

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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|--------------------------|---|-----------------------|
| WADE V. CHARLES, |) | |
| |) | |
| Claimant, |) | IC 2005-004124 |
| |) | |
| v. |) | |
| |) | |
| BECHTEL GROUP, INC., |) | |
| |) | |
| Employer, |) | ORDER |
| |) | |
| INSURANCE COMPANY OF THE |) | |
| STATE OF PENNSYLVANIA, |) | |
| |) | 2/15/08 |
| Surety, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant is not entitled to medical treatment at the direction of Dr. Burke beyond April 28, 2005.
2. Claimant is entitled to disability in excess of impairment in the amount of 19% (25% permanent disability, inclusive of 6% PPI).

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

DATED this 15 day of February , 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 15 day of February , 2008, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

G LANCE NALDER
591 PARK AVE STE 201
IDAHO FALLS ID 83402

GLENNA M CHRISTENSEN
P O BOX 829
BOISE ID 83701-0829

jkc

 /s/

1. Whether and to what extent Claimant is entitled to medical care at the direction of Terry L. Burke, D.C.;

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

3. Whether and to what extent Claimant is entitled to retraining.

Claimant withdrew the issue of retraining in his Reply to Defendants' Post-Hearing Brief and the issue will not be further addressed in this decision.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an injury to his lower back while in the course of his employment on April 5, 2005. The parties further agree that Claimant has a permanent partial impairment (PPI) rating of 8% with 25% of the rating apportioned to pre-existing conditions for a total of 6% PPI attributable to the compensable injury. Claimant contends that he is entitled to medical treatment at the direction of Dr. Burke, at least through August 3, 2005, since Dr. Burke was the first doctor to evaluate Claimant post-injury and because continued treatment was approved by his treating physician, Dr. Phillips. Claimant seeks permanent disability in the amount of 42.5%, inclusive of PPI, based on loss of wage earning capacity, loss of job market access, and limited past vocational experience. Defendants contend that Claimant is not entitled to reimbursement for chiropractic treatment beyond May 10, 2005, since Claimant opted to continue treatment with Dr. Burke in spite of conflicting referrals and recommendations from Dr. Phillips and Dr. Simon. Defendants assert that Claimant is not entitled to disability in excess of PPI and maintain that Claimant's calculations are inflated due to inclusion of pre-injury non-guaranteed salary augmentation, assumption that Claimant's current employment is in

jeopardy and failure to consider Employer's voluntary lump sum payment to Claimant as compensation for his decrease in earnings.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant at hearing;
2. The testimony of Douglas N. Crum, C.D.M.S., at hearing;
3. Claimant's Exhibits 1 through 16;
4. Defendants' Exhibits A through B;
5. The post-hearing deposition of Karen K. Phillips, M.D., taken on November 1, 2007; and
6. The post-hearing deposition of David C. Simon, M.D., taken on November 1, 2007.

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 Medical Treatment

1. Claimant was born on April 9, 1965 and was 42 at the time of hearing. He sustained an injury to his lower back on April 5, 2005 while working for Employer as a night shift security inspector. Claimant was preparing for his annual physical evaluation and fitness test for Employer which included a timed run. Claimant was running on a treadmill at Employer's exercise facility when he felt a "pop" in his lower back. His pain intensified over the next few hours and Claimant applied ice to what he thought might be a pulled muscle.

2. Claimant initiated medical treatment with Terry L. Burke, D.C., prior to making a formal injury report to Employer. Claimant couldn't recall how he initially selected Dr. Burke but indicated that he had received "a couple" of treatments from him during the few years prior to the injury for adjustments related to soreness. Dr. Burke's records are primarily comprised of treatment logs/notes and do not include narrative reports. Records generated prior to the injury or during the initial visit after the injury were not included in the exhibits and the first documented treatment by Dr. Burke after the injury is on April 27, 2005. However, a massage therapy note from May 2, 2005 reflects that therapy was initiated on April 13, 2005 at Dr. Burke's referral and it is presumed that Claimant was treated by Dr. Burke on or before April 13, 2005.

3. Karen Phillips, M.D., is the occupational medical director at the Naval Reactors Facility (NRF) of the Idaho National Laboratory in Scoville, Idaho, the site where Claimant works. Dr. Phillips initially evaluated Claimant on April 20, 2005 at the request of Employer after Claimant indicated he was pursuing a workers' compensation claim. Dr. Phillips ordered diagnostic studies.

