BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TRAVIS ROBERTS, Claimant, v. PORTAPROS, LLC., Employer, and WESCO INSURANCE CO., Surety, Defendants.	**IC 2019-008048** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed October 11, 2019**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted an expedited hearing in Boise, Idaho, on July 1, 2019. Daniel Luker represented Claimant. Eric Bailey represented Defendants. The parties produced oral and documentary evidence at the hearing and submitted briefs. No post-hearing depositions were taken. The matter came under advisement on August 20, 2019. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order for different treatment on the application of Idaho Code § 72-403 and *Malueg*.

ISSUES

The issues for hearing were limited to:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Temporary disability benefits, total or partial (TTD/TPD); and

b. Attorney Fees.

All other issues were reserved.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his lumbar spine in a work-related accident on March 8, 2019, and is still within his period of recovery. Defendants are wrongfully denying Claimant ongoing temporary disability benefits, and past TTD benefits were unreasonably delayed, ultimately being paid the day before hearing. Claimant is entitled to continuing disability benefits for the duration of his ongoing period of recovery and attorney fees for Defendants' unreasonable denial and delay of such benefits as set out above.

Defendants note that Claimant was fired for cause on March 9, 2019. They argue that after his March 8, 2019 work accident, Claimant received temporary disability benefits from March 11, when he was first given light-duty work restrictions which Employer could not accommodate, through April 24, when Claimant's work restrictions were upgraded to a forty-pound lifting restriction.[1] At that time Employer could have accommodated the restriction, but did not offer such work to Claimant due to his previous termination for cause. Instead, as of April 25, TTD benefits were stopped. Claimant has no right to continuing TTD payments for three reasons. First, Claimant's termination for cause unrelated to his industrial accident removed Defendants' duty to pay TTD when Claimant could have returned to work but for the termination. Second, Claimant refused suitable and available work, and unreasonably failed to seek work. Finally, Claimant reached MMI on May 13, and no matter what, is not eligible for TTD benefits thereafter. His subsequent accident shortly thereafter caused a new injury, and thus even if Claimant had not previously reached MMI, this new injury would constitute

[1] It should be noted these benefits were paid immediately prior to hearing; no TTD benefits were paid prior.

a superseding event.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and witnesses Chelsea Piet and Ricky Parks taken at hearing; and

2. Joint exhibits (JE) 1 through 15 admitted at hearing.

The objection in Claimant's deposition (JE 13) is overruled.

FINDINGS OF FACT

1. Claimant was working for Employer on Friday, March 8, 2019, when he injured his low back. Notice is not at issue herein. Surety has accepted the claim and paid all medical expenses associated with this injury to date of hearing.

2. Claimant did not immediately seek medical care. Instead he went to work as scheduled the next day. Claimant testified his low back was really hurting, making it difficult to complete his work duties. As a result, Claimant left work early.[2] He went home, but did not see a doctor that weekend.

3. Claimant's next scheduled work day was Monday, March 11, 2019. On Sunday Employer called and advised Claimant to come to work the next day at 8 a.m. Claimant did as instructed. However, the computer would not let him "clock in." He was then instructed to meet with management. At that meeting on March 11, Claimant was fired.

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[2] There is a discrepancy between the parties as to the details surrounding Claimant's early departure and whether he told his supervisor and had permission to leave. Claimant's early departure was a catalyst for his termination, which will be discussed below. For the sake of this opinion it will be assumed, but not decided as a matter of law, that Claimant's termination was "for cause" based in part on him leaving his shift early and without prior permission from Employer on Saturday, March 9, 2019.

4. Employer's representative and general manager Ricky Parks testified that Claimant had been repeatedly warned about missing excessive work, including a written "final warning" letter in January 2019. When Claimant left work early on March 9, 2019, Employer decided to terminate him.

5. Later that same Monday, after communicating with Mr. Parks, Claimant sought medical care for his low back at Nampa Occupational Health, where he was diagnosed with a lumbar strain. He was placed on light-duty restrictions with no bending, twisting, or stooping, and a ten-pound lifting limit.

6. Claimant was placed on sedentary work restrictions the following week after reporting increasing symptoms. Physical therapy was initiated. Claimant failed to improve.

7. By the end of March, Claimant was referred to Cody Heiner, M.D., of Boise Occupational Health. Dr. Heiner discontinued physical therapy and ordered an MRI. Sedentary work restrictions were continued.

8. After reading the MRI, Dr. Heiner diagnosed Claimant with a left-sided herniated nucleus pulposus, L4-5. Dr. Heiner considered an epidural steroid injection and started Claimant on gabapentin with physical therapy, pain medication, and home exercises. Claimant received a ten pound lifting restriction.

9. Approximately two weeks later, on April 25, Claimant reported significant symptom improvement when he returned to Dr. Heiner. In light of the improvement Dr. Heiner cancelled the proposed injections, continued physical therapy, and modified Claimant's restrictions to forty pounds lifting. Claimant's hydrocodone was discontinued.

