

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRIAN D. NOVAKOVICH,)
)
 Claimant,)
)
 v.)
)
 J. H. KELLY, LLC,)
 dba KELLY GROUP, LLC,)
)
 Employer,)
)
 and)
)
 LUMBERMEN'S MUTUAL)
 CASUALTY COMPANY,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 01-010137

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

Filed
March 1, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Coeur d'Alene (CDA) on October 14, 2004. Claimant, Brian D. Novakovich, was present in person and represented by attorney Michael J. Walker of Spokane, Washington. Defendant Employer, J. H. Kelly, LLC, dba Kelly Group, LLC, and Defendant Surety, Lumbermen's Mutual Casualty Company, were represented by attorney Glenna M. Christensen of Boise. The parties presented oral and

documentary evidence. This matter was continued for the taking of two post-hearing depositions, the submission of briefs, and subsequently came under advisement on January 11, 2004.

ISSUES

The noticed issues to be resolved are:

1. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;
2. Whether Claimant is entitled to permanent partial and/or permanent total disability (PPD/PTD) benefits in excess of permanent partial impairment (PPI), and the extent thereof; and,
3. Whether Claimant is entitled to attorney's fees due to Employer/Surety's unreasonable denial of compensation pursuant to Idaho Code § 72-804.

ARGUMENTS OF THE PARTIES

Claimant argues he is entitled to continuing TTD benefits from April 20, 2002, the date they were terminated by Surety, until January 12, 2003, the day before his second lumbar surgery. He maintains he remained medically unstable after his first lumbar surgery and consequently was unable to return to work during this period. He relies on the opinion of his treating physician, Dr. Tohmeh. Claimant further argues he has suffered significant PPD, based on his reduced earning capacity, in excess of the 10% of the whole person PPI he was awarded. He maintains he has suffered a 50% wage loss as a consequence of the physical restrictions placed on him after his industrial injury. Claimant also argues he is entitled to attorney's fees for Defendants' unreasonable denial of TTD benefits.

Defendants counter Claimant is not entitled to additional TTD benefits during the time frame in question since he was found medically stable by Dr. Sears on February 9, 2002, and that once a

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

claimant is found stable, he is no longer in a period of recovery and TTD benefits cease. They further argue that if the Commission is inclined to award further TTD benefits, the benefits should not start until November 19, 2002, when Dr. Tohmeh diagnosed the recurrent herniated disk. Defendants also argue Claimant is not entitled to PPD in excess of PPI. They maintain Claimant's wage loss analysis does not accurately reflect his ability to engage in gainful activity, and that he has failed to present any analysis of non-medical factors to support an award of additional PPD. Defendants further argue Claimant is not entitled to attorney's fees since he was found medically stable by Dr. Sears, whose opinion they reasonably relied upon, and that PPI benefits were paid after TTD benefits were stopped.

Claimant argues Dr. Sears' February 9, 2002, medical stability opinion is not clear-cut since he also recommended continuing treatment and a FCE in order to finalize his opinion. He points out Dr. Sears never examined him again and Dr. Tohmeh recommended a work hardening program on March 26, 2002. Claimant further argues Defendants' argument that he is not entitled to PPD benefits is illogical since they have acknowledged he cannot return to his time-of-injury job involving heavy manual labor and is now restricted to medium work. He also argues he is entitled to attorney's fees since Defendants have not provided any medical evidence to contradict Dr. Tohmeh's opinions and recommendations for treatment, and have in essence acknowledged liability for TTD benefits after the recurrent herniated disk was diagnosed.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and David E. Kirk taken at the October 14, 2004, hearing;
2. Claimant's Exhibits A through I admitted at the hearing;

3. Defendants' Exhibits A through H admitted at the hearing;
4. The deposition of Tom L. Moreland taken by Claimant on October 27, 2004; and,
5. The deposition of Stephen R. Sears, M.D., taken by Defendants on October 27, 2004.

Claimant's objection on p. 13 of Mr. Moreland's deposition is sustained; his objections on pp. 16 and 19 are overruled.

Defendants' objection on p. 8 of Mr. Moreland's deposition is overruled.

