BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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<tr><td>ANDREA GRANT,
Claimant,
v.
PARAMOUNT FLOOR CLEANING,
Employer,
and
IDAHO STATE INSURANCE FUND,
Surety,
Defendants.</td><td>IC 2014-029800

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

Filed August 25, 2017</td></tr>
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INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on November 29, 2016. Matthew Andrew represented Claimant. Paul Augustine represented Defendants. The parties presented evidence, took post-hearing depositions, and submitted briefs. The case came under advisement on May 1, 2017 and is now ready for decision.

ISSUES

According to the Notice of Hearing, the issues are as follows[1]:

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

   (a) Temporary disability,
   (b) Permanent partial impairment,
   (c) Disability in excess of PPI,
   (d) Medical care, and
   (e) Attorney fees;

CONTENTIONS OF THE PARTIES

Claimant contends that after working 20 straight days as a janitor she developed a shoulder condition. She is entitled to attorney fees for Defendants' failure to pay the additional

[1] The threshold issue of the compensability of Claimant's shoulder condition, i.e. whether she suffered a compensable occupational disease, is not contested. (Hrg. Trans. Pg 11).

0.5% PPI which represents the average of two physicians' 6% and 7% PPI ratings, delay in paying TTD benefits due her, delay in initially accepting this claim, and failure to pay a specific medical bill. Claimant's permanent disability should be rated up to 44%.

Defendants contend Claimant's PPD should be rated between 8 and 11 percent. Defendants did not act unreasonably at any time: they accepted the claim and began paying benefits within a reasonable time given Claimant's delay in making a claim and the ambiguous circumstances surrounding this claim; until the date of the hearing they were unaware that one specific medical bill had gone unpaid because Claimant had not notified Defendants nor demanded that the bill be paid; the 7% PPI rating was unreasonably based upon subjective factors and therefore averaging was not appropriate.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, her boss Lonnie Burton, her daughter Harmony Bade, and Surety adjustor Jodi Bolin;

2. Claimant's exhibits 1 through 19 admitted at hearing;

3. Defendants' exhibits 1 through 10 admitted at hearing; and

4. Post-hearing depositions of Mark Williams, D.O., Stanley Waters, M.D., and vocational rehabilitation experts Barbara Nelson and William Jordan.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant worked as a night janitor for Employer. She cleaned the Challenger School in Meridian. She had worked for Employer for nearly a year before this claim arose.

Initial Descriptions of How Claimant's Pain Arose

2. After 20 consecutive nights of work her shoulder was hurting. On August 30, 2014 Claimant visited an emergency room at St. Luke's in Meridian. The ER note describes "right shoulder pain after a 20 day stretch of repetitive motion at work. . . . ONSET: A few weeks ago." It clearly describes the discomfort arising before the 20 day stretch of work but increasing thereafter. Upon examination Claimant reported specific tenderness as well as increased pain with range of motion. X-rays were normal.

3. On September 18, 2014 Claimant visited Stanley Waters, M.D. By history Dr. Waters noted, "The mechanism of injury includes lifting while at work and repetitive actions . . ." with a gradual onset, but without a specific date of injury.

4. On a September 23, 2014 initial visit to a physical therapist, Brian O'Neal, Claimant denied "any isolated incident" as a cause of her right shoulder pain and blamed overuse. However, when Claimant returned for post-surgical physical therapy on May 27, 2015 she told a physical therapist from the same office, Dave Anderson, that the initial injury occurred "when lifting a heavy bag."

5. Beginning February 16, 2015 Claimant visited another physical therapist, Brian Lee. This history states, "Andrea developed significant anterior lateral right shoulder pain after 20 days in a row of hard work for a floor cleaning company which included heavy reaching, scrubbing and lifting."

Medical Care: 2014-2015

6. Dr. Waters' note of his initial visit on September 18, 2014 erroneously refers to August 9, 2014 as a date for the ER visit to St. Luke's in Meridian. Upon examination Dr. Waters noted that Claimant reported acromioclavicular (AC) joint tenderness and pain with motion as well as mild diffuse rotator cuff weakness. He noted atrophy of deltoid and

supraspinatus fossa. X-ray showed mild elevation of the clavicle suggesting an AC joint separation. He diagnosed a shoulder dislocation.