10. Claimant next saw Dr. Heiner on May 13 at which time Claimant told the doctor his left-sided low back and leg pain was "nearly gone" with just some mild aching and weakness

at times. Claimant expressed a desire to get serious about finding employment, (he had not worked since March 8), and Dr. Heiner released Claimant to full duty with no restrictions, continued weekly physical therapy, and educated him on lifting mechanics. Dr. Heiner was hopeful that with the rate of improvement Claimant was showing, he could be rated for permanent partial impairment by early June.

11. On May 24, Claimant called Dr. Heiner's office. He wanted to cancel his face-to-face visit with Dr. Heiner scheduled for that day, and instead asked if the doctor would reinstate work restrictions. Claimant relayed that he had "re-aggravated" his back carrying his daughter to their house after she had crashed her bicycle. He also relayed an event where he "fell down the stairs in his home." These incidents made it so Claimant felt he could not "possibly tolerate the 40 lb. restrictions." Dr. Heiner acquiesced to Claimant's request and instituted a ten pound lifting restriction until he could see Claimant at a re-scheduled office visit on June 3. JE 4, pp. 106, 107.

12. When Claimant next saw Dr. Heiner on June 3, he complained of low back and right-sided lower extremity pain, but his left leg, which had been previously bothersome, was still pain free with no weakness. Claimant had normal posture, gait, and range of motion. Dr. Heiner noted Claimant had no symptoms in his lower extremities, but had experienced a mild setback in low back pain. Dr. Heiner felt a "few more" physical therapy visits would be beneficial, along with home exercises, and Flexeril and ibuprofen. Dr. Heiner imposed a forty-pound lifting restriction.

13. By Claimant's next office visit on June 24, his right-sided back pain was gone. He still had occasional left-sided low back and lower extremity pain. All testing was normal. Dr. Heiner suggested three options for treatment: continuing with the same course of treatment, gabapentin for neuropathic pain, or steroid injections. Claimant chose gabapentin treatment,

along with continued physical therapy and home exercises. The lifting restriction was kept in place.

14. At the time of hearing Claimant's condition was unchanged from June 24.

DISCUSSION AND FURTHER FINDINGS

15. The first issue for resolution herein is whether Claimant is entitled to additional temporary disability benefits beyond those paid by Defendants to date.[3] Defendants paid such benefits from March 11, 2019 through April 24, 2019. Claimant asserts he is entitled to TTD benefits from March 11, 2019 through the present, and continuing, until Claimant reaches medical stability at some yet-undetermined future date, with the exception of the time period from May 13 through May 23 when Claimant had no work restrictions, (although still in a period of recovery during such time frame), and subject to a credit for payments previously made by Defendants. Claimant also worked a couple of days in this time frame and Defendants are entitled to a credit for income earned from such work.

Effect of Firing "For Cause"

16. Defendants first argue Claimant is not entitled to TTD benefits beyond those paid because Claimant was terminated from employment for cause, and not for any limitation from his industrial accident. They cite several cases in support of this proposition, leading with the recent decision in *Phipps v. Trinity Trailer Mfg., Inc.*, 031119 ID WC, IC 2017-031418 (March 11, 2019).

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[3] Defendants appear to argue, mainly through suggestion, that the threshold issue of initial causation is in play, and that Claimant did not suffer an injury as a result of an accident at work on March 8, 2019. If so, that finding would render all other issues moot. However, Defendants' answer admits an accident occurred as outlined in the complaint, and further admits that at least in part Claimant's condition for which he seeks benefits was caused by such accident. Admissions in an answer are binding upon Defendants. *McCoy v. Sunshine Mining Co.*, 551 P.2d 630, 632 (Idaho 1976).

17. *Phipps* does contain boilerplate language which states in part, "an injured worker … may lose such benefits if he refuses suitable work or is unable to return to work for the employer due to the termination of his employment for cause, rather than for any limitation from his industrial injury." Cited authority for this statement includes Idaho Code § 72-403, the cases of *Griffin v. Extreme RV*, 2008 WL 5426353 (Dec. 5, 2008), and *Smith v. Champion Building Products*, 1994 IIC 1511 (Dec. 14, 1994). This statement is overly broad and not entirely accurate.

