BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN W. JORDAN, Claimant, v. HECLA MINING COMPANY, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2012-027819** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed September 4, 2020**

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 Wallace, Idaho, on July 9, 2019. Claimant was represented by Starr Kelso, of Coeur d'Alene. Mindy Muller, of Boise, represented Employer and Surety. Oral and documentary evidence was admitted. Post-hearing depositions were taken and the parties thereafter briefed the issues. The matter came under advisement on June 23, 2020.

ISSUES

The issues as stated at hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant's condition is due in whole or in part to a subsequent injury, disease, or cause;

3. Whether and to what extent Claimant is entitled to the following benefits;
    a. Medical care;
    b. Temporary disability benefits, total or partial (TTD/TPD);
    c. Disability based on medical factors, also known as permanent partial impairment (PPI);
    d. Retraining;
    e. Permanent disability in excess of impairment (PPD), including total disability under the odd-lot doctrine or otherwise (PTD);
    f. Attorney fees;

4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

Causation and subsequent injury (issues 1 and 2) were not advanced by Defendants, and Claimant conceded in briefing that there were no unpaid medical expenses or pending medical care at the time of hearing, thus eliminating the issue of medical care entitlement. The issues remaining for resolution are limited to Claimant's right to additional temporary total disability and permanent disability benefits, apportionment of Claimant's 6% impairment, and attorney fees.

CONTENTIONS OF THE PARTIES

Claimant asserts that he was rendered totally and permanently disabled by his October 26, 2012, industrial accident and subsequent back surgeries. Further, he is owed additional total temporary disability benefits which were wrongfully denied him while he was in a period of recovery. Apportionment of impairment is inapplicable. Claimant is entitled to attorney fees.

Defendants argue Claimant is not totally and permanently disabled. All required temporary disability benefits were paid. Claimant's impairment is predominately due to pre-existing conditions. Defendants overpaid PPI benefits and seek a credit for such overpayment. Claimant has no right to attorney fees on these facts.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, taken at hearing;

2. The hearing testimony of witnesses William Hill, Susan Stull, and Michelle Horning;

3. Claimant's Exhibits (CE) A through U, W through Z, BB through FF, and HH through RR, admitted at or after hearing[1];

4. Defendants' Exhibits (DE) 1 through 18, admitted at hearing;

5. The post-hearing two-part deposition transcript of Rodde Cox, M.D., begun on September 5, 2019 and concluded on January 13, 2020; and

6. The post-hearing deposition transcript of William Jordan, taken on January 14, 2020.

The objections made during post-hearing depositions were handled by way of a separate Order for Dr. Cox's September 5, 2019 deposition testimony, or contemporaneously by the Referee, who presided over the continued deposition of Dr. Cox on January 13, 2020, and the deposition of Mr. William Jordan.

Having considered the 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

1. On October 26, 2012, while working for Employer in the Lucky Friday mine, Claimant injured his back. This industrial accident was accepted by Surety.

2. After the accident in question Claimant began a long course of treatment including three spinal surgeries. As noted earlier, Defendants paid for this treatment.

[1]Defendants objected to Claimant's proposed exhibits F, H, V, AA, and GG. Proposed Exhibits F and H were taken under advisement: V, AA, and GG were excluded at hearing. While F and H were not technically admitted at hearing, but rather the objections were taken under advisement, since the proposed use for those two exhibits was solely for "impeachment" of Dr. Cox, they were considered and given the weight to which they are entitled as impeachment evidence - none. Exhibits F and H are not admitted for any other purpose, such as rebuttal evidence.

3. Several physicians have opined on the various dates when Claimant reached medical stability with regard to the conditions afflicting him since his industrial accident.

DISCUSSION AND FURTHER FINDINGS

4. The two primary issues for resolution in terms of factual and legal complexity are Claimant's entitlement to additional TTD benefits and whether Claimant is totally and permanently disabled, and if not, the extent of his permanent disability in excess of his impairment. The issues of apportionment of PPI benefits paid, and Claimant's right to attorney fees are addressed subsequent to the primary issues.

Total Temporary Disability Benefits

5. Idaho Code § 72-408 establishes Claimant's entitlement to temporary total and temporary partial disability during his period of recovery. In relevant part, the statute states "[i]ncome benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code…." Therefore, while in a period of recovery, and before reaching medical stability, if Claimant be temporarily totally or partially disabled, he "shall be paid" the TTD/TPD benefits, subject to a caveat found in Idaho Code § 72-403, which imposes an affirmative obligation on an injured worker receiving TTD/TPD benefits to attempt to obtain employment while receiving TPD/TTD benefits, and which will be discussed in further detail below.

6. The burden is on Claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Claimant herein argues that for substantial periods of time between the accident of October 26, 2012, and February 28, 2019, when Claimant was

declared to be at MMI by his treating surgeon, he did not receive TTD benefits.[2] Claimant acknowledges that during this time frame he received some wages for a brief time in late 2012, and also received TTD benefits on and off, often centered around his periods of recovery from his back surgeries. Defendants argue Claimant was not entitled to TTD benefits when suitable work was available to him, but he refused or failed to perform such work.

October 26 through November 8, 2012 Facts

7. On Friday, October 26, 2012, Claimant slipped while assisting in rock drilling operations for Employer; he felt immediate pain in his low back. He was seen that day at Mountain Health Services (Mountain Health) in Kellogg by Taryn Richlie, PA. After obtaining a lumbar spine x-ray, (which showed diffuse mild degenerative changes throughout Claimant's lumbar spine without significant osteophytes or traumatic bone lesions), and conducting an examination, PA Richlie diagnosed muscle spasm with a strained back muscle, prescribed pain medications, muscle relaxants, and heating pad with rest; *she also specifically released Claimant to work without restrictions*. Her note on a form supplied by Employer for authorization of medical treatment indicated that Claimant did not need to be seen in follow up unless his symptoms did not improve.

8. Claimant testified he had the upcoming weekend off work and intended to rest his back. On Monday, October 29, Claimant again presented to PA Richlie with ongoing right-sided low back pain.[3] Again, his examination was unremarkable except for spasms of the paraspinal muscles on his right side. PA Richlie felt an MRI was warranted, as well as

[2] Specifically, those time frames include October 26 to November 8, 2012, November 9, 2012 through February 23, 2014, and December 28, 2015 to January 31, 2018.

[3] Claimant was treated in the local emergency room over that weekend for flu-like symptoms unrelated to his industrial accident. However, his continuing low back discomfort and diffuse mild muscle spasms were noted in the ER records. He was told to rest for a couple of days and see his primary provider if symptoms did not improve.

continued rest, heat, ibuprofen, and pain medication (Norco). These office notes were silent regarding Claimant's work status.

