BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARVIN CUNNINGHAM, Claimant, v. RECORD STEEL & CONSTRUCTION, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2010-027200** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on May 16, 2017. Richard Owen of Nampa represented Claimant. Matthew Vook of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing and submitted post-hearing briefs. One post-hearing deposition was taken. The matter came under advisement on August 14, 2017.

ISSUES

The issues the parties agreed are ripe for consideration are:

1. Whether Claimant is entitled to retraining benefits under Idaho Code § 72-450;
2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant asserts he suffered an occupational disease which has forced him out of his chosen profession as a welder. He has proven the need for retraining, without which he would be unable to restore his earning capacity. Claimant has satisfied all requirements for retraining under Idaho Code § 72-450, including a permanent disability, and medical stability. Defendants should be required to pay for the final two years of Claimant's studies at Boise State University, where he is currently enrolled and pursuing a degree in material science engineering. Defendants are also liable for attorney fees pursuant to Idaho Code § 72-804 for failing to timely obtain an impairment rating for Claimant, thus requiring Claimant to seek out and pay for his own impairment rating examination with a local physician. Defendants also unreasonably refused Claimant's request for an advance on his impairment rating benefits after he reached medical stability but before an impairment rating was obtained.

Defendants argue that Claimant suffered no permanent impairment under the guidelines set out in the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Edition. As such, Claimant has not met the requirements for consideration of retraining under Idaho Code § 72-450, which requires a Claimant to have suffered a permanent disability. Without impairment there can be no disability. Claimant is not entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Michael Hurley, Ph.D., taken at hearing;
2. Claimant's exhibits 1 through 5, admitted at hearing;
3. Defendants' exhibits 1 through 15, admitted at hearing;

4. The post-hearing deposition transcript of Robert Friedman, M.D., taken on June 29, 2017.

FINDINGS OF FACT

1. At the time of hearing Claimant was fifty-six years of age.

2. Claimant's chosen profession was welding. His welding activities for Employer led to a lung condition known as Pulmonary Alveolar Proteinosis (PAP).[1] Surety accepted the claim and has paid benefits including medical treatment for his condition since late 2010.

3. Claimant cannot continue in his chosen profession of welding due to his lung condition.

4. At the time of his diagnosis, Claimant had no high school degree, having not acquired enough credits to graduate. However, he was an accomplished welder, and had earned approximately $46,500 in his last year of employment with Employer.

5. Once Claimant learned he could no longer be a welder, he returned to school and obtained his GED in 2011. Subsequently that same year he enrolled at College of Western Idaho (CWI), taking core classes. Claimant's initial goal was to get a business degree and find an office job. A friend suggested Claimant should pursue a degree in material science engineering at Boise State University (BSU). As described by Claimant, material science engineers are involved with atomic structures of materials, from DNA to semiconductors. Claimant had a particular interest in jobs related to developing materials with superior mechanical properties.

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[1] According to the OMAC IME report of January 12, 2011, PAP is a rare disease, (fewer than 500 cases have been reported worldwide in literature, and it has a prevalence rate of 3 per 1 million persons), characterized by accumulation of fluid within the lung's alveolar sacs. Five-year survival rate is 80%.

6. In 2012, Claimant began taking more focused classes in science, technology, and math, with the goal of obtaining a bachelor degree in material science engineering.

7. Claimant has been paying for his schooling with student loans.

8. While Claimant had difficulty with some of his classes, namely chemistry and math, he continued at CWI into the fall of 2014, when he dual-enrolled at CWI and BSU.[2] Claimant graduated from CWI with an associate of arts degree in liberal arts after the spring 2015 semester. Thereafter, Claimant has continued his studies toward a material science engineering degree at BSU.

9. Claimant continues to struggle with classes such as physics, math, and thermodynamics. He has had to repeat certain classes, but has managed to keep moving forward toward his goal. His cumulative GPA at the time of hearing was 2.4. His most recent semester GPA was over 3.0. Claimant recognizes there are challenging classes on his horizon, including quantum physics. At the time of hearing, Claimant had four more semesters before graduating, assuming he passes all his classes.

