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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARIO AYALA, Claimant-Appellant, vs. ROBERT J. MEYERS FARMS, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants-Respondents.	DOCKET NO. 46186-2018 **RESPONDENTS' BRIEF**

RESPONDENTS' BRIEF

Appeal from the Idaho Industrial Commission
State of Idaho, Thomas E. Limbaugh, Chairman, Presiding.

L. Clyel Berry
Residing at Twin Falls, ID for Appellant, Mario Ayala

Paul J. Augustine
Residing at Boise, ID for Respondents, Robert J. Meyers Farms, Inc. and Idaho State Insurance Fund

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STATEMENT OF THE CASE

A. Nature of the Case

This is a worker's compensation case appealed from the Idaho Industrial Commission (hereinafter the "Commission"). Appellant Mario Ayala (hereinafter "Ayala" or "claimant") appeals from the Findings of Fact, Conclusions of Law and Order of the Commission dated April 9, 2018 (hereinafter "2018 Order") which found: (1) that claimant failed to prove that his low back condition was causally related to his 2009 accident and is therefore not entitled to benefits for that condition; (2) that claimant is not totally and permanently disabled under the odd-lot doctrine; and (3) that claimant has suffered disability of 40% of the whole person inclusive of impairment due to his 2009 and 2013 industrial accidents.

B. Course of Proceedings

On November 16, 2012, claimant filed two Complaints. The first alleged that on October 6, 2009, he injured his cervical spine, left upper extremity, right upper extremity and low back while employed by Robert J Meyers Farms, Inc. (hereinafter "Employer") R., pp. 1-3. The second alleged that on October 14, 2001, he injured his low back working for Employer. R., pp. 407-408. In both Complaints, claimant alleged entitlement to medical treatment for his low back. In his 2009 Complaint, he alleged entitlement to additional impairment for his low back and benefits for total and permanent disability. R., pp. 1-3. In their Answers, Employer and Idaho State Insurance Fund (hereinafter "Surety") (collectively referred to as "defendants") denied any liability for claimant's alleged lumbar spine injury and for total and permanent disability

benefits. R., pp. 4-5; 409-410. On May 24, 2013, the Commission consolidated the Complaints. R., p. 9. Thereafter, on March 28, 2014, the Commission consolidated these two cases with a third Complaint alleging an accident dated August 28, 2013 causing an injury to claimant's right knee filed on January 24, 2014. R., pp. 9; 411-413. On April 25, 2016, claimant filed a Motion to Enforce an alleged February 17, 2016 settlement agreement between the parties. R., pp. 16-24. On June 7, 2016, the Commission denied claimant's Motion to Enforce. R., pp. 36-38.

On October 26, 2016 Referee Michael Powers held a hearing on several issues, including: (1) whether claimant's lumbar spine condition was due to a pre-existing condition or was not work-related; (2) his entitlement to disability in excess of impairment; (3) whether claimant was totally and permanently disabled pursuant to odd-lot doctrine; and (4) attorney's fees. R., p. 130. On April 9, 2018, the Commission entered its seventy (70) page 2018 Order finding that claimant: (1) failed to establish his low back condition was causally related to his 2009 accident and was not entitled to benefits; (2) failed to establish that he was totally and permanently disabled under the odd-lot doctrine; (3) suffered disability of 40% of the whole person inclusive of his impairment; and (4) was not entitled to an award of attorney's fees. R., pp. 129-199.

On April 25, 2018, claimant filed several motions including a Motion for Reconsideration, a Motion to Reopen, Motion for Modification of Award, and a Motion for Consolidation. R., pp. 207-229. In his Motion for Consolidation, claimant sought to consolidate his 2009 and 2013 claims with a June 7, 2017 industrial accident causing a left knee injury. R., pp. 228-229. On June 22, 2018, the Commission entered an Order on Motion for

Reconsideration, Modification and Consolidation denying all of claimant's post-award motions. R., pp. 279-302. Claimant timely appealed.

C. Statement of the Facts

1. Claimant's October 6, 2009 Motor Vehicle Accident.

Claimant was involved in a motor vehicle accident on October 6, 2009. The parties agree that the claimant suffered injuries to his cervical spine, left shoulder and left ulnar nerve. Following his accident, he went to the Elmore Medical Center where he had no recorded complaints of low back pain. Claimant's Exhibit (hereinafter "Cl. Ex.") 4, pp. 144 - 148. Due to neck pain with radiation into his left arm, claimant was referred to neurosurgeon Dr. Peter Reedy who treated him on January 8, 2010. At that time, Dr. Reedy documented complaints of neck and left arm pain. Cl. Ex. 5, p. 150. The claimant indicated that if he "stands for 20-25 minutes his legs go numb." *Id.* Claimant's gait was normal. *Id.* at p. 151. Dr. Reedy performed a cervical fusion on February 19, 2010. Cl. Ex. 5, p. 155. Following surgery, Dr. Mark Harris evaluated claimant at the request of defendants on August 2, 2010. Claimant's chief complaint was decreased range of motion and pain in his neck and left arm. Claimant told Dr. Harris that he had left leg symptoms that "have now resolved and has no further concerns about that area." Cl. Ex. 20, p. 603. On June 2010, Dr. Reedy released the claimant to return to work in his time of injury position with no restrictions. Cl. Ex. 27, p. 695. On November 18, 2010, Dr. Reedy released claimant from his care. Cl. Ex. 20, p. 164.

On December 9, 2010, Dr. Clawson and Dr. Hessing performed two procedures on

claimant: a left ulnar nerve neurolysis and a left shoulder arthroscopic surgery with subacromial decompression and rotator cuff repair. Cl. Ex. 8, pp. 421, 424-427. On January 11, 2011, Dr. Clawson released the claimant to return to work without restriction. *Id.* at p. 434. On April 20, 2011, Dr. Hessing opined that the claimant was fixed and stable and had a 5% upper extremity impairment rating. *Id.* at p. 446. He released the claimant to return to work without restriction on May 3, 2011. *Id* at p. 447. In April 2011, Dr. Clawson and Dr. Hessing each approved the claimant's job site evaluation and released claimant to return to his job with no restrictions. Cl. Ex. 27, pp. 704-706, 710.

On August 15, 2011, claimant returned to Dr. Harris for a final impairment rating for his cervical spine, left shoulder and ulnar neuropathy of his left elbow. Dr. Harris rated the claimant's combined impairments at 9% of the whole person. Cl. Ex. 20, p. 617. Dr. Harris opined that claimant should "use caution in overhead activities, although no permanent restrictions were given or suggested." *Id.* at p. 618.

2. Claimant's August 28, 2013 Right Knee Injury and Subsequent Treatment

On August 28, 2013, Claimant fell off an 8-foot ladder landing on his feet causing extreme pain in his right knee. Cl. Ex. 12, p. 493. Dr. Miers Johnson treated claimant. On September 11, 2013, Dr. Johnson documented claimant was working full duty without restriction at the time of his accident. Cl. Ex. 13, p. 496. Dr. Johnson documented claimant had low back pain radiating into both interior thighs with numbness and tingling down the legs on an occasional basis. *Id.* Dr. Johnson performed a right total knee arthroplasty on May 6, 2014. *Id.* at

pp. 514-517. On September 22, 2014, Dr. Johnson released the claimant to full duty work with no restrictions. *Id.* at, p. 525. On October 6, 2014, Dr. Shoemaker rated the claimant's impairment at 4% of the whole person due to his knee replacement noting that the claimant had returned to full duty work status. Cl. Ex. 14, p. 538.

On September 1, 2015, claimant went to his personal physician Dr. Ensminger complaining of ***left*** knee pain. Claimant told Dr. Ensminger that his artificial right knee was "doing well." Cl. Ex. 16, p. 563. Claimant also told Dr. Ensminger that he had been doing a lot of work bent over or kneeling during the harvest. Claimant's right knee was normal on examination. *Id.* at p. 566.

