BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERIK JAMES YEAGER, Claimant, v. BMC WEST, L.L.C., Employer, and ACE AMERICAN INSURANCE CO., Surety, Defendants.	**IC 2016-013845** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed July 29, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who along with Commissioner Aaron White, conducted a hearing in Boise on November 1, 2018. Todd Joyner of Nampa represented Claimant and David Gardner of Pocatello represented Employer BMC West, L.L.C., and its Surety Ace America Insurance Company (Defendants). Oral and documentary evidence was presented and the record remained open for the taking of two post-hearing depositions and the submission of post-hearing briefs. This matter came under advisement on January 29, 2019, but Referee Powers retired from the Commission prior to the completion of his recommendation. The matter was reassigned to the Commissioners on April 18, 2019 and is now ready for decision.

ISSUES

The issues to be decided are:

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;

2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits; and

3. Whether Claimant is entitled to an award of attorney fees for Defendants' delay in paying certain PPI benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to PPD of between 64% - 73.5% inclusive of his PPI according to his vocational expert Nancy Collins, Ph.D. He is also entitled to attorney fees for Defendants' unreasonable delay in paying certain PPI benefits. Defendants contend that, according to their vocational expert William Jordan, M.A., C.R.C., C.D.M.S., Claimant is entitled to, at most, PPD of 31% inclusive of impairment. Defendants also contend that Claimant is not entitled to an award of attorney fees because the extent of any PPD was and continues to be contested and Defendants have no obligation to pay PPD until that amount is finally determined by the Commission.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and William Jordan taken at the hearing.

2. Claimant's Exhibits A-X admitted at the hearing.

3. Defendants' Exhibits 1-6 admitted at the hearing.

FINDINGS OF FACT

Claimant's Hearing Testimony:

1. Claimant was 45 years of age and residing in Kuna at the time of the hearing. Before that, he resided in Meridian for 23 years.

2. Claimant completed high school and spent three-and-a-half years in the Marines as a truck driver and tank gunner. He has no further college or technical education. Mr. Jordan noted in his employability report that Claimant had experience working on his parents' farm, and as a prep cook, drug store retail clerk, and pizza maker prior to graduating from high school. DE 6, p. 63. He also appears to have worked in construction. *Id.*

3. About four months after his military service ended, Claimant began his employment with Employer herein, BMC West, in May of 1993. He initially delivered sheet rock "books" to houses and apartments. After about nine years at that position, Claimant began delivering lumber in a flatbed tractor/trailer.[1] Claimant also chained and strapped heavy equipment onto lowboy trailers. His Class A CDL is still current.

May 20, 2014 Accident/Injury

4. On May 20, 2014, Claimant suffered a work-related injury to his right elbow while strapping a trailer. On or about August 13, 2014, he underwent a debridement and reattachment of the common extensor origin and advancement and repair of the lateral collateral ligament, performed by Dr. Kloss. He did poorly post-surgery. On February 10, 2015, he underwent further MRI evaluation of the right elbow. On March 6, 2015, he had repeat surgery on the right elbow. Dr. Kloss performed a tendon transfer from Claimant's left arm to his right elbow to repair the recurrent defect. On or about January 20, 2016, Claimant underwent a closing

[1] Claimant described flat bed loading as, "You have to - - basically you have to strap, chain, depending on what material you're carrying, you have to getup on the load, you have to tarp it for weather. You have to - - I mean it's just flatbed hauling." HT., p. 29.

evaluation by Paul Collins, M.D., at the request of the State Insurance Fund. Dr. Collins reported, *inter alia*, that although Claimant was right-arm dominant prior to the work injury, he preferentially used his left upper extremity following his right elbow surgeries. However, Dr. Collins also recorded that Claimant returned to work in May of 2015 and was released to full work on July 30, 2015 by Dr. Kloss. Dr. Collins reported that Claimant returned to his previous job without the need for accommodation. DE 2. Dr. Collins found that Claimant was entitled to a 7% whole person impairment for his right elbow.

5. During his pre-hearing deposition, Claimant testified to the May 20, 2014 accident. In terms of the permanent limitations/restrictions he was given as a result of that accident, he gave conflicting testimony. On the one hand, he testified that he was given restrictions against "heavy lifting, pulling," but conceded that he could not remember the full extent of the restrictions. Clt. Dep., p. 17. On the other hand, he testified that he was given a restriction against lifting more than 15 pounds with his right arm as a consequence of the elbow injury. *Id.* at 18. Further, Claimant testified that instead of a 7% whole person rating, he had been given a 9% whole person rating for the right shoulder. *Id.* at 17. Aside from Dr. Collins' reports, the record does not contain any other medical records which might shed light on whether Claimant was given a different impairment rating by Dr. Kloss, or some other physician. The record does reflect that Surety paid a 7% whole person (14% lower extremity) rating in connection with the elbow injury. See DE 3, p. 35.

6. At hearing, Claimant was likewise queried concerning the 2014 accident:

> Q: [By Mr. Joyner] There was an indication that you had an elbow injury in 2014; is that correct?
>
> A: Yes.
>
> Q: What day was that on?

A: May 20 of ’14. I think.

Q: Okay. It sounds like May 20 is not a good day for you.

A: No.

Q: On your right elbow did you have surgery?

A: Yes.

Q: It sounds like you had more than one.

A: Yes.

Q: Did that keep you from doing some work?

A: No.

Q: Were you off work for any period of time?

A: Yes.

Q: Did it heal back up?

A: Yes.

Q: Did you continue to do your job with BMC?

A: Yes.

Q: Did you have any problems with your employment at BMC in regards to them staying in contact with you while you injured in 2014?

A: No.

Q: When you returned to work after that 2014 injury, did you continue to have to strap down your loads?

A: Yes.

Q: Did you have any problems?

A: Yes.

Q: Okay. What did you do?

A: I manipulated myself to do my job.

Q: Okay. Did you do your job?

A: Yes.

Q: Was [sic] there any complaints from your employer?

A: No.

HT., pp. 31-33.