4. A lumbar X-ray of April 22, 2005 revealed mild narrowing of the L5-S1 interspace with mild osteophytes. Alignment was normal with no evidence of subluxation or instability. A lumbar MRI performed on the same date revealed degenerative disc disease at L4-5 and L5-S1; an annular tear at L4-5 with bulging but no frank protrusion; mild effacement of the left L5 nerve root; and a small broad based protrusion at L5-S1 with mild S1 sheath effacement.

5. Dr. Phillips referred Claimant to David C. Simon, M.D., primarily because she felt Claimant's condition warranted evaluation with a physical medicine and rehabilitation

specialist, but also because Claimant expressed that he did not want to be treated by her. Dr. Phillips authorized continued care with Dr. Burke until Claimant could be examined by Dr. Simon.

6. Dr. Simon evaluated Claimant on April 28, 2005 at which time he diagnosed L5 radiculopathy secondary to a disc protrusion at L4-5 which he related to the industrial injury and noted degenerative disc disease at L4-5 and L5-6. Dr. Simon prescribed medication, recommended physical therapy for a dynamic lumbar stabilization program and deferred return to work status to Dr. Phillips. Claimant followed up with Dr. Simon on May 5, 2005 at which time no significant changes were noted. Epidural steroid injections were recommended but deferred because Claimant wanted time to consider his options in light of the fact that a family member had undergone injections with poor result. Dr. Simon made a referral to a physical therapist for a dynamic lumbar stabilization program as previously recommended and indicated that continued chiropractic treatment was not necessary for the industrial injury. He advised Claimant that workers' compensation insurance would not likely pay for chiropractic treatment since physical therapy was recommended.

7. Dr. Phillips discussed Claimant's return to work status with Dr. Simon on April 29, 2005 at which time they agreed that Claimant could return to modified duty work effective May 2, 2005, with no repetitive bending; no lifting over 30 pounds; ability to alternate sitting, standing and walking; no running; no use of weapons and no involvement in physical confrontations.

8. Claimant was re-evaluated by Dr. Simon on May 26, 2005 at which time Claimant indicated that he had not started physical therapy and was continuing with chiropractic care. Dr. Simon discussed the benefits of physical therapy, an active exercise program and

epidural steroid injections. He noted that Claimant did not seem to have much faith in his opinions or recommendations and that Claimant may need to find another treating physician.

9. On June 1, 2005, Claimant initiated treatment with family practice physician Eric Perttula, M.D. There is no clear indication as to how Dr. Perttula was selected, but a treatment log from Dr. Burke of the same date indicates that Claimant may have been referred to Dr. Perttula by Dr. Burke to provide medications and that Dr. Perttula referred Claimant back to Dr. Burke for therapy. Dr. Perttula prescribed Celebrex and Ultracef and recommended adding formalized physical therapy to chiropractic treatment. Dr. Perttula noted improvement at a follow up visit of June 15, 2005 but noted a lack of improvement upon evaluation of July 5, 2005. He felt that Claimant may benefit from an orthopedic/neurosurgery consultation and referred Claimant to Dr. Stromburg. There is no indication that Claimant was ever evaluated by Dr. Stromburg.

10. Claimant returned to Dr. Simon on June 6, 2005 and reported continued pain in the back with left foot numbness. Claimant advised Dr. Simon that he had seen Dr. Perttula and had initiated an exercise program through his chiropractor. Dr. Simon recommended that the active exercise program continue at the direction of a certified physical therapist instead of a chiropractor and that Claimant reconsider epidural steroid injections and a surgical consultation. Improvement was noted at the appointment of July 5, 2005 (the same day that Dr. Perttula noted lack of improvement) and Claimant indicated that his plan was to complete two more weeks of physical therapy and attempt jogging to see how it would impact his symptoms. Follow up visits on July 26, 2005 and August 15, 2005 reflect ongoing therapy with no significant change in condition.

11. Similarly, no changes in Claimant's condition were noted during Dr. Simon's evaluation of September 27, 2005 at which time Claimant declined an L5 nerve block. Dr. Simon recommended a surgical consultation or an independent medical examination based on a lack of resolution of symptoms.