On September 25, 2015, claimant underwent a FCE at the request of his counsel. Cl. Ex. 23. Claimant's primary diagnosis was a lumbar spine injury with secondary diagnoses of cervical spine surgery, shoulder surgery, elbow surgery and knee surgery. *Id.* at p. 646. According to the therapist's testing, claimant's *uninjured* extremities' grip strength, range of motion and leg strength were worse than his *injured* extremities. *Id.* at pp. 649-650; 652. Claimant was limited in lifting, elevated activity, bending, standing activities, crouching, kneeling, sitting and climbing stairs. The therapist apportioned the extent to which these restrictions were attributable to his low back vis-à-vis his other body parts. *Id.* at p. 647.

On August 1, 2016, at the request of his counsel, claimant saw neurologist Dr. Hammond. Dr. Hammond reported regarding claimant's shoulder and ulnar neuropathy, "*he has been left with minimal residual from these ailments.*" Cl. Ex. 24, p. 659a (emphasis added).

With respect to his right knee, claimant said it "*feels good, has no pain and actually works better than his left.*" *Id.* (emphasis added). With regard to the Claimant's left shoulder, Dr. Hammond stated it "feels well and occasionally is stiff, but *he can do pretty much everything he wants with this.*" *Id.* (emphasis added). Claimant had no difficulty with grip or using his left arm or hand other than a little bit of numbness in his palm. *Id.* His chief complaint was significant low back pain. *Id.* at p. 659c.

3. Claimant's Low Back Treatment Pre and Post October 6, 2009

Claimant's documented history of low back pain began in May 2007 when he told Dr. Booth that he had right hip and SI pain for two years. Cl. Ex. 20, p. 629. On September 9, 2009, PA Vern McCready at Glenns Ferry Health Clinic (hereinafter "GFHC") treated claimant due to a chief complaint of back pain in the upper mid and low back which had an abrupt onset for approximately one week. Cl. Ex. 3, p. 136. Claimant had muscle spasms that were mild and located at his vertebra. *Id.* at p. 137. Mr. McCready prescribed a one-month supply of Flexeril and Naprosyn. *Id.* at p. 138. One day prior to his accident, on October 5, 2009, Mr. McCready diagnosed Claimant with obesity, asthma and back pain. *Id.* at p. 143. Claimant reported having back pain, joint pain and stiffness. PA McCready prescribed a one-month supply of Naprosyn. *Id* at p. 141.

Following the claimant's October 6, 2009 accident, he sought treatment at GFHC. He specifically denied having back pain on November 4, 2009, November 16, 2009, November 30, 2009 and December 11, 2009. Cl. Ex. 3, pp. 196, 206, 208 and 211. On April 7, 2010, claimant

reported having no tenderness over his spine or SI joints, he had full spine range of motion without pain and negative straight leg raises on both sides. *Id.* at p. 218. The claimant first reported having back pain to his personal physician on June 21, 2010. At that time he reported that he had back pain "which is new" and located in his *mid*-right back. *Id.* at p. 225. On July 21, 2010, he reported having *mid* back pain of one-month duration. *Id.* at p. 231.

On December 1, 2011 claimant informed PA McCready that he was suffering from lumbar pain that began "*two weeks ago.*" Cl. Ex. 3, p. 288 (emphasis added). The pain was moderate and radiated into his right and left legs. Claimant reported the "*onset of the back pain was gradual and began without a clear precipitating event*." *Id.* (emphasis added).

At the request of Dr. Reedy, claimant had a myleogram of his lumbar spine on April 3, 2012. The radiologist stated it showed "no significant lateralizing mass effect." Cl. Ex. 11, p. 489. Dr. Paul Montalbano testified that this signified that there was no compression of the nerve root; therefore claimant was not a surgical candidate. Montalbano depo., p. 65, ll. 14-25. A post CT myelogram of his lumbar spine showed lumbar spondylosis resulting in severe bilateral L5-S1 foraminal stenosis, moderate bilateral L4-5 foraminal stenosis and multilevel mild canal and foraminal stenosis elsewhere. Cl. Ex. 11, p. 491. On August 7, 2012, Dr. Michael Hajjar recommended lumbar fusion surgery. Cl. Ex. 10, p. 471.

On August 30, 2012, Surety asked Dr. Harris if claimant's complaints of low back pain were related to his 2009 motor vehicle accident. Cl. Ex. 20. pp. 631-632. On September 21, 2012, Dr. Harris opined that claimant's low back problems were not related to his October 6,

2009 accident. Cl. Ex. 20, pp. 629-630. He noted that claimant did not indicate he had a low back problem on a medical exam questionnaire or a pain diagram he filled out on July 31, 2010. *Id.* at p. 629. Dr. Harris noted claimant had documented pre-existing low back pain in September 2009 and May 2007 and opined that his low back pain was not causally related to his October 2009 accident. *Id.* at p. 630.

In April 2013, defendants' counsel asked Dr. Montalbano to review claimant's medical records and provide an opinion regarding causation of claimant's low back complaints. Cl. Ex. 20, p. 637. Dr. Montalbano provided a verbal opinion that based upon medical records the claimant's low back complaints were not related to his industrial accident in 2009. Montalbano depo., p. 6, ll. 12-16.

In October 2014, Dr. Montalbano became claimant's treating physician upon referral by Dr. Johnson for an evaluation of claimant's low back and lower extremity symptoms. *Id.* at p. 7, ll. 1-12. On October 15, 2014, Dr. Montalbano performed a physical examination that was normal except the claimant had an antalgic gait and positive straight leg raise. Cl. Ex. 17, pp. 569-570; Montalbano depo., p. 9, ll. 10-19. Dr. Montalbano recommended an MRI and x-rays to rule out canal stenosis or nerve root compression instability. *Id.* at p. 11, ll. 2-4.

Claimant underwent a post myelo CT and x-rays on October 22, 2014. Dr. Montalbano reviewed the actual films. Cl. Ex. 19, pp. 590-594; Montalbano depo., p. 11, ll. 15-22. Dr. Montalbano noted that the x-rays showed anterolisthesis at L4-5, which was grade one related to arthritis of his facet joints. *Id.* at p. 12, ll. 1-4. The post myelo CT showed arthritis of the facet

joints and neuroforaminal narrowing secondary to the facet issues. *Id.* at p. 12, ll. 5-9. Dr. Montalbano testified that based upon his review of these films although there was lateral recess stenosis at L4-5 and L5-S1 there was no evidence of nerve root compression or central canal stenosis to explain claimant's symptoms. *Id.* a p. 12, L. 10 - p. 13, L. 6.

Dr. Montalbano reviewed the 2012 films taken of the claimant's lumbar spine and compared these to the 2014 films. He testified there was no progression of the underlying arthritic condition in his lumbar spine, no change in instability and no change in the lateral recess stenosis. He added that there was no evidence of nerve root impingement to explain the claimant's leg symptoms. *Id.* at p. 14, L. 5-p. 15, L. 6.

In February 2015, Dr. Montalbano recommended a bone scan because he was looking for an inflammatory condition to explain claimant's pain. It showed mild increase uptake involving a right L4-5 and L5-S1 facet joints due to arthritis but not a surgical condition. *Id.* p. 15, L. 10-p. 16, L. 1. The scan did not explain claimant's low back pain. *Id.* at p. 16, ll. 14-18.

On April 8, 2015, claimant's musculoskeletal exam was normal including reflexes, sensory exam and strength; but he still had a painful gait. Cl. Ex. 17, p. 573. A neurologic exam was normal including reflexes and sensation. Montalbano depo., p. 16, L. 23-p. 17, L. 6. Dr. Montalbano then recommended a right L4-5 facet injection to determine if it was his pain generator. *Id.* at p. 17, ll. 7-14. On May 6, 2015, the claimant underwent a facet injection with little improvement so Dr. Montalbano concluded the right L4-5 joint was not claimant's pain generator. Dr. Montalbano testified that the claimant's facet issue was a degenerative arthritic

condition not caused by trauma. *Id.* at p. 18, ll. 11-25. Dr. Montalbano recommended physical therapy and a weight reduction program because claimant was morbidly obese and his deconditioning and his body habitus caused his low back pain. *Id.* at p. 19, ll. 8-15.

