULAR OR NEURITIC PAIN.

Objective
General Examination
Hip examination:
Note: NO SWELLING, REDNESS, WARMTH FROM
Hip extension:
Note: FULL NORMAL
Hip flexion:
Note: FULL NL
Hip internal rotation:
Note: IN FLEXION CAUSES LATERAL HIP AND POSTERIOR SI PAIN.
Spine and back:
Note: NORMAL CONTOURS AND FULL ROM, SORE RIGHT SI AREA TO RIGHT TILT AT 20DEG. TENDER TO PRESS OVER THE SI AREA AND THE GREATER TROCHANTER OF THE RIGHT HIP
X Ray results:
Note: XRAY OR THE RIGHT HIP REVEALS A FEMORAL SHAFT PIN FROM OLD FX INCURRED IN MVA IN 1974. THERE IS GOOD HIP ALIGNMENT AND NO EVIDENCE OF ARTHRITIS OR NECROSIS. THE SI JOINT IS NORMAL.

Assessment
[736.30] Acquired deformity of hip: Type: SHORT LEG RIGHT 1/4 " DUE TO OLD FX CAUSING MUSCLE TENDON PAIN.

Plan
Procedures
Unlisted dx radiographic procedure
Performed in Consultation (John P Boothe, PA-C)
RIGHT HIP

Instructions
ADVISE:
PT HAS LEG SHORTENING RIGHT AND POSTURE PREDISPOSES TO PAIN. REC SHOE LIFT 1/4 " RIGHT. AND MOBILIZATION EXERCISES TO RIGHT HIP