7. At the time of the May 20, 2014 accident, Employer's worker's compensation risks were insured by the same surety providing coverage in the instant matter. On or about February 5, 2018, the Industrial Commission approved an Idaho Code § 72-404 settlement in connection with the May 20, 2014 accident/injury, pursuant to the terms of which Claimant was paid $35,000 to resolve all remaining issues in the case, including, *inter alia*, such claims as Claimant might have for additional impairment/disability and future medical care:

> The parties acknowledge that the nature and extent of temporary and permanent disability, and medical services and expense in this matter are uncertain and my be continuing or progressive and my substantially exceed that set forth above; however, this shall not limit the scope of this Stipulation and Agreement of Lump Sum Discharge or the Commission's Order of Approval and of Discharge, both of which contemplate and include <u>all</u> rights and claims to all income benefits, all medical benefits, and any and all other all other amounts awardable under the workers' compensation law, whether or not known, herein listed, discoverable, or contemplated by the parties.

DE 3, p. 31 (emphasis in original).

<u>May 20, 2016 Accident/Injury</u>

8. On May 20, 2016, Claimant and another worker were unloading a load of trusses in Twin Falls when:

A: It was raining. I got out. Usually I unload myself. Unstrap myself. Take the load off myself. There was already an existing Hyster driver and he decided he needed to take the load off, because they needed to get it on another truck faster than I

would do it. So, I helped unstrap my truck while he was pulling the load off. I went to the left-hand side of the truck, started going down the side of the truck, he picked to load up when I was between the truck and the Hyster and he decided to go back and there is a dip and he went into the dip and I told him the - - the load is not secure, you don't have extensions on, you can't lift the load. I was between the truck [sic] at this time. It all basically took about 16 seconds, maybe less, before it all went bad.

Q: Did they drop the load on you?

A: They did. I told him to go down with the freaking Hyster and he got scared, because he saw the load tilting and he went forward and hit the wrong lever, tilted the load forward. I saw it wobble. I knew I had two seconds, because prior years before that - - two years ago we had a couple of other drivers [sic] of my best friend that died the same way.

Q: Okay.

A: So, I learned from their mistakes that needed to get underneath the truck as fast as possible. But I - -

Q: Did you make it under the truck?

A: No.

Q: Where did the load land?

A: Across my nose. My face. Ripped my shoulder all the way down. Broke my femur part [sic]. All the way down to my knee and, then, laid on my left knee and my left leg for a couple, three, four minutes before they could get help to get the load off of me.

HT., pp. 33-34.

9. Claimant was transferred by ambulance to St. Luke's – Twin Falls where he underwent a battery of diagnostic testing and was released with a CAM boot and instructions to follow-up with occupational and orthopedic specialists in Meridian which Claimant did on May 25th. According to Claimant, he eventually saw orthopedic surgeon Travis Kemp, M.D., "[s]ix weeks later." Dr. Kemp's records (CE J) indicate that Claimant first saw Dr. Kemp on May 31, 2016. Claimant also testified that he was in a wheelchair when he first saw Dr. Kemp; however,

Dr. Kemp's May 31 office notes report, "The patient presents today using crutches, which do bother his shoulder." *Id*. When pressed during cross examination, Claimant admitted that the records did not match his recollection and said, "Six -- I think six weeks is -- where I'm getting six weeks is that's when I had surgery." HT., p. 105

10. Dr. Kemp performed two surgeries on Claimant's left ankle, the second being a fusion. After the fusion, Claimant testified that he can "hobble" but cannot walk normally. His ankle does not bend and he cannot walk without his Cam boot. Claimant testified that his ankle is painful "[f]rom the time I get up to the time I go to bed." HT., p. 39. Because Claimant is currently a truck driver, he cannot use opioids for pain control; he uses alcohol only.

11. Claimant first saw William Lindner, M.D., for his left knee and left shoulder injuries on June 7, 2016. Dr. Lindner operated on Claimant's left shoulder and Claimant developed an infection requiring hospitalization two days post surgery. He developed a wound that remained open for nine months but eventually healed and closed. Unfortunately, Claimant's range of motion is the same as before his surgery and he cannot lift his left arm above his head.

12. Claimant had similar results with his left knee surgery in that his left knee locks now and it did not pre-surgery.

13. As the result of the continuing problems with his left knee and left shoulder, Claimant became frustrated with Dr. Lindner's treatment and the professional relationship between the two ended when Claimant refused to return to him.[2] Claimant's last appointment session with Dr. Lindner was July 24, 2017. Claimant was subsequently referred to Dr.

[2] Dr. Lindner's September 21, 2016 office note reports a telephone conversation Dr. Lindner had with Claimant's wife wherein he conveyed that he (Dr. Lindner) was interested in continuing with Claimant's care but that he had concerns that Claimant's subjective symptoms did not always correlate with objective signs and that Claimant may have developed a tolerance for narcotic analgesics which makes pain management more difficult. CE J, pp. 17-18.

Lindner's partner, Sean Hassinger, M.D., who first examined Claimant on September 20, 2017. He ordered MRIs of Claimant's left shoulder and left knee at that time.

14. Claimant testified that once he ceased treating with Dr. Lindner by August 2017, he contacted BMC West numerous times asking about getting his job back but they never called back. Consequently, Claimant obtained employment with Granite Excavation in February 2018 as a tractor/trailer driver hauling "aggregated quarry." HT., p. 52. He earns $18.00 an hour but due to restrictions on hauling dirt, gravel, etc., when it rains he does not work during inclement weather that, in the winter, can average 2-3 work days. During the summer of 2018, Claimant was averaging 10 hours a day. He has medical and dental insurance but no vacations or holidays.[3] Claimant is required to inspect his truck, but cannot put on chains as they are too heavy and beyond his physician-imposed restrictions. Claimant testified that he is capable of doing his gravel truck driving job with Granite Excavation and intends to work for them for as long as he can.

15. Regarding Mr. Jordan's analysis of placeability (DE 6, p. 67), Claimant disagrees that he has had "formal training" in automobile mechanics[4] and testified that he has never worked on any automobiles or trucks for wages.