7. At a return visit on October 29, 2014 Dr. Waters found Claimant about the same.

8. On December 18, 2014 Dr. Waters responded to a Surety inquiry. He opined Claimant disabled from the date of his first visit and continuing.

9. Having previously identified his first visit as the date of injury, Dr. Waters noted the date of injury as "August 2014" in his December 18, 2014 examination note. On that date he included traumatic arthropathy of the AC joint with his diagnosis of dislocation. He recommended an MRI.

10. On February 4, 2015 Dr. Waters performed a diagnostic arthroscopy. He observed "posttraumatic arthritis" after Claimant provided additional history that "she sustained a lateral blow to the right shoulder which resulted in a right shoulder acromioclavicular joint separation." Claimant's reports of pain and disability had increased markedly from prior visits. On examination, her right pectoralis also showed atrophy. At surgery Dr. Waters observed some fraying of the supraspinatus tendon, marked hypertrophy of the subacromial bursa, a loose body in the AC joint and "evidence of an acute osteochondral injury to the distal clavicle." Dr. Waters performed an acromioplasty and distal clavicle resection.

11. On March 2, 2015 Dr. Waters responded to a Surety inquiry. He kept her off work.

12. On March 11, 2015 Claimant reported her condition worse after surgery and with the initiation of physical therapy.

13. On March 30, 2015 Claimant reported slow progress after 10 physical therapy sessions. Dr. Waters noted the presence of Waddell's signs for the first time at this visit.

14. After additional visits and physical therapy Claimant was generally not progressing in either strength or range of motion.

15. A repeat MRI on July 9, 2015 showed a partial tear of the infraspinatus tendon with mild tendinopathy of the supraspinatus, but—according to the radiologist—no muscle atrophy. Dr. Waters continued to note deltoid and supraspinatus fossa atrophy over these visits.

16. On July 27, 2015 Dr. Waters provided a Kenalog injection which, by a later report, helped.

17. At an August 24, 2015 examination Dr. Waters noted full strength and range of motion and did not describe any muscle atrophy. He opined Claimant's condition fixed and stable with maximum medical improvement on that date. He rated PPI at 6% whole person. He recommended a two-month period with a 20-pound, right-armed lifting restriction before resuming full duty without restrictions.

18. Claimant returned to Dr. Waters on October 28, 2015 with continuing complaints. Upon examination, Dr. Waters found no objective abnormalities except continued atrophy of the deltoid. Strength and range of motion were full. He could not explain her complaints of continuing pain, "popping," and poor range of motion. He did not change his PPI rating, but made permanent a restriction against too much overhead activity and all lifting over 25 pounds with her right arm.

Medical Care: 2016 to Hearing

19. On July 22, 2016 Mark Williams, D.O., reviewed records and examined Claimant for forensic purposes at Claimant's request. His review noted a history involving janitorial work without a specific precipitating incident. It assumes Claimant's September 18, 2014 visit to Dr. Waters as the injury date although prior symptoms are acknowledged.

Dr. Williams' examination revealed crepitus with motion, tenderness to palpation, decreased range of shoulder motion, and "slight" weakness in abduction. Clinical tests were consistent with impingement syndrome. He opined her impingement syndrome and pain were work related. He opined her AC joint degeneration was "work aggravated." He rated PPI at 7%. He provided a detailed list of categories of restrictions, ranking activities on a scale from "constant" to "never." Dr. Williams' lifting restriction of 25 pounds occasionally and 10 pounds frequently is consistent with Dr. Waters' opinion about restrictions.

Vocational Factors

20. Born July 23, 1976, Claimant was 38 years old around the time of injury and 40 on the date of hearing.

21. Claimant did not finish her freshman year of high school. Although the stories reported by the vocational experts differ in some aspects, they consistently report that Claimant pursued a GED for a time, she does not currently possess a GED. She did take some cosmetology courses, but that school closed before she completed them.

22. Claimant has worked primarily in the food service and janitorial industries. She has performed some retail and photo-developing work.

23. She worked for tips as an exotic dancer, but the atmosphere at the clubs contributed to methamphetamine and alcohol issues. She has overcome these issues and been sober for more than eight years. Because of the relationship between these venues and her former substance abuse, as well as the inherently unstable pay, she reasonably believes a return to such employment would not be suitable.