On June 3, 2015, after undergoing physical therapy, claimant saw Dr. Montalbano. He was much improved. His gait and station were normal, and his back pain had improved. *Id.* at p. 20, ll. 1-17. Dr. Montalbano opined that the claimant's back pain was due to his body habitus and deconditioning. *Id.* at p. 21, ll. 2-7. Claimant was not a surgical candidate because his symptoms did not correlate to imaging studies, his bone scan was normal and there was no evidence of nerve root compression. *Id.* at p. 21, ll. 8-18.

On July 8, 2015, Dr. Montalbano, after receiving a "limited amount" of medical records from Mr. Berry, authored a letter indicating that claimant's motor vehicle accident was the source of his low back pain because Dr. Montalbano thought claimant was asymptomatic before the accident. Cl. Ex. 17, p. 576; Montalbano depo., p. 23, L. 18-p. 24, L. 2. Dr. Montalbano then received a complete set of the claimant's medical records including his September 9, 2009 and October 5, 2009 appointments. Cl. Ex. 21, p. 640. Since claimant complained of back pain before his motor vehicle accident Dr. Montalbano noted the claimant was not asymptomatic. Montalbano depo., p. 26, ll. 11-20 Dr. Montalbano thus opined on October 3, 2015 that the claimant's symptomatology was due to the degenerative condition of his spine and that he had only suffered a lumbar strain as a result of his accident which had resolved. Cl. Ex. 21, p. 639.

On January 6, 2016, defendants' counsel provided Dr. Hajjar with medical records

documenting claimant's complaints of back pain prior to his accident. Cl. Ex.10, p. 472c. On January 27, 2016, Dr. Hajjar agreed with Dr. Montalbano's assessment that the claimant's motor vehicle accident did not cause his current low back symptomology. He stated "at the present time, based upon Mario's history, any issue related to that accident has ran its course a long time ago." He added that he believed that the "causation question was fairly clear that Mr. Ayala had a pre-existing condition causing back pain which was not exacerbated in any meaningful way from the car accident that occurred on October 6, 2009." Cl. Ex.10, pp. 472a-472b. Shortly thereafter, claimant's counsel submitted a four-page letter to Dr. Hajjar requesting his opinion regarding causation. Cl. Ex.10. pp. 472g - 472j. On February 19, 2016, Dr. Hajjar changed his opinion because he felt that claimant's prior treatment for back pain sounded "more like a flulike illness or viral prodrome versus any type of mechanical back issues." Cl. Ex. 10, p. 472f. .

In a post-hearing deposition, Dr. Montalbano opined claimant had low back pain due to a pre-existing condition, i.e., degenerative arthritis accentuated by morbid obesity. He testified claimant showed no evidence of a traumatic injury to his spine due to his motor vehicle accident. Montalbano depo., p. 29, ll. 24-30. He disagreed with Dr. Reedy's opinion that the motor vehicle accident caused or aggravated his pre-existing condition. Dr. Montalbano explained that claimant was symptomatic prior to his motor vehicle accident, he had no complaints of lower extremity symptoms for several months following his accident and he denied having low back pain on several occasions following his motor vehicle accident as documented by claimant's GFHC medical records. *Id.* at p. 31, ll. 1-19.

4. Testimony and Opinions of Nancy J. Collins, Ph.D.

Claimant hired Dr. Collins to provide an opinion regarding the extent of his disability. Dr. Collins opined that due to claimant's 2009 and 2013 accident and the results of the FCE that claimant was totally disabled. Collins depo., p. 17, ll. 6-12. She explained claimant's past work is heavy to very heavy and his current FCE restrictions are for limited light work. Cl. Ex. 32, p. 848. She based her opinion on her understanding that claimant cannot perform his job he did before his injuries by working longer hours, delegating and super human effort to make sure the work is done. She felt that he was not competitively employable with his restrictions and that without accommodation and a sympathetic employer he would not qualify for any job that exists in his labor market. *Id.* at p. 851.

Dr. Collins admitted that the objective medical evidence that she considers are "the restrictions that (the treating physicians) provide when they are medically stationary." Collins depo., p. 59, ll. 4-8. She acknowledged that none of the claimant's treating physicians imposed any restrictions at the time he was medically stable. *Id.* at p. 59, ll. 9-16. Dr. Collins admitted that her statement in her report that claimant's treating physicians did not make specific restrictions for the avoidance of any physical activity "except as tolerated" was not supported by the medical records. *Id.* at p. 60, ll. 3-15. She admitted that if the claimant had no restrictions then he has no disability. *Id.* at p. 62, ll. 12-22. She acknowledged that if claimant represented to his doctors that he was able to do his regular job without restriction following his automobile accident he is not totally and permanently disabled. *Id.* at p. 89, ll. 16-24. She also admitted she

did not know whether his treating physicians imposed restrictions or gave him releases to return to work based upon the information Mr. Berry provided her. *Id.* at p. 94, ll. 10-24.

With regard to claimant's ability to obtain employment in the Mountain Home and Bruneau area based solely on nonmedical factors, she admitted that she did not know how many jobs would be available. *Id.* at p. 73, L. 10 - p. 74, L. 16. She did not know how many frontline farm supervisor positions were available or existed in his labor market. *Id.* at p. 75, ll. 1-6.

5. Testimony and Opinions of William C. Jordan

Mr. Jordan prepared an employability report on February 2, 2016. Def. Ex. 9, pp. 190-214. Mr. Jordan testified that the claimant is a very valuable employee for the Employer because he knows the equipment; how to balance the water pumps so that they operate correctly; how to run the large pivots; and how to repair the pivot, pump and irrigation equipment. Jordan depo., p. 18, L. 19-p.19, L. 18. He noted the claimant also operates farm equipment and helps coordinate the harvest, including supervising two to three people. *Id.* at p. 19, L. 19-p. 20, L. 7.

Claimant told Mr. Jordan that he is able to lift 50 pounds of seed, push a grocery cart, bend and stoop and use a cherry picker for lifting. *Id.* at p. 22, L. 8-p. 24, L. 16. Based upon his knowledge of the farms in the area where claimant worked, Mr. Jordan indicated that ranch hands and farm laborers in their sixties are not doing the heavy aspects of the work because they are too old to physically handle it. *Id.* at p. 25, ll. 2-9.

Mr. Jordan considered that the Employer indicated that claimant was a good worker, he was a foreman of the farm and that he supervised two other employees. Mr. Meyers indicated

the claimant still does the same job tasks after his accidents, but he goes about it a little differently and that they planned to keep him around. *Id.* at p. 38, L. 11-p. 40, L. 12. Mr. Meyers indicated claimant possessed institutional knowledge about how to draw water using the pumps and operating the pivots for irrigating which has to be managed and balanced. He also talks to the chemical distributors for fertilizer and pest control. *Id.* at p. 41, ll. 9-25.

Mr. Jordan also contacted other employers in the area on October 14, 2016 to determine if claimant would be employable considering his skills. One farmer indicated that there would be an employment market for an individual such as claimant who is sixty-four, Hispanic, bilingual, and possess the background in repairing and operating waterline systems and proper watering of large acreages. *Id.* at p. 46, ll. 1-22. Mr. Jordan opined that the claimant had either no disability due to the full releases from his physicians or a 47% disability inclusive of impairment using the results of the FCE (including low back complaints). Def. Ex. 9, p. 173.

ARGUMENT

A. There is Substantial and Competent Evidence to Support The Commission's Finding That Claimant Failed to Meet His Burden of Proving That His Lumbar Condition was Causally Related to His 2009 Accident.

