

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

TED STONE, )  
)  
                  Claimant, )  
)  
          v. )  
)  
ROY CLIFF LOGGING, )  
)  
                  Employer, )  
)  
          and )  
)  
CYGNUS, INC., )  
)  
                  Employer, )  
)  
          and )  
)  
STATE INSURANCE FUND, )  
)  
                  Surety, )  
)  
                  Defendants. )  
\_\_\_\_\_ )

**IC 2002-512382  
2003-519831**

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

filed August 20, 2009

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d’Alene on June 19, 2008. Claimant was present and represented by Starr Kelso of Coeur d’Alene. Bradley J. Stoddard of Coeur d’Alene represented Defendant Employer Cygnus, Inc., (Cygnus), and its surety State Insurance Fund (SIF). H. James Magnuson, also of Coeur d’Alene, represented Employer Roy Cliff Logging (RCL), also insured by SIF. Oral and documentary evidence was presented. The parties took three post-hearing depositions and submitted post-hearing briefs. This matter came under advisement on April 22, 2009, and is now ready for decision.

## ISSUES

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

1. Whether Claimant's condition is due in whole or in part to a preexisting injury or disease or cause not work-related;
2. Whether and to what extent Claimant is entitled to the following benefits:
  - (a). Permanent partial impairment (PPI);
  - (b). Permanent partial disability (PPD) in excess of PPI, including whether Claimant is 100% disabled or is an odd-lot worker; and
3. Whether apportionment between Claimant's two accidents/injuries is appropriate.<sup>1</sup>

## CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as the result of two industrial accidents causing injuries occurring approximately a year-and-a-half apart. On June 18, 2002, while employed by Cygnus, Claimant injured his low back while lifting a piece of particle board (1<sup>st</sup> accident). This lifting accident resulted in two back surgeries. Claimant eventually secured employment at RCL operating a skidder. On September 16, 2003, Claimant's skidder rolled causing further injuries (2<sup>nd</sup> accident). Claimant's claim under his 1<sup>st</sup> accident was still open at the time of his 2<sup>nd</sup> accident; therefore, Claimant requests PPD benefits under both claims rendering apportionment between the two accidents unnecessary. Claimant further asserts that he is totally and permanently disabled under the 100% method, or, in the alternative, under the odd-lot doctrine. The retraining program of Cost Estimator/Project Manager proposed by SIF's vocational expert is unrealistic both in terms of the probability of Claimant's successfully

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<sup>1</sup> Claimant is correct that this issue was not noticed. However, the parties argued apportionment in their post-hearing briefs and because both claims are open, apportionment between the two employers is unavoidable in the disability context and, therefore, will be considered.

completing the program and, in the unlikely event he completes the program, in finding employment in those positions. While Claimant has not searched for or attempted work following his 2<sup>nd</sup> accident, to do either would be futile. Finally, Claimant is entitled to additional PPI benefits.

Cygnus contends that Claimant had fully recovered from his 1<sup>st</sup> accident at Cygnus before his 2<sup>nd</sup> accident at RCL, thus, Cygnus bears no responsibility for any of the benefits Claimant seeks. Further, SIF has proposed a reasonable retraining alternative for Claimant, but he chose not to pursue that option and, instead, wanted to settle his case and go on his way. Finally, Claimant has failed to show that he is totally and permanently disabled by any method.

RCL contends that while Claimant's treating physician released him to return to regular duty without restrictions before his second accident, there was nonetheless, a progression of Claimant's underlying lumbar disc disease exacerbated by Claimant's two surgeries. Further, Claimant was assigned no permanent restrictions as the result of his 2<sup>nd</sup> accident. Finally, Claimant is not totally and permanently disabled by any method. SIF's' vocational expert found actual jobs that Claimant could perform within the restrictions imposed as the result of the 1<sup>st</sup> accident, and it would not be futile for Claimant to look for employment.

Claimant responds that SIF's' vocational expert essentially "abandoned" him and did not inform him of any of the "actual" jobs he found so that he could check into them. Moreover, Cygnus ignores the natural progression of Claimant's lumbar degenerative disc disease, and its focus on the three-day period he worked for RCL before his 2<sup>nd</sup> accident without apparent difficulty is misplaced. Also, RCL ignores a functional capacities evaluation that discusses injuries sustained in Claimant's 2<sup>nd</sup> accident at RCL, and the restrictions related thereto.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Claimant's Exhibit 1 admitted at the hearing.
2. Cygnus Exhibits A-T admitted at the hearing.
3. RCL Exhibits 1-11 admitted at the hearing.
4. RCL Exhibit 12 admitted post-hearing.
5. The post-hearing depositions of: Bret Dirks, M.D., taken by Claimant on September 16, 2008; vocational expert Robert R. Cornell, taken by Claimant on October 9, 2008, L. David Rutberg, M.D., taken by Claimant on November 14, 2008, and that of vocational expert William C. Jordan, taken by RCL on January 21, 2009.

RCL's objection to the admission of Exhibit 2 to Mr. Cornell's Deposition (results of vocational testing) is sustained for failing to timely disclose. However, Mr. Cornell's testimony regarding the testing results will not be stricken. All other objections 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**

### **Background**

1. Claimant was 49 years of age and had resided in the Sandpoint area for around 30 years at the time of the hearing. He is a Canadian citizen, but a "green card" has allowed him to work in the United States.

