BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHAWN D. BENNETT, Claimant, v. QUALITY CONCRETE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2011-019216** **2012-014384** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **January 29, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on January 25, 2017. Claimant appeared with his attorney, David M. Farney[1] of Nampa. Matthew J. Vook represented Employer/Surety. Oral and documentary evidence was considered and the parties took four post-hearing depositions and submitted briefs. This matter is now ready for decision.

ISSUES

The issues to be decided are:

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

[1] Richard S. Owen substituted for Mr. Farney post-hearing.

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

3. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine, or otherwise;

4. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

5. Whether the Commission should retain jurisdiction; and

6. Whether Claimant is entitled to an award of attorney fees for Defendants' failure to advance PPD payments.

CONTENTIONS OF THE PARTIES

Claimant contends that he is an odd-lot worker considering the rather severe physical restrictions assigned by his treating physician and an FCE combined with his age, education, work history, etc. He seeks attorney fees for Defendants' failure to advance any disability payments even though they knew Claimant's disability would be substantial, if not total. Finally, Claimant seeks an order that the Commission retain jurisdiction in the event he is found to be less than totally disabled so that Claimant may be eligible for time loss benefits in the event his spinal cord stimulator (SCS) needs to be revised or replaced in the future.

Defendants contend that if the Commission adopts the restrictions assigned by their IME physician, Claimant is not an odd-lot worker. Those restrictions are the latest in time and consider a re-implant of his SCS that reduced Claimant's pain and increased his function. Further, the last IME was performed after the FCE and treating physician's restrictions were placed and are entitled to more weight than the FCE and the treaters' restrictions. Finally, Claimant is not entitled to an award of attorney fees because, under *Corgetelli*,[2] they will not be

[2] See *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014).

allowed a credit and to force them to pay as yet to be determined PPD benefits is, in itself, unreasonable. Defendants did not respond to Claimant's arguments regarding retention of jurisdiction and apportionment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Annette Bennett, taken at the hearing.

2. Joint Exhibits (JE) A-MM admitted at the hearing.

3. The post-hearing depositions of: Peggy Wilson, PT, CEAS, taken by Claimant on February 3, 2017; Douglas Crum, CDMS, taken by Claimant also on February 3, 2017; Christian Gussner, M.D., taken by Defendants on March 23, 2017; and that of Mary Barros-Bailey, Ph.D., taken by Defendants on April 25, 2017.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

Hearing testimony:

Claimant

1. Claimant was 44 years of age and a 17-year resident of Middleton at the time of the hearing.

2. Claimant attended high school at Boise High through the 10th grade, when he quit to get a job and help raise his newborn son. He was a "D" and "C" student and had particular trouble with math. He obtained his GED in 2014 or 2015.

3. Claimant's first job post-high school was performing heavy labor for Employer herein. He next installed insulation which required a lot of climbing ladders, kneeling, and

otherwise being in awkward positions. Claimant then obtained employment at Buster's in 1994 beginning as a dishwasher and working his way up to cook and kitchen manager. After five years at Buster's, Claimant went to work for Precision Panel for better pay and insurance. He began as a laborer installing prefab insulated panels on houses. Claimant eventually worked his way up to shop foreman. Because Precision's business was slowing down during the recession, Claimant returned to Employer in 2007, once again starting as a laborer. His duties with Employer are summarized in a Job Site Evaluation prepared by Terisa Ballard of ICRD in 2011. See JE 42, p. 43. Claimant supervised a two-person crew.

4. During this time, Claimant's hobbies consisted of hunting (both birds and big game), fishing, camping, hiking, and snowboarding. Claimant took care of his lawn and helped his wife around the house such as doing the laundry, vacuuming, and taking out the garbage. As a homeowner, Claimant did renovations using concrete to make driveways, and a fire pit area. He also built a patio and a 16 x 35 foot cover. He was able to perform this work without difficulty.

5. In late 2009, Claimant injured his low back resulting in left-sided low back, buttocks, leg, calf, and foot pain. Dr. Hajjar performed a back surgery on March 1, 2010. Claimant had a good recovery and Dr. Hajjar released him to return to his time-of-injury job (heavy labor) without restrictions or impairment. Claimant was able to engage in all of his hobbies after his back injury and surgery.