10. In addition to his schooling, Claimant was selected to an internship in the environment corrosion lab under the direction of Michael Hurley, Ph.D., at the Micron School of Material Science at BSU in June 2016. His experience in the lab is designed to provide him with "real world" experience to better enable him to compete in the job market upon graduation.

11. Claimant's understanding is that with a bachelor degree in material science engineering he could start work with an annual salary of between $70,000 and $110,000.

[2] Claimant's dual enrollment was due to the fact that CWI did not offer certain classes Claimant needed to pursue his engineering degree.

BSU offers placement services. Claimant would like to work at INL if given the opportunity. Micron also employs material science engineers, as do several other employers in the Treasure Valley.

DISCUSSION AND FURTHER FINDINGS

In this proceeding, Claimant first asks the Commission to order Defendants to pay or reimburse Claimant for a portion of his post-secondary education, which he deems to be "retraining." He also seeks attorney fees for Defendants' failure to provide Claimant with a PPI rating in a time frame suitable to Claimant, or advance certain payments.

RETRAINING BENEFITS

12. Idaho Code § 72-450 provides, in pertinent part:

> … [I]f the commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case my be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks.

13. Breaking Idaho Code § 72-450 into its component parts, the following are points to be considered:

(1) The Commission has discretion (but not a statutory obligation) to authorize or order retraining benefits when;

(A) Claimant is permanently disabled after reaching MMI, and

(B) Claimant is receptive to retraining into a different field, skill, or vocation than the Claimant previously held, and

(C) The retraining is needed to restore Claimant's earning capacity.

(2) When retraining is authorized or ordered, the retraining benefits will not exceed 52 weeks, unless after hearing the Commission deems it advisable to extend the period of retraining for up to an additional 52 weeks.

14. Applying the phrasing of Idaho Code § 72-450, before retraining benefits may be considered, Claimant must be at MMI and permanently disabled. While the Defendants do not argue that Claimant has yet to reach MMI, they do contend that Claimant suffered no permanent partial disability (PPD) from his occupational disease because, under the provisions of the AMA *Guides to the Evaluation of Permanent Impairment,* 6th Edition, Claimant suffered no permanent partial impairment (PPI), and without PPI there can be no PPD. *Urry v. Walker & Fox Masonry Contractors,* 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989).

Permanent Partial Impairment

15. Claimant's lung condition (PAP) first manifested in 2010 with shortness of breath, fatigue, and coughing fits with mucus production. He sought medical attention for these symptoms.

16. Claimant was initially seen by Cynthia Culp, N.P., who referred Claimant to David Sasso, M.D., a Boise pulmonologist. Dr. Sasso diagnosed PAP due to heavy metal exposure through welding.

17. In 2011 and 2012, Claimant underwent lung lavages in Seattle. The procedures temporarily helped, but did not eliminate Claimant's symptoms. Claimant continued to have diminished lung capacity. During this time frame, Claimant testified he required supplemental oxygen much of the time, and routine activities, such as climbing stairs or mowing his lawn, were difficult.

18. Ultimately, Dr. Sasso determined Claimant's lung lavage therapy was ineffective for any lasting benefit. Due to his deteriorating condition, Claimant elected in 2013 to proceed with a somewhat experimental procedure known as Rituxan infusion therapy.

19. The Rituxan infusion therapy greatly reduced Claimant's symptoms. By late 2013, he no longer needed supplemental oxygen other than for heavy exertion, such as working out at the gym. Claimant began hiking and snowboarding again. By mid-2014, Dr. Sasso noted Claimant's ability to do heavy exercise had returned to near baseline levels, and Claimant was hiking locally and working out aggressively with only a rare cough.