2. On June 18, 2002, Claimant was employed by Cygnus, a Ponderay, Idaho company that manufactures airplane parts. On that date, Claimant injured his low back while

lifting a piece of particle board. He eventually came under the care of Bret Dirks, M.D., a neurosurgeon. When conservative treatment proved ineffectual, Dr. Dirks performed a left L5-S1 laminotomy and microdiscectomy on August 26, 2002. Because Claimant continued to be symptomatic and an MRI revealed a recurrent disc herniation, Dr. Dirks performed a left L5-S1 re-exploration, laminotomy, and microdiscectomy on February 24, 2003. Dr. Dirks released Claimant to regular duty without restrictions on July 15, 2003. Unfortunately, Claimant had been terminated from his employment at Cygnus in December of 2002 because his mother, rather than he, had called in sick on Claimant's behalf.

3. Through Job Service, Claimant secured employment with RCL, a logging outfit from Priest River, Idaho, as a skidder operator on September 12, 2003. On September 16, 2003, the skidder Claimant was operating slid off a rock and rolled several times. Claimant was thrown from the machine and knocked unconscious. He was taken by ambulance and helicopter to Kootenai Medical Center Emergency Department, where he was examined and diagnosed by Duane R. Anderson, M.D., an orthopedic surgeon with: (1) Closed head trauma with temporary loss of consciousness. (2) Right shoulder contusion. (3) Left AC separation, probably grade 2. (4) Left lower rib fractures. (5) Right nondisplaced triquetral injury. (6) Left thumb injury. (7) Nondisplaced proximal tibial plateau fracture (right knee). (8) Multiple abrasions and contusions. Claimant was discharged on September 22, 2003.

4. Claimant's post-2<sup>nd</sup> accident medical care was, for the most part, undertaken by Dr. Dirks (back) and Dr. Anderson (right knee and left shoulder). A February 2004 lumbar MRI revealed degenerative changes, but no recurrent disc herniations. Dr. Dirks treated Claimant conservatively, including a series of two epidural steroid injections that were of little benefit. Dr. Dirks did not believe Claimant was a candidate for further surgery. On October 20, 2004,

Dr. Anderson performed a total right knee replacement that, according to orthopedic surgeon and Dr. Anderson's partner, Douglas McInnis, M.D., resulted in a 20% whole person PPI rating with 50% apportioned to preexisting degenerative joint disease. Claimant was also diagnosed with meralgia paresthetica (a left lateral femoral cutaneous nerve injury) that resulted in a 1% whole person PPI rating with no apportionment.

5. On January 20, 2008, Dr. Dirks responded to a series of questions posed by Cygnus' counsel, indicating that the 1<sup>st</sup> accident was the cause of Claimant's L5-S1 herniated disc creating the need for his surgeries at that level; Claimant reached MMI from the 1<sup>st</sup> accident on July 15, 2003; Claimant suffered an aggravation of his low back condition in the 2<sup>nd</sup> accident; and his diagnosis of Claimant's back following the 2<sup>nd</sup> accident is ongoing degenerative disease of the spine, and his treatment following the 2<sup>nd</sup> accident was due entirely to that accident; however, the 1<sup>st</sup> accident started everything in motion.

6. Claimant has not worked or looked for work since his 2<sup>nd</sup> accident.

#### **IMEs**

7. Claimant has undergone three IMEs; two by **J. Craig Stevens, M.D.**, and one by L. David Rutberg, M.D. Dr. Stevens performed the first IME on November 15, 2003, at Surety's request. Because Claimant was recovering from the injuries he received in his 2<sup>nd</sup> accident he was unable to be examined, so Dr. Stevens conducted a medical records review. Dr. Stevens is a physiatrist. He admitted that it was difficult to glean from the medical records the essential physical findings pertinent to assigning a lumbar impairment rating. He concluded that no further treatment was required for Claimant's back injury. Again, admitting difficulty in determining appropriate restrictions without an examination, he relied upon Dr. Dirks' July 15, 2003, office note and opined that a complete release to full duty without restrictions was

warranted. Dr. Stevens assigned a 10% whole person PPI rating for Claimant's back condition related to his 1<sup>st</sup> accident. Dr. Dirks agreed with Dr. Stevens' IME report, but would have assigned a 40-50 pound lifting restriction.

8. Dr. Stevens performed his second IME of Claimant on January 5, 2006, to address issues related to his 2<sup>nd</sup> accident. Claimant was available for examination and Dr. Stevens reviewed diagnostic studies and additional medical records regarding Claimant's 2<sup>nd</sup> accident. Dr. Stevens opined that Claimant suffered a right tibial plateau fracture superimposed over a "significant" previous history of a prior tibial plateau fracture, as well as preexisting degeneration. Dr. Stevens further opined that Claimant suffered a lumbar strain in the 2<sup>nd</sup> accident, with no further disc protrusion. An EMG of Claimant's left lower extremity was normal even though Claimant reported left L5 sensory deficits and perceived weakness. Dr. Stevens concluded that Claimant suffered a **temporary** aggravation of his preexisting back condition. While Claimant insists he was asymptomatic prior to the 2<sup>nd</sup> accident, he was seen in physical therapy and by Dr. Dirks for back problems up until two months before the 2<sup>nd</sup> injury, insinuating that his lumbar and left radicular complaints are preexisting. Claimant's left shoulder condition is preexisting based on MRI evidence of prior AC joint arthritis. Claimant's cervical spine shows a mild degenerative disc disease without herniation. There is no cervical spine diagnosis related to Claimant's 2<sup>nd</sup> accident. Dr. Stevens relates Claimant's left lateral femoral cutaneous nerve injury causing diminished sensation of the antero-lateral aspect of the left thigh to the 2<sup>nd</sup> accident. Claimant has reached MMI regarding the 2<sup>nd</sup> accident and needs no further medical treatment. The only restrictions stemming from the 2<sup>nd</sup> accident pertain to Claimant's right knee. Dr. Stevens agrees with Dr. Anderson concerning PPI and apportionment regarding the right knee. Dr. Stevens assigned the following PPI ratings: Back – 0% related to the 2<sup>nd</sup>

accident. Right knee – 20% with 50% preexisting. Meralgia paresthetica – 1%, for a total of 11% whole person PPI referable to the 2<sup>nd</sup> accident. Drs. Dirks and McGinnis agree with this IME.