6. Claimant suffered another industrial left-sided back injury on August 10, 2011 while lifting rebar. Claimant was taken off work and prescribed physical therapy. After physical therapy, Surety arranged for Claimant to be seen for an IME with Christian Gussner, M.D. Claimant wanted to go back to work and Dr. Gussner released him without restrictions or

impairment. Claimant returned to his heavy time-of-injury job with Employer without accommodations.

7. On June 5, 2012, Claimant slipped and twisted again injuring his back; however, this time the pain was on his right side. Claimant experienced intermittent pain in his low back since his August 2011 accident, but the pain did not radiate down into his legs. Because Claimant had heard positive things about Richard Manos, M.D., he switched his care from Dr. Hajjar to Dr. Manos. Dr. Manos performed a microdiscectomy/laminectomy at L4-L5 on September 12, 2012. Claimant was satisfied with the surgical outcome and was referred to physical therapy.

8. Claimant re-injured his back in physical therapy when he slipped while standing on a balance ball. He experienced a stabbing, burning pain down his right buttocks and right leg. He returned to Dr. Manos who informed him that, due to the physical therapy injury, his surgery "slipped" or did not "take." Dr. Manos suggested a lumbar fusion but before Surety authorized the surgery, they sent Claimant to Paul Montalbano, M.D., for an IME. Claimant testified that Dr. Montalbano was more interested in talking to him about how to pour concrete than talking about his back and the need for a fusion. In any event, Dr. Montalbano recommended against the fusion. Claimant returned to Dr. Manos who sent him to Timothy Floyd, M.D., for a third opinion. Claimant eventually had the lumbar fusion in August 2013.

9. Post-fusion surgery, Claimant still had pain in his legs, right greater than left, but his back pain resolved. He was left with no strength in his legs. Claimant completed the Saint Alphonsus Rehabilitation Services (STARS) work-hardening program with some physical difficulty. At the completion of the program, Kevin Krafft, M.D., the program's director, informed Claimant that he could lift 75 pounds and push 200 pounds, a restriction that Claimant

found to be "ridiculous." HT, p. 59. Claimant testified that while the program improved his upper arm strength, it did not help his back or his ability to bend, squat, or twist.

10. Dr. Krafft continued to see Claimant following the STARS program to administer epidural steroid injections with minimal benefit.

11. Claimant saw Howard Shoemaker, M.D., for an IME at his attorney's request on June 9, 2014. Dr. Shoemaker did not find Claimant to be at MMI and recommended a TENS unit or a spinal cord stimulator.

12. Claimant returned to Dr. Manos who indicated that a TENS unit or SCS may help with Claimant's bilateral leg pain, but would not make him one hundred percent.

13. In preparation for a TENS/SCS trial, Claimant saw Robert Calhoun, Ph.D., a psychologist. Dr. Calhoun determined Claimant to be a good candidate for a SCS trial. Claimant experienced good relief for his bilateral leg pain, "I had perfect reduction in the left and probably 75 in the right." HT, p. 66. After a successful seven-day trial, the SCS was permanently implanted. Unfortunately, the SCS was unable to activate on Claimant's problematic right side, so Claimant was understandably disappointed with the results. Claimant chose to have the SCS re-implanted rather than having it removed completely.

14. At around the time of Claimant's difficulties with the SCS, Surety arranged[3] for an FCE with PT Peggy Wilson shortly before his SCS was re-implanted. Claimant thinks the FCE somewhat overstates some of his abilities such as sitting, standing, walking, balancing, bending, stooping, and stair climbing. Claimant has no limitations regarding his manual dexterity or his head/neck/shoulders.

[3] JE 0, p.1, the STARS FCE indicates that the referral was from Claimant's attorney and not Surety.

15. Shortly after his FCE, Claimant had revision surgery to see if his SCS could be modified to provide relief for his right side. The sales people for the SCS (Medronics) informed Claimant that the SCS did not work properly due to the alignment of his spine which prevented proper placement. The revision relieved Claimant's right leg pain "…maybe a tiny bit." HT, p. 83. The Medronics folks were not confident that they would ever get the SCS to work properly. Claimant got some relief while lying down "… and turning it up extremely high where like you're just shocking the bejesus out of your leg, but I'd get a little relief, but with that I was also shocking the crap out of myself." *Id.*, p. 84. Claimant does not believe that the implant revision surgery affected in any way his performance on the FCE.

