

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RICHARD A. PLUDE,)	
)	
Claimant,)	
)	
v.)	IC 2001-021481
)	
WESTCOAST HOSPITALITY)	
CORPORATION,)	
)	
Employer,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
and)	AND RECOMMENDATION
)	
INSURANCE COMPANY OF THE WEST,)	Filed: January 15, 2008
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Idaho Falls, Idaho, on January 23, 2007. Delwin W. Roberts of Idaho Falls represented Claimant. Thomas V. Munson of Boise represented Defendants. The parties presented oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on September 27, 2007, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to disability in excess of impairment;

2. Whether and to what extent Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804; and

3. Whether the Commission should retain jurisdiction beyond the statute of limitations.

PROCEDURAL BACKGROUND

The State of Idaho Industrial Special Indemnity Fund (ISIF) was originally a defendant in this case but did not participate in the hearing because it entered into a lump sum settlement (LSS) agreement with Claimant prior to the hearing date. After the hearing, on February 8, 2007, Claimant and ISIF submitted the LSS to the Commission for approval. The Commission declined to approve the settlement. Upon the Commission's refusal to approve the LSS between Claimant and ISIF, all proceedings in the instant action were stayed, including post-hearing depositions, and briefing.

The Commission conducted a hearing to address the terms and conditions of the LSS. After further review and based on testimony given at the hearing, the Commission approved the LSS between Claimant and ISIF on May 15, 2007 and ISIF was discharged from the case.

Once the matter of the LSS was resolved, the parties in the instant case were able to proceed with post-hearing depositions and briefing on the remaining issues after a three-month delay.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant injured his right shoulder on October 18, 2001 while working as chief maintenance engineer for Employer. Claimant underwent surgical intervention to his right shoulder and has permanent restrictions associated with his injury.

Claimant asserts that his permanent disability is at least 90% and that he is an odd-lot worker who would not be able to obtain and retain meaningful employment within the labor market, but for employer accommodation. Claimant cites his age as a significant non-medical factor contributing to his disability and relies on the expert vocational testimony of Richard G. Taylor, Ph.D. Claimant requests that the Commission retain jurisdiction beyond the statute of limitations to determine Claimant's permanent disability in the event Claimant loses his current accommodative employment. Claimant seeks an award of attorney fees based on Defendants' denial of permanent disability benefits.

Defendants assert that Claimant does not have permanent disability in excess of 22% permanent partial impairment (PPI) assigned by his treating doctor. Defendants maintain that Claimant is working in a *bona fide* maintenance position and that accommodations are being made due to Claimant's extensive knowledge of operating systems and not because of the employer's sympathy. Defendants maintain that Claimant's decrease in work hours and wages are the result of Claimant's voluntary limitation because Claimant has opted to receive social security retirement benefits which are subject to reduction if Claimant's income increases.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1-3, admitted at hearing;
 2. Defendants' Exhibits A-T, admitted at hearing;
 3. Testimony of Claimant, Kari Rohrbach, Richard G. Taylor, Ph.D., and Katherine LaRosa, taken at hearing;
 4. The post-hearing deposition of Douglas N. Crum, CDMS, taken June 28, 2007;
- and

5. The Idaho Industrial Commission legal file.

Claimant's objection to Defendants' Exhibit E (provisionally admitted at hearing) is overruled and all objections made during the deposition of Mr. Crum are overruled.

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

FINDINGS OF FACT

INJURY AND TREATMENT

1. Claimant was born on November 9, 1942 and was 64 at the time of hearing. On October 18, 2001, he sustained an occupational injury to his neck and right upper extremity while working for Employer. Claimant was participating in the removal of an industrial washing machine from Employer's premises which required demolition of the machine into smaller pieces. He was attempting to hold and balance a portion of the machine when it became unbalanced and pulled his right arm and shoulder.

2. Initial treatment was sought on October 19, 2001 with P. Jeffrey Thompson, M.D., at the Family Emergency Center West. Claimant was diagnosed with a cervical strain, right elbow strain, and right shoulder impingement syndrome. Claimant was treated by multiple physicians at the same clinic during October of 2001. Claimant's cervical and right elbow problems resolved without additional treatment.