The initial issue the Commission decided was whether claimant's low back complaints at the time of hearing in October 2016 were causally related to his October 6, 2009 motor vehicle accident. The resolution of this issue impacted claimant's alleged entitlement to further medical, impairment and disability benefits. As the Commission noted, and as should be readily apparent

to this Court, the parties devoted reams of exhibits, expert testimony and arguments on this issue. In fact, the parties' failure to agree to the resolution of this issue caused the need for the hearing as the parties thought they had settled the disability issues prior to hearing but could not agree on this medical causation issue. R., p. 18; 2018 Order, ¶68, R., p. 168. In analyzing this issue, the Commission recognized that "the objective medical evidence must be correlated with the Claimant's history and clinical examination to inform an opinion on whether or not the subject accident did cause some permanent injury to Claimant's lumbar spine." 2018 Order, ¶68, R., p. 169.

The Commission then ruled in favor of defendants on this issue stating:

> Having reviewed the record in its entirety, and having considered the writings and testimony of all the physicians who have rendered an opinion on the cause of Claimant's low back condition, the Commission concludes that Claimant has failed to demonstrate, to a reasonable degree of medical probability, that his current low back complaints are causally related to the subject accident.

2018 Order, ¶ 70, R., p. 169. As is shown below, there is substantial and competent evidence to support the Commission's finding.

1. Standard of Review

When the Supreme Court reviews a decision from the Industrial Commission, it reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Medical causation is generally a question of fact which will not be disturbed on appeal where

there is substantial and competent evidence to support it. *Reyes v. Idaho Supreme Potatoes*, 133 Idaho 385, 387-388, 987 P.2d 297, 299-300 (1999). Substantial and competent evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Boise Orthopedic Clinic v. Idaho State Ins. Fund (In re Wilson),* 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). However, all facts and inferences must be viewed in the light most favorable to defendants herein as they prevailed before the Commission. *Jordan v. Dean Foods*, 160 Idaho 794, 798, 379 P.3d 1064, 1068 (2016). This Court will not re-weigh the evidence or consider whether it would have drawn a different conclusion from the evidence presented. *Excell Contr., Inc. v. State, Dept. of Labor*, 141 Idaho 688, 692, 116 P.3d 18, 22 (2005). This Court will not disturb the Commission's findings on the weight and credibility of the evidence unless those conclusions are clearly erroneous. *Shubert v. Macy's W., Inc.*, 158 Idaho 92, 98, 343 P.3d 10 99, 1105 (2015) *abrogated on other grounds by Chavez v. Stokes,* 158 Idaho 793, 353 P.3d 414 (2015). While the terms of Idaho's workers' compensation statute are liberally construed in favor of the employee, "conflicting facts need not be construed liberally in favor of the worker." *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 755, 302 P.3d 718, 723 (2013).

2. Claimant's Burden to Establish Causation

The permanent aggravation of a preexisting condition is compensable under Idaho's workers' compensation law. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978). An employee may be compensated for the aggravation or acceleration of a preexisting condition, but only if the aggravation results from an industrial accident as defined

by Idaho Code § 72-102(17). See, *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994). Claimant has the burden of proving that his low back condition is causally related to his 2009 industrial accident. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014).

The level of proof required for showing causation is "a reasonable degree of medical probability...." *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). When causation is at issue, the Commission's role is "to determine the weight and credibility of testimony and to resolve conflicting interpretations of testimony." *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006). "The Commission may not decide causation without opinion evidence from a medical expert." *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (quoting *Anderson*, 143 Idaho at 196, 141 P.3d at 1065).

In this case, the Commission was asked to resolve the conflicting and often vacillating opinions of Dr. Harris and Dr. Montalbano (who opined that the claimant's low back condition was not causally related to his industrial accident) and Dr. Hammond, Dr. Reedy, Dr. Hajjar and PA Vernon McReady as to whether claimant's low back condition was caused 2009 accident. As the factfinder, the Commission is free to determine the weight to be given to the testimony of physicians. *Fife v. Home Depot, Inc.*, 151 Idaho 509, 514, 260 P.3d 1180, 1185 (2011). In resolving this conflict in favor of the defendants, the Commission relied on claimant's numerous objective medical records in an attempt to correlate the medical causation opinions with the claimant's history, clinical presentation and examinations.

As is shown below, there is substantial and competent evidence to support the Commission's finding that based upon the testimony of Dr. Montalbano and the objective medical records, the "record better supports the proposition that claimant suffered from periodic, but not unrelenting, low back and lower extremity discomfort between October 6, 2009 in the late fall of 2011, just as he suffered from periodic bouts of low back pain in the years prior to October 6, 2009… For these reasons, claimant failed to establish that his low back condition is causally related to the subject accident." 2018 Order, ¶ 77, R., pp. 175-176.

3. The Commission's Finding is Supported by The Record and Expert Opinions

Claimant's argument that his motor vehicle accident either caused or aggravated his low back pain is based upon two false premises: (1) that his back pain before his accident was due to the flu rather than his pre-existing condition (he was asymptomatic) and (2) that following his accident he had persistent unrelenting low back and leg pain. The Commission analyzed these arguments and rejected both of them, as the record did not support them.

As the Commission properly noted, the radiological studies establish claimant has multilevel degenerative disease of the lumbar spine that predated his accident. 2018 Order, ¶71, R., p. 169. Claimant's medical records also document prior low back pain in May 2007 and again on September 9, 2009 and October 5, 2009, the latter only one day prior to his accident. Cl. Ex. 20, pp. 601, 629; Cl. Ex. 3, pp. 138-143.

In an apparent attempt to minimize the significance of his pre-existing low back pain, claimant argued that on September 9 and October 5, 2009 his pain complaints were due to a

systemic complaint such as the flu as opposed to musculoskeletal low back complaints. Thus, he argues he was asymptomatic prior to his accident. Dr. Hammond based his causation opinions, in part, upon his belief that the claimant's back pain in September and October 2009 were due to the flu while his current complaints were caused by a structural abnormality. 2018 Order, ¶ 59, R., p. 164; Hammond depo., p. 17 L. 18 – p. 21, L. 17. Dr. Hajjar opined on February 19, 2016 that claimant's low back pain was caused by his motor vehicle accident because he felt that the claimant's treatment for back pain in September and October 2009 sounded "more like a flulike illness or viral prodrome versus any type of mechanical back issues." Cl. Ex. 10, p. 472f. Finally, Dr. Reedy based his causation opinion on his assumption that the claimant was "asymptomatic until the time of the MVA which precipitated the need for intervention." Cl. Ex. 5, p. 177.

Dr. Montalbano's opinions illustrate the significance of whether claimant's pre-existing degenerative disease of his lumbar spine was asymptomatic. Dr. Montalbano originally indicated to claimant's counsel that since the claimant was "asymptomatic prior to motor-vehicle accidents… It is my opinion that the etiology of his symptomatology would be related to that motor vehicle accident." Cl. Ex. 17, p. 576; R., p. 160. However, after reviewing the September and October 2009 medical records, Dr. Montalbano changed his opinion and concluded that claimant "was symptomatic prior to the work related injury of 10/04/2009 [sic] and, therefore, I would attributed the etiology of his symptomatology to be related to a degenerative condition." Cl. Ex. 21, P. 640a.

In the 2018 Order, the Commission considered the medical records and opinions of the providers regarding the September 9 and October 5, 2009 notes and found that "the evidence does not establish that the back pain or low back pain with which Claimant presented on those occasions was simply a manifestation of a systemic illness such as the flu." 2018 Order, ¶71, R., p. 170. The Commission opined that Dr. Montalbano's reasoning, i.e., that the medications prescribed were typically prescribed for musculoskeletal complaints and that there was no documentation of the flu in the notes, was more persuasive than Dr. Hammond's opinion. 2018 Order, ¶ 72, R., p. 171.

