12-3-2018

Ayala v. Robert J. Meyers Farms, Inc. Appellant's 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

* * * * * * *

APPELLANT'S OPENING BRIEF

Appeal from the Idaho State Industrial Commission

Chairman Thomas E. Limbaugh, Presiding

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STATEMENT OF THE CASE

I. Nature of Case:

The nature of the underlying proceedings before the Idaho State Industrial Commission is for workers' compensation benefits due Claimant, Mario Ayala, (hereafter referenced as "Mario") by reason of industrial accidents occurring on October 6, 2009, and August 28, 2013.

II. Course of Proceedings and Disposition:

Mario was involved in a work-related motor vehicle accident on October 6, 2009. Defendants-Respondents conceded the compensability of Mario's neck; left shoulder; and, left elbow injuries, but denied his low back injury. Prior to hearing Mario suffered a work-related fall on August 28, 2013, injuring his right knee. The 2009 and 2013 claims were then consolidated.

Hearing was set to be held upon February 18, 2016. Shortly prior to hearing, the parties entered into negotiations and, upon February 17, 2016, counsel for Defendants, Mr. Paul Augustine, notified the Commission that the matter had settled, and hearing was vacated. However, the proposed settlement instruments did not conform to the terms as understood by Mario and his counsel. Mario's Motion to Enforce Agreement to Settle; Alternative Motion for Immediate Re-Setting of Hearing; and, for Sanctions was then filed. The Commission's June 7, 2016, Order held that, "...since the parties are in obvious disagreement regarding the settlement of this case and neither party has an objection to re-setting this matter for hearing, Claimant's Motion to Re-Set is GRANTED."

Hearing was held before Referee Michael E. Powers, which included the testimony of both Mario; and, Mr. Morgan Meyers, upon behalf of Defendants. Following the parties' post-hearing depositions and briefs, the matter was submitted for decision. Thereafter, the Commission advised

that Referee Powers had a backlog of cases and,

> [t]he Commissioners are willing to write this decision on the record adduced to expedite moving this along. If you are willing for the Commissioners to do so, we will reassign the case and will proceed accordingly. If not, resolution of the case will be handled by Referee Powers in due course.

R., Ex "Additional Documents," 1, p. 2245 (hereinafter referenced as ***R.***, EX. AD. 1, p. 2245). The Commission was advised that, as a decision on the record "...would then be absent the consideration of Mr. Ayala's observational credibility which (was) believed to be an important consideration in this case... both Mr. Ayala and (counsel's) office are willing to wait for Mr. Powers' Recommendation." ***R.***, Ex. AD. 2, p. 2247. Ignoring Claimant's objection, decision "on the record" was entered. Following unsuccessful Motions for Reconsideration; to Reopen; for Modification of Award and/or to Correct Manifest Injustice; and, for Consolidation, Claimant filed the instant appeal.

III. Statement of Facts:

1. Mario's Personal Data and Employment History:

Mario was born in Mexico and is currently sixty-seven (67) years of age. ***Tr.***, p. 49, LL. 5-18. Mario's family was poor and he terminated formal education after the third grade to help support his family. ***Tr.***, p. 49, LL. 19-22; and, p. 51, LL. 1-8. Mario has had no other education or training. ***Tr.***, p. 51, LL. 19-22. He reads "hardly anything." His maths skills are "not very good." His wife, with one year of education, handles the family's finances. ***Tr.***, p. 49, L. 23-p. 50, L. 22.

Mario moved to the United States in 1974, and is a U.S. citizen. ***Tr.***, p. 52, L. 21-p. 53, L. 10. Initially Mario could speak no English but, "from day to day" his English gets better. ***Tr.***, p. 53, L. 15-p. 54, L. 2. Prior to Meyers Farms, Mario was employed primarily as a farm laborer and had never been a boss or a foreman. ***Tr.***, p. 58, L. 21-p. 60, L. 18.

Mario began employment with Meyers Farms on or about March 1, 1995, and, through hearing herein remained employed there. At Meyers Farms, Mario had two helpers and was considered the foreman. ***Tr.***, p. 60, L. 19-p. 64, L. 11.

2. Accident and Injury of October 6, 2009; and, Medical Treatment:

Upon October 6, 2009, Mario was involved in a motor vehicle accident and was treated for laceration to his left hand and left-sided chest pain at Elmore County Hospital. ***Tr.***, p. 85, L. 14-p. 88, L 5. Upon October 13, 2009, Mario re-presented with left shoulder discomfort, and was instructed to follow-up with Glenns Ferry Health Center (GFHC). Cl. Ex. 4, pp. 144-148. Mario presented to GFHC upon October 16, November 4, November 12, November 16, and November 30, 2009, with progressing neck, left shoulder and arm symptoms. Following cervical MRI, Mario was referred for neurosurgical consultation. Cl. Ex. 6, pp. 191-208.

Mario presented to neurosurgeon D. Peter Reedy upon January 8, 2010, with neck and left upper extremity symptomatology; and, "...if he stands for 20-25 minutes his legs go numb." Cl. Ex. 5, p. 150. Dr. Reedy diagnosed cervical spondylosis with disk herniation at C5-6 and C6-7, and took Mario to surgery, involving multi-level diskectomies and fusion. Cl. Ex. 5, pp. 155-158.

Following cervical surgery Mario's left shoulder and arm symptomatology came to the forefront. Upon Mario's first presentment, Dr. Reedy had suggested orthopedic consultation, which was not put into Mario's medical records. The State Insurance Fund (hereinafter referred to as "Fund") authorized Mario's referral to Orthopedic Associates, in Boise. Cl. Ex. 5, p. 160. At Orthopedic Associates (Drs. Hessing and Clawson), Mario underwent subacromial decompression, distal claviculectomy, labral and joint debridement and rotator cuff repair, by Dr. Hessing; and, left ulnar nerve neurolysis with anterior subcutaneous transposition by Dr. Clawson, upon December 9,

2010. Cl. Ex. 8, pp. 421-428. Dr. Hessing released Mario upon April 20, 2011, noting that Mario remained symptomatic, but thought "...that he can live with his present symptoms." Cl. Ex. 8, pp. 445-446. Upon May 3, 2011, Mario re-presented to Dr. Clawson with complaints of neck pain with numbness into his hands; and, that his shoulder was painful and stiff. Upon November 8, 2011, Dr. Clawson opined that Mario's symptoms emanated from his cervical spine. Mario then complained of lower back pain. Dr. Clawson advised Mario to "revisit" Dr. Reedy for both his cervical and low back complaints. Cl. Ex. 8, pp. 452-456.

Mario re-presented to Dr. Reedy upon December 5, 2011, with neck and low back symptoms,

> ...that he has had since the accident but that was never investigated. He said that when I first saw him I said lets work on the neck first and then we will deal with the lumbar issue but it never came up again. He describes what sounds like neurogenic claudication in that he can go into a store and walk around for 15-20 minutes but then he has bilateral leg pain, especially in the thighs.... I think he certainly should have gotten an MRI of the lumbar spine and I will ask his attorney to get his case reopened so that we may pursue the lumbar end of things.

Cl. Ex. 5, p. 166. As will be discussed subsequently, the Fund ultimately denied compensability for Mario's low back.

3. Accident and Injury of August 28, 2013; and, Medical Treatment:

Mario continued employment with Meyers Farms. Upon August 28, 2013, Mario fell and injured his right knee, for which he was treated by Dr. Myers Johnson. Incidental to Mario's right knee injury, Dr. Johnson noted Mario's pain "...in his lower back and radiating into both anterior thighs and numbness and tingling down the legs... ." Cl. Ex. 13, p. 499.

Mario ultimately underwent right total knee arthroplasty (TKA) by Dr. Johnson. Cl. Ex. 13, pp. 514-517. Dr. Johnson last saw Mario upon September 22, 2014, and again documented low back symptomatology for which he recommended reevaluation by a spine surgeon; and, noted Mario's

referral to Dr. Howard Shoemaker for a right knee impairment rating. Cl. Ex. 13, pp. 524-525. Dr. Shoemaker assigned Mario 21% impairment of the lower extremity, apportioned 50% to pre-existing conditions. Cl. Ex. 14, pp. 538-540; Def. Ex. 4, p. 008.

Mario then presented to Dr. Paul Montalbano for his continuing low back presentment.

ISSUES PRESENTED ON APPEAL

1. Was the conduct of the Commission in reassigning these proceedings to itself following hearing presided over by Mr. Powers, over the written objection of Claimant/Appellant:

   a. In excess of the Commission's jurisdiction, power and/or authority?

   b. Arbitrary and capricious, so as to constitute an abuse of discretion?

   c. Without enacted guidelines, in violation of Mario's due process rights?

2. Whether the Commission erred by considering medical records specifically excluded from the record?

3. Did the Commission err in its determination that Claimant's low back presentment following the October 6, 2009, motor vehicle accident was not compensable?

4. Whether denial of Claimant's I.C. §§ 72-718 and 72-719 Motions was an abuse of discretion?

   a. Whether the Commission erred in concluding that an I.C. § 72-719(1)(a) Motion required a change in Claimant's physical injury as a condition precedent thereof?

5. Whether the Commission's findings, rationale and/or determinations within the Orders appealed from, to the extent adverse to Appellant, were erroneous as a matter of law; supported by substantial and competent evidence of record; set-forth specific findings required for

appellate review; arbitrary, capricious, or the product of abuse of discretion; and/or, whether the Commission failed to apply the law to the evidence of record in reaching the same?

6. Whether, pursuant to Idaho Code § 72-804 and/or Rule 41, I.A.R., Claimant is entitled to reasonable attorney fees on appeal herein.

ARGUMENT

I. Standard of Appellate Review:

Upon appeal, the Supreme Court will uphold the Commission's Findings of Fact, if supported by substantial, competent evidence. The "substantial evidence rule" requires a Court to determine whether the Commission's Findings of Fact are reasonable. In doing so, the Court should not read only one side of the case and, if any evidence is therein found, sustain the Commission's action and ignore the record to the contrary. ***Ewins v. Allied Security*** 138 Idaho 343, 63 P.3d 469 (Idaho 2003); and, ***Rudolph v. Spudnik Equip.***, 139 Idaho 776, 86 P.3d 490 (Idaho 2004).

The Supreme Court freely reviews the Commission's Conclusions of Law. ***Hamilton ex rel. Hamilton v. Reeder Flying Serv.***, 135 Idaho 568, 21 P.3d 890 (Idaho 2001). Determining the meaning of a statute or applying law to undisputed facts constitutes matters of law on appeal. An Appellate Court may apply the law to undisputed facts, *de novo*. ***Martel v. Bulotti***, 138 Idaho 451, 65 P.3d 192 (Idaho 2003). The Court is required to set aside the Order of the Commission where the Commission failed to make a "proper application of law to the evidence," or where the Commission's Conclusions of Law are unsupported by its Findings of Fact. ***Bortz v. Payless Drug Store***, 110 Idaho 942, 719 P.2d 1202 (Idaho 1986).