9. Claimant next presented to Mountain Health on November 5, 2012, complaining of continuing right-sided back pain. Additionally, he reported nausea and migraines he related to the pain medication use. Claimant was prescribed medication for his migraines and nausea. PA Richlie again considered an MRI, but one was not obtained. Again, the record was silent on Claimant's work status.

10. On November 8, 2012, Claimant was seen at Mountain Health by Frederick Haller, M.D. Dr. Haller noted Claimant experienced sudden lower back pain when he slipped at work, but Claimant did not have radicular symptoms in his lower extremities.[4] Dr. Haller made note of Claimant's prior successful L5-S1 discectomy in 2007, as well as Claimant's ongoing left knee pain, unrelated to his work accident. Dr. Haller prescribed a Medrol Dosepak and physical therapy and delayed making a decision on obtaining an MRI. He scheduled Claimant for a follow up exam in one week.

11. Dr. Haller on November 8, 2012 placed work restrictions on Claimant. He limited Claimant to lifting no more than 10 pounds, no bending, stooping, kneeling, or crouching. However, he also checked the box that Claimant could not return to work with restrictions. Given these inconsistencies it is not clear what Dr. Haller had in mind regarding Claimant's work status, however, as shown below, Employer understood the work release form filled out by Dr. Haller to have released Claimant for light-duty work.

12. Claimant testified that a representative of employer would accompany him each time he went to the doctor. The record is unclear who accompanied Claimant on his

[4] Throughout his notes, Dr. Haller inexplicably describes Claimant's ongoing back pain as located in his thoracic spine contrary to all evidence in the record. Defendants acknowledge Claimant's complaints were located in his lumbar spine and these inaccuracies in Dr. Haller's medical records are acknowledged but not significant to the decisions made herein.

initial visits, but Claimant and Employer's representative Michelle Horning both testified that she accompanied Claimant on the November 8 visit. Immediately thereafter, she notified Claimant he had been released to light-duty work and was to report to the mine the following workday.

October 26 through November 8, 2012 Analysis

13. The parties agree that Claimant received no TTD benefits for the time period from October 26 through November 8, 2012. Defendants argue Claimant was released to work without restrictions during this time, so no benefits are due. Claimant argues he was taken off work by the instructions of physicians who prescribed "rest" after the accident. Furthermore, if Employer thought Claimant was capable of working it would have instructed him to return to work, as happened once Dr. Haller imposed work restrictions on Claimant on November 8. The fact that Claimant was not called to work, or fired for not working during this time frame, is evidence that Employer understood Claimant was not released to work until November 8. It is noteworthy that a representative of Employer accompanied Claimant to each doctor visit and would have had first-hand knowledge of Claimant's injury status and communication with his physicians.

14. At the time of his first physician visit Claimant was specifically released to return to work without any restrictions. This document is given significant weight. An admonition to "rest" is not synonymous with a total work release, especially in light of the written release to return to work without restrictions. The argument that an Employer representative was present during the visits between October 26 and November 8 and must have understood Claimant could not work during this time frame is unpersuasive. Claimant had the opportunity to flesh out this theory at hearing, but there is no testimony that Employer understood Claimant was not capable of working until after November 8.

15. When the record as a whole is considered, Claimant has failed to prove that he is entitled to TTD benefits during the time frame of October 26, 2012, through November 8, 2012.

November 9, 2012 through February 23, 2014 Facts

16. As instructed, Claimant reported to work on or about November 9, 2012. He was assigned "light-duty" tasks which complied with his restrictions. Claimant testified he had no specific job, rather he would try to find someone who needed help in the various departments located above ground at the mine. The random tasks he was given to perform rarely filled his entire work shift. Claimant also testified he was not given a time sheet to log his hours.[5]

17. Claimant testified that he often experienced significant pain while working but limited his pain medication intake to non-prescription pain medicine.

18. On December 21, 2012, Claimant reported to work at 6:00 a.m., his usual start time. Not long thereafter his back began hurting more than his ibuprofen could quell. Claimant testified he looked for a safety department officer to let them know he was in too much pain to continue working and he was going to leave to take his prescription pain medication. When he could find no one he simply left work in violation of a safety protocol. After taking his pain medication he went to sleep and did not wake up until evening.

19. Ultimately Claimant was fired for leaving work on December 21, 2012, without notifying anyone.[6] When he was fired his income stopped. Defendants paid him no

[5] Defendants' Exhibit 1, p. 10 is a documentation of events leading to Claimant's termination; it describes the procedure for Claimant's employment, including filling out his timecard, which he allegedly handed to a safety technician on the day in question. However, there was no sworn testimony from the Employer representative at hearing on this issue, nor was such timecard produced as an exhibit. Whether Claimant did or did not fill out a time card when he returned to work after his accident is not dispositive, and is merely noted here to recognize the discrepancy.

[6] Claimant was already at "step 3" of a four-part disciplinary system when he left the jobsite without notifying anyone. His prior safety violations played a part in his termination, as it put him at step 3, where step 4 is termination.

TTD benefits thereafter until Claimant eventually underwent surgery in late February 2014, as discussed hereinafter.

November 9, 2012 through February 23, 2014 Analysis

20. Relying on the provisions of Idaho Code § 72-403, Defendants argue Claimant's termination for multiple safety violations when there was light-duty work available to him with Employer in effect constituted a willful refusal on Claimant's part to perform available work. Defendants further argue that consistent with the holding in *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986),[7] Employer herein made a reasonable and legitimate offer of employment to Claimant which he was capable of performing under his light-duty restrictions and which employment was likely to continue throughout Claimant's period of recovery. Claimant refused such employment when he violated a safety rule while already at a stage three of a four-stage disciplinary system and accordingly was fired for such violation. The firing was for cause and unrelated to Claimant's injury, thus relieving Defendants from further obligation to pay TTD benefits until the time of Claimant's surgery in February 2014.

21. Idaho Code § 72-403 provides:

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

This statute imposes an obligation on the injured worker to seek or accept "suitable" work, i.e. work consistent with his restrictions, or suffer loss of his entitlement to benefits otherwise payable.

[7] While the Commission in *Roberts, infra,* analyzed the limitations of *Maleug* and determined that under certain circumstances the holding therein was at odds with Idaho Code § 72-403, it does not appear such limitations are applicable under the arguments advanced by the parties in this matter.