In so doing, the Commission specifically rejected the opinions set forth in PA McCready's January 19, 2016 check the box questionnaire prepared by claimant's counsel. See, Cl. Ex. 6, p. 348. PA McCready was asked to fill out this check the box questionnaire by claimant's counsel in response to a six-page letter dated November 5, 2015 which only summarized the medical records and claimant's counsel's view of the evidence. Cl. Ex. 6, pp. 349-354. The Commission found that the opinions to which PA McCready agreed were vague and not especially probative of causation, a conclusion supported by substantial and competent evidence. *Id.*, at R. pp. 170-171. An examination of propositions to which PA McCready agreed establishes that he did not opine that the claimant's October 6, 2009 motor vehicle accident caused the need for the claimant's subsequent low back treatment. Cl. Ex. 6, p. 348.

The Commission also analyzed and considered whether and to what extent claimant suffered from low back complaints following his October 5, 2009 accident. The Commission

succinctly stated how the resolution of this issue would affect its determination of causation:

> Based on the medical opinions that have been adduced, if claimant's low back complaints following the 2009 accident were persistent and unrelenting, it would be rather easy to conclude that the subject accident must have aggravated Claimant's pre-existing low back disease; objective findings consistent with an accident caused an aggravation of a pre-existing condition could be correlated with the medical history of new and unrelenting back in lower extremity symptoms since the accident to support the conclusion that the accident caused permanent injury to Claimant's low back. On the other hand, if the evidence is more susceptible of a conclusion that Claimant did not present with persistent low back complaints following the subject accident until the late fall of 2011, then it becomes much more difficult to conclude that the subject accident is implicated in the cause of Claimant's low back condition. *The evidence on this issue is conflicting but, as developed below, the record offers less support to the proposition that claimant suffered from persistent and unrelenting low back pain since the October 5, 2009 MVA, and more support to the proposition that his low back complaints began, in earnest, in late 2011.*

2018 Order ¶ 73, R., pp. 171-172 (emphasis added).

The outcome of this issue is significant because Dr. Reedy's opined that the claimant's motor vehicle accident led to "persistent unrelenting pain in the back and leg" and therefore the "motor vehicle accident flared up his pre-existing condition" such that it is "directly related to the need for surgery." Cl. Ex. 5, p. 186. Dr. Montalbano, on the other hand, testified in his deposition that the claimant's post-accident medical records did not establish persistent, unrelenting low back pain; therefore, he opined that the claimant's motor vehicle accident only temporarily aggravated his pre-existing low back condition. 2018 Order, ¶ 57, R., p. 162 (citing Montalbano depo., pp. 30, L. 23 – p. 31, L. 19; p. 32, L. 11 – p. 37, L. 3)

The Commission acknowledged that the claimant testified that he suffered from low back

and lower extremity numbness unremittingly since his motor vehicle accident of October 6, 2009. 2018 Order, ¶ 74, at R., p. 172. (citing Clmt. depo., p. 33, ll. 11-22; HT 95, ll. 13-17.) While both Dr. Reedy and the claimant may honestly have believed that the claimant consistently complained of low back and lower extremity numbness and pain following his accident, the Commission's review of the claimant's medical records establishes otherwise.

The Commission found that the claimant's post-accident medical records generated following his accident until the late fall of 2011 "contain an equal number of records in which claimant specifically denied low back/lower extremity symptoms which reference and examine the low back and lower extremities which turned up nothing on toward." 2018 Order, ¶ 74, R., p. 172. The Commission also correctly noted that on the several occasions when claimant complained of back and low back discomfort following the motor vehicle accident, the onset of these problems was not related to his accident but was described as being of a more recent origin. *Id.*, at R., p. 173. There is substantial and competent evidence to support these findings.

Claimant's medical records demonstrate that he did not have "persistent unrelenting" low back and leg pain after his accident. In the months following his accident, claimant repeatedly denied having low back pain as documented by the records from GFHC (November 4, November 16, November 30, and December 11, 2009). Cl. Ex. 3, pp. 196, 206, 208 and 211. The claimant first reported having back pain to his personal physician on June 21, 2010. At that time, he reported that he had back pain "which is new" and located in his mid-right back. *Id.* at p. 225. On July 21, 2010, he reported having mid back pain of one-month duration. *Id.* at p. 231.

Most significantly, on December 1, 2011, claimant informed Mr. McCready that he was suffering from radiating lumbar pain that began "*two weeks ago.*" *Id.* at p. 288 (emphasis added). Claimant said the onset was *gradual without a clear precipitating event*. *Id.* (emphasis added). In his Opening Brief, claimant's counsel tries to challenge the veracity and reliability of his personal physician's medical records from GFHC. Opening Brief, pp. 28-30. Despite claimant's arguments, these objective medical records document occasional low back pain that became more serious without a clear precipitating event in the fall of 2011.

Moreover, the Commission relied on claimant's failure to document any low back pain on his pain diagram or in his medical questionnaire to Dr. Harris in July 2010, including that he specifically denied that he had continuing leg pain when examined by Dr. Harris. 2018 Order, ¶ 77, R. 175; Cl. Ex. 20, pp. 603, 629-630. The Commission also noted that Dr. Reedy released the claimant from his care once he was medically stable following his cervical fusion rather than treating his low back condition which claimant alleges Dr. Reedy felt required medical treatment. 2018 Order, ¶ 76, R., p. 176.

Claimant's attempt to explain the failure of his medical records to document complaints of persistent unrelenting low back pain because it was his practice to only reference his most predominant complaints to his treating physicians was rejected by the Commission. 2018 Order, ¶ 75, R., pp. 173-175. The Commission provided numerous examples where the claimant complained of multiple issues to his therapists. It is apparent from a review of the entirety of the claimant's medical records that he complained of multiple issues to various physicians, including

complaints of back pain to physicians who were not his "back" doctor. The most significant complaint, which was the most damning to his claim, was his complaint of a new onset of low back pain in 2011 to his personal physician that he did not attribute to his motor vehicle accident or any other precipitating event.

Ultimately, based upon the testimony of Dr. Montalbano and the Commission's review of claimant's medical records, the Commission properly concluded based upon the evidence of record noted above that:

> The record better supports the proposition that Claimant suffered from periodic, but not unrelenting, low back and lower extremity discomfort between October 6, 2009 and the late fall of 2011, just as he suffered from periodic bouts of low back pain in the years prior to October 6, 2009. The opinions of Dr. Reedy, Dr. Hammond and Dr. Hajjar are all premised on the assumption that Claimant's low back symptomatology increase precipitously following the industrial accident.... As described by Drs. Hammond, Montalbano and Reedy, Claimant's lumbar spine films demonstrate degenerative findings with no clear evidence of an acute injury which could be related to the subject accident. For those reasons, Claimant failed to establish that his low back condition is causally related to the subject accident.

2018 Order ¶ 77, R., pp. 175-176.

In his Opening Brief, claimant merely rehashes his arguments previously presented to and rejected by the Commission. As this Court stated in *Hartgrave v. City of Twin Falls*, 163 Idaho 347, 413 P.3d 747, 757 (2018):

> "Distilling [claimant's] arguments ultimately reveals a request for this Court to employ a *de novo* standard of review. Yet, that is not the proper standard of review at this juncture. *E.g.*, *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (" [T]his Court does not 'conduct a *de novo* review of the evidence or consider whether it would have reached a different conclusion from the evidence presented.' "

(quoting *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006)).

Claimant's counsel is asking this Court to do the same thing he did in *Hartgrave*, conduct a *de novo* review of the evidence. As in *Hartgrave*, this Court should affirm the Commission's ruling that the claimant's low back condition is not compensable.

B. There is Substantial and Competent Evidence to Support The Commission's Finding That Claimant Suffered a 40% Disability Inclusive of His Impairment due to his 2009 and 2013 Accidents.