3. Claimant pursued additional treatment for his right shoulder with Roger Brunt, M.D., on March 10, 2003. Although there was a significant period of time during which Claimant did not receive treatment for his right shoulder, Dr. Brunt determined Claimant's problems in 2003 to be causally related to the industrial injury. Dr. Brunt referred Claimant to Gene Griffiths, M.D.

4. Dr. Griffiths initiated a course of conservative treatment including steroid injections. A right shoulder arthrogram performed on September 23, 2003, revealed a full thickness tear of the distal supraspinatus tendon. Dr. Griffiths performed surgery on October 1, 2003, consisting of arthroscopic repair of Claimant's right rotator cuff; subacromial decompression with debridement; and debridement of a SLAP (Superior Labrum from Anterior to Posterior) lesion with arthroscopic right distal clavicle resection.

5. Claimant underwent a course of physical therapy for approximately six months, during which time improvement in strength and motion were consistently noted. Claimant's difficulty with forward elevation and abduction persisted with Claimant being unable to hold his right arm in an elevated position beyond a 90-degree angle.

PERMANENT IMPAIRMENT AND RESTRICTIONS

6. Dr. Griffiths certified that Claimant had reached maximum medical improvement in June of 2004 and assigned a 22% whole person PPI rating based on weakness and range of motion deficits of the right upper extremity. He opined that a fair range of impairment would be from 22% to 25% with the additional 3% reflecting subjective complaints.

7. Claimant was evaluated by David Schenkar, M.D., in March of 2005 at the request of Defendants. Dr. Schenkar calculated 44% PPI of the right upper extremity, which converts to 26% PPI of the whole person. His rating was based on range of motion deficits.

8. Dr. Griffiths initially released Claimant to modified work in February of 2004 with a 20- to 40-pound lifting restriction, no overhead reaching, and limited use of the right arm. Dr. Griffiths reiterated the 40-pound lifting restriction in May and June of 2004. On January 10, 2005, Dr. Griffiths completed a functional capacity evaluation (FCE) indicating that Claimant could perform light work, lifting up to 10 pounds frequently and 20 pounds occasionally, and no

reaching of the right upper extremity. Medical reports do not address Dr. Griffiths' reason for changing Claimant's lifting maximum from 40 to 20 pounds.

9. Dr. Schenkar's report of March 17, 2005, indicates that Claimant is able to perform medium type work lifting up to 40 pounds to the waist occasionally and 10 pounds frequently. Claimant should not engage in forward reaching or lifting, and sideways lifting with the right shoulder is limited to 5 pounds. There should be no above-waist lifting with the right arm, and no use of ladders or work at unprotected heights. Repetitive activities are permitted as tolerated, and Claimant may use light manual/electric hand tools with use close to the body.

10. Claimant's understanding of his medical restrictions at the time of hearing was that he should limit lifting with his right arm to 10 pounds to waist height and that he should avoid ladders and overhead lifting. Although there are discrepancies regarding work limitations among the various reports, there is no indication that Claimant is malingering or exaggerating his symptoms. Both Dr. Griffiths and Dr. Schenkar indicate that their restrictions are intended to be permanent.

PRE-EXISTING AND INTERVENING MEDICAL CONDITIONS

11. Claimant did not have pre-existing right shoulder problems. However, Claimant had a previous injury to his left shoulder for which he underwent treatment in the mid 1990s. Claimant had surgery on his left shoulder through his private health insurance in October of 2005. Claimant has experienced knee problems, cardiac issues, diverticulitis and reports spinal arthritis. There is no evidence that Claimant has permanent impairment or disability associated with his pre-existing and intervening medical conditions.

TIME-OF-INJURY EMPLOYMENT

12. At the time of injury, Claimant was the chief engineer at the Red Lion Inn of Idaho Falls. The hotel was owned by Employer at the time of injury but has undergone various name and ownership changes during Claimant's employment. The current owners purchased the hotel in September of 2006. Claimant has worked for the hotel in various capacities since May of 1998.

13. As chief engineer, Claimant was a working supervisor in charge of hotel maintenance. His responsibilities included administrative duties such as preparing the maintenance budget and supervising two maintenance workers, but the majority of the job consisted of hands-on work which ranged from light to heavy tasks.

