BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUAN CALDERON-VEGA, Claimant, v. J. R. SIMPLOT COMPANY, Self-Insured Employer, Defendant.	)	**IC 2003-001571** **ORDER** April 16, 2009

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 additional medical care pursuant to Idaho Code § 72-432.

2. Claimant has 17% PPI with 5% apportioned to pre-existing conditions. Defendant is liable for 12% PPI benefits and is entitled to a credit for benefits previously paid.

3. Claimant is not entitled to PPD benefits in excess of permanent impairment.

4. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

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

DATED this __16_ day of ___April_____, 2009.

INDUSTRIAL COMMISSION

_/s/_____
R. D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __16_ day of _April_____, 2009, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

DARIN G MONROE
P O BOX 50313
BOISE ID 83705

WES L SCRIVNER
P O BOX 27
BOISE ID 83707

jkc _/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUAN CALDERON-VEGA, Claimant, v. J.R. SIMPLOT COMPANY, Self-Insured Employer, Defendant.	)	**IC 2003-001571** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** April 16, 2009

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Boise, Idaho, on October 29, 2008. Darin G. Monroe of Boise represented Claimant. Wes L. Scrivner of Boise represented Defendant. The parties submitted oral and documentary evidence. Three post-hearing depositions were taken and the parties submitted post-hearing briefs. The matter came under advisement on March 25, 2009 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 additional reasonable and necessary medical care as provided for by Idaho Code § 72-432;

2. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;

3. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of permanent impairment; and

4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained an industrial injury to his lower back on December 2, 2002 while working for Employer. The claim was accepted and Defendant paid benefits, including those associated with lumbar surgery on August 12, 2003. A dispute subsequently arose as to the severity of the permanent impact of the injury and the extent to which Claimant requires additional medical treatment.

Claimant contends that he is in need of additional medical treatment, including a fusion at L5-S1. At the very least, Claimant feels that he is entitled to another medical opinion regarding the need for surgery. Claimant asserts that his PPI rating is 17% with a maximum of 5% attributable to pre-existing conditions. Claimant has suffered PPD in the amount of 18%, inclusive of PPI, attributable to the 2002 injury and other relevant non-medical factors. Claimant seeks attorney fees because Defendant engaged in prejudicial contact with Claimant's physician that resulted in the reversal of a surgical recommendation.

Defendant contends that no additional benefits are owed. Claimant has undergone multiple medical evaluations and is not an appropriate candidate for another surgery. Claimant's PPI rating is 13%, with 10% properly apportioned to Claimant's pre-existing lumbar condition. Claimant has not met his burden of proof to establish PPD in excess of PPI. Claimant's restrictions following his 2002 injury are the same as restrictions he was assigned due to a prior back injury. Defendant asserts that there is no basis for an award of attorney fees since there has not been a denial of benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1-25 admitted at hearing;

2. Claimant's deposition taken August 14, 2008 with one exhibit attached;

3. Testimony taken at hearing from Claimant (with the benefit of an English/Spanish interpreter), claims examiner Shirley Tulk and vocational expert Nancy Collins, Ph.D.;

4. Post-hearing depositions of family medicine and sports doctor Richard A. Radnovich, D.O. taken January 15, 2009, physical medicine and rehabilitation doctor Christian G. Gussner, M.D. taken January 20, 2009, and clinical psychologist Michael H. McClay, Ph.D. taken January 20, 2009 with one exhibit attached; and

5. The Industrial Commission's legal file.

Judicial notice is taken of the 5th Edition of the *AMA Guides to the Evaluation of Permanent Impairment* (*Guides*).

Claimant's objection to the exhibit attached to Dr. McClay's deposition is overruled because the basis for the objection is not articulated in the record. After having considered all of 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

Background and Prior Injuries

1. Claimant was born in Mexico in 1963. He was 45 and living in Homedale, Idaho, at the time of hearing. Claimant attended school through the 4th grade in Mexico and has not received additional vocational training or education. He is able to read and write in Spanish and has basic math skills. He is able to comprehend a fair amount of conversational English but is

more limited in his ability to speak English. Claimant does not have computer or other technical skills. Claimant started working seasonally in California during the mid-1980s as a field worker. He moved to Idaho in the mid-1990s where he sought employment as a field worker and also through temporary employment agencies.