24. Since the injury, Claimant has worked brief, part-time stints as an off-ice official—essentially an office clerk and assistant scorekeeper—at hockey games.

25. Claimant's time-of-injury wage was $10 per hour on a full-time basis. She has worked most of her adult life at or near minimum wage. She has taken time off, sometimes consecutive years, for child rearing. Nevertheless, her annualized earnings do not show in her best year a complete year of full-time work at or above minimum wage.

26. Although Claimant testified generally about tips received, no contemporaneous reporting was ever made for income tax or any other purpose. Claimant's testimony about tips is too speculative to assist in measuring potential wage loss from this accident, particularly where Claimant's reasonable reluctance to return to that occupation is unconnected to her shoulder injury.

27. The record does not reveal preexisting condition unrelated to her shoulder which might affect employability.

28. Claimant is right-hand dominant. Her injury is to the right shoulder.

29. On October 31, 2016 vocational expert Barbara Nelson reviewed records and interviewed Claimant for a forensic evaluation at Claimant's request. A test of Claimant's academic skills suggested she has about high-school literacy and middle-school math skills. Ms. Nelson opined Claimant should be able to obtain a GED "without serious difficulty" as well as to improve her computer skills with "community courses." Ms. Nelson identified certain specific job openings available and described how each exceeded Claimant's restrictions. Opining generally, she explained why food service—particularly deli work—and janitorial jobs were beyond Dr. Williams' restrictions and often beyond Dr. Waters' restrictions; Claimant's suitability for retail jobs is reduced by these restrictions as well. Ms. Nelson opined that Claimant's pre-injury labor market access of 18% has been reduced. Using Dr. Waters' restrictions, Claimant's loss of access is rated at 28%; using Dr. Williams, 44%. With a time-of-

injury wage of $10 per hour, wage loss is a lesser but real concern. Overall, Ms. Nelson opined Claimant's disability at 24 to 32 percent, inclusive of medical factors, depending upon which set of restrictions is adopted.

30. On November 9, 2016, vocational expert Bill Jordan issued his written report. He reviewed records and interviewed Claimant for a forensic evaluation at Defendants' request. He met with Dr. Waters. Dr. Waters approved or approved with modification a number of job descriptions Mr. Jordan provided. In certain of the written job descriptions, Dr. Waters expressly approved a below-shoulder-height, 50-pound, bilateral, lifting restriction. In deposition Dr. Waters opined that this restriction was neither an addition nor a change from his prior opinion about restrictions; it was more like a specific clarification of his one-armed lifting restriction.

31. Mr. Jordan's report identified specific available jobs and a list of job types. He opined these were within the restrictions of one or both physicians. Ultimately, he opined Claimant's permanent disability included a loss of labor market access at 26% (Williams) or 16% (Waters). He then averaged a 0% wage loss to cut these numbers in half.

Procedural Factors of this Claim

32. Employer was aware of Claimant's shoulder pain no later than September 20, 2014. When asked in deposition if Claimant informed Employer then that she considered it work related, she testified, "I thought he would get it by what I told him."

33. Employer was aware that Claimant had a potential workers' compensation claim no later than November 3, 2014.

34. Surety responded to the claim on November 14, 2014. It assumed a September 18, 2014 injury date.

35. Claimant's Exhibit 14 indicates that, about December 11, 2014, Defendants had knowledge of the August 30, 2014 emergency room visit and X-ray.

36. Surety approved TTD benefits. It notified Claimant of such on December 23, 2014.

37. On February 4, 2015 Claimant responded to Defendants' interrogatories. These repeatedly referred to a September 18, 2014 injury date. Claimant did not correct the misunderstanding nor indicate the occurrence of the August 30, 2014 emergency room visit.

38. Surety approved a PPI benefit based upon Dr. Waters' evaluation and notified Clamant of such on September 1, 2015.

39. Despite Claimant's May 19, 2016 deposition testimony indicating the contrary, on November 16, 2016 Claimant filed a supplemental discovery response to assert her claim for attorney fees. She expressly mentioned a date of September 20, 2014 and did not mention an unpaid bill from August 30, 2014.