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

FINDINGS OF FACT

1. Claimant, an apprentice pipe fitter, injured his lower back while lifting pipes at the Potlatch paper mill in Lewiston on March 14, 2001. He was taken the following day by his supervisor to William R. England, M.D., at Family Medical Center in Lewiston, complaining of low back pain radiating down into his buttocks and left leg. Dr. England noted the absence of left patellar reflex; he felt Claimant might have herniated a lumbar disk. Lumbar x-rays were normal. Dr. England restricted Claimant to light duty and initiated conservative care.

2. At the time of the industrial accident, Claimant was earning \$22.50 per hour. He worked on various projects through the Plumbers and Pipe Fitters Union local in Spokane, of which he was a member. Claimant would list his name with the union; they would assign him to a project. He lived in Spokane and traveled to the various job sites. According to Claimant, he was 102 hours short of becoming a journeyman pipe fitter at the time of the accident, and that 20,000 hours were required for the designation.

3. Claimant's condition deteriorated with conservative care. A March 20, 2001, venous

ultrasound study was normal; he had complained of a localized, sharp left calf pain. A MRI taken at Gritman Medical Center in Moscow on March 27, 2001, showed a large herniated disk at L5-S1, affecting the left S1 nerve root. Dr. England referred Claimant to Antoine G. Tohmeh, M.D., in Spokane for a surgical evaluation.

4. Claimant saw Dr. Tohmeh, an orthopedic surgeon, on April 10, 2001. Dr. Tohmeh opined Claimant's clinical findings correlated to his MRI findings. He recommended an urgent L5-S1 microdiscectomy and foraminotomy of the left S1 nerve root. Dr. Tohmeh performed the procedures the following day at Holy Family Hospital (Holy Family) in Spokane.

5. Following the lumbar surgery, Dr. Tohmeh referred Claimant to physical therapy. The therapy was conducted at Summit Rehabilitation Associates (Summit) in Spokane and continued through late March 2002.

6. Surety referred Claimant to the Industrial Commission Rehabilitation Division – CDA on May 25, 2001. The case was assigned to Consultant Tom Martin. A job site evaluation (JSE) of Claimant's pre-injury job was prepared with Employer's assistance on June 21, 2001, and sent to Dr. Tohmeh for comment. On July 20, 2001, Dr. Tohmeh indicated Claimant could not work for six weeks. On August 3, 2001, he indicated Claimant could return to work as a pipe fitter after mid-August 2001. On August 31, 2001, Dr. Tohmeh opined Claimant could return to his pre-injury position as a pipe fitter; he indicated, however, that Claimant would have to seek additional care for his leg weakness, and that the weakness might restrict his ability to work. On September 6, 2001, Dr. Tohmeh noted Claimant had not been released to work yet.

7. At Surety's request, Claimant underwent an IME with Stephen R. Sears, M.D., and William R. Bozarth, M.D., in Spokane on September 18, 2001. They found some weakness of the

plantar flexors of Claimant's left ankle, and opined he was not medically stable, but that he should reach stability within four months. Dr. Sears, an orthopedic surgeon, and Dr. Bozarth, a neurologist, further opined Claimant was capable of returning to work with restrictions, but deferred to Dr. Tohmeh for a full work release. They recommended Claimant be weaned from a formal exercise program to a self-directed exercise program.

8. Dr. Tohmeh agreed with the IME panel's findings.

9. Dr. Tohmeh continued to follow Claimant. He noted Claimant's persistent left leg weakness hindered his therapy and prescribed a permanent ankle-foot orthosis (AFO) to support his lower extremity. The AFO was ordered in late September 2001. Dr. Tohmeh characterized Claimant's neurologic deficit as profound.

10. After the IME, Consultant Martin provided Dr. Sears with the pipe fitter JSE. On October 10, 2001, Dr. Sears opined Claimant could not return to work as a pipe fitter, that he had a 50 pound lifting restriction, but that the restriction might be lifted by Dr. Tohmeh within the next four months.

11. In November 2001 Dr. Tohmeh ordered a nerve conduction study to evaluate Claimant's S1 nerve root and myotome. The study was conducted on January 3, 2002. It showed ongoing regeneration/reinnervation of the left S1 nerve root.