16. Claimant returned to Dr. Gussner for a second IME in early 2016, about 10-months post revision surgery and reported that the SCS was providing "minimal" pain relief on the right.

17. Claimant testified that the Hydrocodone and antidepressants he takes daily diminishes his ability to concentrate.

18. Claimant returned to Dr. Manos on January 10, 2017 to discuss physical restrictions he assigned Claimant based on the STARS FCE, Dr. Manos' personal observations, and Claimant's reporting. See JE H., p. 130. Claimant generally agrees with the restrictions placed on him by Dr. Manos.

19. Claimant worked with ICRD consultant Teresa Ballard in his return to work effort. She suggested he obtain his GED, which he did with some difficulty. After Ms. Ballard's retirement, Claimant worked with Shaun Byrne with a focus on security work. Claimant eventually decided he could not do that type of work due to his inability to concentrate and inability to sit for long periods of time.

Annette Bennett

20. Annette has been married to Claimant for almost 18 years and is employed as a "lunch lady" at the Middleton School District. She testified that before Claimant went to work for Employer "He was the most active person I have ever known." HT, p. 126. After Claimant's first surgery with Dr. Hajjar, Claimant was able to "bounce back" and continue his recreational and work activities. Following Claimant's 2012 accident/injury:

> He's squirmy. That's the best word I could use. He's moving all the time. You know, he's either trying to recline and put his feet up and be in that position for a short period of time and, then, he's wincing and moaning in pain, so he gets up and he moves and he lays down - - sometimes he will lay down and take a nap for, you know, an hour or two. Get up, stretch on the - - well, as he says he lays on the floor and elevates his legs. He's constantly trying to find a position of relief. Pain relief.

HT, p. 129.

21. Regarding Claimant's mental state following his 2012 injury/accident, Annette testified:

> Well, he used to be the - - the happiest, most optimistic, hard-working guy you would ever know, you know, he would be the life of the room. He would make everybody laugh. He was always, as I said, optimistic, dedicated and since his injury it's taken a toll on him emotionally as well as physically, you know it's - - obviously being in pain can affect you mentally and emotionally and so definitely he has struggled with depression and anxiety attacks and panic attacks and - - you know, as well as physical limitations and he just simply can't do what he used to do.

HT, p. 130.

<u>Deposition testimony</u>:

Christian Gussner, M.D.

22. Dr. Gussner's deposition was taken by Defendants on March 23, 2017. He is board certified in physical medicine and rehabilitation as well as in pain medicine. He has been

employed by Idaho Physical Medicine and Rehabilitation since 1995. The parties agree that Dr. Gussner is qualified to testify as a medical expert in this matter.

23. Dr. Gussner began seeing Claimant on October 20, 2011 on a referral from Surety to address back pain following surgery for his August 10, 2011 industrial injury. By the time Dr. Gussner saw Claimant, he was at MMI so Dr. Gussner released him to return to work without restrictions. He assigned a 10% whole person impairment, all for a non-industrial injury Claimant suffered in 2010.

24. Dr. Gussner next saw Claimant on October 9, 2015 for an IME at Surety's request after Claimant's June 5, 2012 industrial accident and injury. Dr. Gussner noted Claimant's September 22, 2012 right L4-5 discectomy/laminectomy at the hands of Dr. Manos resulting in continued right leg pain. Claimant went on to have an L-4 to S-1 fusion on August 1, 2013 but continued to have right leg pain. A SCS was implanted by Dr. Manos on May 14, 2015, again with minimal pain relief on the right. Dr. Gussner opined that the SCS should be revised as it may have shifted causing its lack of coverage for Claimant's right side.

25. Claimant next saw Dr. Gussner on March 29, 2016 at which time he found Claimant to be at MMI and assigned a PPI rating and restrictions. Utilizing the 6th Edition of the *Guides*, Dr. Gussner arrived at a 15% whole person PPI rating with 10% apportioned to pre-existing conditions leaving 5% attributable to Claimant's June 5, 2012 accident. Regarding restrictions, "I recommended light-duty restrictions. Maximum lifting 20 pounds occasional, 10 pounds on a repetitive basis. He should avoid repetitive bending, twisting, torquing, the lumbar spine. He should be allowed to change positions as needed." Dr. Gussner Dep., p. 14.