II. Reassigning this Matter from Referee Powers to Itself Following Hearing Over the Written Objection of Claimant was in Excess of the Commission's Jurisdiction, Power and/or Authority; Constituted an Abuse of Discretion as Being Arbitrary and Capricious; and, Without Benefit of Properly Enacted Regulations and/or Guidelines, in Violation of Claimant's Due Process Rights.

As a creature of legislative invention, the Commission may only act pursuant to an enumerated power, whether it be directly statutory or based upon rules and regulations properly issued by the Commission pursuant to I.C. § 72-508. ***Curr v. Curr***, 124 Idaho 686, 864 P.2d 132 (1993). If the Commission acts beyond the bounds of its statutory authority such conduct is arbitrary, capricious and a manifest abuse of its discretion. In challenging the decision of the Commission, there is no presumption in favor of jurisdiction or due process. ***Cook v. Massey***, 38 Idaho 264, 220 P. 1188, (1923). I.C. § 72-717 states that, "[i]f the matter has been assigned for hearing by a ...referee ...the record of such hearing, together with the recommended findings and determination, shall be submitted to the Commission for its review and decision." (Emphasis added). Procedurally, the statute clearly contemplates that following hearing by a referee, the record together with the referee's recommended findings are to be submitted to the Commission for its review and decision. Statutorily, there is no authority enabling the Commission to reassign a claim following hearing before a referee to itself and issue its decision "on the record," as it did in the instant proceedings.

Pursuant to Idaho Code §§ 72-508 and 72-707, the Commission adopted the Judicial Rules of Practice and Procedure (JRPP) to govern judicial matters under its jurisdiction. Introduction, Judicial Rules of Practice and Procedure. Rule 10, JRPP, sets forth the "Hearing Procedure." Neither there nor elsewhere within the JRPP is there any rule authorizing the Commission to reassign a claim to itself following hearing before a referee. Attached hereto as Addendum A are copies of

the Introduction and Rule 10, JRPP.

In ***Kelley v. Blue Ribbon Linen Supply, Inc.***, 159 Idaho 324, 360 P.3d 333 (2015), Chief Justice Jones commented regarding Title 72 cases where the Commission disregarded the referee's findings, conclusions and recommendation, without explanation, and noted that,

> ...a referee acts as the eyes and ears of the Commission. Both hearing officers and referees hear live testimony and the credibility determinations that play into their factual findings. ...The Commission should hereafter take it upon itself to ensure that a referee's recommended decision is always included as part of the record on appeal. ...Otherwise, this Court does not have the complete picture of the case upon which to base an informed decision on appeal.

In ***Chadwick v. Multi-State Electric, LLC.***, 159 Idaho 451, 362 P.3d 526 (2015), Chief Justice Jones added that,

> [a] party to a workers' compensation dispute, just like a litigant in any other type of administrative proceeding, has a right to a reasoned decision and, where the findings of the Commission depart from those of the Referee, there should be an explanation. Although the Commission has its own procedural rules and is not bound by the Idaho Administrative Procedure Act, there is no reason why the Commission should not observe accepted practice for IDAPA proceedings where the administrative agency is utilizing the services of a hearing officer.

This Court has attached significance to the observations and perceptions of hearing officers who presided at hearing and thusly heard the testimony of witnesses "live." ***Woodfield v. Board of Professional Discipline***, 127 Idaho 738, 746, 905 P.2d 1047, 1053 (Ct. App. 1995) stated "[w]here the agency's findings disagree with those of the hearing panel, this Court will scrutinize the agency's findings more critically." The conduct of the Commission herein deprived the parties and this Court, on appeal, of the benefit of the Referee's recommended Findings, Conclusions, and Decision, inclusive of the Referee's observational credibility of Mario Ayala.

It is clear and certain that the Commission's conduct violated the procedure contemplated

by I.C. §§ 72-506, 72-709(1), 72-714(3), and 72-717, together with Rule 10, JRPP, and thusly exceeded the Commission's jurisdiction and/or authority; was arbitrary, capricious and an abuse of discretion; and, was in violation of Claimant's procedural right of due process.

III. The Commission Erred by Considering Medical Records Specifically Excluded from the Record.

The Commission reviewed, considered and incorporated into its rationale certain of Mario's medical records not admitted into evidence. Specifically, Finding of Fact 7 (hereafter F/F) references pages 65 and 115 of Claimant's Exhibit 3; F/F 8 references page 129 of Claimant's Exhibit 3; in F/F 42 the Commission noted counsel's correspondence to Dr. Hajjar of February 4, 2016, failed to synopsize records from GFHC prior to September 14, 2007 (Cl. Ex. 10, p. 474i) and thereafter referenced page 115 of Claimant's Exhibit 3; footnote 4 of F/F 58 noted that Dr. Hammond's causation opinion was without synopsis of records of GFHC from November, 2001 and September, 2007; and, F/F 71 again criticizes Dr. Hammond's causation opinion upon the basis that he was not aware of records from GFHC from 2001 to 2007. Footnote 1 upon pages 1 and 2, candidly concedes that, "[t]herefore, and notwithstanding the Commission's previous accession to Claimant's proposal to withdraw these Exhibits these portions of Exhibit 3 are considered in this decision." ***R.***, pp. 129-199. Such constitutes absolute error which, standing alone, requires reversal of the Commission's April 9, 2018, decision. JRPP 10C1 requires that each party serve copies of all exhibits to be offered into evidence at hearing. However, Rule 10F specifically provides that, "[t]he filing of a document ...does not signify its admission in evidence, and only those documents which have been admitted as evidence shall be included in the record of proceedings of the case."

If the findings of the Commission are not supported by substantial, competent evidence, they

will be set aside on appeal. ***Dean v. Dravo Corp.***, 97 Idaho 158, 161, 540 P.2d 1337, 1340 (1975). ***Mazzone v. Texas Roadhouse, Inc.***, 154 Idaho 750, 302 P.3d 718, (2013), cited ***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) that, "[s]imply, for an agency to rely on facts withheld from the record is a denial of due process." ***Mazzone*** also cited ***Drew v. Psychiatric Sec. Review Bd.***, 909 P.2d 1211, 1214 (Or. 1996), for the fundamental principal "...that fact finding in contested cases is governed exclusively by the record of the hearing." Those medical records within Claimant's Exhibit 3, pp. 46-115, were never offered into evidence but were specifically excluded therefrom. ***Tr.***, p. 8, L. 12-p. 14, L. 12; and, Amended Order Regarding Hearing Exhibits, dated January 10, 2017. The Commission's consideration of these records mandates reversal on appeal.

IV. Claimant's Low Back Presentment Following the October 6, 2009, Motor Vehicle Accident was as Consequence Thereof and Compensable.

Prior to the October 6, 2009, motor vehicle accident, Mario had been employed at Meyers Farms since March 1, 1995. ***Tr.***, p. 60, LL. 19-21. Although Mario was the "foreman" and had two seasonal helpers, he did exactly the same things as and worked alongside his helpers. ***Tr.***, p. 64, LL. 6-12. The ICRD Job Site Evaluation, approved by both Mr. Meyers and Mario, confirmed that this employment required lifting over 100 pounds as well as climbing, bending/stooping, kneeling, crouching, twisting and crawling up to one-third of the work-day. Cl. Ex. 27, pp. 711-712.

Prior to the October 6, 2009, accident Mario was able to walk as far as he wanted, even over plowed ground; lift and carry weights up to 100 pounds, even from the ground to over his head; sit for long periods of time; and, bend, kneel and squat, all without low back discomfort. ***Tr.***, p. 82, L. 20-p. 85, L. 3. Immediately following the accident, Mario notified Mr. Meyers of his back injury

and advised the Fund of back injury upon November 20, 2009. 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. Upon Mario's initial presentment to Dr. Reedy, he reported "...that if he stands for 20-25 minutes his legs go numb." Cl. Ex. 5, p. 150. Dr. Reedy explained that Mario's "...legs went numb because of my low back," but that it was important to treat his neck first and then his low back. ***Tr.***, p. 90, L. 24-p. 91, L. 21; and, p. 92, LL. 10-21.

Mario underwent cervical discectomy with fusion by Dr. Reedy upon February 19, 2010. By April 19, 2010, Mario was complaining of shoulder pathology which Dr. Reedy noted had not been evaluated, and the Fund authorized Mario's referral to Orthopedic Associates. Cl. Ex. 5, p. 160.

Mario underwent left upper extremity surgeries by Drs. Clawson and Hessing upon December 9, 2010. Cl. Ex. 8, pp. 421-423; and, 424-428. Upon November 8, 2011, after Dr. Clawson advised that medical treatment for his upper extremity was concluded, Mario complained of lower back pain. Cl. Ex. 8, pp. 452-456. Dr. Clawson recommended that Mario "revisit" Dr. Reedy for both his neck and lower back complaints. Cl. Ex. 8, p. 456.

Mario had not earlier complained of back pain to Drs. Hessing or Clawson because his referral to those physicians was specific to his left upper extremity, and they were not "back doctors." As Dr. Reedy had assured Mario that his back would be addressed following his neck and had referred him to Drs. Hessing and Clawson, Mario waited until his care at Orthopedic Associates had concluded to then complain of his low back. ***Tr.***, p. 94, L. 17-p. 95, L. 18.

Mario re-presented to Dr. Reedy upon December 5, 2011, with complaints of low back pain "...that he has had since the accident but that was never investigated." Such was strikingly similar

to Mario's complaint to Dr. Reedy of shoulder symptomatology at the conclusion of his cervical treatment, and Dr. Reedy's notation that Mario's shoulder had not, as of that date, been evaluated. Cl. Ex. 5, p. 160. Similarly, the Fund authorized treatment of Mario's low back presentment. Following CT, Dr. Reedy referred Mario to Dr. Michael Hajjar, a Boise neurosurgeon, and noted that the lumbar issues had "...obviously been present ever since his accident (while we focused on his neck and shoulder and arm pain) and ...would have to be legitimately considered a workman's comp injury." Cl. Ex. 5, pp. 171-172; and, ***Tr.***, p. 96, L. 8-p. 97, L. 9.