1. Claimant Failed to Meet His Burden of Proving He Is Totally and Permanently Disabled

The claimant's argument that he is totally and permanently disabled is based exclusively on the fact that he is an older worker and ignores that he remains gainfully employed by Employer. His argument was rejected by the Commission because has continued to work in his time of injury job for Employer since 2009 at increasing pay despite his injuries. The Commission properly found that Employer was not a "sympathetic employer" nor was his continued employment due to super human effort. More importantly, the Commission gave the claimant every benefit of the doubt, including using an FCE that took into account claimant's significant non-industrial low back condition, and found that he suffered a 40% disability inclusive of his impairment. Critical to the Commission's finding was that the claimant was performing an actual job that is likely to continue, that he is an older worker, and that he has suffered no wage loss. Contrary to claimant's assertions in his Opening Brief, the Commission's findings are not clearly erroneous as they are supported by substantial and competent evidence.

The Commission properly noted that the claimant bears the burden of proving that he has suffered disability in excess of his impairment, which is a question of fact. *Boley v State Industrial Special Indemnity Fund,* 130 Idaho 278, 289 P.2d 854 (1997); R., p. 185. The Commission noted that test for determining whether a claimant has permanent disability in excess of impairment is whether the impairment taken in conjunction with nonmedical factors has reduced the claimant's capacity for gainful employment. *Greybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988); R., p. 185.

A claimant falls within the "odd-lot" category of total permanent disability if he was so injured that he can only perform services which are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Arnold v. Splendid Bakery,* 88 Idaho 455, 463, 401 P.2d 271, 276 (1965) (citing *Crawford v. Nielson,* 78 Idaho 526, 307 P.2d 229 (1957)); *Lyons v. Industrial Special Indem. Fund,* 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1977). There are three ways for an injured worker to show they are an odd-lot worker: (1) by showing they have attempted other work without success; (2) by showing that they or vocational counselors have sought other suitable work but it was not available; and/or (3) by showing that any effort to find suitable work would be futile. *Hamilton v. Ted Beamis Logging & Constr.*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

Once a claimant has satisfied his burden of proving a *prima facie* case of odd-lot status, the burden shifts to the employer to show "there is an actual job within a reasonable distance from [Claimant's] home which he is able to perform or for which he can be trained" and that he

"has a reasonable opportunity to be employed at that job." *Lyons,* 98 Idaho at 407, 565 P.2d at 1364.

In the present case the Commission used the claimant's FCE as a guide to evaluating his disability from all causes combined over defendants' objection that the FCE was unreliable, the claimant admitted he could work in excess of these capabilities, the restrictions on the FCE were based in large part upon the claimant's non-compensable low back injury and the claimant's treating physicians had all released the claimant to return to work without restriction. 2018 Order, ¶ 105, R., p. 191. The Commission's decision to use the FCE as the benchmark for his physical restrictions clearly benefited claimant especially since claimant's main disabling condition at the time of his hearing was his low back, which the Commission found was not compensable.

At hearing, claimant testified that both sitting and standing causes pain in his low back and numbness down his legs. Tr., p. 120, ll. 1-24. His low back pain causes him difficulty getting up and walking from a seated position. Tr., p. 121, ll. 4-23. As a result, he feels like he has trouble with his balance and falls over. *Id.* His low back affects his ability to drive long distances that requires him to stop all the time. *Id.* His low back limits his walking to a quarter of a mile. If he walks up and down it causes additional low back pain. Tr., p.122, ll. 3-18. His low back pain requires him to use a cane occasionally. *Id.* at ll. 19-25. He was very clear that it was his low back condition and not his knee that causes him to use a cane. Tr., p. 123 ll. 1-3. Claimant also testified that assuming he had no problems with his left shoulder, left elbow or

right knee he would still have difficulty lifting things off of the floor due to his low back. *Id.* at ll. 4-9. At the time of his FCE the Claimant's primary diagnosis was "lumbar spine injury." Cl. Ex. 23, p. 646. The therapist who performed the FCE determined that the Claimant's low back condition affected the Claimant's functional ability to walk, lift from waist to floor, lift and carry, forward bend, stand and sit. *Id.* at p. 647. Yet the Commission considered the FCE as setting forth his restrictions for purposes of evaluating his disability.

The Commission also considered the claimant's transferable skills including his demonstrated ability to assume responsibility for the day-to-day operation of a large farm with unique soil characteristics. 2018 Order, ¶ 107, R., p. 191. The Commission rejected Dr. Collins' opinion that the claimant's ability to continue to work for seven (7) years following his first industrial accident was due to superhuman effort and/or that the employer was a "sympathetic employer." The Commission noted, consistent with the testimony, that claimant can delegate work as necessary and may take longer to perform certain work activities but his work is not through "superhuman effort." 2018 Order, ¶ 111, R., p. 193. The Commission also rejected Dr. Collins' opinions that employer was "sympathetic" because his job that he performs is real and his services are valuable, even essential, to Employer's business. 2018 Order, ¶ 112, R., p. 194. As a result of claimant's continued employment since 2009 with significant annual earnings increases, the Commission found that defendants satisfied their burden of rebutting a *prima facie* case of odd lot status. 2018 Order, ¶ 113, R., p. 195.

2. *The Commission's Finding That the Claimant has a 40% Disability is Supported by Substantial and Competent Evidence*

In its assessment of the claimant's disability, the Commission considered the claimant's age as a nonmedical factor. While Idaho Code §72-430 includes age among the nonmedical factors to be considered by the Commission in evaluating disability, the statute does not require the Commission to award higher disability to older workers. The Commission determined that the claimant's age is a factor that affected his disability but noted that due to his long tenure and importance to the operation of Employer's farm, his current employment tended towards a lower disability assessment. 2018 Order, ¶114, R., pp. 195-196.

The Commission considered that while the claimant's current employment is likely to continue at his current or higher wage he has still lost 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, lose his current job." 2018 Order, ¶ 115, R., p. 196. As a result, they awarded the claimant 40% disability inclusive of impairment. *Id.* Despite claimant's counsel's representations in his Opening Brief that the Commission erred in finding that the claimant could continue working at Employer's farm until his retirement, claimant's testimony that he contacted Social Security within one year of the hearing to determine how much he would receive in retirement benefits proves that the claimant was considering retirement prior to hearing. Tr., p. 145, l. 9 – p. 146, l. 1. Claimant also testified that he intended to work as long as Employer has a job available for him. Tr., p. 163, Ll. 19-22. The fact that the claimant is still working for

Employer nine years following his initial industrial accident establishes that his employment is likely to continue as long as he is able to work and Employer has work available for him.

It is certainly reasonable that based upon the fact that claimant has been continuously employed in his time of injury position since 2009, has received increases in his wages over several years since his accident and the likelihood of his continued employment until he decides to retire that claimant has suffered ***no*** disability in excess of his impairment. The Commission acknowledged this possible scenario in its Order on Motion for Reconsideration, Modification and Consolidation. R., p. 285. Based upon the claimant's argument to this Court in his Opening Brief that his labor market consists solely of his current job, since he is still employed in this job he has no disability beyond his impairment. Yet, the Commission gave the claimant the benefit of the doubt and awarded 40% disability. Assuming the claimant lost his job, Mr. Jordan identified other employers in his area that would benefit from the claimant's unique expertise in irrigating the lands around Bruneau; therefore, his labor market is not limited to his current job.

3. Claimant's Post-Award Motions Were Properly Denied

Claimant filed several, often contradictory, motions following the Commission's 2018 Order (hereinafter "post-award motions"). In support of his post-award motions, he offered new evidence, including claimant's affidavit stating that his income was lower in 2017 than 2016 and that he suffered a new accident and injury to his left knee in June 2017 while working for employer. R., pp. 209-216. Claimant argued that his recent accident of June 7, 2017 and his income reduction in 2017 constitutes new evidence which wants a review of the Commission's

2018 Order pursuant to Idaho Code §72-718 and/or 72-719. He also asked the Commission to consolidate his 2017 claim with his 2009 and 2013 claims. R., pp. 230-232. The Commission properly denied all of the claimant's post-award motions. R., pp. 279-302.