Cross-examination

26. Dr. Gussner opined regarding FCEs "They're an assessment of the person's function on that day. They do not equate to activity restrictions. They can be part of a process to arrive at activity restrictions, but they do not determine activity restrictions." *Id.*, p. 17.

27. Dr. Gussner generally issues restrictions based on a patient's diagnosis regardless of the number of times he may have seen the patient.

28. Dr. Gussner testified that a SCS has minimal impact on restrictions as it is used to treat pain, which is a subjective complaint. One of the reasons he gave Claimant a light-duty release was to account for potential shifting or movement of the two wire leads in the SCS.

29. Dr. Gussner believes that Claimant can work a full eight-hour day five days a week within his restrictions. He does not know how long Claimant could stand or walk at one time. He is not aware of other opinions addressing that issue. He has reviewed no medical records generated after March 29, 2016, the date he last saw Claimant.

Peggy Wilson, PT, CEAS

30. Ms. Wilson was deposed by Claimant on February 3, 2017. She has been a physical therapist for 33 years and is a certified Ergonomic Assessment Specialist as well as a Certified Idaho Workers' Compensation Specialist. Ms. Wilson has been conducting Functional Capacity Assessments since 2001.

31. Ms. Wilson performed a four-hour Key Functional Capacity Assessment (FCE) with Claimant on August 27, 2013 at Claimant's request. She described the FCE this way:

> Okay. The Key Functional Capacity Assessment was developed by Glenda Key in approximately 1984.[4] It is a picture in time of how somebody is functioning. The Key Assessment is set up to have five validity parameters in it

[4] Ms. Wilson was unable to reveal the "science" behind the Key Assessment due to copyright and proprietary concerns. Ms. Wilson has been certified in the Key system since 2001.

> to identify whether somebody is giving you full effort or not from an objective point of view.

Wilson Dep., p. 5.

32. In Claimant's case, Ms. Wilson determined that Claimant could work a four- to five-hour work day with frequent positional changes.

33. Claimant could sit between three and four hours a day with 20-minute durations.

34. Claimant could stand for four hours with 20-minute durations.

35. The particulars of Ms. Wilson's FCE are found at JE, O and as exhibit 1 attached to her deposition testimony. She admitted that Claimant's current presentation could be different than it was in 2015 when the FCE was conducted. She also acknowledged that she did not have a job description of Claimant's time-of-injury job at the time she conducted the FCE. Ms. Wilson testified that according to the Key Assessment protocols, Claimant's performance was deemed to be valid.

Douglas Crum, CDMS

36. Mr. Crum was retained by Claimant to assess his employability. Mr. Crum's credentials are well-known to the Commission and need not be repeated here. He is qualified to give expert vocational opinions in this matter. Mr. Crum's May 22, 2014 and December 13, 2016 reports may be found at JE - U.

37. Mr. Crum interviewed Claimant twice, reviewed pertinent medical[5] and vocational records including an employability report prepared by Mary Barros-Bailey, Ph.D., reviewed the STARS work hardening records, reviewed the KEY FCE, and attended the January 26, 2017 hearing, although he did not testify.

[5] Mr. Crum's summary of the medical records reviewed in the preparation of his 2014 report consumes 12 pages of his 17 page report.

38. Mr. Crum obtained Claimant's work history that is consistent with Claimant's hearing testimony. He described Claimant's employment at Employer's as heavy to very heavy work based on the ICRD Job Site Evaluation. He described Claimant's transferrable skills:

> I felt he had quite a bit of knowledge of residential and commercial framing and concrete work. He has done some supervisory work in the construction world. He is experienced as a heavy equipment operator loader. Not a lot, but some. He is experienced with hand and power tools. He has some experience driving medium trucks and has held a Class B CDL. Which I think allows you to operate vehicles up to 18,000 pounds. He has very modest computer skills. No significant Word Processing or spread sheet skills.

Mr. Crum Dep., p. 9.

39. Mr. Crum determined that Claimant had pre-injury access to 13.2 percent of the jobs in the Ada/Canyon county labor market. Most of those jobs were in the construction industry and were mostly semi-skilled, meaning the job could be learned in three to six months. Claimant would also have been successful in materials handling, security work, and some cashiering.