22. The Commission's most recent analysis of Idaho Code § 72-403 is found in *Roberts v. Portapros,* IIC 2019-008048, (October 11, 2019). Therein, the Commission determined that Idaho Code § 72-408 benefits will be assumed unless and until Defendants demonstrate that Claimant failed to satisfy his obligation to seek or accept work consistent with his physical abilities. Consistent with this pronouncement, the Commission found that;

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

Roberts at 13.

23. Claimant raised a preliminary argument not specifically addressed by Defendants. He claims the "work" provided by Employer after his industrial accident was not "suitable" employment, as it was nothing more than an assorted compilation of various "make work" tasks which seldom occupied his entire workday. As such, Claimant never had "suitable" work available for him to refuse or unreasonably fail or neglect to perform. Claimant cites to *Wilson v. Beehive Homes,* IIC 2009-030624 (August 4, 2011), as authority. Therein, the Commission determined, without detailed analysis, that the claimant was not presented with a "reasonable and legitimate offer of employment" when his light-duty job "consisted of creating tasks to fill his time." *Id.* at 18.

24. The holding in *Wilson* notwithstanding, the standard is not whether the offer of employment is "reasonable and legitimate;" under Idaho Code § 72-403, the work must be "physically or mentally suitable" in order to trigger a duty on an injured worker to accept and

perform or risk termination of his TTD benefits. The question is whether the employment offered Claimant was physically and mentally suitable for him.

25. The fact that Claimant did not have a titled job to return to after his accident, and his duties were a compilation of tasks which often did not keep him busy for a full workday every day is not determinative of whether his employment was "suitable." He did not complain to his supervisors that the tasks assigned to him were beyond or inconsistent with his work restrictions or actual physical limitations (and the record does not support such an assertion) or in any way mentally or psychologically unsuitable. Claimant went to work each day prior to December 21, 2012 and accepted a paycheck for his services. The argument that piecemeal tasks are not a legitimate job offer such that on that basis alone Claimant is entitled to TTD through the period of his employment in November/December 2012 (subject to a credit for wages paid) and continuing until his first surgery in February 2014 is not supported by statutory language and is unpersuasive.

26. Claimant implies in briefing that the tasks assigned to him somehow exacerbated his condition. He has not proven such a claim (which if shown would support an argument the employment offered him was not suitable) with a preponderance of the evidence. The fact he continued to complain to physicians during the time he was employed (and thereafter) is not evidence of correlation. Furthermore, Claimant's personal belief that he experienced a reduction in pain and swelling in January *because* he was no longer working (a notation found in an ICRD interview document, not a medical record supported by a medical doctor) is likewise insufficient to establish that the work offered by Employer was not suitable.

27. Claimant argues he was "required" to go without his prescription pain medication while working, thus leading to increased pain. The evidence contradicts this argument. Employer did not disallow such medication, but rather required Claimant to provide a written statement with

details of the prescription and its side effects. In reality, Claimant chose not to take prescription pain pills while working after the accident.[8] His decision does not render the work provided for him unsuitable.

28. When the record as a whole is considered, the employment offered Claimant was physically and mentally suitable for him in his condition.

29. Claimant secured employment after his industrial accident with Employer. The employment tasks were consistent with his restrictions. The remaining issue is whether Claimant refused or unreasonably failed or neglected to perform such work.

30. Defendants argue Claimant refused (or in the alternative unreasonably failed) to perform available work by leaving the job site without notifying a supervisor. Since this employment opportunity was and purportedly would have remained available to Claimant for the duration of his period of recovery, Defendants satisfied the *Malueg* requirements and are relieved of their obligation to pay Claimant's income benefits for the time frame in question.[9]

31. Claimant did not refuse any task given him in his return to work. Under these facts the question is whether Claimant *unreasonably* failed or neglected to perform his work such that Defendants had legal justification to terminate his time loss benefits as allowed under Idaho Code § 72-403.

32. On December 21, 2012, Claimant left work without notifying anyone, contrary to Employer's safety rules. His unrebutted testimony is that he left because his low back pain that day was greater than he could manage without prescription pain medication, which

[8] Claimant's testimony that he would not take pain medication while working after the accident stands in contrast to his drug screen results obtained on the day of his accident, which showed Hydrocodone in his system, which he acknowledged he took due to ongoing knee complaints.

[9] Claimant argues that even if Employer was justified in initially denying his TTD benefits, after he was placed under more onerous work restrictions in May 2013 Employer had to again offer him employment within those more restrictive limits. Given the holding herein, such argument is moot.

he kept offsite. After taking the medication, he in effect took the day off by going to sleep and not returning a telephone message left for him by Employer until two days later. Claimant certainly failed or neglected to perform his work assignment on that date.

33. Claimant argues that while the policy of requiring all workers to properly check out is reasonable given the safety issues involved with mining operations, Claimant's termination was based on a "form over substance" use of the rule. Claimant notes he was not required to fill out timecards, often he could not find anyone when he arrived or left work at the end of his shift, and he parked in the parking lot near the offices. In fact, Ms. Horning noticed Claimant's car was missing soon after he left work on December 21. His supervisor stated that Claimant would have been allowed off work had he notified anyone of his increased pain; his only infraction was leaving without notifying anyone after attempting to do so but finding no one around to notify. Claimant returned to work on his next scheduled workday, willing to work.

34. The problem for Claimant is that he put himself in a precarious position (stage three) by previous violations. Had this been his first violation there would have been no reasonable grounds for his termination. This is not a case where an employer was searching for any little thing to use as a pretextual firing; Employer herein has a four-step disciplinary program. Had Employer fired Claimant for not properly checking out when he was at step one, or even step two, such termination would be hard to defend. Employer has given every indication it simply followed its normal protocol in deciding to terminate Claimant. It conducted an investigation prior to rendering a decision. Claimant's action was admittedly against safety rules with which he was familiar. Employer did not invent a reason to fire Claimant.

35. In the normal course of running its business Employer had a sufficient reason to terminate Claimant. It is not the Commission's duty to micromanage Employer's disciplinary programs. *McCartney v. Apollo College,* IIC 2007-011715 (May 28, 2008), (Fired for sexual harassment while on light-duty restrictions.) However, as determined in *Roberts, supra,* an injured worker's default position is one of entitlement to income benefits during periods of disability, subject to those constraints found in Idaho Code § 72-403. Claimant's general entitlement to time loss benefits must be liberally construed in favor of a finding of compensation.

36. While under Employer's disciplinary program Claimant had justification to fire Claimant, the question remains whether Claimant's behavior in leaving work due to increased pain without notifying anyone was *unreasonable* in the context of Idaho's Worker's Compensation Act, which favors compensation. Employer's safety rule in question does not require an *unreasonable* failure to notify; rather *any* failure is subject to discipline. Therefore, Employer may have been justified in terminating Claimant even if Claimant's behavior was not *unreasonable* as that term must be construed under the Act.