DISCUSSION AND FURTHER FINDINGS OF FACT

40. 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 which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

41. Claimant makes a good first impression. Her demeanor does not reveal inconsistencies. Her varying stories of how the symptoms began are problematic as are the infrequent mention of Waddell's signs in the medical records. Nevertheless, the inconsistencies are minor relative to the objective evidence of injury observed at surgery and upon diagnostic

imaging. The functional difficulties and subjective pain she describes are largely consistent with the objective injury.

Medical Care Benefits

42. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1).

43. The parties do not appear to materially dispute Claimant's entitlement to medical care benefits. Rather, the issue is whether there was an unreasonable delay in paying the August 30, 2014 and other medical bills or in authorizing medical treatment. This dispute is relegated to the question of attorney fees addressed below.

Temporary Disability

44. At hearing Claimant admitted that no dispute existed regarding TTD calculations. Only Defendants' delay in paying them was at issue. Therefore, entitlement to TTDs is not at issue and the question of delay will be discussed in the attorney fees section below.

Permanent Impairment

45. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 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*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975). Averaging of competing PPI evaluations is required. IDAPA 17.02.04.281.02.

46. In deposition Dr. Waters opined the differences between his and Dr. Williams' PPI ratings and restrictions were not significant.

47. In deposition Dr. Williams explained his methodology for rating PPI and assigning detailed restrictions. He clarified that the bilateral lifting restriction would be about 40 pounds.

48. Defendants' assertions that Dr. Williams' PPI rating is unreasonable are not persuasive. Indeed, the Referee is not persuaded that the Surety's basis for failing to average and pay these very similar ratings was itself reasonable.

49. Ultimately the question of whether Claimant has impairment payable as disability of 6% or 7% of the whole man is unimportant because both sides agree that the figure is eclipsed by permanent disability from all factors.

Permanent Disability

50. "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 permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

51. 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 nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

52. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory

opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

53. This issue also presents differences between experts which are not grossly at odds. Claimant's personal attack on Mr. Jordan is not established by the evidence of record and does not appear warranted given his methodology or the comparison of his ultimate opinions with those of Ms. Nelson.

54. Both experts describe a hard-working, single mother with insufficient education and greater potential for education. Both experts testified about their reasonable assumptions and bases applied in forming their opinions. The mathematical effects of small differences of assumption as to potential wage loss represent the most salient variation between the opinions of these two credible experts. This record highlights how small differences in varying physicians' reasonable restrictions can result in greater variance in potential permanent disability.

55. Dr. Williams' restrictions are the product of a forensic evaluation. They are naturally more detailed and perhaps a bit more motivated toward safety rather than function, as indicated in his deposition.

56. Dr. Waters' restrictions are the product of having observed Claimant's treatment and progress over time. They are naturally more practically based with an eye toward allowing Claimant to function as fully as she can tolerate, as indicated in his deposition.

57. This is not a case in which opinions are so inconsistent that one is considered correct and the other incorrect. In such a case, weighing the totality of the factors of record, ultimate permanent disability is likely a number somewhere in the middle. The fact that this

matter involves a manual laborer with a painful shoulder suggests an upward adjustment. Opinions about loss of labor market access vary from 16 to 44 percent. Ms. Nelson's opinion of about a 20% wage loss is entitled to weight, tempered somewhat by Mr. Jordan's reasonable assumption that Claimant can regain the $10 per hour wage she earned at the time of the injury.

58. After thorough and vigorous examination of the entire record and all relevant factors, a permanent partial disability award of 30% percent, inclusive of all medical disability, is most appropriate.

Medical Care

59. Claimant does not allege she is entitled to additional medical care. Rather she alleges her bills were not timely paid and one bill remained unpaid at hearing. The parties do not dispute her entitlement to payment of this medical bill.

60. This issue, like TTDs, is relegated to analysis under the question of Claimant's entitlement to attorney fees and discussed below.

Attorney Fees

61. Attorney fees are awardable under the factors set forth by the Legislature in Idaho Code §72-804.

62. Claimant devotes much attention to various dates and aspects of delay in presenting her claim for attorney fees. The bases for this benefit arise essentially under three categories—Employer's delay in filing a claim, Surety's delay in approving or paying medical and temporary disability benefits, and Defendants' failure or refusal to average the PPI ratings and pay 6.5% rather than 6% for physician-rated medical disability.