40. Mr. Crum was provided with additional information which led to the preparation of his December 13, 2016 report, approximately one month pre-hearing. Mr. Crum summarized the additional medical care Claimant received between his two reports:

> It is summarized in my second report. But, in general, after my first report, he had a spinal cord stimulator implant trial that was in February of 2015. In May of 2015 he underwent a permanent spinal cord stimulator transplant procedure. He kept having problems. In October 2015 Dr. Gussner agreed with Dr. Manos that a spinal cord stimulator revision was in order. And that was performed by Dr. Manos on December 4, 2015. And then on March 19, 2016, Dr. Manos gave some new restrictions, or similar to the ones he had given before, with the exception that he reduced the lifting capacity from 50 pounds to 20.

Mr. Crum Dep., p. 13.

41. Claimant had also obtained his GED between Mr. Crum's two reports.

42. Mr. Crum considered the following restrictions in preparing his second report:

> The restrictions I primarily used were the ones given by Dr. Gussner on March 29, 2016. Again, he gave the following restrictions. Twenty pounds occasional lifting. Ten pounds repetitive. Avoid repetitive bending, twisting, torquing of the lumbar spine. Change of positions as necessary. And this was after the Functional Capacity Evaluation had been done I think in 2015.

Id., pp. 15-16.

43. Dr. Manos issued some new restrictions in January 2017:

> I'm just going to - - I have a kind of a summary here. He indicated that he could work two hours a day. He was likely to be absent as a result of medical impairments or treatments one to two times a month. Standing, walking are affected by his impairment. He could stand and walk a total of two hours a day. Fifteen minutes without interruption. He could sit up to two hours a day total with 15 minute increments. He could occasionally lift up to 15 pounds. Frequently lift up to 10 pounds. He should not crouch or crawl. Could occasionally kneel, climb, balance or stoop. Could occasionally reach, push or pull. Could constantly use his hands for handling, feeling and sensation. See, hear, speak. He indicated he should avoid heights due to potential drowsiness from his medications. I believe he is still using hydrocodone, as I recall. And two hours a day it would be expected that he would have to lay down and rest.

Id., pp. 16-17.

44. Mr. Crum explained how Dr. Manos' restrictions were similar to those identified in the FCE:

> They are kind of similar in some ways. Peggy Wilson indicated he could sit three to four hours a day in 20 minute durations. And Dr. Manos said in 15 minute durations. Dr. Manos said he could stand and walk two hours a day at 15 minute increments. So Dr. Manos [sic] restrictions were somewhat more restrictive. In terms of lifting the FCE and Dr. Manos were very close actually. I think these are kind of the main things that were interesting to me.

Id., p. 17.

45. In his second report, Mr. Crum arrived at the same conclusion as he did in his first report regarding pre-injury labor market access. In his post-injury analysis, Mr. Crum utilized Dr. Gussner's March 29, 2016 restrictions. Based on those restrictions as well as non-medical factors, Mr. Crum concluded that Claimant is totally and permanently disabled as of the time of

the hearing. Mr. Crum had reached that opinion before the restrictions placed by Dr. Manos January 10, 2017 which were even more restrictive that those of Dr. Gussner, which reinforced Mr. Crum's earlier conclusion regarding permanent disability as a result of Claimant's August 20, 2011 industrial accident and injury.

46. Mr. Crum's opinion was not changed by Dr. Barros-Bailey's report also finding permanent disability based on Dr. Manos' January 10, 2017 restrictions.

47. On cross-examination, Mr. Crum clarified what the thought was Claimant's biggest obstacle in obtaining employment:

> The restrictions given by Dr. Gussner limiting him to light work at best with significant restrictions. Basically restricting him to occasional bending and twisting and change positions as necessary is a big deal for this particular guy as he kind of demonstrated at the hearing.[6] And as Dr. Manos more recently has talked about. He doesn't have a lot of capacities to do anything for very long. And that creates some very significant employment problems.

Mr. Crum Dep., p. 24.

48. Mr. Crum is of the opinion that it would be futile for Claimant to search for employment. If Dr. Manos' restrictions are applied, there is no labor market for Claimant even with retraining.