18. As discussed in more detail below, Idaho Code § 72-403 does not specify that a worker will lose TTD benefits if fired for cause. However, depending on the facts of a particular case, an employee who is fired for cause may lose his entitlement to TTD benefits. *Smith v. Champion Building Products*, *supra*, is a good example. In *Smith*, claimant was allowed by his physician to return to light duty work while in a period of recovery following a work accident. Employer accommodated these restrictions by offering claimant a light duty job. Claimant successfully performed the light duty job from July 30, 1990 until October 20, 1990, when he was fired for missing work without notifying employer, a violation of company policy. Employer met its burden of demonstrating a job offer consistent with Claimant's restrictions, which was likely to continue through Claimant's period of recovery. Claimant successfully performed the job until being fired for reasons unconnected to his ability to perform the job. Claimant, though still in a period of recovery, was not entitled to the reinstatement of TTD benefits following his termination, because the circumstances of his termination amounted to an unreasonable refusal of an offer of suitable employment made by employer.

19. In *Phipps*, the employer justifiably fired the claimant for cause on October 2, 2017 (the date of his second accident) when he failed a drug test. Defendants argued they owed

no further TTD benefits after such firing. However, on that same date Phipps' physician took him off work due to his injuries. Medical testimony established the claimant would not be able to work for a year or more after this accident. As such, the claimant was in a period of temporary total disability when he was terminated, and could not have worked for his employer or anyone else at the time of his firing. Therefore, he was entitled to TTD benefits, in spite of his termination.

20. Importantly, the Commission ruled that Phipps "has proven he is entitled to total temporary disability benefits from October 2, 2017, through the date of hearing and continuing until those benefits may be curtailed per *Malueg*, *supra*, or Claimant reaches medical stability." *Phipps* at p. 19. The Commission's holding validates the idea that when considering terminating temporary disability benefits prior to Claimant reaching MMI, Defendants must satisfy the requirements set forth in *Malueg*.

21. Defendants rely on several other cases to support their position, the most analogous of which is *Griffin v. Extreme RV*, 2008 WL 5426353, IC 2005-514555 (Dec. 5, 2008). In *Griffin*, the claimant injured his back on June 28, 2005. He continued to work for his employer thereafter. While he was given restrictions, most of his job duties could be performed within those restrictions. Those tasks outside of his restrictions were delegated to others. Griffin improved and was released to regular duty in late August of that year. Griffin was fired on September 9, 2005 for cause. He had violated the employer's timekeeping policy by allowing his girlfriend to clock out for him after he had left earlier for personal reasons. Defendants did not pay temporary disability payments after his termination.

22. After his termination, claimant experienced a relapse. He was taken off work altogether on September 29, 2005, and was released to return to work with a 50-pound lifting

restriction on October 15, 2005. Surety reinstated TTD benefits on April 11, 2006, the eve of claimant's low back surgery. The Commission concluded that for the period September 29, 2005 through October 14, 2005, claimant was entitled to TTD benefits because he had been taken off work altogether. With respect to the period October 15, 2005 through April 10, 2006, the Commission concluded that claimant was not entitled to TTD benefits. Without reference to any controlling authority, the Commission stated:

> Claimant has failed to establish entitlement to TTD benefits from October 15, 2005 through April 10, 2006. During that period of time Claimant was under a 50-pound lifting restriction. The evidence establishes that Claimant would have been able to return to his regular pre-injury job had he not been terminated. In the event that the 50-pound lifting restriction required Claimant to perform light-duty work, Mr. Archuletta credibly testified that such work would have been available to Claimant if he had not been terminated for cause.

Id. As explained below, the Commission believes that a careful reading of Idaho Code § 72-403 mandates a different outcome.

23. Defendants also cite the Commission to *Quinn v. Doug's Fireplace Sales, Inc.*, 2014 IIC 0095 (2014). In that case, claimant suffered thoracic and lumbar spine injuries as a consequence of a November 24, 2008 accident. He was released to return to modified-duty work at employer's place of business in June of 2009, where he performed such work for employer until late November of 2009, when he unilaterally terminated his employment with employer. The Commission specifically found that claimant's decision in this regard was unrelated to any physical limitation from his industrial injury. Therefore, Claimant was not entitled to TTD benefits following the termination of his employment. The Commission finds nothing in *Quinn* that is inconsistent with the provisions of Idaho Code § 72-403.

24. Finally, Claimant cites the Commission to *Hammon v. Century AG, Inc.*, 2016 IIC 0021 (2016). In *Hammon*, claimant suffered a work-related injury on August 7, 2013, when he

was assigned to do welding work in a confined space. While performing this work, he slipped on a power cord and suffered an injury to his knee. Claimant did not immediately seek medical care. However, he did notify his employer of the accident the next day, August 8, 2013. Claimant told his supervisor that he (claimant) had hurt his knee the day before, and did not want to do further work inside the confined space. Claimant's supervisor accommodated claimant's request and gave claimant different work assignment which claimant performed until he quit his job on August 11, 2013, because of a disagreement with a co-worker. The testimony at hearing confirmed that claimant's decision to quit had nothing to do with his physical ability to perform the work to which he had been assigned.