63. Surety would be liable under §72-804 for Employer's denial or delay, had such occurred. Claimant failed to show it likely that Employer actually failed, refused, or unreasonably delayed Claimant's claim. These facts show a simple misunderstanding and

an insufficiently detailed communication between Claimant and Employer before November 3, 2014. Not until November 3, 2014 did Employer have notice that Claimant attributed her condition to work and was considering making a claim. Claimant's attorney prepared the Form 1 dated November 5, 2014. Surety notified Claimant it had received her claim on November 14, 2014. Section 804 should not be invoked on that basis.

64. Regarding the August 30, 2014 emergency room visit: With an initial September 18, 2014 injury date as part of the workers' compensation claim, that visit looked like it might be a preexisting condition. The record does not show when Claimant made that visit a part of her claim for medical benefits or sent Surety a copy of the bill. Although in hindsight clearly a compensable medical benefit, the August 30 visit did not include sufficient indicia to paint that payment oversight within the scope of §804.

65. Regarding TTDs and approval and payment of other medical bills, the adjustor for Surety testified. Her actions and bases underlying her actions appear reasonably timely at every turn. She timely initiated reasonable inquiry about compensability issues. Uncertainty about whether this was an accident and injury versus an occupational disease claim, how and when it arose, and other complications were as much a product of Claimant's own uncertainty and inconsistent reporting Employer and to physicians.

66. Defendants' position that the 7% PPI represented an unreasonable opinion is not well taken. IDAPA regulations require payment of an average of two ratings when available. Surety's failure to follow the regulations without sufficient basis should result in an award of attorney fees. The appropriate fee is 30% of the 0.5% PPI which should have been paid.

CONCLUSIONS

1. Claimant suffered a compensable injury as an occupational disease through repetitive motion. Medical benefits and temporary disability appear to have been appropriately paid;

2. Claimant is entitled to permanent partial disability benefits rated at 30% of the whole person, inclusive of impairment paid as disability and all other disability factors;

3. Claimant is entitled to an award of attorney fees amounting to 30% of one-half of one percent PPI based upon its refusal or failure to reasonably pay the average, as required by IDAPA 17.02.04.281.02, of ratings—6% versus 7%—evaluated by physicians. This amount calculates to $282.15.

4. Claimant failed to establish any other basis for an award of attorney fees under Idaho Code §72-804.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 18th day of August, 2017.

INDUSTRIAL COMMISSION

___/s/________________________________
Douglas A. Donohue, Referee

ATTEST:
___/s/___________________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August , 2017, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MATTHEW C. ANDREW
1226 EAST KARCHER ROAD
NAMPA, ID 83687-3075

PAUL J. AUGUSTINE
P.O. BOX 1521
BOISE, ID 83701

dkb ___/s/_______________________________

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ANDREA GRANT, Claimant, v. PARAMOUNT FLOOR CLEANING, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2014-029800** **ORDER** Filed August 25, 2017

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a compensable injury as an occupational disease through repetitive motion. Medical benefits and temporary disability appear to have been appropriately paid.

2. Claimant is entitled to permanent partial disability benefits rated at 30% of the whole person, inclusive of medical and all other disability factors.

3. Claimant is entitled to an award of attorney fees amounting to 30% of one-half of one percent PPI based upon its refusal or failure to reasonably pay the average, as required by IDAPA 17.02.04.281.02, of ratings—6% versus 7%—evaluated by physicians. This amount calculates to $282.15.

4. Claimant failed to establish any other basis for an award of attorney fees under Idaho Code §72-804.

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

DATED this 25th day of August, 2017.

INDUSTRIAL COMMISSION

___/s/________________________________
Thomas E. Limbaugh, Chairman

___/s/________________________________
Thomas P. Baskin, Commissioner

___/s/________________________________
R. D. Maynard, Commissioner

ATTEST:

___/s/________________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August , 2017, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

MATTHEW C. ANDREW
1226 EAST KARCHER ROAD
NAMPA, ID 83687-3075

PAUL J. AUGUSTINE
P.O. BOX 1521
BOISE, ID 83701

___/s/________________________________