49. Mr. Crum acknowledged that Dr. Manos, who has been Claimant's treating physician for years, was in a better position than Dr. Gussner, who only saw Claimant three times, to assess Claimant's restrictions based on direct observation.

50. Mr. Crum does not believe Claimant would benefit from retraining given his restrictions and his need for ad lib position changes.

[6] The Referee noted at hearing that Claimant appeared uncomfortable in that he "squirmed" while seated and needed to stand after about two hours of testimony and his movements appeared guarded.

Mary-Barros Bailey, Ph.D

51. Defendants retained Dr. Barros-Bailey to asses Claimant's employability. Her credentials are well known to the Commission and need not be repeated here. Dr. Barros-Bailey's March 6, 2014 and January 13, 2017 reports may be found at JE – T. She is qualified to testify as a vocational expert in this matter.

52. Dr. Barros-Bailey met with Claimant on February 28, 2014 and obtained his social, medical, educational, and work histories. After evaluating pertinent vocational and medical considerations, Dr. Barros-Bailey opined that Claimant had suffered disability of 19% inclusive of his impairment. See JE – T, report dated March 6, 2014.

53. Subsequent to her initial report, Dr. Barros-Bailey received additional information that resulted in her second report dated January 13, 2017. She testified as follows regarding this additional information:

> So Dr. Krafft had modified the permanent restriction from 75 pounds to 50, and he also had additional positional restrictions. And so based on his modified restrictions, the loss of access climbed substantially, to 25 percent.
>
> Some of the jobs that I had listed previously would still be consistent. So I thought that there was still a wage loss and also a loss of access. So overall it went up [to] 30 percent, from 19.
>
> Dr. Spackman also had some restrictions. His were quite a bit positional. He had a lower restriction - - well, a partial of the medium range instead of the full range, as Dr. Krafft had it.
>
> And I thought his bumped up the loss of access to 66 ½ percent. There were still some wage loss issues, and so my inclusive of impairment of his was 51 percent.
>
> Then we have the key functional capacity evaluation. That was quite substantial. And it wasn't just the physical restrictions, as it was also the amount of work. And his [?] climbed, as well, substantially, up to about 89 percent loss of access.
>
> There were some occupations that I had listed in my 2014 report that were not appropriate, and I thought that between loss of access and the wage loss combined, it was about 81 percent.

> Same with Dr. Gussner. There were some - - restrictions were kind of close to the functional capacity assessment, but substantially different where it made a difference. And so there was loss of access and wage earning capacity loss with the overall impairment at 69 percent.
>
> And then there was Dr. Manos, his 1/10 of '17 opinion. His were very, very limiting from an exertional standpoint and also a positional standpoint.
>
> And although loss of access came to about 95 percent, given the frequency of some of these, I really thought it would be pretty impossible for him to find work. And so I thought he'd be a [sic] odd-lot worker under that set of restrictions.

Dr. Barros-Bailey Dep., pp. 11-12.

54. Dr. Barros-Bailey had concerns as a rehabilitation counselor regarding some medical and mental health issues that arose between her first and second reports. She recommended that Claimant follow through with the mental health treatment suggested by Drs. Calhoun and Spackman to make sure Claimant was ready to return to the work force. She also recommended that Claimant become involved again with IDVR. Dr. Barros-Bailey believes Claimant would benefit from some sort of retraining program; she does not know if Surety authorized any of the rehabilitative recommendations she made.

55. As part of the additional information Dr. Barros-Bailey reviewed between her first and second reports, were the deposition transcripts of Dr. Gussner, Peggy Wilson, Douglas Crum and the hearing transcript. However, rather than change the substance of her reports, Dr. Barros-Bailey testified that the additional information added more depth to her analyses.

PPI benefits

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such

as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

56. The only opinion regarding PPI given in this matter was that of Dr. Gussner who saw Claimant three times at Surety's request for IMEs. During the last IME, on March 29, 2018, Dr. Gussner assigned a 5% whole person PPI rating for Claimant's June 5, 2012 accident. The Referee has no reason to dispute that rating.

PPD benefits

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and

economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

57. Mr. Crum initially opined that Claimant had suffered a 42% whole person PPD inclusive of 5% PPI based on Dr. Krafft's restrictions. When the FCE and Dr. Manos' restrictions surfaced, Mr. Crum then found Claimant to be an odd-lot worker.