Dr. Hajjar noted Mario's symptoms of lumbar claudication with difficulty in standing, walking and carrying out activities of daily living; that Mario's gait was antalgic and "...somewhat stooped forward"; and, that following the motor vehicle accident Mario was treated for other issues but that, "...his back is now his most significant issue." Diagnostic studies confirmed anterolisthesis at L4-5; worsening with flexion; moderate bilateral recess and foraminal stenosis at L4-5 and L5-S1; impingement of the L4 and L5 nerve roots; and, moderate facet arthropathy. Cl. Ex. 10, pp. 469-470. Upon July 25, 2012, Dr. Hajjar recommended an L4-S1 decompression and stabilization. Cl. Ex. 10, p. 471; and, ***Tr.***, p. 97, L. 11-p. 98, L. 1. Up to this point, the Fund had accepted Mario's back presentment as compensable. However, upon Dr. Hajjar's request for surgical authorization, the Fund referred the issue to Dr. Mark Harris for an IME records review and causation opinion. Dr. Harris opined that,

> [i]nvestigation into the low back pain from the records you provided to me on the visit dated 10/06/09[1] at Orthopedic Associates there is one line which says 'Mario

[1] Mario Did not present to Orthopedic Associates on October 6, 2009, being the date of the motor vehicle accident. Rather, the referenced presentment to Orthopedic Associates was upon November 8, 2011. Cl. Ex. 20.f., pp. 633-636.

> complains of low back pain.' There is no further mention of low back pain in the record until 12/10/11 when Dr. Reedy mentions... 'he also complains of low back pain he has had since the accident but it was never investigated.' (Emphasis added.)

Cl. Ex. 20.e., pp. 629-630. Dr. Harris then expressed that Mario's low back pain was not causally related to the industrial injury but predated the same, which the Fund then based its denial for Mario's low back presentment on. Since Mario was without health insurance coverages, further treatment for Mario's low back was precluded. ***Tr.***, p. 96, L. 8-p. 98, L. 22.

Following the Fund's denial and Mario thusly being precluded from further medical treatment, he continued to work for Meyers Farms, doing the same things that he had done prior to the motor vehicle accident, except "differently." ***Tr.***, p. 97, L. 11-p. 99, L. 13. Mario "finds a way" to do things. As example, as he can not kneel, he lays down. ***Ayala Depo.***, p. 12, LL. 6-7; p. 14, LL. 16-20; and, p. 37, L. 23-p. 38, L. 7. Fortunately, Mario is the farm "foreman," and can delegate physical activity to his two helpers. ***Ayala Depo.***, p. 11, L. 19-p. 12, L. 7.

As above-noted, Mario suffered an industrial knee injury upon August 28, 2013, and thereafter presented to Dr. Myers Johnson. At the conclusion of Dr. Johnson's care for Mario's knee injury, he again noted that if Mario "...stands and walks for long periods he gets pain that radiates into both anterior thighs and legs. He has permanent numbness in his left anterior thigh," and referred Mario to Dr. Montalbano for low back evaluation. ***Tr.***, p. 104, L. 9-p. 105, L. 6. Mario presented to Dr. Montalbano upon six occasions, from October 15, 2014, through June 3, 2015. Cl. Ex. 17, pp. 569-575. Upon October 15, 2014, Mario denied lower extremity symptomatology prior to the motor vehicle accident; had constant burning back and leg pain; was unable to stand for longer than 30 minutes without "...significant issues involving his lower extremities"; antalgic gait; positive

straight leg raise; absent bilateral ankle jerk reflexes; absent right patellar reflex; and, decreased sensation in the left anterior thigh. He was then referred for repeat MRI.

On November 7, 2014, Mario presented with antalgic gait and station, and was referred for physical therapy. Upon February 25, 2015, Mario presented with antalgic gait and station, and was referred for a bone scan. Upon April 8, 2015, Dr. Montalbano noted antalgic gait and station, and referred Mario for an L4-5 facet injection. Upon May 6, 2015, Mario again presented with antalgic gait and station, and was referred for a repeat course of therapy. Dr. Montalbano advised that if Mario was "...not improved, a more aggressive treatment course will follow." Upon June 3, 2015, Dr. Montalbano noted that Mario was "much improved," and released him from his care.

At hearing, Mario advised that the "more aggressive treatment" referenced by Dr. Montalbano on May 6, 2015, was "a surgery." ***Tr.***, p. 105, L. 23-p. 106, L. 15. Mario testified that upon June 3, 2015, he was not " much improved," but told Dr. Montalbano that he did not want surgery as, even with Obamacare, he would have a co-pay and deductible and, without sick leave, would suffer loss of wages following surgery which he could not afford. Mario testified that his back was "getting worse," but that he kept working. ***Tr.***, p. 106, L. 19-p. 107, L. 24.

Medical Causation Opinions:

IME Physicians:

Dr. Harris: Dr. Harris' opinion was based upon records provided by the Fund and the Fund's August 30, 2012, correspondence, which misrepresented that, prior to Mario's first presentment to Dr. Reedy, "...Mr. Ayala did not have back complaints ...nor did he subsequent to his cervical fusion and left shoulder surgery up to your August 15, 2011, IME report." Cl. Ex. 20.e.(1),

pp. 631-632.

Thusly, the Fund not only failed to disclose that Mario had immediately notified Mr. Meyers of back injury; had given notice of back injury and described his legs going to sleep upon standing to the Fund's claims examiner well prior to Mario's presentment to Dr. Reedy; but, the Fund, having absolute knowledge of the same, affirmatively misrepresented to Dr. Harris that he did not. Further, the Fund's correspondence to Dr. Harris misrepresented that subsequent to Mario's cervical fusion and left shoulder surgery he did not have back complaints until following Mario's releases status-post cervical, left shoulder and elbow surgeries. Cl. Ex. 20.d.(1), pp. 627-628. The Fund failed to disclose that, following Mario's February 19, 2011, cervical surgery to August 15, 2011, Mario had complained of lower extremity symptomatology to his physical therapist upon March 25, April 7, April 19, April 27, and May 25, 2010. Cl. Ex. 7, pp. 361, 363, 366, 368, and 377, respectively. On April 19, 2010, Mario complained of hip pain to Dr. Reedy. Cl. Ex. 5, p. 167. On May 12, 2010, Mario complained of his legs going numb to ICRD Consultant Halcolm. Cl. Ex. 27, p. 692. Mario complained of back pain to PA-C McCready upon June 21 and July 21, 2010, and, shortly following August 15, 2010, again complained of back pain to PA-C McCready upon August 17 and August 30, 2010, upon which date PA-C McCready diagnosed chronic back pain. Cl. Ex. 6, pp. 225, 231, 237 and 244, respectively. Dr. Richard Hammond, a board certified neurologist, examined Mario upon five occasions and testified that the phenomenon of Mario's legs going numb upon standing and hip pain was compatible with an L4-5/L5-S1 injury causally related to the October 6, 2009, motor vehicle accident. ***Hammond Depo.***, p. 38, L. 1-p. 40, L. 2.

Thusly, the no causation opinion expressed by Dr. Harris was "set-up" by the Fund in

selectively providing Dr. Harris with records which failed to document Mario's notice of back injury to both his employer and the Fund and omitted documentation of Mario's low back symptomatology, with the exception of Mario's presentments to Dr. Reedy upon January 8, 2010 and December 10, 2011; and, by misrepresenting that Mario did not experience back symptoms from February 19, 2010 to August 15, 2011, when medical records clearly document that he did. Dr. Harris' opinion is thusly without adequate foundation to support it.

Dr. Montalbano: Dr. Montalbano gave three causation opinions. Initially, upon an IME basis upon review of records from Defendants' counsel, following which he expressed a no causation opinion due to "...a significant delay in the onset of "Mario's symptoms." Cl. Ex. 21.b.(1), p. 640. This opinion, as was Dr. Harris', was absent knowledge that Mario immediately reported back injury to both his employer and the Fund.

Dr. Montalbano's second causation opinion was as Mario's treating physician, with Dr. Montalbano stating that, "...the etiology of (Mario's) symptomatology would be related to ...the motor vehicle accident on October 6, 2009." Cl. Ex. 17.a., p. 576.

Dr. Montalbano's third causation opinion was again as an IME physician, after being "reminded" by Mr. Augustine's September 30, 2015, correspondence of the doctor's earlier negative causation opinion, based upon "...a significant delay in the onset of (Mario's) symptoms"; attached the September 9 and October 5, 2009, records from GFHC; and, (mis)representated that, "[o]n both occasions Mr. Ayala complained of back pain which was persistent and moderate for which he was prescribed Naprosyn... ." Cl. Ex. 21.b.(1), p. 640. Dr. Montalbano then signed-off on Mr. Augustine's mischaracterization of the GFHC records that, "[o]n both occasions Mr. Ayala

complained of back pain which was persistent and moderate for which he was prescribed Naprosyn...," and expressed that,

> ...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 (should be October 6, 2009) ...(and) [i]n conclusion, after reviewing the above medical records,... it is quite clear that Mr. Ayala's current symptomatology is of a degenerative condition and not related to his motor vehicle accident.

Cl. Ex. 21.b., p. 639.

The basis for Dr. Montalbano's reversal of causation opinion from that expressed as Mario's treating physician to that expressed as Defendants' IME physician, must be reviewed. Both by Dr. Montalbano's October 8, 2015, IME report to Mr. Augustine and within his deposition, the doctor clearly states that he changed his causation opinion upon the basis of the records of PA-C McCready/GFHC dated September 9 and October 5, 2009, which he interpreted as demonstrating that upon both occasions, Mario presented for low back pain; was evaluated for low back pain; and, was "...started on treatment ...for low back pain and even received a prescription for a non-steroidal anti-inflammatory agent in order to manage such pain." (Emphasis added.) Cl. Ex. 21.b., p. 639; and, ***Montalbano Depo.***, p. 26, LL. 11-20 and p. 92, LL. 8-18.

It is clear that but for Mario's presentments to PA-C McCready on September 9 and October 5, 2009, Dr. Montalbano would not have reversed his July 8, 2015, opinion that "...Mr. Ayala's symptomatology in terms of low back pain is directly related to the motor vehicle accident on October 6, 2009." Cl. Ex. 17.a., p. 576. Thusly, these presentments to PA-C McCready must be reviewed within the context of whether the same support Dr. Montalbano's perceptions and his no-causation opinion.

First, in keeping with the Funds's "pattern" of withholding records and/or data favorable to the Claimant in requesting its expert's opinion, and thusly setting the stage for a favorable opinion, the Fund and its attorney shielded Dr. Montalbano from facts and/or records by or from which the doctor's perception that Mario's low back was central to his September 9 and October 5, 2009, presentments was challenged, until following Dr. Montalbano's deposition testimony supporting that perception had been taken by Mr. Augustine. Cross-examination brought out that prior to the doctor's deposition the Fund and its counsel had only provided the doctor with records and/or data supportive of a no causation opinion. Omitted records and/or data are as follows:

1. That Mario immediately notified Mr. Meyers of his back injury and had notified the Fund of back injury as well as that upon standing, his legs went numb. Thusly, it remained Dr. Montalbano's belief that Mario's first complaint of back pain was upon January 8, 2010, three months following the accident. ***Montalbano Depo.***, p. 46, L. 7-p. 47, L. 20.