2. Claimant sustained a soft tissue injury to his lumbar spine on September 29, 1995 as a result of lifting a heavy pipe while working for Express Personnel Services. Claimant received conservative treatment for approximately two months and was evaluated on an intermittent basis during early 1996. He was released to return to work without restrictions and found to have no permanent impairment in June 1996 with a caveat that he would experience discomfort with repetitive bending and stooping because of deconditioning. In mid-1997, Claimant reported that his pain continued and mentioned radicular complaints. A lumbar MRI and a trial of epidural steroid injections were recommended but not pursued.

3. In mid to late 1996, Claimant began working for SSI, a meat processing company previously affiliated with Employer. Claimant's job involved grinding, cooking and packaging taco meat. Claimant performed heavy lifting, up to 75 pounds. On March 6, 1998, Claimant injured his lumbar spine as a result of a slip and fall on ice. Claimant received conservative treatment and remained in an off-work status for approximately nine months.

4. Claimant's diagnostic studies following the 1998 injury revealed degenerative changes and L4 spondylolysis. A surgical consultation was performed in May 1998 at which time surgical intervention was not recommended. In June 1998, Claimant underwent a neurological evaluation that was normal, but the neurologist noted signs of functional overlay. Epidural steroid injections were performed based on Claimant's continued complaints but were not beneficial.

5. Claimant was evaluated by orthopedist Michael T. Phillips, M.D., on December 3, 1998. Dr. Phillips determined that Claimant suffered a contusion of the spine as a result of his March 6, 1998, injury and that Claimant had pre-existing multi-level degenerative disc disease and congenital L4 spondylolysis. He assigned a whole person permanent impairment rating of 5% and apportioned 4% to pre-existing disease and past history of back complaints. The rating was calculated using the *Guides*. Claimant was found to have impairment consistent with a diagnosis related estimate (DRE) category II which provides for a range of whole person impairment from 5% to 8%.

6. Dr. Phillips recommended that Claimant return to work with avoidance of lifting over 50 pounds and that Claimant limit bending, stooping and twisting to an occasional to frequent basis.

7. Claimant began working for Employer at its meat processing plant in Nampa in 2000. Claimant originally performed janitorial work. He pushed wheeled garbage containers of discarded cow parts to a machine that mechanically dumped the containers. He also washed the floor using a garden hose.

8. Claimant fractured his left ankle while working for Employer on March 14, 2001. After the ankle/foot injury, Claimant transferred from janitorial work to a department where he removed cow hooves from legs. Cow legs were placed in a metal chute from an upper-floor and dropped into a bin from which Claimant retrieved them. He soaked the legs in a bucket of warm water and then fed the legs through a machine that would remove the hooves.

9. Claimant was subsequently transferred from the de-hoofing department to a tongue cleaning position. Cow tongues were delivered to an aluminum bin from which Claimant would pick up a tongue and remove muscle and fat from around the tongue. He placed the

cleaned tongues in a bucket of water. The job required him to stand and was fast-moving. He was required to bend to obtain tongues from the bin and place them back into a bucket. However, the bin and bucket were on a table near waist level.

Current Injury and Treatment

10. On December 2, 2002, Claimant was pushing a wheeled garbage container of tongue trimmings when he experienced the sudden onset of right-sided lower back pain.

11. Claimant sought treatment on January 27, 2003 with Ben Terry, D.O., and received conservative care at the direction of Dr. Terry for approximately six weeks. Claimant received medication and physical therapy. X-Rays were negative. Claimant was diagnosed with chronic low back strain and pain. Physical therapy was discontinued and Claimant was referred to an orthopedist due to ongoing complaints of pain and lack of sustained improvement.

12. Claimant was evaluated by orthopedic surgeon Gary Botimer, M.D., on April 21, 2003. A herniated disc was suspected and a lumbar MRI was scheduled. Dr. Botimer noted the existence of pain behavior and described Claimant's functional abilities as somewhat inconsistent with subjective complaints.

13. A lumbar MRI was performed on April 23, 2003. Dr. Botimer felt that the MRI did not demonstrate nerve compression sufficient to account for Claimant's right-sided symptoms. He noted secondary gain issues and was not comfortable recommending surgery. He recommended additional diagnostic testing.