16. Claimant agrees that he has 25 years of experience in the transportation industry, but only as a truck driver. He testified that now he can only drive a gravel truck because all other trucks require, "[t]arping. Loading. Strapping. Moving freight. It all consists of heavy physical activity, the grunt - - they call it grunt work." HT., p. 77. Claimant added "chaining" to his list in answer to his counsel's prodding.

[3] Later in the hearing, Claimant testified that he got two weeks in December off as well as all holidays.
[4] Claimant testified in his deposition and admitted on cross-examination at hearing that he had at least some formal training in automotive repair at PFC Automotive prior to his joining the Marines. Mr. Jordan testified that Claimant attended PFC automotive for six months and obtained a certificate in basic auto repair, engine rebuilding, etc.

17. Other than internet searches, Claimant testified that he is basically computer illiterate.

18. Claimant is due for a medical examination in regards to retaining his CDL in February 2020. He is concerned that he may not pass because he claims that his "physical ability is deteriorating." HT., p. 80.

19. At the hearing, Claimant wore different sized shoes; size 14 for his left foot (wider) to address his left ankle injury, and size 12 for his right foot requiring him to buy two different shoe sizes at a time. He also wore a prosthetic brace on his left ankle that supports the bottom half of his left leg. Claimant was told that he will need his brace for the rest of his life and it will need to be replaced every two years or so.

20. Claimant testified that BMC West would not fire him and wanted him to resign, which he refused to do so he could keep his health insurance. He further testified that BMC West never contacted him regarding returning to work with them or that he was placed on a leave of absence. Claimant eventually resigned in order to gain access to his 401(k).

DISCUSSION AND FURTHER FINDINGS

21. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes for which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Credibility

22. Having observed the Claimant at the hearing, Commissioner White noted that Claimant made an impression as a hard worker who takes pride in his abilities. He wore a large black boot at hearing, which he removed during Mr. Jordan's testimony. While he is somewhat inarticulate when describing his medical conditions and related procedures, he very clearly describes the requirements of his work as a truck driver. He was combative with Defense Counsel during cross examination to such a degree that Referee Powers had to intervene. The Referee found it necessary to admonish Claimant regarding his somewhat explosive behavior at times throughout the hearing; Claimant apologized after the hearing. Claimant exhibited his frustration with having to deal with serious injuries that were caused through no fault of his own. Additionally, Claimant's testimony adjusts timeframes and outcomes during his treatment that are not correlated in the record. To the extent that Claimant's recollection of events is contradicted by contemporaneous medical records, the medical records will be afforded more evidentiary weight.

Permanent Partial Impairment

23. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the

ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Left Ankle Impairment

24. On August 29, 2017, Dr. Kemp examined Claimant's ankle and determined that he had reached maximum medical improvement following his ankle fusion. He rated Claimant's left ankle impairment as follows:

> Using the AMA's *Guides to the Evaluation of Permanent Impairment*, Sixth Edition, table 16-2 on page 508, the patient has an ankle fusion in the neutral position. This gives him a class 1 impairment. Using a default grade of C, this gives him a 10% lower extremity impairment for this condition.
>
> Using table 16-2 on page 530, the patient has nerve dysfunction in the superficial peroneal nerve, sural nerve, and saphenous nerves. This gives him a class 1 impairment. Using a default grade of C this gives him a 3% lower extremity impairment for each nerve for a total of 9% nerve dysfunction.
>
> Total lower extremity impairment is 19%.
>
> Using table 16-10 on page 530, a 19% lower extremity impairment rating converts to an 8% whole person impairment.
>
> Given the absence of pre-existing conditions, there is no apportionment necessary.

CE J, pp. 50-51.

25. Dr. Williams, too, addressed Claimant's left ankle impairment. In his report of March 2, 2018, Dr. Williams arrived at a slightly different calculation of Claimant's foot and ankle impairment. He agreed with Dr. Kemp's assessment of a 9% lower extremity rating for injuries to Claimant's peroneal, sural, and saphenous nerves. However, he concluded that Claimant was entitled to a higher rating than that given by Dr. Kemp for the orthopedic injury to Claimant's left ankle. As Dr. Williams explained, he would give Claimant a 13% lower extremity rating for the consequences of the left ankle fusion, as opposed to the 9% given by Dr. Kemp:

> Based on the AMA guide to the evaluation of permanent impairment sixth edition, chapter 15, for lower extremity, for the ankle fusion he has a foot that is in a neutral position as described in table 16-2, however with the other associated injuries and issues at subtalar joint would place him in grade E, this is a 13% lower extremity impairment.

CE Q, p. 7. Therefore, Dr. Williams awarded Claimant a combined rating of 22% of the lower extremity for the ankle injury as opposed to the 19% lower extremity rating awarded by Dr. Kemp.[5]

Knee and Shoulder Impairments

26. Dr. Williams was the only physician who rendered an opinion on impairment ratings for Claimant's left knee and left shoulder. He assessed Claimant's left knee impairment at 8% of the lower extremity, explaining his reasoning as follows:

> For the left knee he had a meniscal injury, osteochondral defect and aggravation of patellofemoral joint arthritis. As per the guides, and his current condition, the most significant contributing issue would be patellofemoral joint arthritis. Given his arthritis arthroscopy and x-ray/MRI findings he would fall under class I grade see [sic] for 2 mm cartilage interval. This is equivalent to a 10% lower extremity impairment. Though arthritis takes time to develop Mr. Yeager had no evidence of knee problems prior the injury and would deem this 80% work related due to trauma. This would give him an 8% lower extremity impairment for the knee.