14. Claimant earned \$13.88 per hour and received performance bonuses which ranged from \$500 to \$1,300 per quarter. Claimant's fringe benefits included sick, vacation and holiday pay, and health insurance partially paid by Employer. Medical benefits were particularly important to Claimant because his spouse has mental disabilities and their medical costs are extensive, in spite of federal assistance.

CLAIMANT'S EDUCATIONAL AND EMPLOYMENT BACKGROUND

15. Claimant completed the 11th grade in Massachusetts and joined the United States Air Force, where he obtained a GED. Claimant earned an Associate of Arts degree from Houston Community College in 1976 and completed one semester of vocational training in stationary engineering. Claimant obtained HVAC journeyman certification as well as an EPA refrigeration certification.

16. Claimant completed multiple courses through the Texas Department of Corrections and Harris County Sheriff's Department. Claimant's coursework in the area of law

enforcement includes maintenance of prison water and sewer treatment operations. Claimant was also trained as a jailer and worked in both maintenance and correctional officer roles while in Texas. Claimant worked as a jet aircraft mechanic while in the Air Force and subsequently obtained a private pilot's license which is not medically current.

17. Claimant's highest level of expertise is in the HVAC field. Claimant has been employed as a maintenance worker and/or supervisor for a shopping mall, hospital, correctional facility, large municipality and multiple hotels. Claimant has held short-term jobs in the retail industry and concludes that he is not a salesperson.

POST-INJURY EMPLOYMENT

18. Claimant continued in his role as chief engineer for approximately two years after the industrial injury and was able to self-modify his job duties with the approval of Employer. Claimant's job position was eliminated in October of 2003 during the time when Claimant was off work recovering from his right shoulder surgery.

19. Katherine LaRosa is the current human resources manager for Red Lion Hotels in Twin Falls and also worked for the hotel when it was owned by Employer. Ms. LaRosa testified that a corporate decision was made in 2003 to consolidate Claimant's job with the chief engineer position at the Pocatello Red Lion, with one employee traveling between the two locations. Claimant applied for the new position but did not get the job.

20. Claimant accepted a position with Employer as a maintenance associate in 2003 and was working in that capacity at the time of hearing. Claimant performs light maintenance work and utilizes assistance from co-workers for heavy pushing and pulling. Light maintenance

work includes simple plumbing repairs, spot cleaning carpets, electric lock repairs, setting clocks and maintaining ice machines. Both Employer and the new hotel owner have allowed accommodation for Claimant's physical limitations.

21. As a maintenance associate, Claimant initially earned \$8.00 per hour which was increased to \$9.25 per hour. Claimant did not qualify for fringe benefits as a maintenance associate. A medical plan was implemented by the current hotel owners in January of 2007 for which Claimant qualifies, but Claimant opted not to enroll in the plan. Claimant explained that he was forced to obtain health coverage through COBRA (the Consolidated Omnibus Budget Reconciliation Act) at the time he initially lost health insurance benefits and that he was unable to enroll in the new plan without denials for what would be considered pre-existing conditions under the new plan.

22. In January of 2006, Claimant was 63 and elected to take early social security retirement benefits because of his decrease in earnings. Claimant receives \$1,300 per month in benefits, which are subject to reduction if he earns more than \$1,050 per month in wages. For that reason, Claimant declined to accept a raise from his current employer in 2006 and he attempts to limit his work to 30 hours per week.

23. Claimant has no plans to stop working in the near future but does not know what he would do if he were let go by his current employer. Ms. LaRosa described Claimant as a reliable and motivated employee who contributes to essential functions of the hotel. She testified that if Claimant left, they would need to replace him and that his position is not make-work.

EXPERT VOCATIONAL REHABILITATION OPINIONS

Kari Rohrbach

24. Kari Rohrbach is a rehabilitation consultant for the Industrial Commission

Rehabilitation Division (ICRD) who has provided hands-on vocational services since 1987. Ms. Rohrbach has a bachelor's degree in sociology and a master's degree in human development. Claimant was referred to ICRD by ISIF in September of 2005 and Ms. Rohrbach was assigned to the case.