37. The reason Claimant left work on December 21 is important to the analysis. His decision to leave was motivated by sequala of his industrial accident; his pain was too severe to continue working that day. He did not leave work to go hunting (*See, e.g. Smith v. Champion Building Products,* 1994 IIC 1511 (Dec. 14, 1994)), or some other strictly personal reason which would likely not have been condoned by Employer even if notified. Employer acknowledged Claimant's condition would have justified him taking the day off without ramifications had Employer known.

38. While Claimant's conduct in leaving work without notifying anyone was improper under Employer's safety rules, and Claimant should have made a greater attempt

to leave word with someone that he was leaving (even if that meant leaving a phone message on an answering machine or on someone's cell phone), given the purpose of the Act favoring compensation, Claimant's conduct did not constitute an *unreasonable* failure or neglect to perform work as that term is contemplated under Idaho Code § 72-403.[10]

39. When the record as a whole is considered, Claimant has proven his entitlement to TTD benefits from November 8, 2012, to February 23, 2014, the date when Defendants instated TTD benefits prior to Claimant's first surgery.

December 28, 2015 to January 31, 2018 Facts

40. After an IME report wherein Claimant was declared medically stable, Defendants stopped paying TTD benefits as of December 28, 2015. When it was determined Claimant needed additional treatment in early 2018, Defendants reinstituted TTD payments from January 31, 2018, until Claimant was declared at MMI by his treating physician on February 28, 2019. Claimant argues he is entitled to TTD benefits from December 28, 2015, through January 31, 2018, notwithstanding the IME findings, as Claimant was still in a period of recovery during such time.

41. Claimant was referred by Dr. Haller to Bret Dirks, M.D., with Inland Northwest Spine and Neurosurgery in February 2013. Dr. Dirks had previously treated Claimant surgically (left-sided lumbar laminectomy and discectomy) in 2007 for low back and radiculopathy complaints. Dr. Dirks' initial impression upon examination and review of radiological studies was sacroiliitis. Dr. Dirks suggested injections followed by physical therapy.

[10] The record does not establish, nor do Defendants argue, that Claimant refused or unreasonably failed to seek suitable work after he was fired by Employer but prior to February 24, 2014, which if true would also preclude Claimant from obtaining TTD benefits for this time frame by virtue of Idaho Code § 72-403.

42. Claimant continued to complain of increasing right leg pain over time in spite of additional treatments and therapy. Dr. Dirks suggested L4-5 decompressive hemilaminectomy, discectomy, and medial facetectomy, which surgery took place on February 24, 2014.

43. While Claimant noted some temporary improvement with the surgery, he still complained of right leg pain and Dr. Dirks continued to treat him. An MRI done in late 2014 showed recurrent disc material at L4-5, along with moderate to severe neural foraminal encroachment related to disc degeneration over the preceding several months. Dr. Dirks suggested more surgery, to include a fusion at L4-5. The surgery took place on February 9, 2015.

44. Although Dr. Dirks' records note Claimant's improvement with this second surgery, Claimant continued to complain of pain which Dr. Dirks attributed to Claimant's sacroiliac. By November 2015, Dr. Dirks noted Claimant was definitely better, but still had pain in his back and right leg in spite of post-surgery treatment, which included SI joint injections.

45. Claimant underwent an IME with Jeffrey Larson, M.D., in December 2015. Dr. Larson reviewed medical records and conducted an examination. While Dr. Larson noted Claimant had pain in his L4-5 region, he had no pain with palpation or manipulation of his SI joint and no pain with straight leg raise testing.

46. Dr. Larson specifically stated there was no injury to Claimant's SI joints, nor was he symptomatic from SI joint dysfunction. Dr. Larson pointed out Claimant had received no benefit from the previous SI joint injections.

47. Dr. Larson felt Claimant's low back complaints were due to a combination of his deconditioning, pre-existing issues (low back pain, kyphosis at L1-2 as seen on x-rays

taken that day, degenerative disc disease with disc protrusion at L5-S1), and the industrial accident in question. He opined that Claimant was at MMI, noting that Claimant's radiculopathy had resolved with surgery, and he was neurologically intact. Dr. Larson felt Claimant needed no further treatment for his 2012 industrial accident.

48. Dr. Larson assigned Claimant an 8% whole person impairment with 2% attributed to pre-existing conditions for a net 6% PPI rating from the work accident, and gave Claimant a permanent work restriction of no more than 25 pounds lifting and frequent change of position.

49. Based on Dr. Larson's opinions, Surety ceased paying Claimant TTD benefits and began paying him PPI benefits on his 6% permanent impairment.

50. Dr. Dirks strongly disagreed with Dr. Larson's opinions and stuck to his diagnosis of bilateral sacroiliac pain. Dr. Dirks suggested an iFuse SI joint surgery. He released Claimant for modified-duty work by March 9, 2016, with a 10 pound lifting and pulling/pushing limit and other restrictions.

51. Dr. Dirks continued to treat Claimant with SI joint injections and continued his push for an iFuse surgery. In May 2016 he took Claimant off work again.

52. On June 28, 2016, Dr. Larson again examined Claimant and reviewed updated medical records. He noted in his report that Claimant complained of low back pain at L3-4, just above the site of his previous surgery. Again, Dr. Larson found no SI joint complaints with testing, and opined that Claimant's SI joints were entirely normal with regard to pain; Claimant had no sacroiliac dysfunction. Dr. Larson further opined that Claimant was not a candidate for iFuse surgery; such surgery would not be appropriate.

53. Dr. Larson again stated Claimant had chronic low back pain not helped by any treatment; he was at MMI.

54. Claimant then sought an IME from John McNulty, M.D. Dr. McNulty felt Claimant's low back was the most significant component to his complaints, with increasing lumbar pain above his fusion site. Dr. McNulty agreed with Dr. Larson that Claimant would not benefit from an SI joint fusion surgery. Dr. McNulty felt Claimant should have additional diagnostic evaluation of his lumbar spine and if nothing needing further surgery was discovered then Claimant would be at MMI. Dr. McNulty also agreed with Dr. Larson's PPI rating for Claimant. Claimant was restricted to sedentary job category work with a 10 pound lifting restriction and only rare bending and stooping with frequent position changes.

55. Subsequent CT and MRI scans revealed nothing abnormal at the site of Claimant's fusion.

56. On March 28, 2017, Claimant was seen by Antoine Tohmeh, M.D., of Northwest Orthopaedic Specialists in Spokane for a "fourth opinion." He also found no sign of sacroiliac joint dysfunction or instability. After examination and a diagnostic analgesic discogram study Dr Tohmeh concluded that Claimant was a poor surgical candidate; Dr. Tohmeh recommended conservative treatment and "medical retirement." He prescribed Hydrocodone.