In its order denying claimant's post-award motions, the Commission rejected claimant's argument that his current employment "punishes" claimant for continuing to work in his time of injury position. The Commission correctly concluded that the workers compensation system did what it was intended to do, pay income and medical benefits supporting his recovery and return to gainful employment. R., p. 284.

The Commission also rejected the claimant's claim that his 2017 drop in earnings undercut one of the bases of the Commission's decision to award him a 40% disability. This was due, in part, to the claimant's failure to prove that his drop in earnings was caused by any limitations due to his 2009 or 2013 injuries. It was also due to the fact that the Commission considered the potential that he would lose employment when it awarded him a 40% disability when, based upon the fact of his continued employment and likely employment until he decides to retire, they could have awarded him no disability. R., pp. 284-285.

The Commission also properly denied claimant's Motion for Modification pursuant to Idaho Code §72-719. The two grounds for his motion were: (1) that Claimant suffered a "significant and substantial change in the nature or extent of his disablement" and (2) to correct a manifest injustice. With regard to the alleged manifest injustice, the claimant argued that to avoid a manifest injustice the record must be reopened to allow consideration of claimant's

changed circumstances, his 2017 knee injury and his decreased earnings in 2017. R., 292. This motion was properly denied by the Commission because the claimant's 2017 claim was not part of these proceedings as it was a new, separate claim, and he offered no evidence of a nexus between his decreased earnings and his 2009 and 2013 injuries.

Idaho Code §72-719 allows the Commission to modify an award only if there is a "[c]hange in the nature or extent of the employee's injury or disablement." I.C. § 72-719(1)(a). The Idaho Supreme Court has made the claimant's burden of establishing a change in condition under I.C. § 72-719(1)(a) clear:

> When a Claimant applies for modification of an award due to a change in condition under I.C. § 72-719(a), the Claimant bears the burden of showing a change in condition. *Matthews v. Dep't of Corr.*, 121 Idaho 680, 681, 827 P.2d 693, 694 (1992) (citing *Boshers v. Payne*, 58 Idaho 109, 70 P.2d 391 (1937)). The Claimant is "required to make a showing before the Commission that he had an increased level of impairment, ***and to establish with reasonable medical probability the existence of a causal relationship between the change in condition and the initial accident and injury***." *Matthews*, 121 Idaho at 681-82, 827 P.2d at 694-95 (internal citations omitted).

Magee v. Thompson Creek Min. Co., 152 Idaho 196, 201 268 P.3d 464, 469 (2012) (emphasis added). Therefore, it is clear that Claimant must establish with reasonable medical probability the existence of a causal relationship between the change of condition/disablement and his 2009 and 2013 accidents/injuries.

Claimant ignored Supreme Court precedent set forth in *Magee* because he based his change in condition argument upon a 2017 injury to his left knee. Claimant must establish with

reasonable medical probability the existence of a causal relationship between the change of condition/disablement and his 2009 and 2013 injuries. Claimant offered no proof, facts or other argument as required by this Court in *Magee.* Claimant offered no evidence or facts that his 2017 left knee injury was related to his 2009 or 2013 accidents/injuries. The Commission noted that since claimant conceded that his motion was not premised on any change in the nature or extent of his physical injuries related to his 2009 and 2013 accidents, his motion was denied. R., p. 332.

Claimant also argued that the restrictions attributable to his 2017 left knee injury support his claim that he is totally and permanently disabled; therefore his 2017 claim should be consolidated with his 2009 and 2013 claims. This argument is frivolous and directly contradicts his representations to this Court that he was totally and permanently disabled based upon his 2009 and 2013 injuries. The Commission properly rejected claimant's motion to reopen. R., pp. 332-333.

C. The Commission's Decision to Draft The 2018 Order Was A Proper Exercise of Its Power Under Idaho Code §72-506, Was Not an Abuse of Discretion and Did Not Violate Claimant's Due Process Rights

Under Idaho's statutory scheme, the Commission is the final arbiter of contested worker's compensation claims in Idaho. Relying on Idaho Code §72-506, this Court has made it clear that any findings or awards are not deemed final until they have been approved and/or confirmed by the Commission. *Zapata v. J.R. Simplot Company*, 132 Idaho 513, 516, 975 P.2d 1178, 1181 (1999). Pursuant to Idaho Code §72-506(2), any findings of fact made by a referee are merely *recommendations* to the Commission which, upon review, the Commission could

either adopt or enter its own findings. *Lorca-Merono v. Yokes Washington Foods, Inc.*, 137 Idaho 446, 451, 50 P.3d 461, 466 (2002); see also Idaho Code §72-717. "The Commission need not explain why it did not adopt certain findings recommended by the referee." *Id.* Furthermore, ultimately the Commission decides what weight should be given to the facts and conclusions drawn from those facts. *Zapata*, 132 Idaho at 515, 978 P.2d at 1180.

In the present case, Referee Powers presided over the hearing. Unfortunately, Referee Powers faced a significant case backlog that would result in a delay of the decision. Therefore, he did not prepare recommended findings of fact and conclusions of law for the Commission's review. Over the objections of the parties, the Commission determined that its "obligation to manage our docket to promote timely decisions supports assignment of this matter to the Commission." R., p. 133. The Commission has the authority to use its discretion to manage its docket and decide the case based upon the record before it, including the hearing transcript. Compare, *Van Heukelom v. Pine Crest Psychiatric Center*, 160 Idaho 898, 900, 684 P.2d 300, 302 (1984) (Commission's failure to have a transcript of the proceedings before it rendered its decision denied claimant's due process rights). It is immaterial that the referee did not prepare recommended findings of fact and conclusions of law because the Commission could have disregarded them and reached its own findings and conclusions as provided by Idaho Code §§72-506 and 72-717.

While former Justice Jim Jones, in a concurring opinion, was critical of the Commission's decision not to adopt the referee's recommendations and issuing their own

findings of fact, conclusions of law and order; he felt the Commission should provide discussion in future cases as to why it made a determination to discard the referee's recommendation and issue its own findings of fact, conclusions of law and order. *Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 330, 360 P.3d 333, 339 (2015). In this case, the Commission stated the rationale for its decision to write its own findings of fact, conclusions of law and order, i.e., management of its docket to promote timely decisions. R., p. 133.

The Commission also noted that the outcome of the case did not turn on an assessment of the claimant's observational credibility. *Id.* This Court has stated that observational credibility "goes to the demeanor of the appellant on the witness stand" and it "requires that the Commission actually be present for the hearing" in order to judge it. *Painter v. Potlatch Corporation*, 138 Idaho 309, 313, 63 P.3d 435, 439 (2003). In the present case, the claimant's observational credibility was not an issue. Claimant testified extensively to his perceived limitations due to the injuries he suffered in his motor vehicle accident and his 2013 right knee injury. See, TR.,, pp. 99-101; 111-119. In its 2018 Order, the Commission made no mention of the claimant's credibility as it related to his demeanor. In fact, no one disputed that the claimant suffered from a significant low back condition at the time of the hearing; the only dispute was whether this condition was caused by his 2009 accident a hotly contested and disputed issue.

On the other hand, this Court has held that the Commission may judge a claimant's substantive credibility. *Painter*, 138 Idaho at 313, 63 P.3d at 439. Substantive credibility "may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the

presence of the commission at hearing." *Id.* In its 2018 Order, the Commission analyzed the claimant's substantive credibility by noting that his medical records contradicted his testimony that he had unrelenting low back pain since his 2009 accident and that it was his practice to only address his most predominant complaint with his treating physicians. 2018 Order, ¶¶ 74-75; R., pp. 172-175. As is shown above, there is substantial and competent evidence to support the Commission's findings that claimant failed to prove his low back condition was caused by his 2009 accident.