14. Claimant underwent an EMG/NCV study on May 19, 2003, which revealed borderline to mild radiculopathy at L4. Claimant had an epidural steroid injection (ESI) without benefit and the procedure was not repeated.

15. In July 2003, Claimant had a discogram as well as a repeat lumbar MRI. Discogram findings correlated with an L4-5 disc herniation and Dr. Botimer felt that surgical intervention was reasonable in spite of previous concerns. On August 13, 2003, Dr. Botimer performed a laminotomy and diskectomy at L4-5. [1]

16. Claimant reported relief from radicular symptoms soon after surgery but subsequently experienced a worsening of symptoms including bilateral radiculopathy. Claimant underwent a post-surgical lumbar MRI on October 13, 2003 which Dr. Botimer described as "clean". A bilateral EMG/NCV study was performed on November 18, 2003 which was normal with no evidence of persistent lumbar radiculopathy. Claimant continued to report flair-ups and worsening of pain. Another lumbar MRI was performed on June 29, 2004 that showed potentially significant foraminal narrowing. An EMG/NCV study performed on September 9, 2004 was normal and did not reflect significant change from the previous study of 2003.

17. In September 2004, Defendant provided Dr. Botimer with information via telephone that Claimant had been working in the orchards for most of the summer. Dr. Botimer commented that he was not aware that Claimant had been working and was surprised Claimant could do the work in light of the pain he reported. Dr. Botimer addressed the issue with Claimant and Claimant explained that he had not continued to work in the fields after his September 1, 2004 evaluation at which time discussion arose regarding additional surgery. Dr. Botimer felt that it would be prudent to obtain a second opinion as to Claimant's future care and whether additional surgery was warranted.

[1] Some medical reports reflect that Claimant's 2002 injury and 2003 surgery involved the L4-5 level of Claimant's spine while other reports indicate that the injury and surgery involved the L5-S1 level. The evidence establishes that the medical providers are referencing the same level of Claimant's spine, but that different numbering systems were interchangeably utilized.

Expert Medical Opinions Regarding Future Care, Impairment and Restrictions

Christian G. Gussner, M.D.

18. Dr. Gussner specializes in physical medicine, rehabilitation and pain management. He evaluated Claimant on March 12, 2004 at the request of Defendant. Dr. Gussner reviewed Claimant's previous medical record, interviewed Claimant with the assistance of an interpreter and performed an examination of Claimant including an impairment rating evaluation. As part of the evaluation, Claimant completed questionnaires with the assistance of a translator regarding depression and function.

19. Dr. Gussner was aware of Claimant's previous back injury and pre-existing restrictions based on his review of Claimant's medical records. However, Claimant denied prior lower back problems during his interview with Dr. Gussner. Dr. Gussner opted not to confront Claimant about the inconsistency, but the difference between Claimant's self-reported history and medical records negatively impacted Dr. Gussner's impression of Claimant's credibility and reliability as a historian.

20. Dr. Gussner concluded that Claimant suffered a probable aggravation of pre-existing pathology at L4-5 as the result of his December 2002 industrial injury. He relied on medical records from 1998 to determine the extent of Claimant's pre-existing lumbar pathology.

21. Claimant's pain status inventories reflected that he perceives himself as severely disabled and indicate extreme depression. Dr. Gussner identified marked symptom magnification with Claimant's subjective complaints in excess of objective findings.

22. Dr. Gussner utilized the 5th Edition of the *Guides* to calculate Claimant's permanent impairment of the lumbar spine. He opted to utilize the diagnosis related estimate (DRE) method of calculating impairment as opposed to the range-of-motion (ROM) method. He

chose the DRE method because the injury involved a single level of Claimant's spine and Claimant had one surgery. The ROM method is typically used when there have been multiple surgeries or multiple levels of involvement. (Gussner depo., pp. 29-30).

23. Dr. Gussner determined that Claimant met the criteria for DRE Lumbar Category III which allows for a range of impairment from 10% to 13% and awarded 13% whole person impairment. Dr. Gussner apportioned 10% to Claimant's pre-existing condition and 3% to the injury of December 2002. He felt that 10% was properly apportioned because Claimant's condition after his 1998 injury supported a DRE lumbar category III rating.