2. As of the date of the doctor's deposition, it remained his understanding that Dr. Hajjar's most recent opinion was that of no causation, as per his January 27, 2016, report to Mr. Augustine at Claimant's Exhibit 10.b., pp. 472a and b. Of note, Mr. Augustine's letter to Dr. Hajjar misrepresented that,

> ...Mr. Ayala's low back complaints developed several months after his automobile accident of October 6, 2009, ...(and that Mario's presentments to PA-C McCready of September 9 and October 5, 2009) demonstrate that Mr. Ayala had received treatment for low back pain immediately prior to his automobile accident and was in fact prescribed Naprosyn for low back pain.

Cl. Ex. 10.b.(1), p. 472c. It was not until following Dr. Montalbano's direct examination by Mr. Augustine that Dr. Hajjar's causation opinion of February 19, 2016, was disclosed, which advised that, upon review of Mario's records for the two years prior to the accident,

> [o]n September 8, 2009, (Mario) was treated for body aches and dizziness, upper, mid and low back pain as well as achiness for about one week. He was given Flexeril and Naprosyn. Mario was also diagnosed with obesity and he was scheduled to return to work the following week. On October 5, 2009, Mario was treated for a cough and he was noted to be currently stable. Naprosyn was prescribed again and the first report of illness or injury was dated October 4, 2009. ...(which) ...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, ...this medical record ...supports Mario's contention and it also supports Mr. McCready's contention that the back issues are related to the work accident.

Cl. Ex. 10.c., pp. 472e-f. Of note, Dr. Montalbano was best man in Dr. Hajjar's wedding; they went to the same residency program; and, they are in the same medical practice. Dr. Montalbano respects Dr. Hajjar "as an imminently qualified neurosurgeon." ***Montalbano Depo.***, p. 60, LL. 8-18.

3. It was not until following Dr. Montalbano's direct examination that he was provided with PA-C McCready's dated and signed Questionnaire, confirming that prior to the October 6, 2009, accident, and specifically upon September 9 and/or October 5, 2009, Mario did not present,

> ...with conditions, complaints or symptomatology such that I was of the opinion or otherwise diagnosed Mr. Ayala's presentments as being by reason of a serious or significant injury to or condition of his low back, generally, and specifically at the L4-5 and/or L5-S1 levels; (and) that but for the occurrence of trauma, an accident or other untoward event following October 5, 2009, I would not have reasonably anticipated that Mr. Ayala would thereafter present ...with significant low back issues requiring medical attention... .

Montalbano Depo., p. 97, LL. 1-22. PA-C McCready's signed Questionnaire is at Claimant's Exhibit 6.a., at page 348.

4. Dr. Montalbano was never provided with Mario's hearing testimony. ***Montalbano Depo.***, p. 115, L. 23-p. 116, L. 2.

Ignoring, for the time being, that Dr. Montalbano's no causation opinion was "set-up" by the

Fund/its attorney, Dr. Montalbano's no causation opinion is only, to any extent, credible if his perception that Mario's presentments to PA-C McCready on September 9 and October 5, 2009, were, each, by reason of low back pain for which he was treated and prescribed pharmaceuticals, carried over from and following the October 6, 2009, motor vehicle accident and was but a continuation of that pre-existing condition.

Mario testified that on these two occasions "I have the flu, so I went to see the doctor. So I had my bones hurt." ***Ayala Depo.***, p. 22, LL. 1-18. Upon September 9, 2009, Mario had body aches and dizziness, "...like I had fever inside my body." He felt nauseous, fatigued, had an appetite loss and muscle cramps. PA-C McCready, "told me I had a flu." Instead of taking x-rays or being referred for an MRI or CT, Mario was sent "...to do a blood test." ***Tr.***, p. 80, L. 6-p. 81, L. 16. On October 5, 2009, Mario had a recurring cough, joint pain and muscle aches. Noting that the October 5, 2009, records did not mention his back under the Musculoskeletal portion of the Physical Exam section, Mario explained that, with the exception of having the flu and coughing, there was nothing wrong with him, being fully compatible with PA-C McCready's January 19, 2016, Questionnaire. ***Tr.***, p. 81, L. 24-p. 82, L. 23; and, Cl. Ex. 6.a., p. 348.

Upon Dr. Montalbano's review of the September 9 and October 5, 2009, records, it was his impression that those presentments were for "pain in the low back with paraspinal muscle spasms." When reminded that the records noted that the pain was to "the upper back, mid back and low back," Dr. Montalbano responded, "I mean, I guess it could be. When I see 'back pain,' I think it is low back pain." ***Montalbano Depo.***, p. 26, L. 24-p. 27, L. 7; and, p. 28, LL. 19-23. Thusly, Dr. Montalbano refused to accept PA-C McCready's dictation as written.

In dismissing a cough, cold or flu as the cause for Mario's presentments, Dr. Montalbano responded "[t]here is mention that (Mario) had a cough, but there is no fever or chills in these records. Part of the treatment – (PA-C McCready) didn't include any flu-like symptoms or flu-like treatment." ***Montalbano Depo.***, p. 27, LL. 8-20. During cross examination, Dr. Montalbano conceded that the September 9, 2009, dictation was absent indication that the low back ought to be perceived to be more significant than the upper or mid back. ***Montalbano Depo.***, p. 79, L. 21-p. 80, L. 7. Then, after working-through Mario's other presenting symptoms, being achy, like an "internal fever," being restless, being nauseous, having appetite loss, fatigue and muscle cramps, and with PA-C McCready referring Mario for lab tests, Dr. Montalbano is asked whether such was compatible with the flu, a cold, or upper respiratory conditions. Dr. Montalbano responded in the negative, as Mario did not have diarrhea, cramping or evidence of fever or chills, "...which are classic symptoms of the flu." ***Montalbano Depo.***, p. 8-, L. 8-p. 81, L. 13.

Dr. Montalbano, a neurosurgeon, does not see patients for colds, upper respiratory problems or the flu, except established patients who present incidentally with those conditions. ***Montalbano Depo.***, p. 51, L. 21-p. 52, L. 8. Upon production of a publication from the Centers for Disease Control and Prevention identifying "Flu Symptoms & Complications," as feeling feverish, but not always actually having a fever; a cough; muscle or body aches; fatigue; and nausea (Ex. 2, ***Montalbano Depo***), it became clear that the basis for Dr. Montalbano's opinion regarding Mario's September 9 and October 5, 2009, presentments was personal as opposed to medical. His testimony was, "[w]ell, I'll tell you what. I've had the flu multiple times. I can tell you that I have a fever; my kids have a fever; my wife has a fever; my patients have fevers. They have diarrhea. They have

vomiting. That's the flu." ***Montalbano Depo.***, p. 82, LL. 5-22. Dr. Montalbano became defensive, loud, animated and agitated, which he passed-off as being "...because I'm Italian." ***Montalbano Depo.***, p. 82, L. 23-p. 84, L. 22.

Dr. Montalbano's testimony was internally conflicting and inconsistent. Upon the inquiry of whether PA-C McCready would be the logical individual to discuss whether or not Mario had the flu upon the presentments in question, Dr. Montalbano had "no opinion." ***Montalbano Depo.***, p. 85, LL. 15-24. When reminded that PA-C McCready did not refer Mario for x-rays, CTs, or MRIs, indicative of a suspicion for a back presentment, Dr. Montalbano testified that being the first time that Mario presented, "...I wouldn't subject a patient to a CT scan and x-rays... [t]he standard of care is not to rush everybody for a CT or MRI or x-ray." ***Montalbano Depo.***, p. 86, LL. 16-24. This is in direct conflict with Dr. Montalbano's testimony on direct, as follows:

> Q. Irrespective of whether somebody presents to you as a patient that you are treating or as an IME individual, if you suspect a back issue, what is the first thing that you do? Would you refer him for films? ...
> A. I would order them.
> Q. First thing?
> A. One of the very first things, yes.

(Emphasis added.) ***Montalbano Depo.***, p. 51, LL. 10-20.

Dr. Montalbano conceded that Mario's presentment of October 5, 2009, was for evaluation of a cough and being overweight, with back pain not being mentioned, with "[t]here (being) no additional symptoms to deny." ***Montalbano Depo.***, p. 88, L. 11-p. 89, L. 18. However, Dr. Montalbano insisted that Mario's Naprosyn prescription was for back pain, "because that's why Naprosyn is given." ***Montalbano Depo.***, p. 89, LL. 19-23. Dr. Montalbano testified that the Naprosyn prescribed upon October 5, 2009, was for back pain and not Mario's right knee.

Montalbano Depo., p. 91, L. 3-p. 92, L. 4. Directly rebutting this testimony, the doctor conceded that Naprosyn is also prescribed for knee pain, and the Musculoskeletal portion of the Physical Examination section of the October 5, 2009, dictation did not mention Mario's back, but only his right knee, with "[p]alpation reveals grinding at the lateral aspect of the ...joint line." ***Montalbano Depo.***, p. 90, LL. 3-17.

Emphasizing that PA-C McCready's September 9 and October 5, 2009, records were the basis upon which Dr. Montalbano reversed his causation opinion (***Montalbano Depo.***, p. 92, LL. 8-18), it is respectfully submitted that these presentments are, as a matter of law, inadequate to provide foundation for Dr. Montalbano's IME opinion that Mario's low back symptomatology following the October 6, 2009, motor vehicle accident was unrelated to that event but represented a continuation of symptomatology from his pre-existing degenerative condition, all as pursuant to Dr. Montalbano's October 8, 2015, report to Mr. Augustine. Cl. Ex. 21.b., p. 639.

Opinions of Treating Physicians:

Dr. Reedy: Upon Mario's first presentment he advised Dr. Reedy that if he stood for 20-25 minutes, his legs went numb. Cl. Ex. 5, p. 150. Such is compatible with Mario's First Report, that he had hurt his back; with the Fund's November 20, 2009, Claimant Contact Form; the Fund's December 21, 2009, dictation, that Mario's legs went numb from standing; and, the ICRD Case Notes, that Mario experienced "...numbness in his legs when standing at physical therapy for over 30 minutes." Cl. Ex. 5, pp. 673-674; 674a-b(1); and, 692, respectively. Dr. Reedy advised Mario that his neck was the more significant injury and would be treated first, with his low back to then be addressed, squarely in line with accepted medical protocol. As Dr. Montalbano noted, "...you have

to prioritize the emergent urgent issues first and then do a secondary survey or a tertiary survey to determine if there are any other injuries down the road." ***Montalbano Depo.***, p. 33, LL. 20-23.