[5] In his report, Dr. Kemp did not expressly state that he used the combined values table of the *Guides to the Evaluation of Permanent Impairment, Sixth Edition*, to calculate Claimant's impairment for the orthopedic and nerve injuries to Claimant's ankle. The combined values table at page 604 of the *Guides* suggest that a 10% lower extremity rating combines with a 9% lower extremity rating to produce an 18% lower extremity rating. Dr. Williams did testify that he used the same combined values table to arrive at his 22% rating for the orthopedic and nerve injuries to the left ankle. However, the combined values table reflects that the combined value of a 9% lower extremity rating and a 13% lower extremity rating is a 21% lower extremity rating. However, Dr. Williams was not challenged on this calculation at the time of his deposition. Perhaps more significant is Dr. Williams' ostensible use of the same combined values table to combine the 22% ankle impairment with the 8% knee impairment, discussed *infra*. Dr. Williams testified that instead of an additive combination of the two ratings (22+8=30), the combined values table actually yields a combined rating of 26%. Williams Depo., pp. 30-31. Again, however, reference to the combined values table, at page 604 of the *Guides*, reveals that a 22% lower extremity rating combines with an 8% lower extremity rating to yield a 28% lower extremity rating, as opposed to the 26% rating discussed by Dr. Williams. However, Dr. Williams was not challenged on this calculation either, and his testimony on how the impairments for Claimant's ankle, knee, and shoulder should be combined is uncontroverted. The Commission is unable to ascertain whether Dr. Williams made a clerical error, or whether some other information helped inform his calculations.

CE Q, p. 7. Applying the combined values table, Dr. Williams proposed that Claimant has a 26% lower extremity rating for the combined effects of his knee and ankle injuries. Per Dr. Williams a 26% lower extremity rating equates to a 10% whole person rating. See *Guides to the Evaluation of Permanent Impairment, Sixth Edition*, at Table 16-10.

27. Finally, Dr. Williams concluded that for the residual effects of his shoulder injury, Claimant is entitled to a 9% upper extremity rating, or 5% of the whole person. *Id*. Combining the 10% whole person rating for Claimant's lower extremity injuries with the 5% whole person rating for Claimant's upper extremity injury yields a combined whole person impairment rating of 15%. *Id.*

28. Dr. Williams' assessment of Claimant's ankle impairment is well-explained and well-reasoned. Dr. Williams is the only physician to have authored an opinion on the impairment ratings for Claimant's left shoulder and left knee. Although some of his calculations on how Claimant's various impairments combined to yield a 15% whole person rating might have been challenged (see footnote 5), they were not, leaving the Commission to conclude that Claimant has met his burden of proving that he has suffered a 15% whole person impairment for the effects of the subject accident.

Permanent Partial Disability:

29. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §

72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

30. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The burden of establishing permanent disability is on the claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

31. When evaluating disability in a less-than-total case, a two step analysis is to be employed. Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008). First, Claimant's disability from all causes must be assessed as of the date of hearing. Second, the Commission must ascertain that portion of Claimant's disability referable to the industrial accident as anticipated by Idaho Code § 72-406. *Horton v .Garrett Freightlines, Inc.*, 115 Idaho 912, 915, 772 P.2d 119, 122 (1989).

32. A claimant's disability is to be determined, in most cases, as of the date of the hearing. See *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

Permanent Restrictions

33. For the permanent effects of his ankle injury, Dr. Kemp gave Claimant the following permanent restrictions:

> The patient has permanent work restrictions. He is basically on light-duty work with no lifting over 20 pounds, no standing for more than 1 hour without a break, and no climbing, stooping, bending or kneeling. He may sit continuously.

CE J, p. 51. Dr. Williams concurred with these restrictions and added his own for Claimant's knee and shoulder injuries:

> For the knee I would add no crawling, no ladder or scaffolding, no twisting. For the shoulder restrictions would include no above shoulder work, occasional repetitive use left arm, no lifting greater than 10 pounds with left arm, occasional fingering, no vibratory tools with left arm, maintaining all work within 21 inches of the body.

As noted above, neither Dr. Collins, nor (apparently) Dr. Kloss, gave Claimant permanent restrictions for his 2014 right elbow injury. Claimant has given conflicting testimony on his understanding of restrictions that may have been given to him by treating/evaluating physicians.

Based on the evidence of record, the Commission is unable to reach any conclusion on the question of whether Claimant reasonably had permanent restrictions relating to his right upper extremity as a consequence of the 2014 accident. Therefore, we conclude that Claimant's current restrictions are entirely the product of the subject accident.

Vocational Evidence

34. *William Jordan, M.A., C.R.C., C.D.M.S.* Defendants retained William Jordan to prepare an employability analysis. Mr. Jordan's credentials are well known to the Commission and he is qualified to give expert vocational opinions in this matter.[6] Mr. Jordan prepared an Employability Report dated October 11, 2018 and testified at the November 1, 2018 hearing.

35. Mr. Jordan explained the standard vocational assessment:[7]

> [W]hat I do is meet with the claimant and in this case I met with the claimant and - - so, I met with the claimant and his attorney at Skaug Law Offices. Did a vocational diagnostic interview and what is liked at is a - - a review of the medical and treatment options - - or medical treatment that the claimant received and restrictions they have after the injury. I also looked at the claimant's perception of the situation, previous injuries and disabilities they might have had that may affect their ability to work. I look at their social and family history, their financial history and wage rate, and their education employment history. Any vocational objectives that were developed or other services were provided. In this case he was working, so we talked about the work that he was doing. I look at placeability. His social skills. His interview behavior. And I look at all of that to do an employability analysis. And determine what's realistic as an [sic] vocational objective after an injury. So, I look at all of the above to put it to the appropriate test before making conclusions and it's used in doing the disability analysis.

HT., pp. 120-121.

36. Mr. Jordan understood Claimant's restrictions from his left ankle to be:

> Dr. Kemp rendered restrictions on 8/29/17. He had eight percent - - he rendered an eight percent whole person permanent partial impairment. Gave restrictions of light duty work, no lifting greater than 20 pounds, no standing longer than eight hours without a break. No climbing, stooping, bending, kneeling. Sitting continuously was okay. He also indicated that the claimant would need to wear an

[6] Mr. Jordan's CV may be found at Defendants' Exhibit 5.
[7] Mr. Jordan also explained his methodology at page 2 of his October 11, 2018 Employability Report.

> Arizona brace - - an AFO brace. Likely would need to chronically wear it and would have - - they would probably wear out within a year and a half to two years, so they would need to be replaced. He said that the claimant would need to continue to take Gabapentin, a dysfunction medication, and he anticipated that a sub talar joint - - that the sub talar joint arthritis would lead to a fusion of the ankle in the future. So, those were the restrictions for the ankle.