25. Thereafter, claimant did seek medical treatment, and was given restrictions against lifting more than 40 pounds and to avoid ladders. Claimant sought TTD benefits from the date of his termination through the date of hearing. Citing *Malueg* and Idaho Code § 72-403, the Commission ruled that claimant's loss of earnings following his termination was due to a cause unconnected to the subject accident rather than from any limitation from his industrial injury. There was evidence before the Commission that immediately after the subject accident employer did accommodate claimant's desire to avoid work in confined spaces in order to protect his knee. However, the decision does not reflect that after physician-imposed restrictions were added in October of 2013, employer made an offer of employment to claimant consistent with those restrictions, or had employment available consistent with those restrictions. *Hammon* bears some similarity to the facts of this case in that claimant left his time-of-injury job, was later given modified-duty restrictions, yet never received an offer of employment consistent with those restrictions. As developed below, the Commission questions whether, on the facts above described, *Hammon* was correctly decided.

26. While Claimant attempts to distinguish *Griffin* from the present case, rather than continuing down an erroneous path perpetuated by *Griffin* and overly-broad boilerplate language which finds no support in the Act or any Idaho Supreme Court pronouncement, the notion that Defendants can deny temporary disability benefits whenever a claimant is terminated for cause must yield to the actual law on this issue. This case invites examination of the provisions of Idaho Code § 72-403, and the rule of *Malueg*. More specifically, we consider whether the rule of *Malueg* is inconsistent with statute.

The* Malueg *Test is Not the Co-Equal of Idaho Code § 72-403

27. Analysis must begin with the provisions of Idaho Code § 72-408, which establish Claimant's entitlement to temporary total and temporary partial disability during his period of recovery:

> **72-408. INCOME BENEFITS FOR TOTAL AND PARTIAL DISABILITY**. Income benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code, as follows:
>
> (1) For a period not to exceed a period of fifty-two (52) weeks, an amount equal to sixty-seven per cent (67%) of his average weekly wage and thereafter an amount equal to sixty-seven per cent (67%) of the currently applicable average weekly state wage.
>
> (2) Partial disability. For partial disability during the period of recovery an amount equal to sixty-seven per cent (67%) of his decrease in wage-earning capacity, but in no event to exceed the income benefits payable for total disability.

Therefore, while in a period of recovery, and before reaching medical stability, if Claimant be temporarily totally or totally partial disabled, he "shall be paid" the TTD/TPD benefits as calculated in that section, and as further limited at Idaho Code § 72-409. Idaho Code § 72-408 defines the injured worker's default entitlement to income benefits during periods of temporary

total/temporary partial disability. However, this entitlement comes with certain constraints. Idaho Code § 72-403 imposes an affirmative obligation on an injured worker receiving TTD/TPD benefits to attempt to obtain employment while receiving TPD/TTD benefits. That section provides:

> **72-403. PENALTY FOR MALINGERING — DENIAL OF COMPENSATION**. If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

Though couched in the negative, it is clear that the statute imposes an obligation on the injured worker to seek or accept "suitable" work, i.e. work consistent with his restrictions, or suffer loss of his entitlement to benefits payable per Idaho Code § 72-403. Although the statute imposes an affirmative obligation on the injured worker, it is less clear whether the injured worker has the burden of proving that he has discharged this affirmative obligation before he may receive TTD benefits, or whether it is Employer who has the burden of demonstrating that Claimant has failed to satisfy his statutory obligation in order that Employer may cease the payment of TTD/TPD benefits. We believe that the latter scenario best describes where the burden of proof lies. We reach this conclusion because of the general entitlement to time loss benefits during a period of recovery established by Idaho Code § 72-408. Given the mandate to liberally construe the worker's compensation laws in favor of a finding of compensation, it follows that entitlement to Idaho Code § 72-408 benefits should be assumed until it is demonstrated, by one who opposes the payment of such benefits, that the conditions which warrant curtailment of payment exist, i.e., until it has been demonstrated that the injured worker has, in fact, failed to satisfy his obligation to seek or accept work consistent with his physical abilities.

28. Therefore, an employer may justifiably curtail the payment of time loss benefits in two scenarios: first, if the employer can demonstrate that the injured worker has altogether refused, or failed without good reason, to seek work consistent with his restrictions and abilities, time loss benefits may be denied. Second, should someone offer or secure for claimant a job consistent with his restrictions, and which he is otherwise capable of performing, or should claimant, himself, procure such suitable employment, and then refuse, unreasonably fail, or neglect to perform such work, claimant shall not be entitled to time loss benefits during the period of such refusal.

29. As above noted, both *Malueg* and Idaho Code § 72-403 were cited in support of the Commission's decision in *Hammon*. Specifically, after discussing the rule of *Malueg*, the Commission stated:

> However, an injured worker otherwise entitled to temporary disability benefits may lose such benefits if he refuses suitable work, quits or is terminated for his employment with cause, rather than for any limitation from his industrial injury.