9. **L. David Rutberg, M.D.**, a neurosurgeon, performed an IME at Surety's request on February 29, 2008. At the time of Dr. Rutberg's examination, Claimant's chief complaints were:

. . . aching bilaterally at the webs of the neck going around to the upper back, down into the upper interscapular area. He complains of aching of the left shoulder, numbness of the left arm, pins and needles down the front of his leg on the left and posteriorly the same, pins and needles on the left leg. He has aching in the posterior portion of his knee, specifically the popliteal fossa, that is, the left [*sic*] knee where the total replacement took place.

Cygnus Exhibit T., pp. 8-9.

10. Dr. Rutberg attributes Claimant's current condition to progressive lumbar degenerative disc disease and chronic low back sprain, rather than to Claimant's 2<sup>nd</sup> accident. He does not relate Claimant's cervical complaints to the 2<sup>nd</sup> accident, either. Claimant is not a surgical candidate and any further treatment for his low back should consist of non-narcotic pain medications and anti-inflammatories. Walking and aqua therapy is also recommended. Dr. Rutberg assigned a 5% whole person PPI rating for Claimant's lumbar condition, although he does not relate that rating to Claimant's 2<sup>nd</sup> accident. Dr. Dirks agrees with Dr. Rutberg that further difficulties Claimant may experience regarding his back would be due to the progression of his underlying degenerative disc disease, but that initially Claimant's L5-S1 surgery was directly related to the 1<sup>st</sup> accident.

## DISCUSSION AND FURTHER FINDINGS

### Pre-1<sup>st</sup> accident conditions

#### Left shoulder:

11. The two conditions which could ostensibly constitute preexisting conditions involve Claimant's left shoulder and right knee. Regarding the left shoulder, Dr. Anderson, who primarily treated Claimant for that condition, noted in an undated letter to SIF that he had reviewed some additional medical records at its request and that as of March 9, 2004, Claimant demonstrated a positive impingement sign in his left shoulder, but had excellent range of motion. Dr. Anderson diagnosed impingement syndrome and an AC separation. At that time, Claimant did not wish to consider further diagnostic testing or surgery. Dr. Anderson informed Claimant that he could expect intermittent problems with his left shoulder and may need surgery in the future. Claimant testified at hearing that his left shoulder prevents him from sleeping sometimes and restricts his overhead lifting. There is nothing in Dr. Anderson's records attributing Claimant's left shoulder condition to any pre-existing condition other than his agreement with Dr. Steven' January 5, 2006, IME.

12. Dr. Stevens' January 5, 2006, IME noted: "His left shoulder condition is preexisting, based primarily on the MRI evidence of arthritic features and indeed that appears to be his current symptom pattern of the left shoulder." Cygnus Exhibit M, p. 16. The only left shoulder MRI in evidence is one dated November 14, 2003, that reveals, *inter alia*, "Degenerative AC joint disease is present with inflammatory changes within and around the joint." Cygnus Exhibit L, p. 10. Dr. Rutberg did not concern himself with Claimant's left shoulder in his IME.

13. Based on the paucity of evidence and Dr. Stevens' lack of foundation for his opinion that Claimant's left shoulder problems arise from preexisting degeneration, the Referee is unable to make that finding. There is no evidence that Claimant was suffering from any left shoulder problems before his 1<sup>st</sup> accident.

Right knee:

14. Claimant presented to Dr. McInnis for a PPI rating for his right knee post-replacement. In a September 23, 2005 letter to SIF, Dr. McInnis assigned a 20% whole person PPI rating for Claimant's right TKA without mentioning apportionment. However, in a November 2, 2005 letter to SIF, Dr. McInnis indicated that he had reviewed additional medical records and learned of preexisting arthritis from a remote injury to Claimant's right knee.<sup>2</sup> Even so, Dr. McInnis noted, "However, although he had preexisting arthritis, he was functionally quite able, was fully employed, and did not note any restrictions in his activity." Cygnus Exhibit R, p. 3. Dr. McInnis then went on to apportion 50% of his 20% rating to Claimant's preexisting DJD.

15. Dr. Anderson, who performed Claimant's right knee TKA, noted that Claimant had preexisting DJD of his right knee but was asymptomatic; he could stand and walk all day before the 2<sup>nd</sup> accident.

16. Dr. Stevens, in his January 5, 2006, IME, assigned permanent restrictions due solely to Claimant's right knee condition and agreed with Dr. Anderson regarding the 50-50 apportionment.