Id. at 125-126.

37. Claimant's IME physician, Dr. Williams, agreed with Dr. Kemp's left ankle restrictions. However, Dr. Williams assigned a ten percent lower extremity PPI rating with 20% apportioned to Claimant's pre-existing left ankle reconstruction performed in 2005. Dr. Williams also addressed impairment and restrictions regarding Claimant's left knee and left shoulder. Dr. Williams assigned a 5% whole person PPI for Claimant's left knee and restricted him from crawling, ladder or scaffold climbing, and no twisting. Mr. Jordan considered all of Claimant's claimed injuries in determining his disability.

38. Regarding Claimant's 2014 right elbow injury, Mr. Jordan was unable to verify Claimant's assertion that this injury resulted in a 15 pound lifting restriction. Based on the operating physician's last note, Claimant was given a full-duty release without restrictions on January 6, 2015 and returned to full-duty work. HT., pp. 128-129.

39. Jordan interviewed Adam Street, Claimant's supervisor at BMC West. Street was aware of the 2014 elbow injury and told Jordan that employer provided Claimant with a helper after he first returned to work. However, Claimant didn't use the helper very long and soon returned to doing all components of his job. HT., pp. 134; 151-152. Street told Jordan that he (Street) was unaware of any physician imposed restrictions for the elbow injury.

40. Mr. Jordan noted that Claimant graduated from Meridian High School in 1991 with a GPA of 3.4. He is a certified Hyster driver and has an unrestricted CDL. He was honorably discharged from the Marine Corp. Claimant has a smartphone, pays his bills on his

personal computer with internet access, and uses voice dictation to compose texts. He had knowledge of keyboarding but does not know how fast he can type.

41. Mr. Jordan testified that Claimant has a "steady" work and wage history. He was employed by BMC West for 23 years. Claimant informed Mr. Jordan that he (Claimant) contacted BMC West regarding his employment status and spoke with Human Resources Manager Corina Tyler. She indicated that Claimant had contacted BMC West about rolling over his 401(k). Claimant was told that he would not be able to access the full amount of his 401(k) unless he no longer worked for BMC West. Claimant did so, effective April 10, 2018.

42. Mr. Jordan spoke with Ms. Tyler and Claimant's supervisor Mr. Adam Street, both at BMC West, regarding Claimant's returning to work upon his release from treatment. Mr. Street told Mr. Jordan that "it was fairly soon that the [Claimant] returned to normal work activities." DE 6, p. 61. They both indicated that they would have worked with Claimant in that regard; however, they never learned of Claimant's restrictions, as, "[t]here was never very good contact kept." HT., p. 134. BMC West was able to accommodate Claimant after his right elbow injury and would have done the same after the subject injuries had closer contact been kept. At the time of his accident, Claimant was at the top of his pay scale and was considered to be good driver.

43. Mr. Jordan spoke with Brian Klaus, Claimant's supervisor at Granite Excavation, to gain an understanding of Claimant's current job duties. Mr. Kraus informed Mr. Jordan that Claimant was required to perform all of the duties of a truck driver as outlined in his job description, including chaining on occasion.[8] Mr. Kraus did not provide any accommodations for Claimant because he did not know there was anything wrong with him, and they intended to

[8] Claimant testified that he has never needed to chain up while employed by Granite, but that he could not physically perform that function if the need should ever arise.

keep Claimant employed as long as he continued to perform well. Claimant recently received a raise to $18.50 an hour and is provided with medical/health, dental/vision, short term disability, life insurance, accident coverage, and a 401k.

44. Mr. Jordan described Boise's labor market at 2.3%, which is "considered full employment. Very good job market right now." HT., p. 137. He opined that employers are having difficulty getting and keeping employees.

45. Mr. Jordan testified that Claimant could perform light-duty work, such as a sales representative or cargo and freight agent, where he would be allowed to use a stool to get off his feet as needed. While Claimant may not have experience in that type of industry, he was a good student, had good performance evaluations during his 26 years with BMC West, and his military background should give him the skills required to learn new things.

46. Mr. Jordan gave the following examples of the type of light-duty work Claimant could explore:

> Some types of jobs he could look at would be the salesperson, sales rep, like service writer. Sales rep wholesale, like at a building material store. Truck parts store. Truck sales. Cargo and freight agents. He's much familiar with the freight industry, being involved in it as long as he has been. Dispatchers. He's aware of what dispatchers do. He's worked with them before. Bus drivers - - kind of self explanatory. Inner city bus drivers. Truck drivers, tractor trailer with a no - - no load, no unload kind of stipulation. Light trucking. Driving, delivery in the local area, and motor vehicle operators of all sorts, could be a taxi driver, Uber - - Uber driver, shuttle bus driver, those kind of things.

HT., pp. 140-141.

47. Mr. Jordan addressed Claimant's concerns regarding his inability to chain up by suggesting that Claimant could simply pull off the road and wait out the storm or by hiring others to put on his chains for him. Mr. Jordan's suggestions in this regard seem generally unworkable.

The same can be said for "no touch" loads. Claimant credibly testified that even with so-called no touch loads, there is lifting involved that would exceed his restrictions.

48. Mr. Jordan was questioned regarding Claimant's labor market loss and how he went from a 55% to a 64% loss of access and responded that the 64% was a typographical error and the correct number is 55%. Adding 7% for Claimant's wage loss divided by 2 equals a 31% PPD figure inclusive of his PPI.

49. Mr. Jordan calculated Claimant's wage loss by comparing his time-of-injury wage ($19.75) with his current wage ($18.50) and arriving at 7%. He did not consider benefits as they cancelled each other out. Mr. Jordan calculated Claimant's loss of access by determining that he had about 584 jobs available to him before his accident and 321 jobs available after his accident and restrictions that equals a 55% loss of access. Mr. Jordan opined that Claimant will return to or surpass his time-of-injury wage if he continues his employment at Granite.

50. During cross examination, Mr. Jordan testified that the only physicians he relied upon in completing his employability report regarding impairments and restrictions were Drs. Williams and Kemp.