The Commission did not deny the claimant's due process rights because he had an opportunity upon reasonable notice for a fair hearing before an impartial tribunal. *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 2000, 2004, 280 P.3d 703, 707 (2012). The claimant was given notice of the issues to be decided at hearing, offered documentary evidence, offered his client's and his experts' testimony, briefed the issues and filed post-hearing motions. A review of the 2018 Order indicates that the Commission conducted an exhaustive review of the extensive documentary exhibits and the witness testimony to reach its ultimate findings of fact and conclusions of law that are supported by substantial and competent evidence. Thus, the Commission did not deny the claimant his due process rights.

D. The Commission Properly Considered Admitted Evidence in Reaching Its 2018 Order

Claimant alleges that the Commission considered two pages of allegedly excluded evidence in reaching its 2018 Order, specifically pages 65 and 115 of claimant's Exhibit 3 that document claimant's complaints of long standing low back pain in 2004 and 2007. However, an

examination of the Commission's 2018 Order and the admitted exhibits demonstrate that references to the treatment reflected in these records were already admitted into evidence and. alternatively, the reference to these two pages by the Commission constitutes harmless error.

The claimant in his Rule 10 Disclosure disclosed his intent to offer treatment records from GFHC between 2001 and his October 5, 2009 accident. R., p. 49; Cl. Ex. 3. Defendants in their Rule 10 Disclosure specifically reserved "the right to introduce any exhibit(s) offered by any other party." R., p. 46. At the start of the hearing, claimant's counsel asked to withdraw pages 46 through 115 of Exhibit 3. Tr., p. 8, ll. 12 – 16. However, defendants' counsel moved for admission of these pages because they were relevant and mentioned in an expert report. Tr., p. 13, Ll. 16 – 18. Ultimately, the referee excluded these relevant exhibits from the record. R., p. 73.

Claimant's counsel, however, failed to move for exclusion of all of the exhibits that documented the claimant's complaints of long standing low back problems on May 21, 2007 as reflected on page 115 of claimant's Exhibit 3. As a result, the substance of this treatment note was admitted into evidence in claimant's Exhibit 6 page 349 and Exhibit 20 at pages 601 and 629. In its 2018 Order, the Commission noted that claimant's counsel *quoted* this treatment note in a letter to Vernon McCready requesting an opinion regarding causation on November 5, 2015 and that Dr. Harris relied upon this treatment note in his expert report regarding causation. R., p. 129, fn1; See, Cl. Ex. 6, p. 349; Cl. Ex. 20, pp. 601 and 629. As a result, the May 21, 2007 treatment note documenting claimant's complaints involving the right hip and SI region for over

two years without recent trauma, which claimant's counsel referenced in one of claimant's exhibits that was admitted into evidence, was properly admitted into evidence and could be relied upon by the Commission in reaching its 2018 Order.

The records claimant initially intended to offer as evidence but later withdrew at the time of hearing referenced the low back symptoms the claimant's counsel acknowledged that claimant had been experiencing prior to his motor vehicle accident. See, Cl. Ex. 6, p.635. Dr. Harris and Vernon McCready relied upon them in preparing causation opinions. These records were referenced in exhibits that were admitted into evidence. The only reason claimant's counsel sought to exclude their admission at the time of hearing was because he knew they contained evidence documenting his client's long-standing low back issues. To the extent the Court believes the Commission erred in considering these two pages, claimant's counsel led the Commission into error.

More importantly, claimant's counsel's last-minute attempt to exclude this evidence while referencing the medical treatment in other admitted exhibits and then claiming that the Commission improperly considered the substance of these medical records sets a dangerous precedent in workers compensation cases. Practitioners in workers compensation often give medical records to doctors when soliciting causation opinions. Surety gave these records to Drs. Harris and Montalbano and claimant's counsel referenced this record in his letter to PA McCready. These records were relevant and claimant gave his notice of intent to seek their admission at the hearing. Claimant's decision to attempt to exclude these exhibits over

defendants' objection without removing any reference to the substance of these records in other admitted exhibits invited any alleged error by the Commission in considering these treatment records.

The Commission's decision to admit medical records into evidence is a matter of discretion. *Fonseca v. Corral Agric., Inc.*, 156 Idaho 142, 149, 321 P.3d 692, 699 (2014). Whether to exclude or admit evidence in worker's compensation cases is precisely the kind of the decision subject to the Commission's discretion. *Hagler v. Micron Tech., Inc.*, 118 Idaho 596, 598, 798 P.2d 55, 57 (1990). Pursuant to the abuse of discretion standard of review, this Court "will not supplant the views" of the Commission with its own. *State v. Windom*, 150 Idaho 873, 875, 253 P.3d 310, 312 (2011). The Commission's decision to consider and thus "admit" the actual medical records documenting medical treatment referenced in other admitted exhibits is not an abuse of discretion.

Finally, even if this Court considers the Commission's consideration of the two pages of medical records to be in error, the error is harmless. This Court will not reverse the decision of the Commission when evidentiary issues are harmless. *Hagler*, 118 Idaho at 599, 788 P.2d at 58. Here the Commission acknowledged that it was undisputed that the claimant had pre-existing degenerative disease of his lumbar spine and that the issue was whether the motor vehicle accident in 2009 caused permanent injury to his lumbar spine such that his need for medical treatment in 2016 was related to said accident. 2018 Order, ¶ 68, R., p. 168. The Commission acknowledged that exclusion of these two records referencing periodic low back pain "would not

change any aspect of the Commission's decision; as noted, there is other evidence of record which establishes that Claimant did have some pre-injury low back symptoms." 2018 Order, fn 1, R., p. 130. Since there were references to the claimant's pre-accident treatment for low back symptoms that had been long-standing, which were otherwise admitted and are of record, the Commission's consideration of the 2004 and May 21, 2007 treatment notes is harmless.

E. The Claimant Is Not Entitled to an Award of Attorney Fees

Idaho Code § 72-804 permits an award of attorneys' fees in three limited circumstances: (1) where a Surety contests a claim without reasonable grounds; (2) when the Surety unreasonably delays or denies payment of benefits following receipt of a written claim for compensation; or (3) the Surety discontinues payment of benefits without reasonable grounds. Defendants have prevailed on each and every issue in this case, the Commission found they properly denied benefits for claimant's low back and they paid all medical and income benefits while promoting claimant's return to continued employment. Claimant's claim for attorney's fees is frivolous.

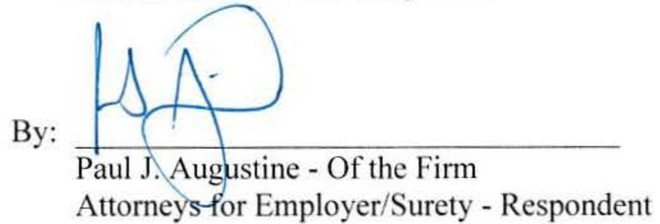
CONCLUSION

This Court should affirm the Commission's findings that claimant failed to prove that his low back condition was caused by his 2009 accident, the claimant failed to prove that he is totally and permanently disabled and that claimant suffers from a 40% disability as they are supported by substantial and competent evidence. This Court should reject the claimant's argument that the Commission abused its discretion and/or denied him due process by deciding

this case without a referee's recommended decision. This Court should also reject claimant's argument that the Commission considered evidence that was not properly in the record. Finally, the Court should deny claimant's claim for attorney fees.

Dated this 31st day of December, 2018.

AUGUSTINE LAW OFFICES, PLLC



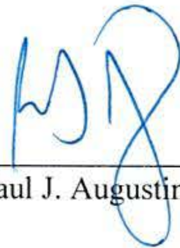
By: ______________________________
Paul J. Augustine - Of the Firm
Attorneys for Employer/Surety - Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of December, 2018, I caused a true and correct copy of the foregoing document to be served upon the following persons in the manner indicated below:

L. Clyel Berry STEPHAN, KVANVIG, STONE & TRAINOR P O Box 83 Twin Falls, ID 83303	X U.S. Mail, Postage Prepaid ___Hand Delivered ___Overnight Mail ___Telecopy

Attorneys for Claimant-Appellant



Paul J. Augustine