12. Claimant went to the emergency room at Holy Family on January 30, 2002, and again on February 1, 2002, complaining of back pain. He was given pain medications and told to contact his physician.

13. On February 8, 2002, Dr. Tohmeh ordered a functional capacity evaluation (FCE) to determine Claimant's weight lifting ability, and restricted him from working for another month.

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14. At Surety's request, Claimant underwent a second IME with Dr. Sears and Dr. Bozarth on February 9, 2002. They noted Claimant had recently experienced his first episode of low back pain since the surgery, and that he had some give-way of the left lower extremity, but that no specific muscle weakness was noted. Dr. Sears and Dr. Bozarth opined it was "time [for Claimant] to cook or get out of the kitchen." (Defendants' Exhibit A). They further opined Claimant was medically stable, that he would benefit from an ongoing exercise program, that he should be weaned from a formalized exercise program, and that a FCE would be beneficial in finalizing their report.

15. The FCE ordered by Dr. Tohmeh and recommended by the IME panel was conducted at Summit on March 12, 2002. The evaluation found that Claimant could perform at the medium work level, that he could not perform the essential duties of a pipe fitter as outlined in the JSE, and that he would benefit from a work hardening program.

16. Claimant saw Dr. Tohmeh on March 26, 2002. He noted Claimant continued to have residual weakness in his left leg along with hamstring spasms. Dr. Tohmeh recommended Claimant start a work hardening program at Summit so that he could hopefully return to work as a pipe fitter.

17. In an addendum to their IME report dated March 29, 2002, Dr. Sears and Dr. Bozarth opined Claimant was able to work full-time at the medium level based on the March 12, 2002, FCE, and that the testing was valid.

18. Conversations between Claimant, Consultant Martin, and a union representative were held in April and May 2002 regarding retraining Claimant as a welding inspector inspecting pipe welds. On May 28, 2002, Claimant notified Consultant Martin he was no longer interested in retraining, and that he wanted to undergo the work hardening program recommended by Dr. Tohmeh so that he could return to his pre-injury position as a pipe fitter.

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19. Claimant returned to Dr. Tohmeh complaining of recurrent left leg pain down to his knee on October 31, 2002. Dr. Tohmeh noted Claimant had had an excellent restoration of strength in his left lower extremity, but suspected he could have a recurrent herniated disk at L5-S1. A November 2, 2002, lumbar MRI at Holy Family showed a recurrent disk herniation at L5-S1 causing marked central canal stenosis. A November 5, 2002, nerve conduction study/EMG demonstrated denervation distally in the left S1 myotome, and reinnervation in the more proximal portion of the myotome. On November 19, 2002, Dr. Tohmeh diagnosed a recurrent L5-S1 disk herniation with radiculopathy related to the March 14, 2001, injury. He then recommended surgery.

20. Dr. Tohmeh performed a re-exploration laminectomy, microdiscectomy, and foraminotomy of Claimant's left L5 and S1 nerve roots at Holy Family on January 13, 2003.

21. Claimant underwent physical therapy at Whitworth Physical Therapy (Whitworth) in Spokane after his second surgery. The therapy continued through June 2, 2003. At its completion, Claimant was able to lift 40 pounds. The therapist noted, however, that he was relatively skeptical about Claimant's ability to return to work as a pipe fitter.

22. In a March 27, 2003, letter, Dr. Tohmeh noted the best option for Claimant would be retraining since a third herniation at L5-S1 would likely be treated with a fusion.

23. Claimant attended the work hardening/readiness program at Summit from July 1, 2003, until August 19, 2003. It was the program Dr. Tohmeh had previously recommended. Its goal was to return Claimant to work as a pipe fitter. Claimant's discharge summary from the program indicated that he had demonstrated the essential demands of a pipe fitter.

24. In a letter dated July 8, 2003, Dr. Tohmeh opined Claimant's lumbar condition was not medically stable on April 21, 2002, that he continued to be symptomatic and in need of further

reasonable medical care, and that he has been temporarily totally disabled and unable to return to gainful employment since that date until the present.