20. In August 2014, Defendants sought opinions concerning Claimant from Barbara Cahill, M.D., a Medical Evaluation Specialist and professor in the Respiratory, Critical Care & Occupational Pulmonary division of the Department of Internal Medicine at the University of Utah. After testing and examination, Dr. Cahill noted that Claimant still had residual disease on CT scan, and although much improved, he was not yet at medical stability. She felt that an MMI determination should not be made until one year after Claimant's Rituxan therapy was concluded. She also opined that Claimant should not work in an environment where he would be exposed to welding fumes. Furthermore, he should be allowed to use his supplemental oxygen as needed at work, although she was hopeful that, due to Claimant's improving condition, his use of oxygen would not be permanent.

21. In December 2014, Dr. Sasso noted Claimant's functional status was exceptional. Claimant was again bike riding, backpacking to over 10,000 feet (albeit with some supplemental oxygen), and unrestricted with heavy exertion, although oxygen helps him recover faster from such exertion. Dr. Sasso scheduled a repeat Rituxan infusion treatment for the following May, and on an annual basis indefinitely.

22. By May 2015, Claimant's condition had declined somewhat. Rituxan infusion was again administered. In records from January 2016, Dr. Sasso indicated that Claimant's pulmonary function was stable with annual Rituxan treatment, and he planned on continuing such annual infusions. Claimant likewise felt his condition had stabilized.

23. In August 2016, Dr. Sasso discussed the idea of stopping Rituxan treatments at some point, and then seeing what happened without the treatment. The concern was that if Claimant's condition deteriorated without annual treatments, there was a possibility that subsequently resuming the treatment would not reverse whatever pulmonary function Claimant lost without the treatment. Dr. Sasso was unsure if continued treatment was needed, due to the lack of literature on this experimental treatment. Claimant wished to continue the treatments, as he was fearful of permanently losing functional gains he made with the Rituxan infusions. It appears no treatment was done in 2016.

24. Claimant testified that with the passage of time since his last treatment, his oxygen saturation rate is declining. He was anticipating a treatment in the near future at the time of hearing. Claimant testified to the limitations he experiences when working out and how supplemental oxygen helps him to recover his breath more quickly.

25. In February 2017, Dr. Sasso wrote a "to whom it may concern" letter indicating that in his opinion Claimant was medically stable. The letter appears to imply that stability is premised upon ongoing infusion therapy.

26. In May 2017, at Claimant's request, Robert Friedman, M.D., a local physical and rehabilitation doctor, examined Claimant and rated his impairment. Dr. Friedman gave Claimant a 6% whole person impairment rating. While Defendants disagree with his findings, they nevertheless paid PPI payments to Claimant in accordance with Dr. Friedman's assessment.

27. Dr. Friedman was deposed. Therein, his opinions were challenged by Defendants. Dr. Friedman testified his opinion of PPI was based on the guidelines set out in the AMA *Guides to the Evaluation of Permanent Impairment,* 6th Edition. However, he had to acknowledge that following the formula contained therein for determining pulmonary impairments, Claimant would be in a Class 0, which would lead to a conclusion of no impairment. Dr. Friedman justified placing Claimant in a Class 1 (impaired) by opining that Claimant's function does not match a Class 0, but rather is really a class 1 by his underlying condition and treatment history. Dr. Friedman also testified that Claimant (in his worst-case test results) was "on the cusp" and if his hemoglobin or DLCO (diffusion capacity for carbon monoxide) had been miscalculated, Claimant's numbers could be adjusted up or down, and if they were adjusted down even one point, then "boom, he's a Class 1." Friedman depo. p. 14.

28. While the arguments are much more involved, there is little to be gained by a detailed analysis of the *Guides* (the relevant table was included as an exhibit) or Dr. Friedman's efforts to correlate his opinion on PPI to the *Guides.* Under the strict construction of the *Guides* Claimant would have suffered no impairment. Dr. Friedman's attempt to bootstrap his opinion into the four corners of the *Guides* is not persuasive. However, that is not the end of the inquiry.