17. As with Claimant's left shoulder, the Referee is not convinced that apportionment is appropriate regarding Claimant's right knee. Claimant was not experiencing any problems

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<sup>2</sup> Claimant testified that he injured his right knee when he was 18 years of age that resulted in a surgery.

with his right knee prior to his 1<sup>st</sup> accident. The AMA Guides to the Evaluation of Permanent Impairment discusses the basics of apportionment:

**Apportionment** analysis in workers' compensation represents a distribution or allocation of causation among multiple factors that **caused** or **significantly contributed to** the injury or disease and resulting impairment. The factor could be preexisting injury, illness, or impairment. In some instances, the physician may be asked to apportion or distribute a permanent impairment rating between the impact of the current injury and the prior impairment rating. Before determining apportionment, the physician needs to verify that **all** of the following information is true for an individual:

1. There is documentation of a prior factor.
2. The current permanent impairment is greater as a result of the prior factor (ie, prior impairment, prior injury, or illness).
3. There is evidence indicating the prior factor **caused** or **contributed to** the impairment, based on a reasonable probability (> 50% likelihood).

AMA *Guides*, Fifth Edition, p. 11. Emphases added.

18. Here, there is documentation of a prior tibia plateau fracture but there is no evidence that Claimant's right knee impairment is greater as the result of that remote fracture. Further, there is no "evidence" indicating that Claimant's remote knee injury contributed to his right knee impairment on "a reasonable probability." Drs. McInnis, Anderson and Stevens appear to have arrived at the 50-50 apportionment out of thin air without support in the record. They could have just as easily arrived at a 40-60, 20-80, or any other apportionment percentage. While the Referee agrees that apportionment may not be an exact science, nonetheless, he is not persuaded by this record that Claimant's right knee condition should be apportioned between its condition prior to his 1<sup>st</sup> accident and its subsequent condition.

### **PPI**

"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).

19. Physician-assigned PPI ratings are summarized as follows:

Lumbar

Drs. Stevens and Rutberg: 10% whole person all from 1<sup>st</sup> accident with no apportionment for preexisting conditions.

Dr. Anderson: Agrees with Dr. Stevens regarding his 10% whole person rating.

Right knee

Drs. McInnis, Anderson, and Stevens: 20% whole person with 50% from Claimant’s “remote injury.”

Cervical

No physician has assigned a PPI rating for any cervical injury.

Meralgia Paresthetica

Dr. Lea: 1% whole person from 2<sup>nd</sup> accident with no apportionment.

Left shoulder

No physician has assigned a PPI rating for any left shoulder injury. Although Claimant has invited the Commission to assign its own PPI rating, the Referee declines the invitation. In this Referee’s opinion, in most cases PPI ratings are best left to medical professionals.

20. The Referee finds that Claimant has incurred the following whole person PPI:

Lumbar: 10% with no apportionment to conditions pre-1<sup>st</sup> accident.

Right knee: 20% with no apportionment.

Meralgia Paresthetica: 1%.

Total: 31%.

Claimant asserts that the combined values table found in the AMA Guides should not be utilized because the PPI ratings assigned involve two separate accidents. The Referee agrees, as it is his intent to make each employer liable for the percentage of PPI related to their respective accidents.

The combined values chart is best utilized where multiple impairments arise from a single accident.

### **PPD**

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the

occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

### **VOCATIONAL EVIDENCE**

#### William C. Jordan

21. Surety retained Mr. Jordan to “. . . provide vocational counseling and case management” to Claimant. Jordan Deposition, p. 9. Mr. Jordan authored numerous case notes and reports, and was deposed. Mr. Jordan’s credentials are well known to the Commission and will not be repeated here. Mr. Jordan first met Claimant at Claimant’s home on April 21, 2005, and prepared an Initial Evaluation that same date. Mr. Jordan interviewed Claimant; discussed the two accidents; reviewed past and present medical treatment and prior medical, social, and family histories, financial status and obligations, and education, employment, and salary histories. Mr. Jordan and Claimant formulated a preliminary vocational plan.

22. Mr. Jordan noted that Claimant quit school in the ninth grade and had not obtained his GED. Claimant's employment history includes:

He hasn't served in the military. He has done a variety of heavy equipment operation, including operating skidder, loader, backhoe, forklift, front end loader, dozer. He's operated delimeter machines in logging. And he's done drilling for oil in the oil fields. He's done logging, including working on a landing and operating equipment. He's done maintenance and mechanic work, building maintenance and maintenance on machinery. He's been a pipe grinder. Worked in a welding shop. He's done retread work for tires. Been a machine operator on a retread machine. He's been a tire repairer. He's repaired brakes for cars and vehicles. He's done alignments on trucks and cars and has been a bus servicer. He's also been a sawmill worker where he operated cut saw, sanders, shapers and cut-off saws.

Jordan Deposition, p. 14.

23. Mr. Jordan reported that Claimant was not registered with the Department of Employment as had been recommended by ICRD and had not looked for work following his 2<sup>nd</sup> accident. Because Claimant was still in recovery, he and Mr. Jordan discussed retraining programs. Claimant expressed an interest in cost estimating and project management programs available through Northwest Technical Institute (NTI) in Portland, Oregon. Claimant expressed some concern regarding his deficiencies in math that may inhibit his ability to successfully complete the retraining. However, Mr. Jordan suggested that Claimant explore a math tutoring program available in Sandpoint and also pointed out that NTI would provide additional assistance in that area. Although not required as a condition of acceptance at NTI, Claimant was informed that obtaining his GED may be advisable and that classes in that regard were available in Sandpoint. Mr. Jordan gave Claimant names and contact numbers. Claimant never followed up with those contacts. Mr. Jordan was to follow-up with Claimant's treating physicians to determine whether Claimant could physically undertake such training. Drs. Dirks and Stevens

approved the job descriptions for project manager, cost estimator, and welding inspector, among others.