12. Dr. Philips made additional referrals to neurosurgeon Stephen R. Marano, M.D. and spinal specialist Eric D. Walker, M.D. Dr. Marano evaluated Claimant on October 4, 2005 and determined that Claimant was not a surgical candidate. He recommended an L5-S1 Cortisone injection which Claimant indicated he wanted to discuss with Dr. Walker. Claimant saw Dr. Walker on October 5, 2005. Dr. Walker concurred with the recommendation for an L5-S1 epidural steroid injection which he performed on October 6, 2005. Dr. Walker noted 50% improvement and a "very positive" response to the injection at the follow up appointment of October 17, 2005. He offered a second injection on November 1, 2005, but Claimant opted to see how things progressed with additional therapy. Claimant's condition plateaued and he was encouraged to undergo a second epidural steroid injection during visits of November 15, 2005 and November 30, 2005. Claimant was resistant to having additional injections and represented that his pain was not sufficient to warrant them. Dr. Marano re-evaluated Claimant on December 6, 2005 and January 17, 2006 at which time he reported ongoing low back and left foot symptoms but no significant radicular complaints.

13. Dr. Simon performed a final evaluation on March 15, 2006 at which time he certified maximum medical improvement and assigned 8% PPI, with 6% PPI attributable to the industrial injury. Dr. Simon assigned permanent restrictions placing Claimant in the light to medium category of work with occasional lifting of 35 pounds and frequent lifting of 15 pounds. Claimant was advised to run only rarely and alternate sitting/standing as needed.

14. Claimant underwent a functional capacity evaluation (FCE) by Jay Ellis, P.T., at the referral of Flint Packer, D.O., Claimant's family doctor. Mr. Ellis noted Claimant's maximum effort and cooperation. Mr. Ellis felt that Claimant could not safely participate in physical confrontation with uncooperative individuals as may be required by security/police work but that Claimant could perform alternate jobs for Employer. The FCE findings were consistent with restrictions identified by Dr. Simon, but were more detailed and specific. Mr. Ellis concluded that Claimant was able to work 8 hours per day, 5 days per week, but that he had low endurance and fatigued easily. Claimant should avoid lifting from floor to waist as well as repetitive squatting, lifting and carrying. He is able to continuously lift 10 pounds from waist and push/pull approximately 30 pounds; frequently lift 20 pounds from waist and push/pull approximately 60 pounds; occasionally lift 30 pounds from waist and push/pull approximately 85 pounds; and rarely lift 40 pounds from waist. Claimant is able to occasionally sit, stand, walk and climb stairs but should rarely use a step ladder. Claimant may occasionally kneel but should rarely crawl or crouch.

15. At the time of hearing, Claimant was experiencing a flare up of symptoms and had returned to Dr. Burke for ongoing treatment. Claimant previously discontinued treatment with Dr. Burke as of August 3, 2005 when he was provided with paperwork indicating that Defendants were denying payment of bills for treatment performed at the direction of Dr. Burke.

Educational and Vocational Background

16. Claimant graduated from high school in 1983 and took college courses in health sciences and accounting in 1984. Claimant describes himself as a B student in high school and earned B's and C's in his college course work. Claimant completed the Idaho Peace Officer

Standards and Training (POST) Academy in 1985 and went to work for the City of Rigby as a patrol officer.

17. During high school, Claimant worked as a cook, janitor, and laborer. He worked briefly in labor positions operating a backhoe and a jack hammer. After high school, Claimant performed yard work at an asphalt company where he performed mechanical maintenance such as oil changes and brake work.

18. Claimant has limited computer skills and describes himself as a slow typist. He is able to send e-mail and has undergone on-the-job training for proprietary software, but has no training or experience with computer programming or networking. Claimant has received post-injury on-the-job training in data entry, filing and general office work.

Pre-Injury Employment vs. Post-Injury Employment

19. Claimant earned \$1,000 per month as a patrol officer and went to work for the Idaho Nuclear Engineering Laboratory (INEL) in August of 1997 for more money. INEL has undergone multiple name and operator changes since 1997 during which time Claimant has continued to be employed in various capacities by different operators.

20. Claimant began work at the INEL as a security officer, earning approximately \$1,800 per month. He worked as an environmental technician for a nine month period in 1990 or 1991, but returned to the security officer job after the environmental technician position was eliminated. Claimant earned less money as an environmental technician, but took the position with the belief that there would be potential for educational and salary advancement.