Dr. Reedy's December 10, 2011, correspondence states that Mario had complained of his lumbar spine "since the accident," but that those complaints had not been investigated. Cl. Ex. 5.a.(1), p. 176. Dr. Reedy expressed opinion supporting causal relation within his reports of December 12, 2012; of November 2, 2015; of January 7, 2016; and, of January 19, 2016. Cl. Ex.5, pp. 177, 182, 186 and 187, respectively. Dr. Reedy expressed that,

> ...I think the industrial accident was the straw that broke the camel's back in a gentleman who has worked hard all of his life. Yes, he has had degenerative conditions in his spine before and yes he has periodically been treated for episodic back pain, but intractable back pain, I believe began with the motor vehicle accident and any treatment to his low back must be directly attributed to that motor vehicle accident.

Cl. Ex. 5, p. 187.

Dr. Hajjar: Dr. Hajjar recommended an L4-S1 decompression and stabilization which was "...related to (Mario's) work injury." Cl. Ex. 10.a., p. 472. Further, in directly contesting the IME opinion of Dr. Montalbano, following review of PA-C McCready's records of September 9 and October 5, 2009, Dr. Hajjar advised that,

> [b]ased 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... (and) supports Mario's contention and Mr. McCready's contention that the back issues are related to the work accident.

Cl. Ex. 10.c., p. 472e-f.

PA-C McCready: PA-C McCready confirmed that Mario's presentments of September 9 and/or October 5, 2009, were not by reason of a significant injury to or condition of his low back;

and, that but for the occurrence of an accident following October 5, 2009, it would not have been medically anticipated that Mario would thereafter present with significant low back issues. Cl. Ex. 6.a., p. 348.

Dr. Hammond: Dr. Hammond was both one of Mario's treating physicians and conducted a records review and neurological examination upon Mario at the request of his counsel. Dr. Hammond determined that Mario's presentments upon September 9 and October 5, 2009, were regarding "...constitutional symptoms, such as a cough or a cold, as opposed to a more significant back issue." ***Hammond Depo.***, p. 17, L. 18-p. 20, L. 13. These presentments were without significant guarding, with the stooped posture with which Mario presented following the motor vehicle accident. ***Hammond Depo.***, p. 20, L. 22-p. 21, L. 9. Following the accident, Mario's complaints took on a new path in terms of quality and type, and became specific, focusing on the low back. Diagnostic studies then documented a specific level that anatomically would be medically anticipated to produce the "focused" low back symptoms, which were new following the accident. ***Hammond Depo.***, p. 108, LL. 1-21; and, p. 128, L. 16-p. 129, L. 18. Dr. Hammond expressed that even if Mario had presented with low back issues prior to the motor vehicle accident, <u>at the very least</u> the accident exacerbated the previously mostly asymptomatic condition and caused it to come to the forefront. ***Hammond Depo.***, p. 123, LL. 15-23. Mario currently presents with chronic back pain related to the October 6, 2009, motor vehicle accident for which he requires fusion of L4-5 and L5-S1. ***Hammond Depo.***, p. 17, LL. 1-4; Cl. Ex. 24, p. 659c. Such is also the opinion of neurosurgeons Reedy and Hajjar. Cl. Ex. 5, p. 172; and, Cl. Ex. 10, p. 471, respectively.

The medical opinions expressed by Mario's four treating physicians far better explain and

are better based than Respondents' IME opinions. However, these opinions were rejected by the Commission upon the following rationale:

Records/Reports of Dr. Reedy:

1. Finding of Fact (F/F) 11: The Commission interpreted Dr. Reedy's letter of January 7, 2016, (Cl. Ex. 5, p. 186) as that, "Dr. Reedy proposed that the treatment notes from GFHC reflect that Claimant was treated for complaints of low back pain immediately preceding the subject accident." Claimant respectfully disagrees. Dr. Reedy's January 7, 2016, notation was responsive to Mr. Augustine's correspondence of December 17, 2015 (Cl. Ex. 5, p. 186a), which attached the September 9 and October 5, 2009, records from GFHC and represented that the same demonstrated that Mario complained of low back pain for which he was prescribed pharmaceuticals; referenced Dr. Montalbano's perception that Mario then experienced low back pain; and, requested that Dr. Reedy revisit his causation opinion in light of the GFHC records and Dr. Montalbano's report. Dr. Reedy's response should be taken in the context that, upon his review of the September 9 and October 5, 2009, records; and, accepting for argument's sake the perception of Dr. Montalbano that the same "document" low back pain, the motor vehicle accident remained the precipitating cause for Mario's need for surgery, as recommended by both himself and Dr. Hajjar.

2. F/F ¶¶ 21-23: Here, the Commission discredits Dr. Reedy's December 5, 2011, office dictation upon Mario's presentment with complaints of his legs going numb which "had never been investigated" (Cl. Ex. 5, p. 168), and correspondence to PA-C McCready, of the same date (Cl. Ex. 5, p. 166), that Mario "...complains about low back pain that he has had since the accident but that was never investigated (and) when I first saw him I said lets work on the neck first and then we will

deal with the lumbar issue but it never come up again." The Commission's criticism is that neither the office dictation nor the correspondence to PA-C McCready "explicitly" reflected that Mario related his leg numbness to the motor vehicle accident or that Dr. Reedy had specific recall of advising Mario that his neck would be treated first, with the low back complaints being addressed thereafter. Such constitutes pure speculation which was does not flow from and is inconsistent with the record.

Although Dr. Reedy did not specifically state that he recalled advising Mario that his neck would be addressed first and the back subsequently, such is most certainly inferred upon reading Dr. Reedy's dictation/reports as a whole. In his April 12, 2012, letter to PA-C McCready, Dr. Reedy stated that Mario's low back presentment "...has obviously been present ever since his accident (while we focused on his neck and shoulder and arm pain) and I think it would have to be legitimately considered a workman's comp injury." Cl. Ex. 5, p. 172. His December 10, 2011, report stated that Mario's "...lumbar spine, which he has complained about since the accident, has never been investigated... ." Cl. Ex. 5, p. 176.

What should be obvious is that Dr. Reedy never questioned Mario's recall of the conversation, when it most certainly would have been easy had the doctor had any reservation or doubt, to have done so. Rather, the Commission speculated and assumed facts not of record in rejecting Mario's testimony which the record, taken as a whole, thoroughly supports. What is important is that Mario gave notice of his back injury and thereafter his physicians related his symptomatology to that back injury. Simply stated, the record is absolutely devoid of any basis upon which the Commission should reject Mario's testimony or misconstrue Dr. Reedy's records so as

not to support the same.

Records of Glenns Ferry Health Clinic:

1. In F/F ¶¶ 12-13 and 71, the Commission discussed PA-C McCready's completion of his Questionnaire. Cl. Ex. 6, p. 348. The Commission speculates, that

> [i]t is unclear whether PA McCready's reply (Questionnaire) represents his actual opinion, or was simply his way to buy some peace, noting that counsel had corresponded with PA-C McCready upon three occasions and had advised that failing his written response, it would be necessary to take PA-C McCready's deposition.

The Commission ignored the obvious. PA-C McCready could have "bought his peace" just as easily by disagreeing with the statements upon the Questionnaire. The Commission also ignored that the Questionnaire is corroborated by the testimony of Mario, (***Tr.***, p. 80, L. 6-p. 82, L. 23); the testimony of Dr. Hammond, (***Hammond Depo.***, p. 17, L. 6-p. 24, L. 7); and, the February 19, 2016, report of Dr. Hajjar (Cl. Ex. 10, pp. 472e-f). One is left to wonder whether Referee Powers, having benefit of observational credibility at hearing, would have rejected Mario's testimony, as corroborated by PA-C McCready's Questionnaire; the testimony of Dr. Hammond;the narrative of Dr. Hajjar; and, Mr. Meyers' testimony that Mario was "definitely" honest. ***Tr.***, p. 101, LL. 10-15.

2. Within F/F ¶¶ 16-18; 25-26; and, 74-75, the Commission reviewed Mario's records, principally those from GFHC, and noted that, upon occasion if not the majority of occasions, Mario failed to complain of his low back, while rejecting his testimony that he was symptom specific when presenting to physicians. As example, when presenting to Drs. Hessing and Clawson, he would not complain of his back, because they were not "back doctors" (***Tr.***, p. 94, L. 23-p. 95, L. 17); and, when he presented to Dr. Hammond, he did discuss his back, because Dr. Hammond was a "back doctor." ***Tr.***, p. 139, L. 19-p. 140, L. 19.

Rather than the records of GFHC supporting that Mario oft-times presented without back complaints those records document that Mario is complaint-specific regarding the condition for which he is then presenting; and, there is an obvious pattern of inconsistency within those records as to Mario's complaints and/or symptomatology. Reference is made to Claimant's Post-Hearing Reply Brief commencing with the first full paragraph upon page 5 and continuing through the first paragraph upon page 7. In the interests of space and avoidance of redundancy, the same will not be fully repeated hereat. However, certain of GFHC's records provide clear example of the internal inconsistencies within Glenns Ferry's records. The August 30, 2010, dictation notes chronic back pain under "PMHx," whereas review of symptoms for the same date "denies" back pain. Cl. Ex. 6, pp. 244-245. The November 1, 2010, dictation records "a ringing in his ear, and a loss of hearing for two weeks," with the CC/HPI then stating, in the very next paragraph, "denies" hearing loss and ringing in the ears. Cl. Ex. 6, 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. Cl. Ex. 6, pp. 233-344. Thusly, the records from Glenns Ferry clearly can not be used as documentation of the complaint with which Mario then presented, with certainly.

Regarding Mario being symptom-specific, Glenns Ferry's February 3, 2011, record is absent left upper extremity complaint. Cl. Ex. 6, pp. 267-268. Yet, on that same date, Mario presented to Dr. Hessing status-post surgery, and was referred for therapy. Cl. Ex. 8, p. 437. Of note, Dr. Hessing's dictation is also absent notation of Mario's presentment to Glenns Ferry. Upon April 28, 2010, Mario underwent subacromial injection by Dr. Schweiger. Cl. Ex. 8, p. 402. Upon August 23, 2010, Mario underwent MRI of the left shoulder. Cl. Ex. 11, p. 484. Upon September 21, 2010,

Mario underwent EMG and NCV. Cl. Ex. 9, p. 457-463. Yet, none of those procedures were "documented" within Glenns Ferry's records for August 17 and October 1, 2010, within days of the MRI and EMG. Cl. Ex. 6, pp. 237 and 250. Clearly, the absence of documentation of Mario's low back complaints to providers not having responsibility for that presentment is not indication that Mario did not, in fact, have low back pain upon the dates of those presentments.