57. Claimant returned to Dr. Dirks on January 30, 2018, complaining of left-sided radiculopathy, which by February 20, 2018 had become bilateral radiculopathy. A new CT scan was ordered to check for pseudoarthrosis. Dr. Dirks took Claimant off work.

58. Dr. Dirks read the CT scan as showing an incomplete fusion at L4-5 and operated on Claimant for a third time since 2012. The surgery took place on April 18, 2018.

December 28, 2015 to January 31, 2018 Analysis

59. Defendants began paying TTD benefits to Claimant when he presented to Dr. Dirks in late January 2018, complaining of a new bout of radiculopathy. They argue that Claimant reached MMI in late December 2015, and until his new onset of radiculopathy culminating in a third surgery, TTD benefits were inappropriate. Instead, they paid Claimant's 6% PPI rating during this time.

60. Defendants argument is well taken. At the time he was declared at MMI by Dr. Larson Claimant had no radicular symptoms. While he had chronic low back pain, he received a PPI rating taking his chronic condition into account. Dr. Dirks' opinion that Claimant was not at MMI due to SI joint dysfunction was rebutted not just by Dr. Larson, but by Drs. McNulty and Tohmeh as well. Until Claimant developed a pseudoarthrosis with radiculopathy in early 2018 and was taken off work by Dr. Dirks, he was medically stable, albeit not asymptomatic.

61. The opinion of Dr. Larson (supported by Dr. Tohmeh) is given more weight than that of Dr. Dirks regarding Claimant's medical stability after December 28, 2015.

62. When the record as a whole is considered, Claimant has failed to prove he is entitled to TTD benefits during the time period from December 28, 2015 through January 30, 2018.

Permanent Disability Benefits

63. 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 nonmedical factors provided in Idaho Code § 72-430. Idaho

Code § 72-425.

64. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, the nature of the physical disablement, 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, are among the factors to consider. Further, consideration is given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area, together with all the personal and economic circumstances of the employee, and other factors deemed relevant. 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, 294, 766 P.2d 763, 764 (1988).

65. The extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997); *Thom v. Callahan*, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). The burden of establishing permanent disability is upon Claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

66. As a general rule, Claimant's disability assessment is performed as of the date of hearing. *Accord, Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

67. Claimant argues he is totally and permanently disabled, either 100% or under the odd-lot doctrine. Defendants concede Claimant has suffered permanent disability

over his permanent impairment but believe Claimant's disability rating is no more than 52% inclusive of his impairment rating.

68. The parties agree Claimant cannot return to his time-of-injury employment. The first issue for resolution is the extent to which Claimant's physical impairment, taken in conjunction with his nonmedical factors, has reduced his capacity for gainful employment, which involves analysis of conflicting medical and vocational rehabilitation opinions.

69. Preliminarily, Defendants argue that whatever difficulties Claimant may have had prior to his third and final post-injury surgery in 2018, both with his physical state and in locating employment through his own efforts or with the aid of ICRD, none of those facts are relevant to deciding the extent of Claimant's permanent disability, which is determined at the time of hearing and after Claimant had reached MMI following his final surgery. Defendants' point is well taken. As such, the focus of analysis will center on Claimant's capacity to compete in his open labor market after February 2019 given all relevant medical and non-medical factors.

70. On February 28, 2019, Dr. Dirks found Claimant had reached maximum medical improvement. He noted Claimant still complained of persistent left leg complaints, but Claimant was satisfied with his latest surgery and felt his condition was much improved. Claimant had good lower leg strength bilaterally. He did not give Claimant an impairment rating nor did he in any way address Claimant's work restrictions, if any.[11]

FCE

[11] On February 5, 2019, Dr. Dirks had filled out a work status form indicating that as of that date Claimant was not released to work in any capacity. Notes of his February 28 visit with Claimant do not indicate whether this work ban continued after he released Claimant from his care and declared him at MMI on that date. In fact, his notes do not discuss work restrictions at all. The doctor's silence on this issue is not evidence of a continuation of his previous work prohibition and will not be considered as such.

71. One week prior to being declared at MMI by Dr. Dirks, Claimant underwent a functional capacity evaluation (FCE) at River City Physical Therapy at the request of his attorney. The results of the evaluation were interpreted by Michael Kim, DPT, as placing Claimant in the light physical demand category. Specifically, Claimant's restrictions were as follows;

Activity Handling	Infrequent (lbs.)	Occasional (lbs.)	Frequent (lbs.)
Back lifting	15	10	5
Leg lifting	20	15	8
Shoulder/Overhead lifting	30	25	13
Carry – one or two hands	30	25	13
Pushing/Pulling	30	25	13
Activity – Positional			
Bending	✓		
Squat/Kneel/Crawl		✓	
Stair climbing		✓	
Sit/Stand/walk		✓	
Forward/Overhead reach			✓

Claimant's bending and squatting were limited to 12 inches above the floor; his back and leg lifting were likewise commenced from 12 inches elevated from floor level. CE CC, p. 1471. Claimant would also need to change positions from sitting to standing to walking approximately every 15 minutes throughout the course of an 8-hour workday.

72. On April 22, 2019, Dr. Dirks completed a "check-the-box" form from Claimant's attorney which asked if the doctor felt the physical limitations documented in the FCE report were consistent with the doctor's evaluation of Claimant. Dr. Dirks checked "yes."

73. Subsequently, in June 2019, Dr. Dirks, in response to a request from Claimant's counsel, opined that although FCEs are not "necessarily precise predictors of a specific person's ability to perform the job duties of a specific job," the FCE findings in

this case would serve as a medically valid projection of whether Claimant could perform any given job.

74. Mr. Kim was critical of Dr. Cox's work restrictions, discussed below, because Dr. Cox did not utilize the same protocol as Mr. Kim, who felt his method of analysis was superior to that of Dr. Cox's, whose opinion was based on his professional experience as a licensed medical physician, and not based on physical testing to the degree of the FCE.

Rodde Cox, M.D.

75. Rodde Cox, M.D., of Boise Physical Medicine & Rehabilitation Clinic, examined Claimant at Defendants' request on April 29, 2019. In addition, Dr. Cox reviewed various medical records and interviewed Claimant regarding his preexisting conditions and history from the date of the industrial accident forward.