24. As Claimant was concerned with health issues, the idea of retraining was “back-burnered.” On January 24, 2006, Claimant informed Mr. Jordan that he wanted to settle his case and move on. Claimant erroneously thought that Mr. Jordan could assist him in that regard. Instead, Mr. Jordan informed Claimant that he would put together a cost estimate of the NTI programs and forward that to SIF for its consideration. He also indicated to SIF that he would prepare an employability report and labor market survey. Claimant was not furnished with the survey or report because, according to Mr. Jordan, he never asked for them. After Claimant informed him of his intent to settle, Mr. Jordan had no more personal contact with him. Claimant testified that he felt “abandoned” by Mr. Jordan.

25. Mr. Jordan identified a number of jobs in Claimant’s labor market that were available and approved by his treating physicians. Unfortunately, none of those potential jobs were made known to Claimant.

#### Robert R. Cornell

26. Claimant retained Mr. Cornell to assist him with vocational issues, but was not hired to find Claimant a job. Mr. Cornell is self-employed in the vocational rehabilitation field. His office is located in Rathdrum. He has bachelor’s and master’s degrees in vocational rehabilitation. He is a Certified Vocational Evaluations Specialist that he described as similar to the Certified Vocational Counselor (CVR) designation, but with more emphasis on “testing of measurements.” Mr. Cornell initially handled Washington state workers’ compensation issues in his practice, but decided to devote more time to “real rehab,” that is, working with the general population rather than deal with the litigation that frequently accompanies worker compensation claims. His practice currently consists of approximately 2% workers’ compensation cases.

27. Mr. Cornell interviewed Claimant for an hour on July 18, 2007, and on July 31, 2007, administered “Valpar Avatar” testing he described as a computerized assessment of academic, spatial, shape and size discrimination, memory, and problem solving abilities. The test has no built-in validity/reliability features. The testing took four or five hours to complete. Mr. Jordan testified that the test was usually used with people having no vocational aptitude or for aptitude testing with students just graduating. At some point during the course of the testing, Claimant complained of increased pain in his low back and left shoulder, as well as increased numbness in his left forearm and fingers. Mr. Cornell testified that Claimant scored the highest in spatial aptitude and color discrimination and lowest in math and spelling. Mr. Jordan testified that all the tests show is that Claimant is in need of remedial training in math and spelling.

28. Mr. Cornell takes exception to Mr. Jordan’s retraining program at NTI for a number of reasons. First, Mr. Cornell, who was somewhat familiar with NTI’s programs, contacted them to determine their admission requirements. He learned that NTI tests for math and verbal reasoning, neither of which are Claimant’s strong suits. On the other hand, Mr. Cornell testified that it was his impression that NTI would accept anyone who paid their fee. Second, Mr. Cornell’s staff contacted some employers<sup>3</sup> and learned that project managers are required to perform tasks exceeding Claimant’s physical restrictions. Third, some employers of cost estimators require a two-year degree; some required four years in civil engineering. Based on the foregoing, Mr. Cornell does not believe the NTI programs recommended by Mr. Jordan are a viable option for Claimant.

29. Mr. Cornell described Claimant’s “limiting factors” as his inability to sit, stand, and walk due to back pain; knee pain; low academic skills including lack of a GED; low spelling,

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<sup>3</sup> In his deposition, the only employer Mr. Cornell was able to identify that his staff actually contacted in the Sandpoint area was Garco Building Systems.

language, math, and writing skills; and, “. . . his difficulty in anxiety in terms of dealing with the public.”<sup>4</sup> Cornell Deposition, p. 42.

30. Although he did not conduct a labor market survey in Claimant’s labor market, Mr. Cornell is of the opinion that there are no jobs regularly and continuously available to Claimant and that it would be futile for Claimant to search for such employment.

ICRD consultants Richard Hunter and Kurt Kopsa

31. Claimant was referred to ICRD and consultant Richard Hunter by SIF on July 18, 2002, between his 1<sup>st</sup> and 2<sup>nd</sup> accidents. Mr. Hunter worked with Claimant and Cygnus to ease him back into the workforce after his two low back surgeries. However, Cygnus terminated Claimant’s employment in early January 2003. Mr. Hunter closed his file after Claimant commenced employment with RCL. After his 2<sup>nd</sup> accident, the case was re-opened and assigned to consultant Kurt Kopsa.

32. Mr. Kopsa first met with Claimant on September 24, 2003, when he was still in a period of recovery from his 2<sup>nd</sup> accident. By December 16, 2003, Dr. Anderson had released Claimant to sedentary work. Mr. Kopsa’s plan was to return Claimant to his pre-injury occupation as a logger, pending medical stability. On June 28, 2004, because Mr. Kopsa could find no sedentary work for Claimant, he was instructed to contact Adult Basic Education at North Idaho College to obtain his GED. Claimant did not follow-up with that suggestion. On September 22, 2004, Mr. Kopsa closed Claimant’s file due to long-term medical recovery and Claimant’s pending knee replacement. Mr. Kopsa noted, “Given the extent of the injuries and surgical intervention involved, it is unlikely Claimant will return to his pre-injury occupation. The labor market is unknown but it is anticipated that Claimant will be very limited in his

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<sup>4</sup> As there is no documentation regarding Claimant’s lack of “people skills” or his anxiety around people, Mr. Cornell relies solely on Claimant’s self-reporting of this “limitation.”

abilities once he achieves medical stability.” Cygnus Exhibit D., p 74. Mr. Kopsa indicated that either Claimant or SIF could request that his file be re-opened in the event additional vocational services became necessary. No such request was ever made.