29. As acknowledged by Defendants in their briefing, permanent partial impairment is an anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved. Evaluation of PPI is a medical appraisal of the nature and extent of an injury as it affects a claimant's personal efficiency in the activities of daily living. When determining impairment, the opinions of physicians are advisory only because

the Commission is the ultimate evaluator. The Commission is not limited to the record or opinion of a physician requested to give permanent impairment ratings; medical records and opinions obtained from physicians for purposes of general diagnosis and treatment are competent evidence in determining PPI. The Commission is to assign weight to attach to medical expert testimony, and may consider the expert's reasoning and methodology, and whether the expert has taken into account all relevant facts. *Accord* Defs' Responsive Brief, p. 6.

30. In the present case, the medical record as a whole supports the finding that Claimant suffered at least some permanent partial impairment. While Dr. Friedman's reliance on the AMA *Guides* carries no weight, his opinions beyond the *Guides* are very much in line with the medical records as a whole. As Dr. Friedman stated, Claimant's function does not correspond with an individual with *no* impairment. After all, impairment is defined as a functional abnormality after Claimant has reached medical stability. Claimant testified as to his limitations at hearing, and to the objective medical determination that his oxygen saturation rate was decreasing (95% when tested in April 2017, down from 97% when tested in August 2016) without infusion therapy. More importantly, as noted by Dr. Friedman in his deposition, to argue Claimant has no impairment would also mean he has no current signs of disease and no current symptoms. The doctor pointed out that Claimant had intermittent symptoms, and evidence of his underlying pulmonary condition. There are times when he is worse, times when he is better. Friedman depo. p. 18.

31. While Dr. Sasso apparently moved the infusion therapy regimen from annual to bi-annual, nowhere in the record does he consider Claimant to be "cured" of his disease, or permanently returned to baseline. At no point since the infusion therapy began has Claimant been able to perform all activities without at least occasional supplemental oxygen.

While for the time being the infusion therapy has allowed Claimant to maintain a fairly normal "almost baseline" activity level, with or without supplemental oxygen, he is nevertheless impaired by his condition.

32. The parties have not raised the issue of Claimant's PPI rating as an issue for resolution. However, the record as a whole supports the position that Claimant has suffered at least some permanent impairment as a result of his PAP. Determination of the exact rating is reserved for another day.

Permanent Partial Disability

33. In order to consider retraining benefits, Claimant must first show he is permanently disabled. Defendants' argument against this position is that Claimant suffered no permanent impairment, and therefore by law cannot show a permanent disability.

34. The record is clear that without retraining, Claimant has suffered at least some level of disability. The evaluation of Mary Barros-Bailey, Ph.D., is of little use in that she made her determination prior to Claimant reaching MMI, and further, even before he began his infusion treatments. When she evaluated Claimant, he was on supplemental oxygen more or less full time. He is much improved since then.

35. Even without rehabilitation expert testimony on the subject, it is clear from physician restrictions that Claimant is precluded from ever pursuing his former occupation. No party disputed the fact that Claimant has lost job opportunities as a result of his occupational disease.

36. This case is not ripe for determining the percentage of Claimant's permanent disability. However, Claimant has shown he has suffered at least some permanent disability as a result of his occupational disease.

Retraining Function and Necessity

37. Because there is no disputing that Claimant desires retraining, the last two issues to discuss are whether the retraining sought is needed to restore Claimant to his pre-loss earnings, or said differently, whether Claimant could restore his earnings without the retraining Claimant seeks.

38. Claimant asks the Commission to order Defendants to pay for the next two years of Claimant's BSU studies. He anticipates, but does not know, that he will complete his bachelor's degree in that time frame. If Claimant successfully completes what may well be the most difficult two years of his higher education, and finds employment, the chances are good his income will be 75% to 100% greater than he was making pre-injury.