21. Claimant subsequently began work for Employer as a security police officer (SPO). He continued in this position until approximately 10 days after his injury. SPO job duties include carrying 35 pounds of gear including an M16, pistol, ammunition, hand-cuffs,

radio, spray canister, flashlight, keys and a bullet proof vest. He was required to make rounds which included 2 miles of walking and climbing stairs. Claimant was required to be able to perform a physical restraint or hand-to-hand combat although he was never required to utilize those skills while an SPO. He was required to undergo yearly fitness testing for which he was training when the injury occurred.

22. At the time of injury, Claimant's base salary was \$4,788.58 per month which translates to an annual base salary of \$57,462.96. Claimant's pre-injury wages were consistently augmented by overtime pay, shift differentials and bonuses. His annual gross wages averaged \$69,545.75 from 2001 through 2004. This reflects an average of \$1,006.90 per month in earnings above Claimant's base salary. Claimant's benefits included medical, dental, optical and life insurance as well as a retirement plan to which Employer contributed 2% of wages.

23. It is undisputed that Claimant is precluded from returning to work as an SPO due to medical restrictions associated with his industrial injury.

24. Upon Claimant's return to work in May 2005, he was provided with modified duty work consisting of general office duties and serving as an escort for visitors. Claimant subsequently supervised the facility escort program. He continued to receive his SPO base salary while working with the escort program, but wasn't eligible for overtime pay, shift differentials or bonuses.

25. In late August of 2006, Claimant applied for and was offered an alternate position as an engineering assistant. Claimant accepted the position on September 1, 2006. Claimant's monthly earnings were reduced to \$3,730.48 per month which translates to an annual salary of \$44,765.76. The position accommodated Claimant's physical restrictions but was essentially a demotion.

26. Claimant continues to be employed as an engineering assistant. His benefits as far as insurance have remained the same, but he has experienced a slight decrease in Employer's retirement contribution since it is based on a percentage of Claimant's earnings. Similarly, he remains entitled to an annual 3% cost of living salary increase which would result in slightly lower annual raises as an engineering assistant than an SPO since the amount is proportionate to the base salary. Claimant is no longer eligible for overtime pay, shift differentials or bonuses.

27. Pursuant to Employer's policy, Claimant received a one-time subsidy payment of \$28,731.56 because his demotion was the result of medical disqualification from the SPO position through no fault of his own.

28. At the time of hearing, Claimant expressed concerns about the physical requirements of handling documents and repetitively getting out of his chair to file as well as bending or squatting to pick documents up from the floor. Claimant's pain has increased and he is no longer taking ibuprofen because of complications with kidney function associated with anti-inflammatories.

Expert Vocational Evidence

29. Douglas N. Crum, C.D.M.S., is a vocational expert hired by Claimant to evaluate factors surrounding disability in excess of impairment. Mr. Crum reviewed medical records and wage information. He interviewed Claimant on January 29, 2007.

30. Based on Claimant's physical restrictions, Mr. Crum calculated a 55% loss of access to jobs in the Idaho Falls labor market, predominately because of restrictions relating to sitting/standing and Claimant's inability to return to work as a police officer. Mr. Crum acknowledged that none of the jobs to which Claimant lost access would pay wages higher than Claimant is earning as an engineering assistant for Employer.

31. Mr. Crum calculated 30% reduction in wage earning capacity based on a comparison of Claimant's 2004 gross earnings as an SPO with projected 2007 gross earnings as an engineering assistant. However, he noted that Claimant's reduction in wage earning capacity would increase to at least 65% if Claimant were to lose his job with Employer, since his best employment opportunities would likely be in the fields of telemarketing or emergency dispatch which would pay less than \$12 per hour.

32. Based on an analysis of non-medical factors, Mr. Crum determined that Claimant's ability to compete in the open labor market is somewhat hindered based on Claimant's narrow work experience but that Claimant demonstrated a history of excellent job stability and was not significantly impacted by other non-medical factors.

33. Claimant described his engineering assistant job to Mr. Crum as sitting at a computer desk for 7 out of 9 hours per shift and reported job duties to include copying engineering manuals, filing, tracking construction materials and running two databases into which he enters information about problems in the facility. There is no indication that Claimant was having physical difficulties with the job or that the job requirements exceeded his restrictions at the time he was interviewed by Mr. Crum. The position was not created to accommodate Claimant's restrictions and Claimant described the position as a "real job" which was held by a previous worker prior to Claimant accepting the position.