### **100% method**

33. Claimant contends he is totally and permanently disabled. There are two ways to prove total and permanent disability. The first is by proving that Claimant’s medical impairment together with pertinent non-medical factors totals 100%. Here, Claimant’s total PPI equals 31% whole person. While Claimant has been assigned certain permanent restrictions to be discussed later in this decision, no physician has indicated that he cannot work. In fact, 10 out of 12 job descriptions submitted to Drs. Dirks and Stevens by Mr. Jordan were approved as appropriate given Claimant’s physical restrictions. The Referee is unable to find that Claimant is totally and permanently disabled pursuant to the 100% method.

### **Odd-lot**

Even though Claimant has failed to prove he is totally and permanently disabled under the 100% method, he may still be able to establish such disability pursuant to the odd-lot doctrine. An odd-lot worker is one “so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road*

*Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

An injured worker may prove that he or she is an odd-lot worker in one of three ways (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

34. Claimant has not attempted work without success nor has he or others on his behalf searched for suitable work and found such work to be unavailable. While Mr. Cornell concluded from his experience that there were no jobs regularly and continuously available to Claimant in his labor market, he did not contact any prospective employers in the Sandpoint area to determine whether there were any actual jobs Claimant might be able to perform within his restrictions. Mr. Jordan contacted actual employers with actual openings in Claimant's labor market that were physician-approved, but failed to so inform Claimant so that he could follow up if he desired.<sup>5</sup> Therefore, Claimant has failed to prove he is an odd-lot worker by the first two methods.

35. The last method to establish odd-lot status is by showing that any work search would be futile in that there are no jobs regularly and continuously available within his

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<sup>5</sup> Mr. Jordan was somewhat justified in severing his ties with Claimant after Claimant informed him that he wanted to settle his case. Claimant denies telling Mr. Jordan that he wanted to move out of state to operate a backhoe or some other equipment. In any event, Claimant does not deny that he was concerned about his medical stability and put off making a decision regarding retraining. Had Claimant decided against retraining, nothing prevented him from so informing Mr. Jordan and/or Mr. Kopsa, so that actual employment opportunities could have been further explored with Claimant's active participation.

restrictions. It is therefore necessary to examine just what permanent physical restrictions have been assigned to Claimant for his various injuries from both accidents. Dr. Stevens assigned no restrictions for Claimant's lumbar spine. Dr. Dirks agreed, but would add a 40-50 pound lifting restriction as a precaution after two back surgeries. Regarding Claimant's right knee, Dr. Stevens recommended no heavy lifting (no more than 20 pounds), no repetitive squatting, climbing, or long duration walking (more than 300 yards accumulated per day).

36. Claimant participated in a Functional Capacity Evaluation (FCE) on January 15 and 16, 2007, for a total of about five hours. The FCE was performed by Mark Bengston, P.T., and was determined by him to be consistent and valid. The FCE noted the following "significant limitations": walking, standing, and other ambulatory activities secondary to right knee pain; crouching; climbing stairs and stepladders; kneeling on right knee; waist-to-crown lifting and overhead work; and sitting limited to 20 minutes consecutively. The FCE is interpreted by Mr. Bengston as allowing Claimant to participate in an eight-hour workday in the sedentary-to-light work categories.

37. The Referee finds that Claimant is not receptive to the retraining program identified by Mr. Jordan and questions whether, even if successful in completing the program, he could have performed the duties involved in either position should he have been fortunate enough to have been hired. However, the Referee is not convinced that it would be futile for Claimant to conduct a meaningful search for employment. Claimant does not appear as interested in returning to gainful employment as he was after his 1<sup>st</sup> accident. At that time, Claimant had registered with Job Service and that is how he obtained employment with RCL. After his accident there, Claimant has made no effort to find suitable employment. It is one thing to broadly assert that no such employment is available as Mr. Cornell has done,<sup>6</sup> but it is another to actually survey the labor market to ascertain whether that is in fact the case. Mr.

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<sup>6</sup> Mr. Cornell's inability to identify any jobs that Claimant might be able to perform may be explained by his failure to conduct a labor market survey or contact any potential employers.

Jordan identified a number of jobs that Claimant may be able to perform, and all were approved by Claimant's treating physician. Mr. Cornell's sole reliance on the FCE regarding Claimant's restrictions in the place of, or in conjunction with, physician-imposed restrictions undermines his "futility" opinion. As an example, the FCE indicates that Claimant cannot sit for more than 20 minutes. Yet, no physician has so restricted Claimant and the Referee noted that Claimant sat for considerably longer than that at the hearing. Further, Mr. Cornell placed great emphasis on Claimant's perceived inability to work around people. Claimant testified that he can work around other co-workers; it is the general public that he has problems with, as in customer service or sales. Mr. Jordan testified that Claimant never mentioned that problem to him. Claimant testified that he did. In any event, many of the potential jobs located by Mr. Jordan were summarily dismissed by Mr. Cornell on Claimant's alleged "people-skills" deficiency. Moreover, Mr. Cornell refers to left upper extremity limitations that no physician has recognized in reaching his "futility" opinion. Additionally, Mr. Cornell does not take into consideration any transferrable skills Claimant has accumulated during his years in the work force. Finally, Mr. Cornell cites Claimant's lack of a GED and math skills as an obstacle to finding employment. Claimant was provided with information from Mr. Jordan that could have assisted Claimant in obtaining his GED and remedial math training but Claimant did not follow through, thinking that he did not need to.

38. The Referee finds that Claimant has failed to prove that he is an odd-lot worker.

#### **Disability in Excess of Physical Impairment**

39. Even though Claimant has failed to prove total disability by either the 100% method or by the odd-lot doctrine, he may still prove PPD in excess of his PPI, but less than total.