24. Dr. Gussner concluded that Claimant is able to perform at least medium duty work. He recommended the same permanent restrictions that Dr. Phillips recommended in December 1998. These restrictions include maximum lifting of 50 pounds on an occasional basis and up to 25 pounds repetitively; avoidance of repetitive bending, twisting and torquing of the low back; avoidance of prolonged low frequency vibration or jarring activity and the ability to change positions as needed.

25. Dr. Gussner does not recommend further treatment to Claimant's spine. During his post-hearing deposition, Dr. Gussner testified that he has confidence in psychological assessments performed by Dr. McClay (see below) and agrees with him that Claimant is not an appropriate candidate for additional surgery. He believes that Claimant has secondary gain issues and that Claimant's disability presentation will be reduced upon resolution of litigation.

Timothy E. Doerr, M.D., Part 1

26. Dr. Doerr is an orthopedic surgeon who evaluated Claimant on November 9, 2004 at the request of Dr. Botimer. Dr. Doerr has essentially taken over from Dr. Botimer as Claimant's treating physician. Dr. Doerr felt that it was appropriate to pursue aggressive

rehabilitation and to consider a lumbar fusion as an "absolute last resort." He referred Claimant to Michael O. Sant, M.D., for additional non-surgical recommendations.

Michael O. Sant, M.D.

27. Dr. Sant is an internal medicine and rehabilitation physician who evaluated Claimant on December 1, 2004. Dr. Sant is affiliated with the same medical practice as Dr. Gussner.

28. Dr. Sant noted pain amplification behavior and identified psychological barriers to Claimant's recovery. He recommended additional physical therapy, continuation of anti-inflammatories and use of a muscle relaxant during physical therapy.

Dr. Doerr, Part 2

29. By early January 2005, Dr. Doerr concluded that Claimant's condition had not improved with conservative treatment including anti-inflammatories, activity modification, ESIs, physical therapy and formal rehabilitation. He recommended a fresh lumbar MRI and that Claimant undergo an L5-S1 Gill laminectomy with bilateral foraminotomies and posterior fusion/posterior lumbar interbody fusion. A new MRI was performed and did not reveal recurrent disc protrusions.

30. In early February 2005, Dr. Doerr received information from Defendant about Claimant's previous workers' compensation claims. He was also informed by Defendant that Claimant collected time-loss benefits while working. Based on the information he was provided, Dr. Doerr felt that a neuropsychological evaluation was appropriate prior to proceeding with additional surgery. He referred Claimant to Michael H. McClay, Ph.D.

Michael H. McClay, Ph.D.

31. Dr. McClay is a clinical psychologist who evaluated Claimant on March 1, 2005, at the referral of Dr. Doerr to assist him in determining whether Claimant is an appropriate surgical candidate. Neurosurgeons in the Boise area often refer surgical candidates to Dr. McClay to determine whether there are emotional disorders or motivational issues that may impact the outcome of surgery. Dr. McClay interviewed Claimant with the assistance of an interpreter and administered various tests including a Spanish language version of the MMPI-2, pain scale, mental status exam, sleep history and a screening tool known as the SF-36.

32. The MMPI-2 is a psychological inventory used to establish a basic personality profile on a patient. The MMPI-2 has a built-in validity scale to determine when a patient attempts to manipulate the results of the evaluation. Claimant's responses to the MMPI-2 yielded invalid results and reflected that Claimant answered the questions in such a way as to present himself in an overly negative light for possible perceived advantage. Claimant's responses led Dr. McClay to determine that Claimant was malingering and that he volitionally attempted to distort his test results.

33. The SF-36 is a screening inventory used to evaluate the physical and mental status of a patient. It is not as sophisticated as the MMPI. Claimant's SF-36 results reflected that he reported himself to be in an extremely debilitated physical and mental state. His responses were statistically circumspect. Claimant self-reported his pain scale to be a 10 out of 10 at the time of evaluation.

34. Dr. McClay concluded that Claimant's reported symptoms were not reliable and that Claimant was malingering. Dr. McClay recommended that Claimant receive only

conservative treatment and that he be removed from the workers' compensation system as soon as possible.