39. While Idaho Code § 72-450 allows for retraining benefits in certain circumstances, the purpose of the statute, by its very language, is to restore, not elevate Claimant's wage earning capacity. As Defendants argued at hearing, retraining is not intended to be a college sponsorship. Also, the statute contemplates training programs which one could expect to complete in two years or less, since a maximum of two years of retraining benefits is contemplated by statute. That is not to say that a college degree could never be considered retraining. But in the present case, to require Defendants to pay for the next two years of Claimant's college education is not reasonable.

40. At his time of loss, Claimant did not even hold a high school diploma. He was a welder and fabricator by trade, and had done such work for over three decades. Certainly, he would benefit from some type of retraining if he could not return to welding.[3]

[3] Although Claimant holds a CDL, there is nothing in the current record to establish that he could use the commercial license to obtain employment which would allow him to regain his time-of-injury income.

Obtaining a high school diploma was a logical starting point, and he did that. Next he obtained a broad-based associate degree in liberal arts; another boon to finding employment outside of welding. That degree should open jobs to Claimant of a less physically-demanding nature.

41. There is no showing that Claimant needs to obtain a bachelor degree in engineering in order to restore his pre-loss earning capacity.

42. The degree most useful to restoring Claimant's pre-injury earning capacity was his associate degree with a math and science-based emphasis. Claimant has proven he is entitled to retraining reimbursement of costs associated with obtaining his associate degree at CWI. To the extent it took him longer than two years (52 weeks x2) to get his degree, Defendants are limited to reimbursement of the final two years (104 weeks) of such education. Expenses include Claimant's tuition, books, travel and related expenses, as set out in *Haldimon v. American Fine Foods,* 117 Idaho 955, 793 P.2d 187 (1990).

43. As noted in *Haldimon*, temporary disability benefits not paid during the relevant time frame are recoverable under Idaho Code § 72-450. The parties did not notice up TTD benefits as an issue for resolution, and to the extent there is a disagreement over the amount, or availability of such benefits for the relevant time frame of retraining, the parties may notice that issue for resolution as needed.

ATTORNEY FEES

44. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law. They may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides for an award of attorney fees to a claimant if: (1) the employer or surety contests a claim without reasonable ground; (2) refuses to pay compensation provided by law; or (3) discontinues payment of benefits without

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

45. In the present case, Claimant seeks attorney fees for the Defendants' failure to obtain a PPI rating for Claimant in a time frame suitable to him. First, he cites to no authority requiring Defendants to obtain a PPI rating for Claimant. Assuming such a duty exists, (and it is not self-evident it does), Defendants were attempting to schedule Claimant for an examination with Dr. Cahill. She had no availability to see Claimant until June 2017. Defendants suggested Dr. Klock, an IME physician from OMAC, as an alternative. Claimant did not respond to the suggestion. Instead, Claimant sought out Dr. Friedman, who issued his opinion in May 2017.

46. Assuming *arguendo* it was Defendants' duty to line up a physician to rate Claimant's PPI, and further assuming Idaho Code § 72-804 can be read broadly enough to apply to this situation, (which again appears questionable), Defendants were not unreasonable in scheduling Claimant to be seen by Dr. Cahill at her first available date.

47. Claimant has failed to show an entitlement to attorney fees for Defendants' failure to secure a physician appointment to determine Claimant's PPI rating prior to June 2017.

CONCLUSIONS OF LAW

1. Claimant has proven he is entitled to reimbursement and corresponding benefits under Idaho Code § 72-450 for up to the last 104 weeks of his education at College of Western Idaho;

2. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

RECOMMENDATION

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

DATED this 2nd day of October, 2017.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

RICHARD OWEN
PO BOX 278
NAMPA ID 83651

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARVIN CUNNINGHAM, Claimant, v. RECORD STEEL & CONSTRUCTION, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2010-027200** **ORDER** **Filed 10/17/17**

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 has proven he is entitled to reimbursement and corresponding benefits under Idaho Code § 72-450 for up to the last 104 weeks of his education at College of Western Idaho.

2. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

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

DATED this 17th day of October, 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 17th day of October, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD OWEN
PO BOX 278
NAMPA ID 83651

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707

/s/

jsk