25. Ms. Rohrbach met with both Claimant and Employer in September of 2005. She did not maintain an open case file because Claimant successfully returned to work for Employer who was making appropriate accommodations. Ms. Rohrbach was surprised that Claimant was able to return to work for Employer and did not discuss alternate employment with Claimant since he was already in the best employment situation that he could likely find. Employer confirmed that they were willing to allow Claimant to direct other employees to perform the work that was beyond Claimant's restrictions because Claimant's knowledge of the operating systems was so vast that they needed him to keep things running.

26. Claimant expressed concern over the possibility of losing his accommodative employment once the hotel was acquired by the new owners, but was otherwise happy with his arrangement. Similarly, Employer was happy with the situation and was willing to allow Claimant to reduce his hours to 30 per week once Claimant began receiving retirement benefits through social security. Employer acknowledged that they could not speak for the new owners as to whether or not Claimant would be permitted to work reduced hours.

27. Ms. Rohrbach testified that she was not in a position to assign a disability rating to Claimant since her services were limited and she did not perform a labor market survey. However, Ms. Rohrbach confirmed that there are security jobs in the Idaho Falls area, paying between \$6 and \$7 per hour, that are sedentary in nature and do not require employees to physically interact with subjects. She further testified that there is an older worker program

which consists of a network of employers who are interested in hiring individuals over 55 years old, but that the jobs generally pay minimum wage.

Richard G. Taylor, Ph.D.

28. Richard Taylor is a vocational rehabilitation expert hired by Claimant to assess his loss of capacity to perform work and earn money as a result of the industrial injury. Dr. Taylor has a bachelor's degree in psychology, a master's degree in vocational rehabilitation counseling and a Ph.D in counseling. Dr. Taylor utilized the Vocational Assessment of Lost Earnings (VALE) as an objective assessment tool to calculate Claimant's loss of labor market access and projected lost wages based on statistical averages. Dr. Taylor did not speak to Employer or any prospective employers about Claimant's job prospects.

29. Dr. Taylor relied primarily on Dr. Griffiths' FCE of January 10, 2005 to determine Claimant's restrictions and concluded that Claimant could perform sedentary-to-light work with additional restrictions regarding reaching with the right arm and climbing. Sedentary work is defined as sitting most of the time and exerting 10 pounds of force occasionally, while light work is defined as requiring frequent lift, carry, push or pull of weights up to 20 pounds. Dr. Taylor's analysis included inputting Claimant's restrictions into a database, VALE, that does not discriminate between unilateral upper extremity limitations and bilateral upper extremity limitations with regard to reaching. This produced results which wrongly assume that Claimant is precluded from reaching with *either* arm.

30. Dr. Taylor considered the local labor market as consisting of the state of Idaho and that Claimant had the capacity to perform 29.21% of labor market jobs prior to his injury. Taking Claimant's post-injury restrictions into consideration, Claimant retained the ability to perform .08% of existing jobs which essentially represents a loss of labor market of 100%.

31. Dr. Taylor calculated loss of earning capacity at 42%, plus benefit loss, based on Claimant's hourly rate reduction from \$13.88 per hour to \$8.00 per hour. Dr. Taylor was not aware that Claimant's wages increased to \$9.25 per hour following his initial assessment in February of 2005 and was similarly unaware that Claimant was voluntarily reducing his hours to approximately 30 per week. Dr. Taylor projected Claimant's lost wages to total \$107,569.79, taking into account factors such as life expectancy, participation, and employment rates.

32. Dr. Taylor felt that Claimant required significant accommodation in his job as a maintenance associate and that Claimant would not be able to find a full-time job in the competitive labor market. It is Dr. Taylor's opinion that Claimant is 100% disabled, absent his current accommodative employment.

Douglas N. Crum, CDMS

33. Mr. Crum is a vocational rehabilitation consultant hired by Defendants to evaluate factors that might lead to a finding of permanent partial or total disability. Mr. Crum has a bachelor's degree in business and obtained Disability Management Specialist Certification in 1995. Mr. Crum was previously employed as a rehabilitation consultant for ICRD but is now in private practice.

34. Mr. Crum relied primarily on medical restrictions outlined by Dr. Schenkar in March of 2005 and concluded that Claimant could perform medium work with lifting to the waist up to 40 pounds occasionally and 10 pounds frequently with no forward or overhead reaching of the right arm. Mr. Crum reviewed documents indicating that Dr. Griffiths agreed with the restrictions proposed by Dr. Shenkar.