58. Dr. Barros-Bailey ultimately found that Claimant suffered PPD of 81% inclusive of his PPI. Mr. Crum did not offer any PPD percentages. The Referee finds that Claimant has incurred PPD of 81% inclusive of PPI.

> There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. No party herein is contending that Claimant's PPD equals 100%. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the

> labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).
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> A claimant may satisfy his or her burden of proof and establish total permanent disability under the odd- lot doctrine in any one of three ways:
>
> (1) By showing that he or she has attempted other types of employment without success;
>
> (2) By showing that claimant or his or her vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or
>
> (3) By showing that any efforts to find suitable work would be futile.

Lethrud v. State of Idaho, Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

59. Defendants argue that the Commission should place no weight on the FCE or the restrictions assigned by Dr. Manos in January 2017 because Dr. Gussner's opinion "…truly embodies Claimant's ongoing condition." Defendants' Responsive Brief, p. 16. The Referee disagrees. Dr. Gussner's restrictions were "diagnosis based" and were not the result of any physical examination, testing or the FCE. On the other hand, Dr. Manos' restrictions were based on his direct observation of Claimant over time as well as the FCE and Claimant's subjective complaints that better embodies Claimant's ongoing condition than Dr. Gussner's restrictions.

60. Defendants assert that Dr. Manos initially agreed with Dr. Gussner's restrictions and only added more stringent restrictions shortly before the hearing and no foundation has been established for that late change of opinion.[7] Defendants also question the accuracy of the FCE in that Claimant's condition improved after his SCS was re-implanted. However, it must be

[7] Apparently, Dr. Manos declined to be deposed in this matter. See Dr. Barros-Bailey Dep., p. 36, ll 3-4.

remembered that permanent disability is generally determined as of the time of the hearing[8] so it follows that restrictions assigned closer to the hearing date should be given more weight than those assigned more remotely. Further, Dr. Manos was Claimant's treating physician for a considerable period of time and was in the best position to understand his physical condition and assign restrictions accordingly. Dr. Gussner saw Claimant three times for IMEs and the FCE was merely a "snapshot" of Claimant's abilities at the time of the evaluation.

61. Mr. Crum's reliance on Dr. Manos' restrictions is reasonable. Dr. Barros-Bailey admitted that if those restrictions are accepted and considered, Claimant is an odd-lot worker. Defendants have offered no evidence in rebuttal to Dr. Manos' restrictions. The Key FCE was performed on August 27, 2015. Dr. Gussner issued his restrictions on March 16, 2016. Dr. Manos issued his latest restrictions on January 10, 2017. The hearing was held on January 26, 2017. Defendants could have moved for a continuance to address Dr. Manos' more stringent restrictions and such a motion would likely have been granted.

62. Claimant has not attempted work without success.

63. Claimant worked with ICRD in an attempt to return to the workforce; however, no employment opportunities were located. Even so, ICRD and IDVR assisted Claimant in obtaining his GED. The Referee finds that Claimant conducted a job search that satisfies the second prong of the *Lethrud* test.

64. Mr. Crum found that it would be futile for Claimant to continue to seek employment considering his physical and postural restrictions and the Referee so finds. Claimant has satisfied the third prong of the *Lethrud* test.

65. The Referee finds that Claimant has proven that he is an odd-lot worker.

[8] See *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

Once a claimant establishes a *prima facie* case of odd-lot status, the burden shifts to Employer to show that there is:

> An actual job within a reasonable distance from [claimant's] home which he [or she] is able to perform or for which he [or she] can be trained.[9] In addition, the [Employer] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he [or she] would in fact not be considered for the job due to his [or her] injuries, lack of education, lack of training or other reasons.

Lyons v. Idaho Industrial Indemnity Fund, 98 Idaho 403, 407, 565 P. 2d 1360, 1364 (1977).

66. The Referee finds that Defendants have failed to rebut Claimant's *prima facie* odd-lot case in that they have identified no job or jobs Claimant is capable of performing.

Attorney fees

67. Claimant argues that since Defendant's own expert determined that Claimant is entitled to disability of 19% (inclusive of 5% impairment), Defendants had no defense to the payment of 19% disability prior to hearing. Claimant argues that Defendants refusal to pay disability in this amount warrants an award of attorney fees under Idaho Code § 72-804. That section 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.