Dr. Doerr, Part 3

35. Dr. Doerr was persuaded by the information he received from Defendant and the opinion of Dr. McClay. Dr. Doerr concluded that Claimant was not a surgical candidate. He relied on the opinion of Dr. Sant to determine that all conservative measures have been exhausted and that Claimant has reached maximum medical improvement (MMI).

36. Dr. Doerr concurs with Dr. Gussner that Claimant has 13% whole person impairment with 10% reflective of pre-existing problems. Dr. Doerr released Claimant with a lifting restriction of 30 pounds frequent lifting and 50 pounds occasional lifting.

Richard A. Radnovich, D.O.

37. Dr. Radnovich is board certified in family medicine and osteopathic manipulative treatment. His practice is primarily comprised of sports medicine and pain management. He has been a certified independent medical examiner for the past two years and performs approximately 25 impairment rating evaluations per year that address spinal impairment.

38. Dr. Radnovich evaluated Claimant on August 20, 2007 at the referral of Claimant's attorney. Dr. Radnovich interviewed Claimant with the benefit of an interpreter, reviewed Claimant's past medical records and performed a physical examination including an impairment rating evaluation.

39. Dr. Radnovich is familiar with both the 5th and 6th Editions of the *Guides*. He utilized the 5th Edition to calculate Claimant's PPI rating in order to be consistent with ratings previously assigned to Claimant. Dr. Radnovich applied the ROM method over the DRE method based on language in the *Guides* that require application of the ROM method whenever the

subject has experienced a prior injury to the same level of his or her spine. (Radnovich depo., pp. 12-13).

40. Dr. Radnovich assigned a 17% whole person impairment rating for Claimant's low back condition. He utilized the combined values chart of the *Guides* to calculate impairment based on Claimant's surgery with residual pain (10%), range of motion deficits (7%) and sensory deficit (1%).

41. Generally speaking, Dr. Radnovich agrees that it is appropriate to subtract a prior rating from a claimant's whole body impairment rating to apportion pre-existing permanent impairment. Claimant was previously assigned a 5% impairment rating for his lumbar injury of 1998. In his August 2007 report, Dr. Radnovich apportioned 1% of Claimant's 17% PPI to pre-existing conditions. At the time of his deposition, Dr. Radnovich could not recall the logic he previously applied and testified that it is possible that 5% should be apportioned to pre-existing conditions instead of 1%. (Radnovich depo., p.16).

42. In order for as much as 10% PPI to be apportioned as suggested by Dr. Gussner, the medical records would have to reflect ongoing symptoms such as range of motion deficits and radicular complaints.

43. Dr. Radnovich assessed Claimant's permanent physical restrictions related to the 2002 injury and determined that Claimant should limit his lifting to a maximum of 50 pounds; avoid frequent (defined as more than 30% of the work day) lifting greater than 25 pounds; avoid repetitive bending, twisting or stooping; and avoid exposure to low frequency vibration.

44. Dr. Radnovich believes that Claimant should be evaluated by another surgeon. It is possible that Claimant would have benefited from a diskectomy and fusion as opposed to a

simple resection of a disc protrusion as performed by Dr. Botimer. It also possible that there is multi-level involvement and that Claimant's pain generating disc level has not been addressed.

Vocational Evidence

Nancy J. Collins, Ph.D.

45. Dr. Collins is a vocational expert hired by Defendant to assess Claimant's employability and future vocational disability. Dr. Collins reviewed medical records, vocational records, Claimant's deposition testimony and discovery responses. She conducted a personal interview with Claimant in October 2008.

46. Dr. Collins noted that Claimant performed unskilled work over his work life and has no transferrable skills. His ability to acquire new skills is limited because of his inability to speak English. Claimant's current work restrictions result in a loss of access to 17% of unskilled jobs.

47. Restrictions assigned by Drs. Radnovich, Gussner and Doerr are consistent with medium work restrictions. Claimant's current restrictions are essentially no different than the restrictions assigned by Dr. Phillips following his 1998 injury. Variations in the restrictions given are not significant from a vocational standpoint and reflect identical access to the labor market.

48. Most farm labor work and harvest jobs exceed Claimant's restrictions because of the bending and stooping required. Examples of jobs that would be appropriate for Claimant are production, assembly, janitor, inspection, housekeeping, supply room clerk, harvest driving, food preparation, dishwashing, grading, sorting and some packaging jobs.