76. Dr. Cox concluded that Claimant's subjective complaints during examination were inconsistent with the doctor's objective findings and symptom magnification was evident. Dr. Cox felt Claimant's behavior was more likely a learned pattern than intentional misrepresentation. He opined that Claimant's overall prognosis was good; he rated Claimant's PPI at 6% whole person. This rating was subject to apportionment if records could establish that Claimant had ongoing low back symptoms predating the industrial accident, but Dr. Cox did not make an apportionment at the time of his initial report.

77. Dr. Cox suggested a 35 pound lifting restriction on an occasional basis and felt Claimant should avoid repetitive bending, twisting, and stooping on a permanent basis.

78. On May 14, 2019, Dr. Cox was asked by Defendants to respond to the FCE report by answering specific questions. In response, Dr. Cox noted differences in Waddell's findings between the two events; during his examination Dr. Cox noted 4 out of 5 positive

findings, whereas the FCE report listed only one. This difference led Dr. Cox to question the accuracy of the FCE's other validity measures.

79. After reviewing the FCE report, Dr. Cox maintained his original opinion on Claimant's permanent restrictions. Dr. Cox noted his restrictions were based on his personal evaluation during examination, imaging studies, and expected restrictions for the diagnosis. Dr. Cox also noted his opinions were consistent with the *Official Disability Guidelines* (ODG), which indicate "someone with [Claimant's] diagnosis should be able to return to modified work or manual work within a period of 70-140 days." Dr. Cox also pointed out the ODG did not support heavy manual labor for Claimant's diagnosis and Dr. Cox agreed with that sentiment.[12] DE 7, p. 738.

80. Dr. Cox noted and discussed the controversial nature of FCEs in general and in back injury cases and worker's compensation cases in particular, as discussed in Chapter 6 of the *AMA Guides to the Evaluation of Work Ability and Return to Work* (2d ed. 2011). He concluded his analysis by noting that there are "limits to the value of Functional Capacity Evaluations." *Id.*

81. Dr. Cox was deposed. Therein Dr. Cox testified on his objections to the FCE findings. In Dr. Cox's opinion Claimant's medical pathology was inconsistent with the FCE findings. Claimant had no objective findings supporting such severe restrictions; his fusion was solid, his strength normal, his lower extremities had normal sensation. Dr. Cox noted the AMA Guides, 6th ed. no longer considers range of motion when determining impairment

[12] Claimant consistently attempted to impeach Dr. Cox with his "reliance" on ODG (which claims to use "evidence based" recommendations) with various arguments, and argued Dr. Cox's use of ODG materials was equivalent to Dr. Cox ignoring Claimant as an individual and instead relegating Claimant to an "average" person who has undergone a fusion surgery. Dr. Cox reaching an opinion on work restrictions which is "consistent with" ODG guidelines is not the same thing as Dr. Cox relying solely or even predominately on ODG guidelines to form his opinion, and he made that clear in his testimony. Furthermore, he indicated ODG was just one of several resources he utilized when forming his opinion on permanent restrictions. This issue warrants no further discussion herein.

because there is little support for ROM as being a reliable indicator of function. Dr. Cox also would not give Claimant a walking limitation based on physical therapy records which placed no limitation on Claimant's walking, coupled with a lack of pathology which would limit Claimant's ability to walk.

82. During cross examination Dr. Cox had to admit that one Waddell's sign the doctor had reported as being positive – the axial loading test –was actually negative.

Vocational Rehabilitation Experts

83. After Claimant reached MMI in 2019, the parties hired vocational rehabilitation experts to evaluate Claimant's prospects for employment. Claimant hired Fred Cutler of Cutler counseling LLC, out of Portland. Defendants hired William Jordan of Northwest Consulting, Inc., in Boise.

Fred Cutler

84. Prior to authoring his June 10, 2019 "vocational rehabilitation evaluation," Mr. Cutler interviewed Claimant and reviewed relevant medical records, including pre-employment examinations for Claimant from 2005 forward. He also reviewed and detailed Mr. Kim's FCE findings. He reviewed ICRD consultant records concerning Claimant from 2013 through February 8, 2018. Mr. Cutler also read Claimant's pre-hearing deposition transcript. It does not appear Mr. Cutler reviewed or considered Dr. Cox's IME report and recommendations.

85. Mr. Cutler documented Claimant's work history from high school graduation in 1986 through his industrial accident in question. He also summarized Claimant's medical history from 2007 through February 2019. Mr. Cutler also listed Claimant's self-described physical limitations and pain complaints as of the time of the interview.

86. Relying on the limitations set out in the FCE, (which findings were supported by Dr. Dirks), Mr. Cutler placed Claimant in a sedentary to modified light-duty job category. He then reportedly took Claimant's skills and knowledge gained as a miner, a bartender, and a siding applicator, coupled with specific work activities Claimant performed in the past, and cross referenced that information with all jobs in the Dictionary of Occupational Titles (DOT) in an effort to identify light or sedentary jobs which would be consistent with Claimant's skills. He found none.

87. Mr. Cutler recognized that based on FCE test results Claimant could potentially perform some light-duty jobs if permitted to change positions, including sitting standing and walking in equal proportions throughout a workday. Mr. Cutler determined the DOT did not identify any jobs which could be done while sitting, standing, *and* walking for roughly equal amounts of time throughout the workday, including work such as waiter, bar attendant, caterer helper, or lunchroom counter attendant. In Mr. Cutler's opinion Claimant's age, 52, was also a barrier to employment.

88. Mr. Cutler determined Claimant's significant physical limitations resulted in a complete inability for Claimant to obtain or maintain employment. Mr. Cutler opined Claimant had suffered a total loss of labor market access in his relevant labor market, Silver Valley, Idaho, due to his industrial accident and injury, thus rendering him totally and permanently disabled.[13]

William Jordan

89. On June 10, 2019, William Jordan submitted an "employability report" to Surety regarding Claimant's potential for employment in the Silver Valley and Coeur

[13] Mr. Cutler supported his conclusion by noting that his finding was "entirely consistent" with an ICRD entry of November 20, 2017, wherein it was noted that no suitable positions were identified that Claimant could return to in his labor market. This entry was prior to Claimant reaching MMI after his last surgery and was a summary of efforts made by ICRD over several preceding years.

d'Alene job market. Mr. Jordan interviewed Claimant, reviewed his medical history and FCE findings, obtained Claimant's subjective perception of his functional abilities, (severe incapacitation), and outlined Claimant's employment history. He also conducted labor market research by contacting several potential employers in Claimant's labor market. Additionally, Mr. Jordan outlined retraining programs potentially available to Claimant.