40. As noted, Claimant's treating/evaluating physicians have endorsed significant limitations/restrictions for Claimant to protect him from further injury. As well, Claimant has

testified to his subjective complaints, including aching and swelling in his right knee, aching in his left shoulder which interferes with his sleeping and overhead lifting, constant low back pain with occasional left leg pain, and neck and rib pain that interferes with sleeping.

Because of these complaints, Claimant does not believe there are any jobs he can perform. Admittedly, some of the potential jobs identified may not be suitable for Claimant; however, the main reasons given by Claimant at hearing as to why he could not perform most of the jobs were his inability to work with the public<sup>7</sup> and difficulty with sitting, neither of which are physician-imposed restrictions. Simply stated, there is employment suitable for Claimant in his labor market. Granted, the potential employment will not afford the same level of earnings as Claimant's time-of-injury employment. Further granted, such employment may not be the "perfect fit" for Claimant, but that is not the standard in determining PPD.

41. When taking into consideration Claimant's objective and subjective physical restrictions, age, education, work experience and transferrable skills gained therefrom, loss of wage earning capacity, loss of job market access, as well as those factors enumerated in Idaho Code §§ 72-424 and 430, the Referee finds that Claimant has incurred PPD of 70% inclusive of his PPI.

### **Apportionment**

Claimant contends that apportionment is not an issue as Claimant is entitled to disability benefits under both claims. Cygnus contends that, in the event PPD above PPI is found, all liability therefor belongs to RCL as Claimant was at MMI from the 1<sup>st</sup> accident at the time of his

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<sup>7</sup> The Referee noted that Claimant at hearing paid close attention to the questions asked of him, was quick to answer, and was very articulate, considering his education. Claimant did not appear to exhibit "social anxiety," at least in the hearing context.

2<sup>nd</sup>. RCL contends that any liability for benefits should be apportioned between it and Cygnus as Claimant was not, in fact, at MMI from his 1<sup>st</sup> accident at the time of his 2<sup>nd</sup>.

42. There is no dispute that Claimant's right knee total knee arthroplasty and his left leg meralgia paresthetica are products of the second industrial accident and are the responsibility of RCL. Concerning the limitations/restrictions that stem from these conditions, Dr. Rutberg provided the following information in his February 29, 2008 IME:

Please describe Mr. Stone's current restrictions and limitations, and differentiate between those that apply solely to the injury of September 16, 2003, and those that have resulted from any subsequent causes or factors, or from any preexisting causes or factors.

So far as current restrictions and limitations, the patient's limitations and restrictions, specifically referring to the injury of September 16, 2003, would of course limit him to avoiding any type of prolonged walking or climbing activities. He could, nevertheless, use his arms, which are completely unimpaired, for some type of clerical work or assembly work where he could sit. So far as limitations in lifting, he should not lift anything heavier than 35 pounds and should not engage in any frequent bending or stooping. This patient has a limited educational background, having finished only the 10<sup>th</sup> grade; nevertheless, he certainly can read and could perform some type of manual labor in the competitive workplace, preferably when he could be seated or require limited walking or time on his feet.

RCL Exhibit 2, p. 673.

In addition to the limitations/restrictions which arise from the Claimant's right knee and left leg injury, Claimant has limitations/restrictions which relate to his lumbar spine condition. Dr. Dirks' records reflect that he would release Claimant to return to work with a limitation against lifting more than 40 – 50 pounds in order to protect his back from further injury. In his deposition, Dr. Dirks elaborated on Claimant's current low back limitations/restrictions, stating that Claimant is now capable of performing "light duty only." However, Dr. Dirks' testimony also suggests that his use of the term "light duty" is not inconsistent with his view that Claimant may be able to perform lifting in the 40 – 50 pound range. (*See*, Dirks Deposition, pp. 16-17).

Regardless, it seems clear from the medical records that Claimant does have a significant limitation arising from his lumbar spine condition, in addition to the limitations/restrictions stemming from his right knee and left leg limitations, limitations which are solely related to the second industrial accident.

One of the difficulties in this case lies in making some judgment as to the extent and degree to which Claimant's lumbar spine limitations are referable to the first industrial accident as opposed to the second industrial accident. In other words, how should Claimant's lumbar spine limitations, and the disability arising there from, be apportioned between the first and second industrial injuries?

To be sure, the record establishes that Dr. Dirks did release Claimant to return to "regular duty" following the second L5-S1 surgery. Claimant did evidently perform heavy work tasks associated with his employment by RCL for at least two days before the second industrial injury. However, the Referee doubts that this trial at regular duty employment is sufficient to support the conclusion that Claimant had no limitations/restrictions as a result of the first industrial accident. Indeed, Dr. Dirks' testimony establishes that he did believe that there was reason to impose permanent limitations/restrictions on Claimant following the second surgery. As explained by Dr. Dirks, it is often possible to return an injured worker to unrestricted activity following a successful lumbar spine surgery. However, if the worker suffers a failed low back surgery, thus requiring repeat surgical exploration, one must be much more cautious about returning the injured worker to physical activity:

Q: Prior to the second accident when you released him from your care after his first accident.

A: At that point I probably would have stuck with something like a light duty or a regular duty with some lifting restrictions to 40 to 50 pounds. And that's consistent kind of with what I say there. After the first surgery if somebody will

work their back muscles and get them back into shape, then you can pretty much get people back to doing whatever they were doing before in most cases, or in a lot of cases, if they will work at it. Generally speaking, after a second surgery, they are kind of a two-time loser as far as back surgery goes and try to tend to regulate how much lifting they are going to do. Unless they really work at it to get themselves back into shape again. The problem is with the industrial accident surgeries you are going to have increased degeneration in the lumbar spine and acceleration of that. And that's going to create more problems. So the more lifting you do, the more problems you are ultimately going to have.