49. Claimant's pre-injury wage of $9.86 per hour is a high wage for an unskilled worker. Claimant was not able to return to work for Employer due to plant closure. Jobs that are

currently recommended for Claimant will start at a lower wage. Claimant's loss of earning capacity is 19%.

50. Dr. Collins calculates Claimant's permanent disability at 18%. However, Claimant's permanent physical restrictions were the same pre-injury as have been assigned following the 2002 injury and surgery. Claimant does not have additional disability as a result of the 2002 injury.

Claimant's Credibility and Post-Injury Employment

51. Claimant was a poor historian with regard to dates and the chronology of events. His testimony regarding his employment history was at odds with the documentary evidence. Observationally, Claimant's credibility was fair to poor. Substantively, the medical evidence consistently reflects reports of symptoms that are out of proportion to objective findings.

52. Claimant had multiple short-term periods of employment following his 2003 surgery. He worked in a cherry orchard for approximatley two months in 2004 during which time he collected lost time benefits. It is possible that Claimant was under the impression that he was receiving impairment benefits and the evidence falls short of establishing that Claimant knowingly gamed the system. Nonetheless, Claimant's ability to work in the orchard was in conflict with symptoms and abilities reported to Dr. Botimer during the corresponding time period and negatively impacts Claimant's credibility.

53. Claimant also worked for a few months at Wal-Mart in 2005 or 2006 but quit because his boss told him he was stupid.

54. Claimant worked for one day at a food products company but quit because he felt that the work was too much for him. The work required palletizing boxes weighing between 20 and 30 pounds which is within Claimant's restrictions.

55. Claimant was referred to the Industrial Commission Rehabilitation Division (ICRD) and had sporadic contact with ICRD from September 2003 through May 2005. Claimant's file was closed in July 2005 based on lost contact with Claimant. Claimant's follow-up with job leads and suggestions from ICRD was marginally compliant.

DISCUSSION AND FURTHER FINDINGS

Medical Benefits

56. Generally, an employee is entitled to reasonable medical treatment for a compensable injury. Idaho Code § 72-432(1). 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). 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).

57. Claimant received a significant amount of conservative treatment both prior to and following his surgery of August 2003. Claimant has undergone extensive diagnostic testing since 2003 that does not correlate with his subjective complaints. The opinions of Dr. Gussner and Dr. Doerr that Claimant does not require additional medical treatment are persuasive and supported by the other evidence. Claimant is not an appropriate surgical candidate and has exhausted conservative treatment modalities.

58. Dr. Radnovich's opinion that Claimant might benefit from an additional medical opinion or additional treatment is not sufficient to overcome the other medical evidence which establishes that Claimant has already received reasonable and appropriate medical treatment for his injury.

59. Claimant has not met his burden to establish that he is entitled to additional medical treatment for his 2002 injury.

Permanent Partial Impairment

60. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

61. The reason for the discrepancy between the 13% rating assigned by Dr. Gussner and the 17% rating assigned by Dr. Radnovich is the method of calculation- DRE versus ROM. Dr. Gussner utilized the DRE method because Claimant's injury involves a single level of the spine and Dr. Radnovich utilized the ROM method because there had been a prior injury to the same level of Claimant's spine.

62. The *Guides* provide instructions and a flow chart to determine which method should be utilized (*Guides*, p. 380). The ROM method is favored when there is multi-level involvement *or* when there is a recurrent injury to the same spinal region. *Id*. Accordingly, Dr. Radnovich's interpretation of the *Guides* is more accurate than that of Dr. Gussner, in spite of the fact that it is undisputed that Claimant's injury is single-level. Further, the *Guides* instruct that

in the rare circumstance in which both methods are properly utilized, that the higher of the two ratings should be awarded.

63. Claimant has met his burden of proof to establish that his PPI rating is 17% in accordance with the opinion of Dr. Radnovich.

64. Claimant was assigned PPI of 5% attributable to his lumbar spine following his 1998 injury that is properly apportioned from Claimant's current rating of 17% PPI. The opinion of Dr. Radnovich that only 1% PPI should be apportioned to pre-existing conditions is not supported by the other evidence. During his post-hearing deposition, Dr. Radnovich was unable to explain his rationale for apportioning 1% and conceded that 5% would be properly apportioned to pre-existing conditions.