90. Mr. Jordan met with Dr. Cox to discuss job descriptions and advertised jobs then available in an area as far removed from Wallace as Coeur d'Alene, to determine if the doctor felt such listings would be within Claimant's restrictions. They included delivery truck driver, cashier, building equipment sales representative, plastic press molder, quality control technician, loss prevention worker, shipping/receiving clerk, hardware sales person, parts clerk, "Uber" type taxi driver, security guard, convenience store clerk, bartender, and flagger. Dr. Cox approved all jobs, albeit some (shipping clerk, delivery truck driver, taxi driver, and bartender) with concerns that Claimant does not exceed his 35 pound lifting restriction. Suggested jobs requiring retraining included no-load truck driver, dump truck driver, trucking company dispatcher or broker, cost estimator, and building inspector. All listed jobs were approved by Dr. Cox.

91. Considering all the above data, Mr. Jordan submitted three alternative scenarios concerning Claimant's permanent disability likelihood. The first relied on Claimant's subjective limitations, which were well in excess of any limitations imposed by the FCE and/or a physician. Under this scenario Claimant would suffer a complete loss of wage-earning capacity and be considered totally and permanently disabled.

92. Mr. Jordan's second scenario utilized the FCE findings and recommendations endorsed by Dr. Dirks. Under this standard, Mr. Jordan felt "it is possible that the [Claimant] could perform some unskilled or semi-skilled occupations that would have exertional levels

within a light classification." Mr. Jordan calculated Claimant's loss of access to the labor market at 64%, with a 75 to 81% loss of wages. Mr. Jordan calculated Claimant's PPD under this scenario at 70 – 73%, inclusive of PPI.

93. Under his final scenario Mr. Jordan accepted Dr. Cox's recommendations concerning Claimant's restrictions. Mr. Jordan calculated Claimant's loss of access to the labor market under this scenario at 47% and Claimant's loss of wages at 57 to 66%. Averaging these figures, Mr. Jordan arrived at a PPD rating for Claimant of 52 to 57% inclusive of PPI.

94. Mr. Jordan was deposed. Therein, he described the meetings he had with various potential employers in the Silver Valley to find out if they would be interested in interviewing Claimant for open positions. Included employers were Wallace Inn, for a front desk clerk, O'Reilly Auto Parts store, which had an opening for a parts clerk, McDonald's, which needed workers full and part time. All employers on his list were interested in interviewing or receiving an application for employment from Claimant, and all took no issue with Claimant's 35 pound lifting restriction (as per Dr. Cox). Mr. Jordan noted Claimant had not contacted IDVR or Social Security's "Ticket to Work" program, both of which assist individuals find work or retrain for reentry to the workforce.

95. Mr. Jordan testified that using either the FCE or Dr. Dirks' restrictions, Claimant would qualify for light-duty jobs such as hotel front desk clerk/guest representative, service runner, and cashier. Additional jobs were available if Dr. Cox's restrictions were used.

96. In cross examination Mr. Jordan testified he did not personally contact employers in Coeur d'Alene regarding Claimant, but he felt Coeur d'Alene jobs were within

Claimant's labor market. Mr. Jordan limited his in-person interviews to Silver Valley job openings.

97. Mr. Jordan acknowledged that when he spoke with potential employers with openings for light-duty work he told the employers of Dr. Cox's restrictions (35 pound lifting with occasional bending, twisting, and stooping), but did not mention either Claimant's subjective perceived level of function or the FCE restrictions because of the severity of the latter two restrictions. Mr. Jordan testified that under the FCE restrictions (much less Claimant's perceived incapacity) Claimant would not stand a chance of being hired. Mr. Jordan agreed that under the FCE restrictions it would be improbable, although possible, that Claimant could find suitable employment. Finally, Mr. Jordan agreed that under the FCE and Dr. Dirks' recommendations it would be "futile for [Claimant] to work." Jordan Depo p. 88.

98. In response to questioning by the Referee, Mr. Jordan indicated the labor market used in calculating his labor market reduction of 47% was the entire five-county panhandle labor market, not the Silver Valley.

Permanent Disability Analysis

99. Mr. Jordan, in his deposition, made it clear that analyzing the extent of Claimant's permanent disability comes down to two competing viewpoints. The first is that the FCE limitations and restrictions, as endorsed by Dr. Dirks more closely correlates with Claimant's actual restrictions and limitations, and his ability to maintain suitable employment. The second viewpoint is that Claimant's restrictions as opined by Dr. Cox more closely defines the employment opportunities available to Claimant. Mr. Jordan opined that if the FCE restrictions were followed it would be futile for Claimant to seek employment, as it would be unlikely any employer would hire him. Mr. Jordan did not even attempt to

find Claimant a potential job using the FCE restrictions. On the other hand, if Dr. Cox's restrictions are utilized then Mr. Jordan located actual jobs in the Silver Valley which would be suitable for Claimant to pursue.

FCE/Dr. Dirks

100. No one in this case, other than perhaps Mr. Kim, opined that FCE results, even if declared "valid", are a dispositive indicator of permanent disability. Rather, an FCE is one piece of evidence among many to be considered when determining permanent disability.

101. Standing alone, the FCE results are an insufficient indicator of Claimant's permanent disability. As noted by Dr. Dirks, *supra,* an FCE is not necessarily a precise predictor of a specific person's ability to perform the job duties of a specific job. As noted by Dr. Cox, the FCE presents a particular outcome at a particular point in time. FCEs rely on the subjective effort of the participant and the subjective analysis of the administrator, and many variables can affect the outcome. For example, in the present case, the hearing was held in Wallace instead of in the Industrial Commission's Coeur d'Alene office (where North Idaho hearings are typically held) due to Claimant's stated difficulty in traveling from Wallace to Coeur d'Alene because of the pain such trip caused him. The FCE was held in the Coeur d'Alene area. There is no way to tell if, or to what extent, Claimant's performance was negatively affected by the drive from Wallace. Any number of other factors could likewise have influenced his performance that day. That is an inherent risk of all FCEs; variables affect outcome. As a predictor of any person's long-term success in any job, such testing is at best "imprecise" as noted by Dr. Dirks.

102. Whatever its limitations, the FCE did provide a set of restrictions which physicians could then analyze and comment upon. In this case, Dr. Dirks, Claimant's treating surgeon who had an extensive history with Claimant over a period of years,

examined the FCE results. While he did not give a glowing recommendation of FCEs as a general predictive tool, he did opine that in this case the FCE results were in line with restrictions he felt were appropriate for Claimant on a permanent basis. He reiterated his agreement with the FCE results on multiple occasions.