51. He further testified that the Dictionary of Occupational Titles is a starting place but the "Rehab Counselor's Bible" is outdated and should be used only in the context of other factors found in a local labor market analysis. There are many current job titles that are not included in the DOT because the DOT cannot keep up with the constantly changing data. Also, there are jobs within the DOT that indicate "medium" where only a small percentage of activity required is really medium (actually light) and vice versa. In other words, the DOT exertion requirements are job specific.

52. Following is a list of jobs Mr. Jordan believes Claimant could perform within his restrictions and Claimant's responses:

- Long haul tractor/trailer driver: Claimant cannot do because he cannot tarp, move product, or chain up.
- No touch loads: According to Claimant, there is no such thing as a no touch load. No touch loads are used to describe hauling double and triples like Fed X or XP or Yellow where they simply drop their loads at a terminal. However, the trailers are hooked up to haul dollies that have to be physically manhandled to place them in the proper position to hookup or unhook from the trailer. Claimant cannot move the dollies with his restrictions.
- Light delivery: Claimant cannot do because the product being delivered needs to be stacked and he is not supposed to lift over 20 pounds.
- Bus driver transit: Claimant cannot do due to "liability". HT., p. 68.
- Cargo/freight agent: Claimant cannot do because he would have to move freight exceeding his restrictions.
- Sales representative: Cannot do due to lack of experience and knowledge.
- Stein distributing delivery supervisor:[9] Moving beer cases/kegs would exceed his restrictions.
- Outdoor sales rep at FleetSide: Claimant's Indeed search revealed that he would be required to drive, inspect, wash and clean and otherwise getting the trucks ready for sale; all exceeding his restrictions. It also revealed that computers are used extensively.
- Small potato trucking: Claimant cannot get on top of a trailer to tarp a load.
- Gravel truck driver at Sunroc: Similar to Claimant's current job.
- Tack driver at Sunroc: A "big rock truck" heavy maintenance and difficulty climbing on the truck to see the load.

53. Of the 19 representative labor market samplings identified by Mr. Jordan, Claimant testified that he could only perform the gravel truck driving job.

54. On redirect, Mr. Jordan testified that Granite Excavation was aware of Claimant's restrictions, but that Granite was not aware of any accommodations afforded Claimant. This is not consistent with what Claimant apparently told Dr. Collins that he was accommodated.

55. Mr. Jordan testified on re-cross examination that he was informed by someone at Granite that Claimant had, on occasion, chained tires without accomodation. This is contrary to Claimant's testimony that he never chained up while employed at Granite.

[9] Claimant uses an app called Indeed on his phone to determine what is physically required of selected jobs like a job description. He obtained his current employment through the use of Indeed.

56. On rebuttal, Claimant testified that while employed by Granite he had the need to chain up, but did not do it. Instead, Claimant chose to continue driving without chaining up. He did indicate that there were times when he probably should have chained up but did not. Claimant testified that it was possible that his supervisor may have believed Claimant chained up when, in fact, Claimant had never chained up while employed at Granite.

57. *Nancy Collins, Ph.D.* Claimant retained Dr. Collins to assess Claimant's disability. Her credentials are well known to the Commission and need not be repeated here. She is qualified to testify as a vocational expert in this matter.

58. Dr. Collins interviewed Claimant and obtained his work and education histories, reviewed pertinent medical, vocational, and tax records, reviewed Mr. Jordan' report and hearing testimony, and prepared a report dated July 30, 2018. CE W.

59. Dr. Collins understood Dr. Kemp's permanent restrictions, as agreed to by Dr. Williams, to be sedentary/light with occasional lifting of 20 pounds, no standing for more than an hour without a break, and no climbing, stooping, bending, or kneeling regarding Claimant's left ankle.

60. Regarding Claimant's left knee, Dr. Collins understood Dr. William's restrictions to be no crawling, no ladder or scaffolding, and no twisting.

61. Regarding Claimant's left shoulder, Dr. Collins understood Dr. William's restrictions to be no above shoulder work, occasional repetitive use of the left arm, no lifting greater than 10 pounds with the left arm, occasional fingering, no vibratory tools with the left arm, and maintaining work within 21 inches of the body.

62. Regarding Claimant's transferrable skills, Dr. Collins testified:

> [H]e has pretty limited transferrable skills. He's really been in the transportation industry and almost exclusively as a driver. He was never a supervisor. He was

> not a dispatcher. He pretty much drove a truck. So that limits him as far as transferrable skills.
>
> As we know, he is working as a truck driver, and he does have driving skills and knowledge of transportation rules and regulations and that kind of thing. So I think there are some lighter driving jobs that aren't heavy truck driving jobs that would fit within his restrictions, but they're very limited.

Collins' Dep., pp. 15-16.

63. Dr. Collins does not believe that Claimant has the supervisory skills or temperament to be a supervisor.

64. Dr. Collins described the current job market as "extremely good," especially for truck drivers and suggested that that may be the reason Claimant obtained employment with Granite. She testified that the current favorable job market will not continue indefinitely.

65. Dr. Collins agrees that Claimant should not be chaining trucks. Claimant should also avoid hauling heavy equipment because he would have to climb on and off the equipment to load/unload them and that would exceed his restrictions.

66. Dr. Collins does not believe that no touch loads are an option for Claimant because,

> … [i]t doesn't mean that they don't touch the truck, that they don't have to hook it up to the cab, you still have to do the inspections, that you don't have to make sure your cargo's secure, you don't have to check under the hood, or that you don't have to crawl under the truck. That's not what it means. It means you don't load or unload.

Collins' Dep., p. 24.

67. Based on her interview of Claimant, Dr. Collins assumed that he had a 15 pound right upper extremity lifting restriction referable to the 2014 elbow injury. She admitted that she was unaware of any medical opinion supporting such a restriction. HT., pp. 45-46. She testified that based on a pre-existing 15 pound lifting restriction, Claimant had already lost access to

heavy jobs on a pre-injury basis. HT., pp. 26-28. Therefore, his loss of labor market access solely attributable to the 2016 injury was approximately 94%. Assuming Claimant had no pre-existing restrictions, his loss of labor market access referable to the subject accident is in the range of 97%.