Idaho Code § 72-403 is cited as authority for this proposition. In *Hammon*, claimant's restrictions, if any, at the time of his termination were purely subjective. Claimant asked to be relieved from further work in confined spaces, in order to manage his knee pain. Employer accommodated this, i.e., made him an offer of suitable employment which he performed until he self-terminated a few days later for reasons unconnected to his injury. These facts support a denial of TTD benefits under Idaho Code § 72-403, at least until claimant's restrictions were revised in October of 2013. At that point, claimant received specific restrictions from his treating physician to avoid ladders and lifting over 40 pounds. Assuming these restrictions to be more onerous than the accommodation claimant initially requested, i.e., relief from work in confined spaces, there was no showing that following the imposition of these new restrictions employer

(or anyone) offered claimant a job consistent with his physical abilities. Nor was there a showing that following the imposition of physician-imposed restrictions claimant unreasonably refused or failed to seek employment consistent with his restrictions. Therefore, under Idaho Code § 72-403 it would seem that Claimant was entitled to the reinstatement of TTD benefits following the imposition of what we assume to be more onerous modified-duty restrictions in early October of 2013.

30. In reported cases, Idaho Code § 72-403 does not figure prominently in discussions of when, and under what circumstances, an injured worker may be denied time loss benefits during a period of recovery. Rather, reliance is more frequently placed on the test established by *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986). In *Malueg*, the Court adopted a test devised by the Industrial Commission for determining when time loss benefits may be curtailed for an injured worker who has been released to return to modified-duty work during his period of recovery. The Court quoted with approval the following test devised by the Commission:

> In the opinion of the commission, once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which Claimant has reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

To paraphrase, where an injured worker has been released to modified-duty work, time loss benefits must be paid until Employer proves one of two things: (1) Claimant has been offered a reasonable job by his former employer which is consistent with his restriction and for which he is otherwise suited, and which is likely to continue through his period of recovery; or, (2)

employment consistent with claimant's restrictions and abilities is available in claimant's general labor market and that claimant has a reasonable chance of securing such work.

31. Application of *Malueg* to the facts of *Hammon* would probably yield the same outcome as application of the provisions of Idaho Code § 72-403 to those facts. *Hammon* would not be entitled to TTD benefits between the date of his termination and the date his restrictions were revised. However, following the revision of his restrictions, employer did not make an offer of employment to claimant. Nor was there proof that following the revision of his restrictions, work was available to claimant in his general labor market, which he had a reasonable opportunity of securing.

32. *Malueg* makes no reference whatsoever to Idaho Code § 72-403, yet both *Malueg* and Idaho Code § 72-403 deal with the same issues, the facts that must be proven by employer before claimant may be denied the time loss benefits he would otherwise receive pursuant to the provisions of Idaho Code § 72-408. The specific provisions of the statute govern the determination of when, and under what circumstances, an injured worker's entitlement to benefits otherwise payable under the workers' compensation law may be curtailed. The question which must be answered is whether the *Malueg* test is actually consistent with the provisions of Idaho Code § 72-403.

33. Both Idaho Code § 72-403 and *Malueg* treat the curtailment of TTD benefits in two scenarios, where a job has been offered or secured for the injured worker which is consistent with the injured worker's physical abilities, and where no job has been offered. Comparing the second tranche of Idaho Code § 72-403 to the first tranche of *Malueg* yields some differences. Per *Malueg*, before TTD benefits may be curtailed, it must be demonstrated that the injured worker's "former employer" has made a job offer to the injured worker consistent with his

restrictions. Under Idaho Code § 72-403 employer may curtail the payment of TTD benefits on proof that someone, not necessarily a former employer, has offered or secured a job for claimant, or that claimant, himself, has taken the laboring oar to obtain the job. *Malueg*, then, is more restrictive than the provisions of Idaho Code § 72-403.[4] We can think of no reason why only the refusal of a suitable job offered by the former employer should justify the curtailment of TTD benefits. We conclude that the provisions of statute are controlling.

34. Next, this tranche of Idaho Code § 72-403 requires demonstration that the injured worker refused, "unreasonably" failed or neglected to work at a "suitable" job offered to him. *Malueg* requires demonstration that a "reasonable" job consistent with Claimant's physical abilities has been offered to the injured worker. Suppose that a hypothetical injured worker, who has been released to return to modified duty, is offered a job by a third party. That job, while in claimant's geographic area, is not served by public transit, and would require claimant to have an automobile to get to work. Claimant has no car. He declines the job. Under these facts, the job, while legitimate, may not have been "reasonable" under *Malueg*. Similarly, in rejecting the job, claimant probably did not act "unreasonably" under Idaho Code § 72-403, because the job was not "suitable." In this regard, the provisions of Idaho Code § 72-403 and *Malueg* are not significantly different.