25. Dr. Tohmeh released Claimant to return to work on August 21, 2003. He had noted on August 19, 2003, that Claimant had excellent improvement in his work hardening program, that he could lift up to 75 pounds, and that he had minimal leg and back pain. Dr. Tohmeh also released Claimant from his care and prescribed custom-made high-top boots with cork soles to support his arches and stabilize his ankles while at work.

26. Consultant Martin spoke with Dr. Tohmeh on August 21, 2003. Dr. Tohmeh indicated Claimant was being released to return to his time-of-injury position as a pipe fitter.

27. Claimant and Consultant Martin spoke on September 5, 2003. Claimant indicated he had informed his union of his desire to return to work, but that he first needed to secure viable transportation and reinstate his driver's license. Apparently a job was available for Claimant in Pullman, Washington.

28. At Surety's request, Claimant underwent an IME with Larry K. Lamb, M.D., on September 24, 2003. Dr. Lamb, a Spokane physiatrist, noted Claimant reported no residual radicular pain in his left lower extremity, but that he might have some mild residual weakness remaining in his left S1 myotome. He opined Claimant's rehabilitation course was complete, that he was medically stable, and that a FCE showed he could perform medium work with a 50 pound lifting restriction.

29. Claimant and Consultant Martin spoke on September 25, 2003. Claimant indicated he was waiting to pick up his custom boots, that he had contacted his union about returning to work, and that the only barrier to employment was viable transportation. Since Claimant had been

medically released to return to his pre-injury job, Consultant Martin closed his case.

30. Claimant returned to Dr. Tohmeh on January 20, 2004, complaining of recurrent and persistent pain in his left leg. X-rays of the lumbar spine showed loss of disk height at L5-S1 representing the two previous microdiscectomies. A nerve conduction study/EMG showed evidence of denervation without reinnervation of Claimant's gastrocnemius soleus muscle group, and partial reinnervation of his left hamstring muscles. On February 17, 2004, Dr. Tohmeh opined Claimant had left S1 axonal damage and residual weakness, that he was medically stable, and that he was ready for an impairment rating.

31. At the request of his attorney, Claimant underwent a FCE at Andres Work Assessment in Spokane on September 21, 2004. The evaluation found Claimant was capable of working eight hours per day lifting and carrying at the medium work level. It was noted he had poor tolerance for repetitive stair climbing due to left leg give-way, and that he should avoid unenclosed heights and ladder climbing due to poor balance when bending. It was also noted Claimant had very poor cardiovascular endurance, that he was not wearing his AFO during the evaluation, and that he had not used it for some time.

32. Claimant was given a PPI rating of 10% of the whole person for his condition based on Table 15-3, DRE Lumbar Category III, of the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition. Dr. Sears, Dr. Bozarth, Dr. Lamb, and Dr. Tohmeh, at one time or another, all placed Claimant in that category; there were no ratings to the contrary. The rating has been paid by Surety and is not at issue here.

33. Claimant was 31 years old at the time of the hearing. He was born and raised in Spokane and comes from a family of pipe fitters. Claimant is a high school graduate. Other than

working as a pipe fitter, he has worked as a pizza delivery driver and in a fast food restaurant.

34. Claimant stated he wanted to return to work as a pipe fitter, but that he cannot now because of his physical condition. He maintains he still feels weakness in his left leg, has balance problems, and soreness in his back. Claimant acknowledged continuing his exercise program, and that he rides his bicycle for one hour three days a week and lifts weights at home two days a week.

35. Claimant has not worked since the March 14, 2001, industrial accident. At the time of the hearing, he indicated he was on his union's hiring call, but that he had not been called. Claimant further acknowledged he had been on the call list for approximately one year, and that the union knew he had no transportation to get to a job site. Most of the work he had done in the past was out of town, and included jobs in Idaho, Oregon, and Washington.

36. At his post-hearing deposition, Dr. Sears indicated he did not find any evidence of a recurrent herniated disk when he examined Claimant on February 9, 2002.