Dirks Deposition. p. 11-12.

The Referee appreciates that it is Claimant's subjective sense that he enjoyed a complete and full recovery following the second surgery, as evidenced by his brief return to regular duty activities. However, the Referee is more persuaded by the expert testimony of Dr. Dirks, Claimant's treating physician, that the fact that Claimant required two lumbar spine surgeries following the 1<sup>st</sup> accident did, in fact, leave him with certain permanent limitations/restrictions relating to his lumbar spine.

Dr. Dirks testified that Claimant's low back condition has continued to deteriorate, with multi level degenerative changes noted throughout Claimant's lumbar spine, most significant at the L5-S1 surgical level. It is these ongoing degenerative changes that are thought to be primarily responsible for Claimant's low back limitations/restrictions. The question that arises is the extent and degree to which the industrial accidents, or either of them, are responsible for these limitations/restrictions. Again, Dr. Dirks has offered compelling testimony on this point as Claimant's treating physician, and is the only physician that has seen Claimant both before and after the 2<sup>nd</sup> accident.

Dr. Dirks has clearly testified that it is his view that both accidents are implicated in contributing to Claimant's ongoing degenerative low back problems, although he believes that the 1<sup>st</sup> accident is the most significant of the two events. Dr. Dirks is of the view that Claimant's

low back complaints have their genesis in the 1<sup>st</sup> accident, leading to two L5-S1 surgeries, and that Claimant's low back condition was further exacerbated by the 2<sup>nd</sup> accident. (See, Dirks D, pp 17-20; 23, 27). Viewed as a whole, the testimony demonstrates that Dr. Dirks is unequivocal in his view that the initiating event in Claimant's long cascade of low back difficulty is the 1<sup>st</sup> accident, as subsequently aggravated by the 2<sup>nd</sup> accident. Although Cygnus would have the Referee dismiss the 1<sup>st</sup> accident as insignificant, it is impossible to do so in view of Dr. Dirks' testimony. Indeed, Dr. Dirks intimates that Claimant's current limitations/restrictions are not much different than the limitations/restrictions Dr. Dirks would have recommended for Claimant following the second L5-S1 surgery. (See, Dirks Deposition, pp 15-16).

Based on the foregoing, the Referee concludes that as the result of the 1<sup>st</sup> industrial accident, Claimant was left with limitations/restrictions against engaging in lifting over 40 – 50 pounds. Following the 2<sup>nd</sup> accident, Claimant suffered additional limitations/restrictions, as described by Dr. Rutberg. These limitations/restrictions are more onerous. Dr. Rutberg would restrict Claimant from lifting anything heavier than 35 pounds, presumably to protect his right knee from further injury. However, after reviewing the relevant medical records, and, in particular, the testimony of Dr. Dirks, the Claimant's treating physician, the Referee is persuaded that some portion of Claimant's disability must be assigned to the first industrial accident. Based on the foregoing, the Referee concludes that of Claimant's 39% disability in excess of physical impairment, 15% should be assigned to the 1<sup>st</sup> accident, and 24% assigned to the 2<sup>nd</sup> accident.

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**CONCLUSIONS OF LAW**

1. Claimant's condition is not due in whole or in part to a preexisting injury or disease or cause not work-related.
2. Claimant is entitled to whole person PPI benefits of 31%.
3. Claimant is entitled to PPD benefits equaling 70% inclusive of his PPI.
4. Claimant is not totally and permanently disabled.
5. Apportionment between the two employers herein is appropriate. RCL is responsible for 24% of the PPD benefits awarded in excess of physical impairment, and Cygnus is responsible for 15% of the PPD benefits awarded in excess of physical impairment.

**RECOMMENDATION**

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

DATED this \_\_\_17th\_\_\_ day of July, 2009.

INDUSTRIAL COMMISSION

\_/\_s/\_/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_/\_s/\_/\_\_\_\_\_  
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2009, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO  
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BRADLEY J STODDARD  
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H JAMES MAGNUSON  
PO BOX 2288  
COEUR D'ALENE ID 83816

cjh

*Gina Espinosa*

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

TED STONE, )  
)  
                    Claimant, )  
)  
          v. )  
)  
ROY CLIFF LOGGING, )  
)  
                    Employer, )  
)  
          and )  
)  
CYGNUS, INC., )  
)  
                    Employer, )  
)  
          and )  
)  
STATE INSURANCE FUND, )  
)  
                    Surety, )  
)  
                    Defendants. )  
\_\_\_\_\_ )

**IC 2002-512382  
2003-519831**

**ORDER**

filed August 20, 2009

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended 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 recommendation of the Referee. The Commission concurs with this recommendation. 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's condition is not due in whole or in part to a preexisting injury or disease or cause not work-related.

2. Claimant is entitled to whole person permanent partial impairment benefits of 31%.

3. Claimant is entitled to permanent partial disability benefits equaling 70% inclusive of his permanent partial impairment.

4. Claimant is not totally and permanently disabled.

5. Apportionment between the two employers herein is appropriate. RCL is responsible for 24% of the PPD benefits awarded in excess of physical impairment, and Cygnus is responsible for 15% of the PPD benefits awarded in excess of physical impairment.

DATED this 20th day of August, 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 \_\_20th\_ day of \_\_August \_\_\_\_ 2009, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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ge/cjh

*Gina Espinoza*