34. Mr. Crum asserts that Claimant's permanent disability is 42.5%, inclusive of permanent partial impairment, based on wage earning ability and labor market access.

DISCUSSION AND FURTHER FINDINGS

Medical Treatment

35. Generally, an employee is entitled to reasonable medical treatment for a compensable injury. Idaho Code § 72-432(1). The determination as to whether or not a specific treatment is reasonable and required is determined by the employee's physician. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 722, 779 P. 2d 395 (1989). However, the Claimant bears the burden of proving that the condition for which treatment is sought is causally related to the compensable injury. Sweeney v. Great W. Transp., 110 Idaho 67, 71, 714 P.2d 36 (1986). In the event that medical treatment is determined to constitute reasonable medical care which is causally related to a compensable injury, liability of an employer/surety for the treatment may be negated if the treatment is not performed at the direction or referral of the employee's treating physician and requirements of Idaho Code § 72-432(4) relating to change of physician are not otherwise satisfied. Quintero v. Pillsbury Co., 119 Idaho 918, 811 P.2d 843 (1991).

36. In the present case, Claimant acknowledged that he sought treatment with Dr. Burke prior to reporting his injury to Employer (Tr. p.24 1.20 – p.35 1.4). Once Employer became aware of the injury, Claimant was directed to seek care with Dr. Phillips. Dr. Phillips ordered diagnostic studies and referred Claimant to multiple specialists, beginning with Dr. Simon. Dr. Phillips was aware that Claimant initially sought treatment with Dr. Burke and advised Claimant that he could continue with Dr. Burke until he could be seen by Dr. Simon. (Dr. Phillips' Depo. p. 19 1.5 – p.20 1.22). Claimant was examined by Dr. Simon on April 28, 2005. (Defendants' Ex. 2 p.14).

37. Medical records from Dr. Burke are insufficient to establish anything beyond the dates of appointments and subjective complaints made by Claimant. The records do not mention the industrial injury other than a Family Medical Leave Act form dated October 12, 2007 which

indicates the onset of chronic lumbar disc disease which began on “4/05”. (Claimant’s Ex. 1, p.1). There is a notation of May 4, 2005 which indicates that Claimant’s condition worsened as the result of moving a 5th wheel with clutch pressure and twisting while seated. (Claimant’s Ex. 1, p.7). The records do not contain a treatment plan or explanation of how treatment rendered constitutes necessary and reasonable treatment for the industrial injury. Reports from other physicians note that Claimant reported improvement on some occasions with Dr. Burke’s treatment but do not provide an opinion on the necessity or reasonableness of the treatment.

38. Neither Defendants nor his treating doctors represented to Claimant that care given at the direction of Dr. Burke would be covered beyond April 28, 2005. To the contrary, Dr. Simon repeatedly advised Claimant to pursue therapy with a certified physical therapist as opposed to a chiropractor. Claimant’s testimony and argument that Dr. Phillip’s initial approval to return to Dr. Burke was open-ended or indefinite is not credible or supported by the other evidence. Claimant has not met his burden of proof to establish entitlement to medical treatment at the direction of Dr. Burke beyond April 28, 2005.

Disability In Excess of Impairment

39. “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 functional or marked change in the future can be reasonably expected. Idaho Code § 72-430. The test for determining the existence of disability in excess of impairment also referred to as permanent partial disability (PPD), is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful activity.” Bennett v. Clark Hereford Ranch, 106 Idaho 438, 440-441, 680 P. 2d 539, 541-542 (1984). Wage loss is one of many factors than may be considered when calculating permanent disability.

Baldner v. Bennett's Inc., 103 Idaho 458, 649 P.2d 1214 (1982). The burden of proof is on the claimant to establish the existence of disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986). The degree of permanent disability suffered by a claimant is a factual question to be resolved by the Commission. McClurg v. Yanke Machine Shop, Inc., 123 Idaho 174, 176, 845 P.2d 1207, 1209 (1993).

40. The only disability rating assessed in this case is the 42.5% rating of Mr. Crum. Defendants do not offer an alternate rating, but contend that Mr. Crum's rating is flawed for three reasons: (1) Claimant's pre-injury wages are inflated due to the inclusion of non-guaranteed salary augmentation in the form of overtime pay, shift differentials and bonuses; (2) The analysis presumes that Claimant will lose his current workplace restriction accommodated employment; and (3) Failure to account for the lump sum disability payment of \$28,731.56.