Mario testified he suffered low back symptoms following the October 6, 2009, motor vehicle accident. ***Ayala Depo.***, p. 33, LL. 11-22; and, ***Tr.***, p. 95, LL. 13-17. The Commission rejected Mario's testimony, reasoning that, "[h]aving reviewed Claimant's testimony, both at hearing, and at the time of his pre-hearing deposition, there is little-if-any support for this proposition in the record." (Emphasis added.) F/F ¶¶ 74 and 75, pp. 44-45. The Commission's negative assessment of the credibility of Mario's testimony is not supported of record and provides example of the Commission's error in removing this matter from Referee Powers and thereby precluding consideration of Mario's observational credibility.

3. F/F ¶ 76, speculates that the assurances from Dr. Reedy to Mario that his low back would be medically addressed following his neck never occurred, upon the basis of Dr. Reedy's November 18, 2010, notation that Mario was then medically stable following cervical surgery but that, rather than then addressing the low back, Dr. Reedy released Mario. Ignored by the Commission is the fact that following cervical surgery, Mario had unaddressed left upper extremity symptomatology for which Dr. Reedy referred Mario to Orthopedic Associates. Dr. Reedy's November 18, 2010, correspondence noted that Mario was actively treating with Drs. Hessing and Clawson. It was upon being released by Dr. Clawson that Mario logically re-presented to Dr. Reedy regarding continuing low back symptomatology.

A Title 72 claimant must prove to a reasonable degree of medical probability that his injury is causally related to an industrial accident. "Probable" is defined as having more evidence for than against. ***Stevens-McAtee v. Potlatch Corp.***, 145 Idaho 325, 179 P.3d 288 (2008). In the instant matter, the medical evidence overwhelmingly supports that Mario's low back presentment following the October 6, 2009, motor vehicle accident was by reason of that event and, thusly, compensable.

V. The Commission was Clearly in Error in Reducing Disability from "Profound, and Possibly Total and Permanent" to but 40% of the Whole Person

In determining Mario's permanent disability the Commission accepted the Functional Capacity Evaluation results as reported by Dr. Wright. F/F ¶¶ 104-106. The Commission noted that Mario is an "older worker"; Hispanic; has limited education and ability to read or write in either English or Spanish; has limited computer skills; and, has "some" transferrable vocational skills. The Commission noted that Mario's past relevant work experience has largely been limited to agricultural and that his skills are "somewhat unique to the Meyers Farm's operation relevant to the soil characteristic which make irrigation there challenging." F/F ¶ 107.

The Commission recognized that, "[t]he real issue is whether there are in fact suitable jobs for Claimant within his limitations/restrictions." F/F ¶ 110. While appearing to reject most of the opinions of Defendants' vocational expert, Mr. William "Bill" Jordan, and to accept certain of Claimant's vocational expert's opinions, being Dr. Nancy Collins, the Commission determined that Dr. Collins had a poor understanding of the actual physical requirements of Mario's current job and an equally poor understanding of to what extent he required the assistance of other workers, referencing ***Collins Depo.***, p. 78, L. 6-p. 80, L. 25; and, p. 84, L. 20-p. 92, L. 5. Reviewing those portions of Dr. Collins' deposition and comparing the same with Mario's testimony, it is submitted

that Dr. Collins actually had a good grasp of Mario's current employment's physical demands and the extent to which Mario required the assistance of others.

Dr. Collins noted that Mario was "older"; presented with an antalgic gait, walking slowly and deliberately; shifted his weight frequently while sitting; experienced difficulty arising after sitting; that his reading and writing skills were "poor"; had been employed by Meyers Farms for the past 20 years, but was unable to perform tasks requiring computers or reading and writing ability; that his past work history was heavy to very heavy; that following Mario's industrial injuries, he learned to "accommodate" for certain of his limitations and delegated tasks to his co-workers; and, that with "superhuman effort," he remained employed but that, without accommodation by Meyers Farms he does not qualify for any job in his labor market. Cl. Ex. 32, pp. 843-852.

It was Dr. Collins' ultimate opinion that, even exclusive of consideration of Mario's low back, he presents as totally and permanently disabled but for his current position at Meyers Farms, which was the ONE POSITION on this ONE FARM which constitutes Mario's employment pool and that, were he to lose that position, it would be futile for him to engage in a job search on the open labor market. ***Collins Depo.***, p. 30, LL. 4-10; p. 45, LL. 4-21; and, p. 51, L. 11-p. 52, L. 22.

The Commission noted that Mario's "...ability to perform his current job and his value to his current employer is not necessarily inconsistent with the finding that (he) is totally and permanently disabled under the odd-lot doctrine." F/F ¶ 112. The Commission specifically determined that, "...absent Claimant's current employment, his disability, as of the date of hearing, would be profound, and possibly total and permanent under the odd-lot doctrine (and that) ...there is no dispute that the accident has left (Mario) without access to a large swath of his pre-injury labor market, thus constraining his employment options now and in the future, should he, for whatever reason, loose

his current job." F/F ¶ 115. The Commission then undertook a rationale contrary to precedent, common sense and the record herein. The Commission determined 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. If Claimant was 20 years of age, the Commission would be much less impressed by the fact that Claimant has a job for which he is well suited, and an employer that values his service. ...here, though, Claimant is near the end of his work life and holds employment in which he is likely to remain until he retires. This makes the fact of Claimant's current job much more significant in evaluating his disability.

F/F ¶ 114, pp. 67-68.

This rationale is a reversal of the Commission's methodology in treating older workers in prior claims. In ***Duran v. Silverwood***, I.C. 2011-013270, (June 22, 2018), the claimant was 77 years of age at the time of the hearing. There, the Commission reasoned that, "...and while (that claimant) is extremely experienced and hard working, his age would be a disadvantage if Claimant had to compete against younger workers for work within his restrictions." F/F ¶ 125, p. 34. In ***Woody v. Seneca Foods***, I.C. 2010-012114, filed May 23, 2013, the Commission noted that that claimant was 64 years of age and determined that, "[a]s an older worker, Claimant's age reduces her employability." F/F ¶ 112, p. 39. I.C. § 72-430(1) mandates the consideration of various factors in the determination 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.) Thusly, a disability award is upon consideration of the effect of claimant's impairment and pertinent non-medical factors, upon that specific claimant's ability to compete in an open labor market. This, the Commission failed to do. Rather, after determining that, in Mario's open labor market, "...his disability, as of the date of hearing, would be profound, and possibly total

and permanent," the Commission reduced the disability award to which Mario was clearly entitled and, by and through pure speculation without support of record, determined,

> ...here, though, Claimant is near the end of his work life and holds employment in which he is likely to remain until he retires. ...
>
> However, the fact that Claimant's current employment is likely to continue at his current or higher wage must be taken in to account. Based on these facts, Claimant's proven disability is 40% of the whole person, inclusive of impairment.

F/F ¶ 113-115, pp. 67-68.

As noted by Respondents' counsel at hearing, Mario has "...worked his entire life on the farm doing heavy to very heavy work ...if he were to go out without any injuries at all out in the open labor market to try to say I want to go out there and pick rocks and carry pipe, no one is going to hire him because of his age." (Emphasis added.) ***Tr.***, p. 44, LL. 20-25. Mario's age was acknowledged by Respondents to have a significant adverse affect upon Mario's employability in the open labor market. What a pleasant and undeserved surprise it must have been when Mario's disability was profoundly reduced by the Commission upon the consideration of his status as an older worker and that, as of the date of hearing, he remained employed at/with Meyers Farms. Such result in unconscionable; conflicts with controlling statute/precedent; and, is just plain wrong.

As basis for this rationale the Commission speculated that, "[t]here 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." (Emphasis added.) There is nothing in the record supporting the proposition that Mario can retire, ever. Mario fully understands that his employment with/at Meyers Farms constitutes his singular position in his labor market. Absent this one job, he is unemployable. The house in which he and his wife live is on farm property and part and parcel of his wages. He has no money saved and understands that, absent that employment, "...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. Mario testified that he planned on working "[u]ntil I can't," or, as long as the Meyers allow him to work. ***Tr.***, p. 137, LL. 10-20. The Commission's speculation and improper rationale/methodology, if allowed to stand will, to the same extent as a poor southern sharecropper's plow mule, require Mario to continue to work until he is without value to the Meyers or he dies in the harness. Such is not in keeping with the promise of I.C. § 72-201, for "...sure and certain relief for injured workmen and their families."

The Commission clearly erred in reducing Mario's disability upon consideration that, following his industrial injuries, he returned to work for Meyers Farms. In ***Barton v. Seventh Heaven Recreation, Inc.***, I.C. 2008-031084, (December 9, 2010), that claimant, as here, had returned to work for the employer, but not at his time-of-injury job. He was no longer able to crawl, kneel or otherwise move around as required by his original position, and thusly returned to work in a modified capacity. The Commission there determined that,

> [i]n measuring loss of access to the labor market, it matters not that Claimant is employed as of the date of evaluation. Labor market access loss is calculated by comparing Claimant's pre-injury access to the labor market, to his post-injury access to the labor market.

In ***Lienhard v. Sodexo***, I.C. 2011-002489 (July 8, 2014), the claimant "retired" following injury. The Commission there held that even a claimant's retirement "does not otherwise affect analysis of her permanent disability."

The Commission rejected Mario's claim that, irrespective of his current position with/at Meyers Farms, he is, prima facie, totally and permanently disabled pursuant to theories of odd-lot. The Commission recognized that an odd-lot worker need not be unable to perform any work but

determined that, even assuming that Mario had established a prima facie entitlement to odd-lot status, his current employment satisfies "[e]mployer's obligation to rebut a prima facie case of total and permanent disability." F/F ¶¶ 112-113, pp. 66-67. In so ruling, the Commission determined that Mario's current position is not by reason of a sympathetic employer and/or by or through a superhuman effort on his part. F/F ¶¶ 111-112, pp. 65-67.