35. From the foregoing, we conclude that the most significant difference in this tranche of *Malueg* and Idaho Code § 72-403 is the acknowledgement in statute that claimant is required to evaluate an offer of employment from anyone, including a job that he creates or finds for himself. To the extent that *Malueg* is to the contrary, Idaho Code § 72-403 controls.

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[4] However, under *Malueg*, an offer of employment to claimant by someone other than employer would be relevant to satisfying the other tranche of *Malueg*, i.e. is there suitable work available to Claimant which he has a reasonable chance of securing.

36. It is somewhat more difficult to reconcile the second tranche of *Malueg* and the similar first tranche of Idaho Code § 72-403. Per *Malueg*, once an injured worker is released to modified-duty work, TTD benefits must be continued until the employer demonstrates that there is employment available to the claimant which is consistent with his restrictions, which he is otherwise capable performing, and which he has a reasonable chance of getting. However, under Idaho Code § 72-403, where an employee is physically capable of some work, benefits may be curtailed where employer demonstrates, not that work consistent with claimant's restrictions is available, but rather that employee has refused or unreasonably failed to take affirmative action necessary to obtain suitable work. *Malueg* emphasizes the availability of work while Idaho Code § 72-403 focuses on the search for work.

37. For example, assume that following his release to modified-duty employment, a claimant has not looked for work. Employer does some research, and identifies ten (10) jobs in claimant's geographic locale which are consistent with his restrictions, and for which he is otherwise qualified. The jobs all require the use of a vehicle and claimant is without a car. Per *Malueg*, claimant does not have a "reasonable opportunity" of securing this work absent transportation. It could also be argued under Idaho Code § 72-403 that on these facts, claimant has not refused or unreasonably failed to look for suitable employment. If Claimant had such knowledge of his labor market that made it obvious to him that suitable work did not exist, his failure was not unreasonable. Under neither *Malueg*, nor Idaho Code § 72-403, is it sufficient to merely show that work consistent with Claimant's restrictions is available in his geographic locale. It must also be shown that Claimant has a "reasonable opportunity" to secure such work (*Malueg*) or that the available work is "suitable" for Claimant (Idaho Code § 72-403). As another example, suppose that claimant has looked diligently but unsuccessfully for a job, but employer,

equipped with better resources, has identified ten jobs for the claimant, consistent with his restrictions and in his geographic locale. Under *Malueg*, the employer could rely on this proof to curtail TTD benefits, but claimant has a better argument for continued receipt of benefits under Idaho Code § 72-403; although his work search was unsuccessful, it cannot be said that he unreasonably failed to look for suitable work. (However, on proof that claimant only applied for work at places he knew were not hiring, it would seem that his search would be found unreasonable).

38. Though similar, the requirements of Idaho Code § 72-403 and *Malueg* diverge in subtle, but potentially significant ways, depending on the facts of a particular case. To the extent that *Malueg* is inconsistent with Idaho Code § 72-403, the statute must control. *Malueg* is limited by Idaho Code § 72-403; after all *Malueg* could not judicially create a new standard for determining when temporary disability benefits are or are not payable independent of the Act. The standard for denying TTD benefits is not *either* Idaho Code § 72-403, *or* the holding in *Malueg*.

I

39. Applied to the facts in the instant matter, the proof does not demonstrate that Claimant refused, unreasonably failed, or neglected to work after a suitable job was offered to him. No offer of suitable employment was made to Claimant by Employer following the revision of Claimant's restrictions to allow lifting of up to 40 pounds. Employer's prior termination of Claimant does not excuse the obligation to demonstrate the existence of an offer of employment at the time Claimant's restrictions were revised. Employer avers that had Claimant not been terminated, a job existed that Claimant could have performed with his revised restrictions, and

such job would have been offered to him, had he not been previously fired. This speculation is unpersuasive.

40. Regarding other offers of employment, at their June 18 meeting, Claimant informed Ms. Piet he had turned down a job because it conflicted with his role as primary caregiver for his daughter while his wife was at work. Since late April Claimant had been working with ICRD and had to know that if he got a job it would require a child care plan for his daughter while he was at work, at least until his wife could resume those duties. Claimant testified that he would not expect his wife to quit her job at Albertsons without giving two weeks' notice.

41. Claimant cannot indefinitely use his obligation as primary caregiver for his daughter as an excuse to fail to accept employment. However, the Commission cannot conclude that Claimant's objection was unreasonable in connection with the Gem Staffing job. Moreover there is no showing that the Gem Staffing job was more than a temporary one, perhaps no more than a day. Finally, we note that Claimant did accept the lawn maintenance job that was offered to him. Without more, the Commission is unable to conclude that Claimant unreasonably failed or neglected to work after suitable work was offered to him.