41. Defendants' first argument regarding calculation of pre-injury wages resulting in an inflated apparent wage loss is rejected. The fact that Claimant's salary augmentation was not guaranteed does not make it less real. Claimant established that his salary augmentation was consistent and that he averaged \$1,006.90 per month in gross wages above his base salary during the four year period prior to his injury. There was no evidence presented that Employer had a change in policy or circumstances that would have precluded ongoing augmentation of Claimant's base salary had he been able to continue working as an SPO. Mr. Crum's calculation of 30% loss in earning capacity is supported by the evidence and adopted.

42. Defendants' second argument that the analysis by Mr. Crum presumes Claimant will lose his current job is well taken. Both Employer and Claimant have demonstrated flexibility and a desire to maintain their employment relationship. Employer provided on-the-job retraining and allowed Claimant to fill a position that is consistent with his physical limitations.

Claimant pursued the position and acquired new skills. The engineering assistant job is an essential position which Claimant took over from a previous employee and is not make work.

43. The extent to which Claimant's current position is secure involves speculation. There is neither a guarantee of continued employment with Employer nor an indication that Claimant's employment is in jeopardy. Claimant's assertion in his Reply Brief that it "appears he will not be a reliable employee capable of consistently performing all of the essential functions of the job in the future" is not supported by the credible evidence. (Claimant's Reply to Defendants' Post-Hearing Brief, p.6). Claimant's testimony at hearing about his job duties requiring repetitive bending is at odds with the job description he relayed to Mr. Crum. Claimant successfully performed the essential functions of the engineering assistant position for approximately one year prior to experiencing an exacerbation of his condition during the two weeks prior to hearing.

44. Mr. Crum's determination that Claimant has lost access to approximately 55% of jobs in the Idaho Falls labor market is uncontroverted but the impact of the loss of labor market access on Claimant's disability is lessened by the fact that none of the jobs to which Claimant has lost access would likely pay as much as his current employment.

45. Defendants' third argument that Mr. Crum failed to consider the lump sum payment to Claimant from Employer of approximately \$28,000 is rejected. Defendants argue that an award of disability benefits in excess of impairment would constitute an unjust double recovery to Claimant and/or that Defendants are entitled to a credit in the amount of the subsidy. The one time subsidy paid by Employer to Claimant was made pursuant to Employer's pay policy and was calculated using a formula that is based, in part, on number of service years and was not based on factors articulated by Idaho Code § 72-430. Claimant would have been eligible

for the subsidy based on medical disqualification from the SPO position regardless of whether the medical limitations resulted from an industrial injury or a personal injury/illness. Acceptance of the subsidy by Claimant does not constitute a satisfaction of a judgment or any type of settlement involving Claimant's rights under Idaho workers' compensation law. In fact, such characterization of the subsidy would likely be prohibited by Idaho Code § 72-318(2) as constituting an invalid agreement between Employer and Claimant resulting in a waiver of Claimant's rights to compensation under the Idaho workers' compensation act.

46. The subsidy payment was offered in conjunction with Claimant's acceptance of the engineering assistant position. Accordingly, the subsidy has an indirect impact on Claimant's disability in excess of impairment and is relevant to the extent that the subsidy helped facilitate Claimant's ongoing employment and lessened the financial sting of Claimant's decrease in wages. However, the subsidy does not bar a finding of permanent disability or allow Defendants to take a credit for the voluntary payment.

47. Permanent disability in the amount of 42.5% is somewhat inflated because Mr. Crum's calculation ignores the fact that Claimant's current employment provides an income higher than any identifiable position to which Claimant has lost access, except for his time of injury position as an SPO. A more accurate rating is 25% permanent disability, inclusive of PPI. This amount is based on Claimant's measurable loss of earning capacity and his inability to return to customary police/security work.

CONCLUSIONS OF LAW

1. Claimant is not entitled to medical treatment at the direction of Dr. Burke beyond April 28, 2005.

2. Claimant is entitled to disability in excess of impairment in the amount of 19% (25% permanent disability, inclusive of 6% PPI).

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 8 day of February 2008.

INDUSTRIAL COMMISSION

 /s/
Susan Veltman, Referee

ATTEST:

 /s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

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

G LANCE NALDER
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IDAHO FALLS ID 83402

GLENNA M CHRISTENSEN
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jc

 /s/