[9] Dr. Barros-Bailey identified certain vocational rehabilitation services that might increase his chance of obtaining employment. For some inexplicable reason, none of her recommendations in that regard were approved by Surety. See pp. 16-17 of JE T for her recommendations.

Accordingly, the argument would be that Defendant's refusal to pay, at the very least, the 19% PPD rating endorsed by their own expert, amounts to a refusal to pay a benefit justly due and owing, or the contest of a claim for disability without reasonable grounds. In defense to the claim for attorney's fees, Defendant's invoke *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014), decided August 25, 2014. In *Corgatelli*, the Court noted that PPI and PPD represent different classes of worker's compensation benefits, and nothing in the statutory scheme suggests that the payment of PPI may be applied as a credit against a subsequent award of total and permanent disability. While *Corgatelli* treated the narrow issue of whether a prior payment of impairment should serve as a credit against a subsequent disability award, *Corgatelli* is nevertheless instructive in this case. Claimant claims that he is totally and permanently disabled, and indeed, the Referee so finds. As such, benefits are payable for life under Idaho Code § 72-408, at 67% of the currently applicable average weekly state wage. Benefits for less than total permanent disability are payable pursuant to Idaho Code § 72-428 at 55% of the average weekly state wage for the year of injury. As in *Corgatelli*, there is nothing in the statutory scheme to suggest that a surety's prior payment of benefits pursuant to Idaho Code § 72-428 may be applied as a credit against a subsequent finding that Claimant is entitled to the payment of total and permanent disability under Idaho Code § 72-408. Therefore, Defendants had a justifiable concern that the payment of a 19% PPD rating would do nothing to help retire an obligation to pay total and permanent disability benefits.[10] Per *Corgatelli*, Defendants might pay a 19% disability award commencing on Claimant's date of medical stability, only to be

[10] In March of 2017, the Commission ruled that the reasoning of *Corgatelli* cannot be reconciled with certain language in *Mayer v. TPC Holdings*, 160 Idaho 223, 370 P.3d 738 (2016) see *Dickinson v. Adams County* 2017 IIC 0007 (March 21, 2017). However, Defendants did not have the benefit of *Dickinson* when faced with the decision of whether or not to pay PPD. Applying *Dickinson*, Defendants would be entitled to apply the payment of PPD as a credit against a subsequent determination of total and permanent disability.

subsequently ordered to pay total and permanent disability benefits effective Claimant's date of medical stability. Claimant would receive a windfall, and Defendants would be without recourse. Defendants cannot be criticized for their decision to await a determination of Claimant's disability in order to avoid paying some portion of Claimant's disability twice, and there is no basis for an award of attorney fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant is entitled to an award of whole person PPI benefits of 5%.

2. Claimant has proven that he is an odd-lot worker and is entitled to statutory benefits effective March 29, 2016 when Dr. Gussner assigned his 5% PPI rating.[11]

3. Claimant is not entitled to an award of attorney fees.

4. The issues of retention of jurisdiction and apportionment under IC § 72-406 are moot.

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 __9th____ day of January, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

[11] In the event Defendants have paid any or all of the PPI rating, then total permanent PPD benefits will commence at the time of Defendant's last PPI payment per *Dickinson v. Adams County* 2017 IIC 0007 (March 21, 2017).

CERTIFICATE OF SERVICE

I hereby certify that on the ___29th____ day of ___January_____, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707-6358

ge Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHAWN D. BENNETT, Claimant, v. QUALITY CONCRETE, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2011-019216** **ORDER** **Filed January 29, 2018**

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation 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 is entitled to an award of whole person PPI benefits of 5%.

2. Claimant has proven that he is an odd-lot worker and is entitled to statutory benefits effective March 29, 2016 when Dr. Gussner assigned his 5% PPI rating.[1]

3. Claimant is not entitled to an award of attorney fees.

4. The issues of retention of jurisdiction and apportionment under IC § 72-406 are moot.

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

DATED this __29th____ day of __January_____, 2018.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

__/s/_____
Aaron White, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __29th ____ day of ____January_____ 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707-6358

ge

Gina Espinosa

[1] In the event Defendants have paid any or all of the PPI rating, then total permanent PPD benefits will commence at the time of Defendant's last PPI payment.