II

42. Next, under the second prong of Idaho Code § 72-403, Defendants cite to the following facts:

- Claimant did not timely show up for a scheduled initial job development meeting with ICRD Consultant Chelsey Piet on April 29, 2019; instead he moved the meeting to the next day. At that meeting Ms. Piet identified numerous jobs Claimant could seek within his restrictions and Claimant agreed (but failed) to apply for a minimum of seven jobs over the following week.

- Claimant cancelled follow up appointments with Ms. Piet on May 7, May 10, and May 14. On May 14, when Claimant spoke with Ms. Piet to cancel

that day's appointment due to lack of transportation, Claimant indicated he had been released to full duty and had a job interview scheduled for that afternoon. That interview did not happen.

- By May 21, Claimant told Ms. Piet he had only applied for about six jobs total, but he had registered with Gem Staffing, and said he had talked with multiple potential employers. He claimed he had a potential job lined up through Gem Staffing, but was unsure if the job would work for him due to Claimant's role as primary care provider to his four year old daughter while his wife was working. Claimant also indicated he had hurt his back again. Ms. Piet told Claimant he needed to apply for more jobs, and should create an account with Indeed.com. She showed him how to create the account. Ms. Piet also provided Claimant with seven additional job leads.

- On June 6, Claimant indicated he had interviewed with a Porta-Potty company in Ontario, but had not heard back. On June 11, he moved his scheduled meeting with Ms. Piet to June 13.

- On June 13, Claimant indicated he had applied for approximately two jobs per week, but had interviewed with an auto repair shop and was optimistic about his chances for employment with them. Ms. Piet provided an additional five job leads, and informed Claimant about a job fair through the Idaho Department of Labor on June 17 through 20.

- At their June 18 meeting, Claimant indicated he had applied for only one job in the past week. He did not get the auto repair job. Claimant further indicated he received a call from Gem Staffing about a job, but could not take it due to child care issues. Likewise he did not attend the job fair due to the same child care responsibilities. Ms. Piet discussed the importance of establishing a child care plan, as Claimant had turned down several job opportunities due to not having a child care plan in place. Claimant was given five more job listings.

- Ms. Piet testified that Claimant cancelled meetings on June 25 and 26 because he was working a temporary job for a friend doing lawn maintenance.

43. Defendants argue that Claimant failed to seek employment to any meaningful degree in spite of numerous job leads provided by ICRD. Claimant cancelled more meetings than he attended. Claimant responds by averring that he did look for jobs during the relevant time frame.

46. Ms. Piet testified she had made personal contact with a potential construction company employer which Claimant failed to follow up on by phone call or interview. Ms. Piet further testified that every job lead she provided Claimant was available at the time, within his restrictions, and appropriate for his skill set. In contrast, Claimant's "job diary" listed several contacts who were not hiring at the time.

47. Under Idaho Code § 72-403 a claimant's conduct is scrutinized, and when an employer can demonstrate that it falls below the statutory threshold for maintaining temporary disability benefits, such benefits can be suspended. Simply showing there was work available which fell within Claimant's work restrictions is insufficient to deny him TTD benefits; instead Claimant must refuse or unreasonably fail to seek suitable work. To hold otherwise would lower the bar for denying TTD benefits by ignoring Claimant's behavior, contrary to the statute.

49. In hindsight, Claimant's conduct was far from stellar. He failed to follow up on many jobs suggested by ICRD, including a construction job with a 35-pound lifting maximum, which Ms. Piet had personally investigated. Instead of applying for at least one job a day, Claimant was lucky to make two applications in a week.

50. Claimant sought employment at a Porta-Potty outfit in Ontario, which is in a line of work he knows well. He also interviewed with an auto repair shop he felt would hire him. He worked for a couple of days for a friend. He talked with potential employers.

51. In summary, it is a close call whether Claimant unreasonably failed to seek suitable employment. However, when the totality of the evidence is considered, Claimant's conduct does not fall to the level of being unreasonable. His child care concerns, at least for a period of time, were legitimate. He did make contacts, go to interviews, and worked when his wife was available to watch their daughter.

52. Defendants did not offer Claimant employment, but they did establish that there existed in Claimant's job market jobs which were within his work restrictions and were more than temporary. It is less clear whether or how many of those jobs Claimant had a reasonable chance of obtaining. However, per Idaho Code § 72-403, Defendants failed to establish that Claimant unreasonably failed to pursue suitable work or to accept work when offered, and thus justifying curtailment of his temporary disability benefits.

53. Defendants next argue that Claimant was released to full duty with no restrictions in mid-May, after which Claimant had a subsequent intervening accident involving his daughter.[5] The record suggests differently. While Claimant was released for a time to full duty work without restrictions and Claimant acknowledges he is not eligible for disability benefits during this period, at no time was Claimant declared to be at MMI. Dr. Heiner was hopeful Claimant would soon be medically stable if he continued to improve, but Claimant continually had intermittent left leg pain for which he was under a doctor's care and doing physical therapy. Claimant's accident with his daughter bothered his right leg and low back, but his condition soon returned to baseline. Claimant's temporary exacerbation of his underlying low back injury while lifting his daughter was not an intervening accident which would relieve Defendants of liability for temporary disability benefits until such time as Claimant is once again released to full duty work without restrictions or found to be at MMI.