35. Mr. Crum analyzed Claimant's pre- and post-injury labor market access using statistical data for the Idaho Falls/Bonneville County area and assumed that Claimant could

perform medium to heavy work prior to the injury. Mr. Crum calculated a 46% reduction in labor market access and believes Claimant can perform a variety of lighter sales, light production, cashiering, property management, and security jobs.

36. Mr. Crum calculated 33% post-injury wage reduction based on the hourly rate decrease from \$13.88 per hour to \$9.25 per hour. He noted that Claimant was working 32 hours per week, but that no physician had limited Claimant from working full-time. Mr. Crum did not take into consideration Claimant's loss of benefits or bonus eligibility.

37. Mr. Crum concluded that Claimant was not totally and permanently disabled and that he retained a reasonably large labor market and had strong skills. He feels that Claimant would be employable in the competitive job market. However, he agrees that Claimant's current employment is optimal and doesn't recommend that Claimant leave his current job to seek alternate employment. Mr. Crum did not tender an opinion as to Claimant's disability in excess of impairment, but offered to do so if requested by Defendants.

DISCUSSION AND FURTHER FINDINGS

PERMANENT DISABILITY

38. The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). "Evaluation (rating) of permanent disability" is an appraisal of the Claimant'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 non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425. A determination as to the degree of permanent disability resulting from an industrial injury is a factual question to be resolved by the Commission. *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 29 P.3d 390 (2001). Accordingly, whether a

claimant is totally and permanently disabled is also a question of fact. *Boley v. State*, 130 Idaho 278, 280, 939 P.2d 854, 856 (1997).

39. There are two ways in which a claimant can establish a total and permanent disability: (1) by proving that his or her medical impairment and nonmedical factors caused him or her to become 100% disabled; or (2) by proving that he or she is an odd-lot employee. *Id.*, at 281, 939 P.2d at 857. A claimant falls within the odd-lot category if he or she is so injured that he or she can only perform services which are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 584, 38 P.3d 617, 622 (2001). A claimant proves odd-lot status by showing that: (1) he or she attempted other types of employment without success; (2) he or she, or vocational counselors or employment agencies on his or her behalf, searched for other work and other work was not available; or (3) any efforts to find suitable employment would be futile. A *prima facie* case of odd-lot status is only established if the evidence is undisputed and is reasonably susceptible to only one interpretation. *Thompson v. Motel 6*, 135 Idaho 373, 376, 17 P.3d 874, 877 (2001). Once the claimant proves odd-lot status, the burden shifts to the employer to prove that regular and continuous suitable work is available to the claimant. *Id.*

40. In the present case, both parties have taken all or nothing positions in which Claimant asserts total disability as an odd-lot worker and Defendants' assert that there is no disability in excess of 22% PPI. The evidence establishes that Claimant has experienced a decrease in wages for multiple reasons, including Claimant's physical limitations attributable to his industrial injury, the elimination of Claimant's pre-injury job position by Employer and Claimant's voluntary limitation of income associated with receipt of social security retirement benefits.

41. Claimant has not established that he has permanent disability of 100% or that he is an odd-lot worker. Although Claimant's industrial injury has significantly reduced his labor market access, the credible evidence fails to establish that Claimant's efforts to find suitable employment would be futile. There is no indication that Claimant will lose his current accommodative employment in the near future and the vocational evidence from Ms. Rohrbach and Mr. Crum establish that Claimant would likely be able to find employment in a competitive labor market, particularly in the field of security or property management, should his current employment cease for any reason. Dr. Taylor's mechanistic analysis that could only analyze bilateral restrictions and considered the entire state of Idaho as a reasonable labor market was not persuasive.

42. As noted above, there are multiple causes of Claimant's post-injury wage reduction. Claimant's decision to limit his work week from 40 to approximately 30 hours per week is voluntary as is Claimant's decision to decline the raise offered in 2006. Claimant's loss of his position as chief engineer, and associated benefits, resulted from a corporate decision to eliminate the position. However, Claimant's injury prevents him from obtaining similar positions, requiring heavy work, with other employers.