68. Dr. Collins testified that Claimant's actual wages were difficult to assess because he had not yet worked for Granite Excavation for a full year. Despite her complicated calculations, she arrived at a 30% wage loss. Further, Claimant's wages were somewhat higher presently than when she interviewed him and prepared her report.

69. Dr. Collins testified as follows regarding how she "came up with a number":

> Well, over the years the Commission has kind of looked at how to arrive at disability ratings, and it seems as though they are comfortable with averaging loss of access and loss of earning capacity. There are times when the loss of access is so significant, you know, there are only a few jobs out there that are available to a person, that they give more weight to that or to earning capacity. So it depends. And they use their discretion in kind of arriving at that.
>
> So what we typically do is just provide the average of losses. And in this particular case I had 64 to and I think 73.5 would be the high end.
>
> And I think that's fairly accurate. Even with the changes that I've kind of learned through the hearing testimony. I think the difference in the loss of access and the loss of earning capacity remained fairly stable.

Collins Dep., pp. 32-33.

70. Dr. Collins found that the job samples provided by Mr. Jordan (except for bus driver transit) were either beyond Claimant's restrictions and/or his qualifications. Claimant expressed no interest in returning to school, "…[h]e just wanted to support his son. That is what he knows how to do. He can drive a truck. End of story." Collins Dep., p. 39.

71. In evaluating permanent disability, the Commission must take into account all medical and non-medical factors referenced at Idaho Code § 72-425 and Idaho Code § 72-430.

The opinions of vocational experts are informative, but not dispositive of the effect of the subject accident on Claimant's ability to engage in gainful activity. Neither Dr. Collins, nor Mr. Jordan, were able to confirm that Claimant had pre-existing right elbow restrictions. Dr. Collins assumed that Claimant did, but explained how her evaluation would change should it be demonstrated that Claimant had no restrictions on a pre-injury basis. Mr. Jordon does not appear to have evaluated the impact of a 15 lb lifting restriction on Claimant's access to his pre-injury labor market.

72. As developed above, the Commission is unable to conclude that Claimant had any restrictions prior to the subject accident, which effectively moots discussion of the issue of apportionment. Therefore, in connection with the two-step process envisioned by *Horton v. Garrett Freightlines, Inc., supra*, Claimant's disability from the effects of the subject accident is the equivalent of his disability from all causes; if Claimant's only restrictions stem from the industrial accident, then no other pre-existing condition has contributed to his current disability.

73. Our synthesis of the opinions of the vocational experts, along with our consideration of Claimant's testimony and other evidence of record leads the Commission to conclude that Claimant has incurred permanent partial disability solely as a result of the May 20, 2016 accident of 50%, inclusive of his 15% whole person impairment rating.

74. To his credit, Claimant was able to obtain his current truck driving job within a couple of weeks of job searching. The undersigned Commissioners agree with Dr. Collins that this is what Claimant does – he drives a truck and is still able to do so after suffering serious injuries to the left side of his body. After observing Claimant at hearing, it is doubtful that Claimant is suited for any sales or customer service positions. He has not expressed an interest in retraining or returning to school. Claimant has been given rather onerous physical restrictions regarding kneeling, stooping, crawling, and lifting that may be problematic should he lose his

current employment. However, in all cases where PPD is to be determined as of the time of the hearing, the future is never subject to a degree of predictability. Suffice it to say that Claimant is currently working at a job he knows that fits within his physical restrictions and appears to be able to continue his employment with Granite Excavation so long as he is able to perform appropriately.

Attorney Fees

75. Attorney fees are not granted to a claimant as a matter of right under the Idaho worker's compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides in pertinent part:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

76. The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Industrial Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P. 2d 1130, 1133 (1976).

77. Claimant seeks an award of attorney fees alleging Defendants neglected within a reasonable time to, after receipt of a written claim for compensation, pay the injured employee. The record provides a basis for an award of attorney fees.

78. Claimant argues that Defendants were "aware from the treating physician that an IME evaluation needed to be conducted for an impairment rating." Claimant's Brief, page 26. Treating physician Dr. Lindner's notes dated July 24, 2017 state: "[p]erhaps an IME would be prudent to objectively evaluate the patient in terms of his multiple extremity injuries and to give the patient an additional perspective." CE J, p. 47. The relationship between the treating physician and Claimant deteriorated to the point that Dr. Lindner suggests an IME for the purposes of either substantiating or refuting his recommendations for treatment. Dr. Lindner does not appear to be recommending an IME for the purposes of rating Claimant's impairment, but rather so that Claimant could continue to receive care. Indeed, Claimant continued to receive treatment for the left knee and shoulder injuries by Dr. Hassinger, who works in the same practice as Dr. Lindner. This supports that Claimant was not at MMI as of July 24, 2017 and therefore, an IME evaluation to evaluate his permanent impairment would not have been appropriate at that time.

79. Defendants contend they did not unreasonably deny or delay payment of benefits. However, according to the testimony of Asia Williams, a change of status notice was sent to the parties on November 21, 2017. CE R. Defendants assert the change of status notice was for the purpose of notifying Claimant that time loss benefits had been terminated, "when Claimant did not seek a change of physician or additional treatment through Dr. Lindner for over four months." Defendants' Brief, p. 24.

80. As set forth below, the record contains substantial evidence that Surety unreasonably curtailed Claimant's benefits. The record demonstrates that Claimant continued to require and receive treatment following his last interaction with Dr. Lindner on July 24, 2017.

He had not been released or returned to fully duty work at that time.[10] September 20, 2017 examination notes made by Dr. Hassinger of Claimant's left shoulder and left knee indicate his active role in Claimant's ongoing care: "[g]iven his lack of improvement and continued mechanical symptoms in his knee and weakness in his shoulder, I think an MRI of his left knee and MRI of his left shoulder are indicated to evaluation [sic] for any possible rotator cuff or meniscal tear." CE J, p. 52. Dr. Hassinger did not opine that Claimant's left shoulder was at MMI until December 8, 2017. CE J, p 55. On February 14, 2018, Dr. Hassinger records: "Assessment is left knee osteoarthritis. Medical decision making: This constitutes an acute exacerbation of a chronic problem. I recommended Visco Supplementation. After discussing it with him he wished to proceed." CE J, p. 57. Dr. Hassinger indicated that there would be a followup in one week. *Id.* Even though the most cursory review of the notes would have indicated Claimant was to be receiving additional treatment, Surety curtailed Claimant's time-loss benefits. The Commission could find nothing in the record that supports Ms. Williams' decision to terminate time loss benefits on November 21, 2017, and the Surety's actions are particularly inexplicable considering that Claimant was receiving active medical treatment on his knee and shoulder well beyond that date as recommended from a physician within the chain of referral.