In rejecting that Mario's current employment is by and through superhuman effort on his part, the Commission noted that Mario has the assistance of two helpers, such that, "...Claimant is not required to perform physical tasks which are too difficult for him." F/F ¶ 111. Unfortunately, the Commission failed to adequately consider the record. Mario "finds a way" to do things, and testified that, "[s]ince I can't kneel, I just lay." When welding outside, he lays on the ground. ***Ayala Depo.***, p. 14, L. 16-p. 15, L. 1. Further, Mario's two helpers are seasonal workers, whereas he works year-round. ***Tr.***, p. 62, LL. 13-21. During his helpers' absence, he "finds a way," such as using machinery or having his wife help, who is 66 and, herself, in ill health. Upon occasion, he asks his neighbors for assistance. ***Tr.***, p. 123, L. 21-p. 125, L. 3. Even with assistance, at the end of the work-day, he is exhausted, hurts, goes home and lays on the floor. ***Ayala Depo.***, p. 40, LL. 5-15. Such most certainly must come within the definition of "superhuman effort."

With respect to whether Meyers Farms is a sympathetic employer, Meyers Farms is aware that Mario can not engage in physical activities as he did prior to the industrial accidents. Rather, Mario's value is by reason of his "institutional knowledge." Defs' Ex. 9, p. 212. Mario "...has institutional knowledge about how to draw the water out using the pumps, operating the 14 pivots for irrigating. It has to be managed and balanced." ***Jordan Depo.***, p. 41, LL. 9-16. Mario is the only individual qualified to "troubleshoot" the irrigation pivots. ***Tr.***, p. 179, L. 18-p. 180, L. 4. The

irrigation system where Mario is employed is unique to that farm, with a "learning curve" of up to two years for a new employee to assume Mario's responsibilities. ***Tr.***, p. 193, LL. 5-17.

The Commission noted Mr. Meyers' testimony that Mario was a valuable employee who has a peculiar knowledge of the employers' operation and thus, "[t]he record supports the conclusion that the job Claimant performs is real and that his service is valuable, perhaps essential, to employer's business." F/F ¶ 112, p. 66. In ***Glenn v. Idaho State Police***, I.C. 2006-530833 (August 30, 2013), the Commission discussed what is or is not a sympathetic employer to greater depth, citing ***Christensen v. SL Start & Associates, Inc.***, 147 Idaho 489, 207 P.3d 1020 (2009), which noted that 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 was so limited that even the most well-disposed employers had few positions that were suitable. Claimant is the odd-lot worker personified.

In ***Glenn***, the Commission noted that per ***Christensen***, "...in determining whether an employer is a 'sympathetic employer,' the question is not whether the employer has a charitable purpose at heart, but rather whether the accommodations it offered are 'out of the ordinary' in order that it might obtain claimant's beneficial services."

Applying the principals espoused by the Commission in ***Glenn***, as well as this Court in ***Christensen***, it is only by reason of the fact, as noted by the Commission at F/F ¶ 112, p. 66, "...that Claimant is a valuable employee who has a peculiar knowledge of employer's operation such that

his loss (as an employee) is almost an untenable proposition for the employer," that Meyers Farms "accommodates" Mario in order to continue to receive the benefit of his institutional knowledge regarding that specific farm.

Recall, prior to the 2009 motor vehicle accident, Mario worked alongside his helpers, physically doing exactly the same activities as did they. Such is to be compared with Mario's current position, such that Meyers Farms "...leave it up to him (Mario) how he wants to do that and delegate it, but, you know, ...he takes care of it and for the most part just gets it done." ***Tr.***, p. 185, LL. 16-21. Clearly and definitely, Meyers Farms provides Mario accommodations at current which it did not prior to the industrial accidents and which it would not/does not to any other employee, so as to continue to receive the benefit of Mario's special knowledge, skill set and expertise regarding the farm's unique irrigation system. Such comes totally within the definition of a "sympathetic employer." Upon this basis, the Commission was in clear error when it determined that Mario's current position at Meyers Farms was sufficient to rebut a prima facie showing of odd-lot status.

VI. Claimant's Motion for Reconsideration; to Reopen; for Modification of Award; and, for Consolidation

These Motions, hereafter collectively referenced as "post-award motions," were filed responsive to the Commission's rationale and methodology in reducing Mario's disability from "profound, and possibly total and permanent" to but 40% of the whole person, upon noting that Mario remained an employee of Meyers Farms, with significant annual increases in earnings; and, that Mario was "...an older worker (and) ...near the end of his work life and holds employment in which he is likely to remain until he retires (and) ...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." F/F ¶ 112-115, pp. 66-68. Even prior to the Commission's April 9, 2018, decision, this speculation by the Commission was shown to be ill-founded and overly optimistic. Upon June 7, 2017, Mario injured his left knee at work and presents status-post arthroscopic surgery by Dr. Miers Johnson. Upon April 16, 2018, Dr. Johnson noted that Mario requires left TKA.

Following left TKA, Mario will present status-post anterior diskectomy, C6-7 with arthrodesis, C5-6 arthrodesis, Bengal cage lordotic prosthetics times 2 and anterior stabilization; left ulnar nerve neurolysis, anterior subcutaneous transposition; left subacromial decompression, distal claviculectomy, labral and joint debridement with rotator cuff repair; right TKA; and, left TKA. Cumulatively, the effects and residuals from these injuries undermine the Commission's speculation that, "[t]here 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."

Related to the June 7, 2017, left knee injury, the Fund denied authorization for Mario to proceed with left TKA. Absent TKA, Mario has restrictions which include preclusion of repeated bending/stooping; preclusion from continual standing and/or walking; preclusion from lifting greater than 20 pounds; and, preclusion from "climbing into pivots." Ex. C, Affidavit of Claimant in Support of Post-Award Motions, dated April 23, 2018. ***R.***, pp. 209-212. Thusly, Mario's restrictions/limitations flowing from his industrial left knee injury preclude him from performing services essential to his employment at Meyers Farms, even within the scope of his special skill set, knowledge and expertise of the farm's irrigation system. As noted by Mr. Meyers at hearing, Mario is "the only one qualified to troubleshoot and repair the pivots... (which) ...involve some degree of climbing." ***Tr.***, p. 179, L. 18-p. 180, L. 7. Ironically, Mario's left knee injury was the result of an accident while working upon the farm's pivot irrigation systems.

Clearly, one of the principal assumptions, derived by and through pure speculation on the part of the Commission, advanced as basis for the reduction of Mario's disability from "profound" and potentially total and permanent, that "[t]here 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," was short-lived.

The Commission's decision also emphasized that Mario had enjoyed continuous employment and earnings, with significant annual increases, through the date of hearing, which it rationalized as additional basis to reduce Mario's disability. Attached to Mario's Affidavit in Support of Post-Award Motions as Exhibits A and B are copies of his W-2s for 2016 and 2017. ***R.***, 213-14. Mario's hearing was held in 2016. Promptly following that hearing Mario's earnings from Meyers Farms went from $47,690.00 to but $27,500.00, being a drop of $20,190.00. Thusly, the second basis advanced by the Commission to support reducing Mario's disability also proved to be short-lived.

Upon these facts Mario's Post-Award Motions were as follows:

1. **Motion for Reconsideration:** As above-shown, the factors considered by the Commission which resulted in its treatment of Mario as an "older worker" in the exact opposite manner than typically and customarily done were unsupported of record; the product of speculation by the Commission; and, short-lived/invalid, in stark contrast to the promise of that "sure and certain relief" promised by I.C. § 72-201, and warranted the Commission's reconsideration of its rationale, methodology and result encompassed within the April 9, 2018, decision.

2. **I.C. § 72-719 Motion for Modification:** This aspect of Mario's Post-Award Motions argued that, following hearing, he had suffered a significant and substantial change in the nature or extent of his disablement, which reopening and/or review of the April 9, 2018, decision was required

to correct. In short, upon analogous grounds and references to the record as advanced in support of his Motion for Reconsideration, Mario argued that the nature of his disablement had significantly increased subsequent to the April 9, 2018, decision, upon consideration that the Commission's assumptions that his time-of-hearing employment would continue at then current or higher wages; and, that he would not become unable to perform the requirements of that employment "until he decides to retire," became invalid.

Following the 2017 industrial left knee injury Mario is squarely faced with the dilemma of either continuing in his employment, and thereby engaging in activities in excess of his medical restrictions and/or limitations; or, refusing to engage in those physical activities and being terminated. Either of these choices represents an extreme manifest injustice which requires correction and flows directly from the invalidity of the Commission's above-referenced assumptions.

In its June 22, 2018, Order the Commission determined that an I.C. § 72-719(1)(a) Motion, required a change in the Claimant's impairment, as opposed to the employee's disablement, such that the motion can not be premised upon a showing of a change in a non-medical factor, standing alone. In so doing, the Commission "borrowed" the definition of "disablement" from I.C. § 72-102(22)(c), irrespective of the fact that that code section is limited to occupational disease claims as opposed to industrial injury claims. Order on Motion, p. 17. The Commission also cited ***Magee v. Thompson Creek Mining Co.***, 152 Idaho 196, 268 P.3d 464 (2011), as support for its position.

In ***Magee***, following hearing the claimant relocated from Cascade, Montana, with a population of approximately 2000, to Radersburg, a small mining town with a population of approximately 150 people. In effect, the claimant was arguing that by reason of his voluntary relocation from Cascade to Radersburg, he had suffered a change in the nature or extent of his

disablement. The Commission rejected that argument and this Court affirmed. As noted in ***Brown v. Home Depot***, 152 Idaho 605, 272 P.3d 577 (2012), a party's action that has the effect of manipulating the outcome of a disability determination should not be allowed.

In the instant matter, Mario's industrial left knee injury was, most certainly, not volitional on his part, nor was his employer's reduction of Mario's wages from $47,690.00 to $27,500.00, being a 42.2% decrease. The Commission's Order on Motions noted that ***Magee*** cited ***Matthews v. Dept. of Corrections***, 121 Idaho 680, 827 P.2d 693 (1992). However, in ***Matthews***, the claimant was arguing that he had misunderstood the effect of a lump sum settlement of his Title 72 claim, which the Court determined did not support an I.C. § 72-719 Motion.

An I.C. § 72-719(1)(a), motion can be made upon a change in the nature or extent of the employee's "injury or disablement." Obviously, injury should not be construed the same as disablement. Injury is anatomical whereas disablement encompasses the physical injury as well as non-medical considerations upon the claimant's capacity for employment. No other reading of the statute comports with common sense. Mario is not arguing that such motion may be premised upon a change of circumstance of his own creation. However, where such is not the case the underlying humane purpose upon and by reason of which Title 72 was enacted fully supports that an I.C. § 72-719(1)(a) Motion may be premised upon facts as advanced herein.