43. The difference between Claimant's pre-injury hourly rate and post-injury hourly rate is 33%. If adjusted slightly downward (by 3%) due to Claimant's voluntary decision to decline a raise and adjusted upward (by 10%) to compensate for loss of benefits and bonus income, Claimant's wage loss is 40%. This method of calculation does not compensate Claimant for the voluntary reduction of hours worked per week.

44. The reduction in labor market access of 46% as calculated by Mr. Crum is supported by the evidence and adopted.

45. All three vocational experts agree that Claimant's current employment likely represents a best-case scenario as far as hourly rate and physical accommodation. Other jobs in the labor market for which Claimant is qualified, and that he is physically able to perform, range in pay from minimum wage to \$9 per hour. Accordingly, an appraisal of Claimant'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 non-medical factors, support a finding of permanent disability in excess of the wage loss amount and closer to the amount of reduction in labor market access.

46. The Referee finds that Claimant's permanent disability is 45%, inclusive of 22% PPI.

ATTORNEY FEES

47. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which 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.

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

48. Claimant's request for attorney fees is based upon two factors: Defendants' failure to acknowledge the findings of their own expert, Douglas Crum, that Claimant did have disability in excess of his impairment, and Defendants' rather pointed failure to ask Mr. Crum for an expert opinion on Claimant's disability in excess of impairment.¹ Mr. Crum's analysis of factors relating to disability establishes that permanent disability exists, and it is unclear why Defendants did not request a calculation and opinion as to the specific percentage of disability from Mr. Crum. Mr. Crum's report is inconsistent with the position taken by Defendants that Claimant "has simply chosen to restrict his employment due to factors other than his industrial injury." (Defendants' Post Hearing Reply Brief, p. 12). Defendants' argument that Mr. Crum's opinion cannot be used as a basis for imputing a percentage of liability is rejected.

49. On the other hand, Defendants correctly point out that Claimant has voluntarily limited his wages in order to prevent a reduction of his social security benefits. Further, Defendants initiated payment pursuant to the PPI rating of 22%, and Claimant continued to receive income benefits at least through the date of hearing. Although Defendants' argument regarding the utility and impact of Mr. Crum's opinion is not persuasive, the actions of Defendants do not rise to the level of an unreasonable denial of benefits subject to an award of attorney fees pursuant to Idaho Code § 72-804.

RETENTION OF JURISDICTION

50. Whether to retain jurisdiction beyond the statute of limitations is within the discretion of the Commission. Where a claimant's medical condition has not stabilized or where a claimant's physical impairment or disability is progressive, "it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the claimant's condition is non-

¹ Defendants are evidently familiar with the old legal adage—do not ask a question unless you want the answer.

progressive.” *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). “Neither physical impairment nor disability is permanent until the point when no further deterioration or change can be expected.” *Id.* 113 Idaho at 968, 751 P.2d at 116.

51. The burden of establishing that his condition is progressive or unstable lies with Claimant. In this case, Claimant has failed to carry his burden on this issue. There is no medical evidence in the record that Claimant’s condition is progressive. The fact that Claimant’s wage-earning capacity may decrease if he loses his current accommodative employment has been considered in calculation of Claimant’s permanent disability and is not a basis for the Commission to retain jurisdiction beyond the statute of limitations.

CONCLUSIONS OF LAW

1. Claimant is entitled to disability in the amount of 45%, inclusive of permanent impairment;
2. Claimant is not entitled to attorney fees; and
3. Claimant has failed to establish good cause to retain jurisdiction beyond the statute of limitations.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this 3 day of January, 2008.

INDUSTRIAL COMMISSION

/s/ _____
Rinda Just, Referee

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2008, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404

THOMAS V MUNSON
P O BOX 8266
BOISE ID 83707

djb

/s/ _____

3. Claimant has failed to establish good cause to retain jurisdiction beyond the statute of limitations.

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

DATED this 15th day of January, 2008.

INDUSTRIAL COMMISSION

/s/ _____
James F. Kile, Chairman

Participated but did not sign
R.D. Maynard, Commissioner

/s/ _____
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2008, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DELWIN W ROBERTS
1495 E 17TH ST
IDAHO FALLS ID 83404

THOMAS V MUNSON
PO BOX 8266
BOISE ID 83707

djb

/s/ _____