37. Claimant's attorney retained Tom L. Moreland, a vocational rehabilitation counselor, to assess Claimant's vocational status. At his post-hearing deposition, Mr. Moreland stated pipe fitting was classified as heavy work and that it was very physically demanding. He opined, based on Dr. Sears' IME findings and the FCEs, Claimant could not return to work as a pipe fitter. Mr. Moreland further opined that if Claimant could perform the full scope of light work he could earn between \$7.50 and \$10.00 per hour in the Spokane labor market, and that if he could do the full scope of medium work, he could possibly earn up to \$12.00 per hour. He also opined Claimant had suffered a wage loss of at least 50% as a consequence of his March 2001 industrial injury. Mr. Moreland acknowledged Claimant was not interested in pursuing any employment opportunity other than returning to work as a pipe fitter. He did not address any of Claimant's non-medical factors

other than wage loss.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the

terms of his or her light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986) (emphasis in original).

Claimant argues he is entitled to continuing TTD benefits from April 20, 2002, the day benefits were stopped by Surety, until January 12, 2003, the day before his second lumbar surgery. Surety resumed paying the benefits the day of the surgery. Claimant relies on what he characterizes as the “unrefuted” opinion of his treating physician, Dr. Tohmeh, regarding his period of recovery. In a letter dated July 8, 2003, Dr. Tohmeh opined Claimant’s lumbar condition was not medically stable on April 21, 2002, that he continued to be symptomatic and in need of further reasonable medical care, and that he has been temporarily totally disabled and unable to return to gainful employment since that date. The letter was written while Claimant was still in a period of recovery following his January 2003 lumbar surgery, and covered the entire period in dispute here.

Defendants counter Claimant is not entitled to additional TTD benefits during the period in question because he was found medically stable on February 9, 2002, by Dr. Sears, and that once a claimant is found stable, he is no longer in a period of recovery and TTD benefits cease.

After the February 9, 2002, IME, Dr. Sears and Dr. Bozarth opined Claimant was medically stable, that he would benefit from an ongoing exercise program, that he should be weaned from a formalized exercise program, and that a FCE would be beneficial in finalizing their report. The FCE was conducted on March 12, 2002. That evaluation found Claimant could perform at the medium work level, that he could not perform the essential duties of a pipe fitter as outlined in the JSE prepared by Consultant Martin, and that he would benefit from a work hardening program. Claimant saw Dr. Tohmeh on March 26, 2002. Dr. Tohmeh noted Claimant continued to have residual weakness in his left leg along with hamstring spasms. He recommended Claimant start a work

hardening program so that he could return to work as a pipe fitter. At the time, the program was not approved by Surety. In an addendum to their IME report dated March 29, 2002, Dr. Sears and Dr. Bozarth opined Claimant was able to work full-time at the medium level based on the FCE. Surety then stopped TTD benefits on April 20, 2002.

Claimant returned to Dr. Tohmeh on October 31, 2002. After a MRI and a nerve conduction study/EMG, Dr. Tohmeh diagnosed a recurrent disk herniation on November 19, 2002, and recommended surgery. The surgery was performed on January 13, 2003.

Claimant could not return to work as a pipe fitter after he was found medically stable by Dr. Sears and Dr. Bozarth in March 2002 because of the physical restrictions they imposed on him. There is nothing in the record to indicate Dr. Tohmeh released Claimant to return to work; in fact he recommended a work hardening program which did not occur. There is also nothing in the record to indicate Employer offered Claimant employment within the work restrictions given by Dr. Sears and Dr. Bozarth after they found him stable and released him to work, or that employment was available to him in his labor market which he had a reasonable opportunity of securing, and which was within his work restrictions during the period in question.

The Commission is not bound to accept the opinion of any particular doctor that a patient's condition is stable and ratable. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 901, 591, P.2d 143, 148, (1979). The Referee finds the opinion of Dr. Tohmeh more persuasive. He was Claimant's treating physician, continued to treat him, and was aware of his condition. Dr. Sears, on the other hand, was unaware Claimant's condition deteriorated and that a second surgery was necessary. The Referee further finds Claimant was in a period of recovery from April 21, 2002, through January 12, 2003. In so finding, the Referee notes Defendants have not shown Employer

made a reasonable and legitimate offer of employment, or that employment was available to him in the general labor market. Thus, the Referee concludes Claimant is entitled to temporary total disability (TTD) benefits from April 21, 2002, through January 12, 2003.