3. **Motion for Consolidation:** Here, Claimant argues as an alternative that his Title 72 claims relating to the 2009 and 2013 industrial injuries should be reopened and consolidated with his pending claim flowing from the June 7, 2017, industrial left knee injury. If the Commission's April 9, 2018, decision is allowed to stand, Mario will never be entitled to and Title 72 Defendants herein will never be responsible for the differential between the profound and possible total and

permanent disability which Mario would have been awarded but for his current employment and the assumptions thereupon made, and the 40% disability actually awarded, with a singular exception. That exception is if it is determined within the 2017 left knee proceeding that Mario is totally and permanently disabled by reason of that injury and preexisting impairment, the Idaho Special Indemnity Fund would then be responsible to the extent of Mario's disability relating to that prior/preexisting impairment. However, even so, Title 72 Defendants herein escape responsibility for that which should be theirs with that responsibility then becoming that of the ISIF. Further, should Mario continue to be employed with/at Meyers Farms, just as in the underlying proceedings and under the same analysis and methodologies advanced by the Commission's April 9, 2018, decision, it is conceivable if not probable that Mario would not be found to be totally and permanently disabled, in which case his recovery in that proceeding would be limited to the impairment and disability flowing solely and strictly from the 2017 left knee injury, leaving unpaid the Title 72 benefits corresponding with that which was not awarded herein, again being the differential between disability which is profound and possibly total and permanent and a 40% award. Such result would be unconscionable, constitute a manifest injustice, and fly in the face of the promise of Title 72, being "sure and certain relief for injured workman."

Upon consideration of the above, it is clear that the record compels reconsideration of the Commission's April 9, 2018, decision; the modification thereof pursuant to I.C. § 72-719(1)(a) and/or (3); or, consolidation of the instant matter with pending Title 72 claims in I.C. 2017-017451.

VII. Claimant is Entitled to Attorney's Fees Pursuant to I.C. § 72-804; and/or, IAR 41.

Pursuant to I.C. § 72-804, attorney's fees shall be awarded if the employer contested a claim without reasonable grounds. The conduct of Defendants/Defendants' counsel must be subject to the

rule of good faith. Defendants'/Defendants' counsel's conduct "set-up" Dr. Montalbano's opinions to be in favor of Defendants' position. Defendants failed to provide Dr. Montalbano with evidence of record supporting Mario's claims, even to the extent of disclosing that Dr. Hajjar, who is in the same practice as Dr. Montalbano and whose opinions Dr. Montalbano holds in high regard, had last issued opinion that Mario's presentment following the 2009 motor vehicle accident was related to that accident. Defendants further failed to provide Dr. Montalbano with the McCready Questionnaire specific to Mario's two presentments shortly prior to the October 6, 2009, motor vehicle accident, wherein PA-C McCready confirmed that neither of those presentments was by reason of significant low back issues.

Overall, Defendants' conduct and positions taken herein have been unreasonable and deceptive, giving rise to punitive fees pursuant to I.C. § 72-804.

CONCLUSION

In the underlying proceedings, the Commission committed reversible error upon multiple occasions and upon multiple issues, as thoroughly above-discussed.

In a recent decision the Commission noted, "[i]t is important to recall an axiom of workers' compensation that is so frequently repeated in case law it tends to fade into the noise instead of standing out, as it should be, that the Act is to be liberally construed in favor of finding compensation." ***Marquez v. Pierce Painting***, I.C. 2010-012699 (July 10, 2017), F/F ¶ 23, p. 13. Apparently not so here. Not only did the Commission fail to "liberally construe" the Act, but it constricted it upon the basis of unsupported speculation and treatment of Mario's age in the exact opposite manner as mandated by both precedent and statute. In doing so the Commission lost sight of the fact that the objective of I.C. § 72-425, being the evaluation of permanent disability, is the

determination of whether and to what extent a Title 72 claimant's ability to compete for employment in an open labor market has been diminished. In the instant matter, the Commission's decision was clearly not premised upon the open labor market but, rather, speculation regarding Mario's continued employment with/at Meyers Farms and his continuing to be paid the same or higher wages thereby.

The Commission's findings and conclusions were not supported by substantial and competent evidence of record; failed to set forth specific findings required for meaningful appellate review; and, were not the result of the correct application of controlling statute to facts of record. Rather, the same were the product of repeated error and the result of the Commission acting in excess of its authority, power and jurisdiction. Upon this basis, Appellant respectfully requests that the Commission's April 9, 2018, decision together with those subsequent Orders refusing to revisit the same be reversed, with specific instructions on remand regarding Mario's odd-lot status and/or determination of appropriate permanent disability upon the established record.

Respectfully submitted this 3 day of December, 2018.

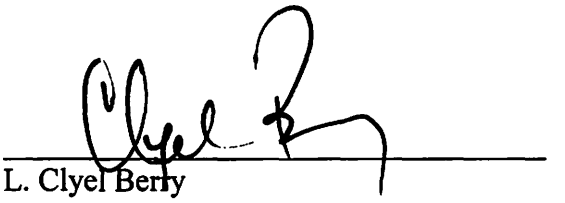
STEPHAN, KVANVIG, STONE & TRAINOR

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 3 day of December, 2018, 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

JUDICIAL RULES OF PRACTICE AND PROCEDURE

Under the Idaho Workers' Compensation Law

Effective April 26, 2017

IDAHO INDUSTRIAL COMMISSION
700 South Clearwater Lane
PO Box 83720
Boise, ID 83720-0041
(208) 334-6000 – FAX (208) 332-7558
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INTRODUCTION

By virtue of the authority vested in the Industrial Commission pursuant to Idaho Code §§ 72-508 and 72-707, the Industrial Commission of the State of Idaho hereby adopts the following rules of procedure governing judicial matters under its jurisdiction as provided by the Idaho Workers' Compensation Law. These rules shall amend and supplement those rules previously adopted by the Commission.

COMMENT: *This paragraph is intended to introduce the reader to the authority vested in the Commission to establish its procedural rules.*

RULE 10.

HEARING PROCEDURE

A. Presiding Officers.

Hearings are held before one or more Commissioners or a Referee appointed by the Commission. The presiding officer in each case is designated by the Commission.

B. Stipulations.

The parties may stipulate to the facts of any case in writing and the Commission may make its order or award thereon.

C. Exhibits.

1. Unless good cause is shown to the contrary at least 10 days prior to a hearing, each party shall serve on all other parties complete, legible, and accurate copies of all exhibits to be offered into evidence at hearing, including, but not limited to, medical records. The proposed exhibits shall be arranged in chronological order with the first exhibit as the earliest date: proceeding to the last as the latest date. All pages within each exhibit shall be numbered in consecutive order. Each party shall file a notice with the Commission that service of such exhibits has been completed.

2. In the event that the existence of a proposed exhibit is discovered in good faith and with due diligence less than 10 days before the date of hearing, the party discovering the same shall immediately notify all other parties of the existence of the exhibit. The party shall also serve a complete, legible and accurate copy of the exhibit on all other parties, and file with the Industrial Commission a notice indicating the proposed exhibit has been served.

3. All parties are encouraged to present the Commission, at hearing, with an electronic copy (in .pdf format) of all exhibits to be offered. Each exhibit within the electronic copy shall be clearly identified by its exhibit letter or number. An electronic copy shall not substitute for the requirement to provide a paper copy of exhibits at the hearing.

D. Depositions.

Generally - The testimony of any witness or witnesses may be presented by deposition prior to the conclusion of the hearing, provided that the party offering the deposition testimony provides reasonable notice prior to the taking of the deposition that the deposition may be used for testimonial purposes. The deposition testimony of any witness also may be presented prior to

the conclusion of the hearing by agreement of the parties. Absent such notice or agreement, a deposition may be used only to the extent allowed by the Idaho Rules of Civil Procedure.

E. Post-hearing Depositions.

1. At the conclusion of a hearing, unless the parties agree to a shorter time, the record shall remain open for the submission of expert testimony through post-hearing deposition. Notice of all depositions to be taken pursuant to this subsection must have been be filed with the Commission and served on all other parties not later than 10 days prior to the hearing. The original of all post-hearing depositions shall be filed with the Commission.

2. A party who has given notice of a deposition under this subsection may vacate the deposition only by serving reasonable written notice on all other parties and giving them an opportunity to respond. Any party who objects to vacating a post-hearing deposition must serve reasonable written notice of its objection on all other parties. If any party serves a notice of objection as provided herein, the deposition shall not be vacated; provided, however, that the service of a notice of objection shall constitute a certification that the party or parties objecting to vacating the deposition will bear the costs of the deposition.

3. All depositions to be submitted on behalf of a claimant must be taken no later than 14 days after the conclusion of the hearing; all depositions to be submitted on behalf of a defendant must be taken no later than 28 days after the conclusion of the hearing. The Commission may alter the time limits within which to notice or take post-hearing depositions upon the filing of a motion showing good cause for such modification: Provided, however, that any stipulation or motion to enlarge the period for post-hearing depositions must be submitted to the Commission for its approval prior to the expiration of the original period and must set forth reasonable grounds for such enlargement and the extent of the enlargement sought.

4. Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing as well as on expert testimony developed in post-hearing depositions. Lay witness rebuttal evidence is only admissible post-hearing in the event new matters have been presented and the Commission so orders.

F. Evidence.

The filing of a document, including a pre-hearing deposition, does not signify its admission in evidence, and only those documents which have been admitted as evidence shall be included in the record of proceedings of the case.

G. Medical Reports.

Any medical report(s) existing prior to the time of hearing, signed and dated by a physician, or otherwise sufficiently authenticated, may be offered for admission as evidence at the hearing. The fact that such report(s) constitutes hearsay shall not be grounds for its exclusion from evidence.

H. Hearing Transcript and Deposition Procedure.

1. All requests for copies of hearing transcripts shall be in writing and filed directly with the Commission. The Commission will provide the requesting party with one copy of the hearing transcript. Oral requests will not be honored.

2. The Commission will not honor any request for a transcript made directly to the court reporter. The requester will be responsible for any costs charged by the court reporter for any documents the court reporter provides to the requester. Invoices sent to the Commission for such costs will be returned.

3. Parties that notice a deposition will be responsible for its costs, including the court reporter.

4. The Commission will not provide or pay for copies of pre- or post-hearing depositions.

I. Video Hearings.

The Commission may, *sua sponte* or on a motion made by a party, order the holding of a hearing utilizing video conferencing equipment and facilities available to the Commission under such terms and conditions as the Commission may provide.

COMMENTS: *Subsection C.1 provides a system of organization of exhibits presented to the Commission for its consideration in resolving issues. Bates stamping is encouraged. Although the rule requires service of the exhibits 10 days before the hearing, the Commission would encourage the parties to make every effort for each party to receive the exhibits 10 days before the hearing.*
Subsection E.4 addresses the use of expert testimony and lay witness rebuttal testimony. Subsection H memorializes the Commission's policy to provide hearing transcripts, but not deposition transcripts, upon a party's written request.