65. Dr. Gussner's contention that 10% PPI should be apportioned to Claimant's pre-existing conditions is supported by some of the medical evidence. However, apportionment based on the previous PPI actually assigned to Claimant (5%) at the time of maximum medical improvement for the 1998 injury is adopted over what impairment *could* have been properly assigned based on discretionary aspects of application of the *Guides*.

Permanent Partial Disability

66. 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.

67. In the present case, the only PPD rating established by expert evidence is 18% as assigned by Dr. Collins. Neither party disputes Dr. Collins' rating or her methodology in calculating the rating. Dr. Collins considered both medical and non-medical factors that impact Claimant's future ability to engage in gainful activity. A dispute exists as to PPD because Claimant asserts that he is entitled to benefits based on the 18% rating and Defendant asserts that Claimant is not entitled to PPD benefits because Claimant's PPD rating of 18% pre-existed the 2002 injury and was not caused or increased because of the 2002 injury.

68. Idaho Code 72-406(1) states:

> Deductions for preexisting injuries and infirmities. (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

Accordingly, it is necessary to evaluate the extent to which the 2002 injury resulted in additional disability.

69. Defendant's argument that Claimant failed to establish additional disability resulting from the 2002 injury is supported by the opinions of Dr. Collins and Dr. Gussner and is not contradicted by evidence beyond Claimant's testimony that he is no longer able to tolerate work that he could previously perform.

70. At first glance, it seems harsh and contrary to common sense that a claimant with non-medical barriers to employment would not have PPD as a result of an injury resulting in lumbar surgery. On the other hand, it defies logic (and statute) to hold a defendant responsible for disability that existed prior to an industrial injury. This is particularly true in this case, in which Claimant's pre-injury condition was evaluated based on actual permanent medical

restrictions as the result of an earlier occupational injury, not retroactive speculation about restrictions that he should have had.

71. Certainly, Claimant is at least somewhat worse-off from a medical standpoint by sustaining an injury that resulted in an increase of back symptoms that served as the tipping point between non-surgical and surgical intervention. However, such a worsening of Claimant's medical condition is reflected in an increase in PPI from 5% to 17% for which Claimant is compensated through PPI benefits.

72. In light of the fact that Claimant's medical restrictions following his 2002 injury did not significantly increase and did not further reduce Claimant's labor market, Claimant has failed to establish that he has PPD in excess of his 17% PPI rating.

Attorney Fees

73. Idaho Code § 72-804 states:

> 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.

74. Claimant's theory of recovery for attorney fees based on contact between Defendant and Dr. Doerr is rejected on both a factual and legal basis. Defendant's communications with Dr. Doerr may have provided him with prejudicial information that was only marginally relevant to Claimant's need for future treatment. However, it was up to Dr. Doerr to determine the relevance of the information and it appears that Dr. Doerr found the

information relevant enough to prompt a referral for a psychological evaluation of Claimant to assist in determining whether Claimant was an appropriate surgical candidate.

75. The evidence fails to establish that Defendant unreasonably denied or delayed payment of any benefit to Claimant. Although this decision results in additional liability to Defendant based on an increase in Claimant's PPI rating and decrease in apportionment of PPI, Defendant's previous payment of PPI benefits based on Dr. Gussner's assessment was reasonable. Defendants sought and obtained the concurrence of Dr. Doerr on the issues of impairment and apportionment. It was not unreasonable to reject the subsequent opinion of Dr. Radnovich.

CONCLUSIONS OF LAW

1. Claimant is not entitled to additional medical care pursuant to Idaho Code § 72-432.

2. Claimant has 17% PPI with 5% apportioned to pre-existing conditions. Defendant is liable for 12% PPI benefits and is entitled to a credit for benefits previously paid.

3. Claimant is not entitled to PPD benefits in excess of permanent impairment.

4. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

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 __14__ day of __April_____ 2009.

INDUSTRIAL COMMISSION

_/s/_____
Susan Veltman, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _14 day of _April a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

DARIN G MONROE
P O BOX 50313
BOISE ID 83705

WES L SCRIVNER
P O BOX 27
BOISE ID 83707

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