2. **Permanent Disability.** "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. 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 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 permanent partial or total loss or loss of use of a member or organ of the body no additional benefits 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).

The FCEs show Claimant is only capable of performing work at the medium level. This effectively precludes him from returning to work as a pipe fitter, a relatively high paying occupation which requires much greater lifting ability. Claimant has devoted a significant portion of his adult life to pursuing his goal of becoming a pipe fitter. His industrial injury has precluded that goal.

Claimant is relatively young, has a high school education, and lives in a good labor market. His apprenticeship has shown that he is capable of learning new tasks and working as a team member. He has worked in the service industry and acquired customer service skills. There was also discussion in the record about Claimant undergoing training to become a welding inspector.

On the other hand, Mr. Moreland opined that the types of jobs now available to Claimant at the light and medium work levels do not pay what he was earning at the time of his industrial accident; they pay much less. Mr. Moreland has quantified this wage loss at approximately 50%. The Referee finds Claimant has suffered a significant wage loss as a consequence of his industrial accident.

Based on Claimant's PPI rating of 10% of the whole person and his permanent medium work restrictions, and considering his non-medical factors, including his age, education, transferable skills in customer service, ability to learn new job tasks, the job opportunities available to him in the Spokane labor market, and his personal situation, the Referee further finds Claimant's ability to engage in gainful activity has been reduced. Thus, the Referee concludes Claimant is entitled to a permanent partial disability (PPD) rating of 35% of the whole person inclusive of his 10% of the

whole person permanent partial impairment (PPI) rating.

3. **Attorney's Fees.** Idaho Code § 72-804 provides:

Attorney's fees - Punitive costs in certain cases. - 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.

Attorney's fees are not granted to a claimant as matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding a claimant attorney's 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).

Claimant seeks attorney's fees for Defendants' alleged unreasonable denial of TTD benefits from April 21, 2002, through January 12, 2003. Defendants counter benefits were stopped after he was found medically stable and released to work with restrictions by Dr. Sears in March 2002, and that they have the right to rely on the opinion of the IME panel.

Claimant views this matter retrospectively. Dr. Tohmeh's opinion, on which he relies, was not prepared until July 8, 2003, well after the second surgery. Moreover, there is nothing in the record to indicate Claimant saw any care providers between March 2002, and October 31, 2002, and that Defendants were aware of the recurrent disk herniation until November 2002. They then approved the second surgery and resumed TTD benefits on the date of the surgery. Under the

circumstances of this case, the Referee finds Defendants' conduct in paying TTD benefits has not been unreasonable. Thus, the Referee concludes Claimant is not entitled to attorney's fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant is entitled to temporary total disability (TTD) benefits from April 21, 2002, through January 12, 2003.
2. Claimant is entitled to a permanent partial disability (PPD) rating of 35% of the whole person inclusive of his 10% of the whole person permanent partial impairment (PPI) rating.
3. Claimant is not entitled to attorney's fees pursuant to Idaho Code § 72-804.

RECOMMENDATION

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

DATED This 15th day of February, 2005.

INDUSTRIAL COMMISSION

/s/
Robert D. Barclay
Chief Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March , 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

MICHAEL J WALKER
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kk

/s/ _____

1. Claimant is entitled to temporary total disability (TTD) benefits from April 21, 2002, through January 12, 2003.

2. Claimant is entitled to a permanent partial disability (PPD) rating of 35% of the whole person inclusive of his 10% of the whole person permanent partial impairment (PPI) rating.

3. Claimant is not entitled to attorney fees pursuant to Idaho Code § 72-804.

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

DATED This 1st day of March, 2005.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
James F. Kile, Commissioner

/s/
R. D. Maynard, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2005, a true and correct copy

of the foregoing **Order** was served by regular United States Mail upon each of the following:

MICHAEL J WALKER
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BOISE ID 83701-0829

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