Dr. Cox

103. Doctor Cox disagreed with the FCE findings in large part because they were not supported by objective evidence. Additionally, no one had placed limitations on Claimant's ability to walk, so he found no basis for limiting Claimant in that regard. These points are valid, but not dispositive. Objective evidence often does not tell the entire story, and diagnostic studies, like FCEs, are but pieces of evidence to be considered. While Dr. Cox testified that a 35 pound lifting restriction was in line with other low back surgical patients he sees in his practice, undoubtedly the majority of those patients are not coming off their fourth low back surgery and continuing to complain of some residual low back and lower extremity pain. To err on the side of more onerous restrictions than the "garden variety" low back patient, as recommended by Claimant's treating physician, seems prudent under the circumstances of this case.

104. Other observations are worth noting when analyzing the comparative weight to be afforded the competing physicians in this case. It appears Dr. Cox was focused on Claimant's perceived "symptom magnification" to the point of hurting the doctor's credibility. In his report (and initially repeated in sworn deposition testimony) Dr. Cox indicated Claimant had a positive finding on an axial loading test, one in a battery of "Waddell sign" testing, which is often used to see if a patient will make "nonanatomic" and inappropriate pain complaints; in other words, the patient reports pain when there is nothing about the test which should cause pain. Positive Waddell signs tend to suggest

the patient is not being candid with the physician, and instead is trying to make their situation seem worse than it is.[14] At his deposition, Dr. Cox heard an audio excerpt from the IME examination wherein he conducted the test and Claimant clearly indicated the axial loading did not cause pain. The doctor then corrected himself but attempted to downplay the error by noting his mistake did not increase Claimant's Waddell "score," which missed the point. The relevant issue is not whether the doctor's misstatement altered Claimant's overall score, but rather it impugned Claimant's credibility. Mistakes which unfairly cast someone in a negative light are significant and reflect poorly on the accuser.

105. Additionally, Dr. Cox's fixation on Claimant's "inconsistent" reporting also manifested itself on tests the doctor chose not to conduct. Dr. Cox testified the Claimant exhibited inconsistent leg raises testing during the examination. He described it thusly;

> Well, that would be consistent with what Waddell describes as a distraction test, where you basically are distracting them. You straighten their leg out, and they don't have complaints of discomfort. And then you lay them on their back and do a formal straight leg raise, and they have discomfort, then that would be inconsistent.

Cox Depo p. 124. Once Dr. Cox elicited pain from Claimant on a formal supine leg raise after the distraction test, he quit measuring other confirmatory straight leg parameters, such as the degree of elevation at which Claimant elicited pain on the formal leg raise. He also chose not to perform ankle dorsiflexion testing and internal hip rotation testing, as provided in the AMA Guides as tests to validate a positive straight leg test. He testified the inconsistent distraction test obviated the need for further testing.

[14] Claimant made a point to discuss with Dr. Cox the original, perhaps more benign, purpose of the testing as suggested by Dr. Waddell, but the fact remains the "lay perception" is that positive Waddell signs can suggest a less-than-credible presentation.

106. The Guides caution physicians to be cautious in evaluating sitting and supine straight leg testing due to the increased flex in the sitting position. It would have been a more thorough exam, and may have shed additional light on Claimant's situation had the tests been done as recommended by the Guides, but Dr. Cox was convinced the inconsistent results signaled a positive Waddell sign and as a result he skipped other clarifying testing. To err on the side of a thorough exam in light of the ultimate findings which negatively impacted Claimant's case would have evidenced Dr. Cox's attention to detail and more importantly, objectivity.

Vocational Experts

107. Mr. Cutler and Mr. Jordan both concluded it would be futile for Claimant to attempt to find work if the onerous restrictions set forth in the FCE and supported by Dr. Dirks were used to set the limits of Claimant's work capacity. Mr. Cutler concluded Claimant was 100% disabled. Mr. Jordan did not render that opinion, instead opining that Claimant would be 70 to 73% disabled under the FCE restrictions. However, he also used the entire panhandle to calculate Claimant's loss of work access. Given the relatively small and isolated location of Wallace as compared to Coeur d'Alene, for example, it is possible if not likely Claimant's loss of access would be greater had Shoshone County been used as Claimant's labor market. Regardless, in his deposition Mr. Jordan acknowledged that under the FCE restrictions it was unlikely Claimant could find suitable employment.

108. Although Mr. Cutler's analysis left much to be desired in terms of professional analysis, his conclusion was rather elementary; Claimant would not find work in the Silver Valley with FCE-level restrictions. Mr. Jordan did not disagree.

Permanent Disability Conclusion

109. When the entire record is examined, the weight of the evidence supports the opinions of Dr. Dirks more than the opinions of Dr. Cox. Dr. Dirks, as Claimant's treating physician, was better situated to assess Claimant's limitations and suggest appropriate restrictions to minimize the risk of further injury to Claimant's low back.

110. With the restrictions imposed by Dr. Dirks, both in agreeing with the FCE findings and independently (e.g. DE pp. 936, 937), Claimant has proven by the weight of the evidence he is totally and permanently disabled under the 100% method.

Apportionment

111. Apportionment under Idaho Code § 72-406 is inapplicable to the present case, as it only applies to cases of disability less-than-total.

Attorney Fees

112. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 which provides:

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

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

113. Claimant seeks attorney fees for Defendants' conduct, but it is not exactly clear what specific time frame, or on what specific prong of Idaho Code § 72-804 Claimant relies for his claim. While Claimant cites facts and activities of Employer which he calls "unreasonable" stemming from "the day that Claimant was instructed to return to perform make-work," there is nothing in the record which points to conduct falling under the standards outlined in Idaho Code § 72-804. Even though Claimant has prevailed on a significant portion of his claim, he did not establish conduct warranting attorney fees.

114. Based upon the totality of the evidence, Claimant has failed to prove his entitlement to an award of attorney fees under Idaho Code § 72-804 by a preponderance of the evidence.

CONCLUSIONS OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that he is entitled to TTD benefits during the time frame of October 26, 2012, through November 8, 2012.

2. Claimant has proven by a preponderance of the evidence his entitlement to TTD benefits from November 8, 2012, to February 23, 2014.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to TTD benefits during the time period from December 28, 2015, through January 30, 2018.

4. Claimant has proven by a preponderance of the evidence that he is totally and permanently disabled under the 100% method.

5. The issue of apportionment under Idaho Code § 72-406 is moot due to Claimant's total permanent disability.

6. Claimant has failed to prove his entitlement to an award of attorney fees under Idaho Code § 72-804 by a preponderance of the evidence.

RECOMMENDATION

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

DATED this 12th day of August, 2020.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2020, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by *regular United States Mail **and email transmission upon each of the following:

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