54. Claimant has shown he is entitled to temporary disability benefits from April 25, 2019, when such benefits were curtailed, until such time as Claimant is released to work full time with no restrictions, or reaches MMI, or until those benefits may be curtailed after

[5] There is also a notation in the medical records that Claimant fell down stairs. Claimant convincingly testified at hearing that he slipped off one stair. We find no reason to disturb the Referee's judgment on Claimant's credibility.

the date of hearing per Idaho Code § 72-403. Defendants are entitled to a credit for money Claimant earned doing odd jobs during this time frame.

Attorney Fees

55. Claimant seeks attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> 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.

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

56. Defendants first denied Claimant's demand for any TTD benefits on the ground he was dismissed for cause unrelated to his industrial injury. Subsequently, and with a hearing date approaching, Surety supposedly determined from Employer that no light-duty (10 pound lifting) positions were available at the time Claimant had such restrictions imposed. So, on the eve of hearing, Surety changed course and paid those TTD benefits available for the time Claimant was under a light-duty restriction. When Claimant's restriction was moved to a forty-pound lifting limit, Employer had suitable work available (but for Claimant's prior termination) and Surety decided TTD benefits were not available to Claimant due to his termination.

57. Claimant makes two arguments in favor of attorney fees. First, Defendants' initial denial of TTD benefits on the assertion that they owed no such benefits when Claimant was terminated for cause unrelated to the industrial injury was contrary to the law. Secondly, Defendants waited until one business day prior to the hearing to reverse their earlier denial and provide at least some TTD benefits, which was an unreasonable delay. Defendants' argument that their investigation led to the reversal does not help them, as they were not diligent in their investigation. Claimant argues it took Surety 99 days after accepting the claim to discover Employer had no light-duty jobs available, and then only undertook the investigation due to the pendency of the hearing. Claimant's latter argument is persuasive.

58. Defendants were unreasonable in taking over fourteen weeks from the time they accepted the claim to communicate with Employer to see if Claimant's light-duty restrictions could have been accommodated by Employer. Surety had a duty to conduct a good-faith investigation into the claim in a timely manner. It would have been a simple matter to check with Employer regarding the availability of light and medium-duty jobs without the need for a hearing to prompt such investigation. While there was a legitimate debate on the duration of TTD benefits available to Claimant, Surety knew that Claimant was entitled to TTD benefits at least for that period of time when neither the Employer nor the general labor market had suitable work for Claimant with his limitations and work restrictions.

59. Medical and temporary disability claims are often preliminary issues a Surety must consider in workers' compensation claims, and yet after an early denial of all TTD benefits, Surety waited over three months to take a serious look into this basic issue, when a phone call could have provided Surety the information needed to consider Claimant's TTD claim on the merits.

60. Attorney fees are awardable for a surety neglecting *within a reasonable time* after receipt of a claimant's written claim for compensation to pay the claimant TTD benefits allowed by law. Even if Surety, based on its reliance on past Industrial Commission case language, was not unreasonable in contesting TTD benefits after Claimant obtained a medium-duty work release for which Employer had available work, Claimant was owed *some* TTD benefits. In order to determine the amount of *uncontested* benefits to which Claimant was entitled, Surety had to do some investigation. It waited over three months to conduct that investigation. Such delay is unreasonable under Idaho Code § 72-804.

61. Claimant has proven, pursuant to Idaho Code § 72-804, a right to attorney fees for efforts connected with obtaining those TTD benefits which were paid on the eve of hearing.

62. Claimant is not entitled to attorney fees for efforts made to obtain benefits awarded from the date of hearing forward as a result of this decision. Defendants were not unreasonable in defending against payment of TTD benefits after April 24, 2019, based on an interpretation of past Commission language found in *Griffin*, *supra*.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to TTD benefits from April 25, 2019 until such time as Claimant is released to work full time with no restrictions, or reaches MMI, or until those benefits may be curtailed per Idaho Code § 72-403.

2. Claimant is entitled, pursuant to Idaho Code § 72-804, to attorney fees for efforts connected with obtaining those past TTD benefits which were paid prior to hearing. 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 the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection

with these benefits, and an affidavit in support thereof, with appropriate elaboration on *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 the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

3. Claimant is not entitled to attorney fees for efforts made to obtain benefits awarded from the date of hearing going forward.

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

DATED this ___11th___ day of ___October___, 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 __11th__ day of ___October___, 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:

DANIEL LUKER
PO BOX 6190
BOISE ID 83707

ERIC BAILEY
PO BOX 1007
BOISE ID 83701

/s/

jsk