81. The Commission finds Defendants' handling of the Claimant's impairment rating award to be an even more objectionable and egregious derogation of their statutory duty. Following Dr. Kemp's evaluation in August of 2017, Surety paid the 19% lower extremity rating referenced in Dr. Kemp's report. As noted, Dr. Kemp did not address impairment for Claimant's left knee and left shoulder. That task fell to Dr. Williams, who evaluated Claimant on or about March 2, 2018. Dr. Williams gave Claimant additional impairment for his left ankle and gave

[10] In 2017, Claimant's wages from BMC West were $352. DE 6, p. 63.

Claimant his first and only impairment ratings for his left knee and left shoulder. These impairment ratings Surety declined to pay, and the record fails to reveal any justification, medical, or otherwise, to support this course.

82. Defendants' arguments to explain the failure to pay Claimant's impairments rating are not well taken, and reveal a reckless disregard for the injured worker. In their briefing, Defendants studiously avoid discussion of their rationale for not paying the additional impairment calculated by Dr. Williams, except in two places. Defendants allude to the fact that since Dr. Williams issued his rating after the Complaint in this matter was filed, this fact somehow insulates Defendants of their ongoing obligation to adjust the claim. See Defendants' Post-Hearing Brief at 2. There is no support for the proposition that the filing of a Complaint relieves Defendants from their obligation to pay worker's compensation benefits that are due and owing. Again, the Commission is unaware of any evidence supporting a conclusion that Claimant is not entitled to the additional impairment calculated by Dr. Williams.

83. Next, Defendants make this rather startling averment:

> The record in this case demonstrates a dispute as to the amount of partial impairment to which Claimant is entitled. Dr. Kemp assessed Claimant with a lower extremity rating of 19% for his left ankle in August 2017. Since then, Claimant has received no additional treatment for the ankle. Dr. Williams, without providing any explanation, assessed the ankle at 22%, while agreeing with all of Dr. Kemp's diagnosis and restrictions. As such, there is a dispute as to the amount of lower extremity impairment to which Claimant is entitled. Dr. Williams also gave additional impairment for the knee and shoulder. Since Dr. Kemp was the treating physician and most familiar with Claimant's conditions -- and Dr. Williams agreed with him, Defendants submit that the proper amount of impairment is 19% of the lower extremity, which has been properly paid. Dr. Kemp converted his rating to 8% whole person impairment, which does not significantly differ from the whole person rating given by Dr. Williams at 10% whole person. Due to the fact [sic - that] disability beyond impairment is warranted in this case, the difference in impairment is not significant to the overall outcome.

See Defendants' Post-Hearing Brief at 9. Therefore, the argument goes that Dr. Williams and Dr. Kemp were pretty close on their assessment of Claimant's ankle impairment, and since Dr. Williams failed to provide any explanation for his higher impairment rating, it was okay for Defendants to stick with Dr. Kemp's opinion. However, Dr. Williams did explain why he gave Claimant a higher rating for the orthopedic component of Claimant's ankle injury, thus obligating Defendants to at least consider averaging the competing ratings of Drs. Williams and Kemp for the ankle injury. However, the most glaring problem with the argument above quoted appears right in the middle of the paragraph, where Defendants acknowledge the additional impairment rating given by Dr. Williams for the knee and shoulder without explaining why they did not pay it. The only explanation that the Commission is given is the apparent concession that since Claimant likely has disability in excess of whatever his impairment rating might be, it is acceptable for Defendants to decline to pay the additional impairment awarded by Dr. Williams on the theory that Claimant will capture that money within the disability rating eventually awarded by the Commission in this decision. There is no statutory justification for Surety to withhold benefits to which Claimant is entitled. Defendants had no medical predicate to decline to pay the impairment rating awarded to Claimant by Dr. Williams for his knee and shoulder injuries, nor do they appear to have ever attempted to develop a defense to the payment of his additional impairment anytime between March 2, 2018 and the date of hearing. Of course, Claimant would have benefited from the timely payment of the 8% lower extremity rating and 9% upper extremity rating given by Dr. Williams for the knee and shoulder injuries. A surety should not wait until it is further indebted to an injured worker before it initiates undisputed payments; this is a nonsensical and irresponsible approach.

84. For the reasons set forth above, we conclude that Claimant is entitled to an award of attorney's fees pursuant to the provisions of Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven his entitlement to permanent partial impairment of 15% whole person.

2. Claimant has proven his entitlement to permanent partial disability of 50%, inclusive of his 15% impairment. Apportionment pursuant to Idaho Code § 72-406 is moot.

3. Claimant has proven his entitlement to attorney fees pursuant to Idaho Code § 72-804 due to Defendants' unreasonable termination of his time loss benefits without a finding of medical stability and Defendants' failure to timely pay undisputed disability ratings for Claimant's left shoulder and left knee. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of this Commission decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, plus an affidavit of support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

4. Pursuant to Idaho Code § 72-718, this decisions is final and conclusive as to all matters adjudicated.

DATED this ____29th____ day of _____July_____, 2019.

INDUSTRIAL COMMISSION

___/s/_____
Thomas P. Baskin, Chairman

___/s/_____
Aaron White, Commissioner

___/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____29th____ day of ___July____, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

TODD JOYNER
SKAUG LAW
1226 EAST KARCHER RD
NAMPA ID 83687

DAVID GARDNER
HAWLEY TROXELL ENNIS & HAWLEY
412 W CENTER, STE 2000
POCATELLO ID 83294

el _____/s/_____