

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANIEL LISBONY,)
)
 Claimant,)
)
 v.)
)
 DELTA FIRE SYSTEMS, INC.,)
)
 Employer,)
)
 and)
)
 TRAVELERS PROPERTY CASUALTY)
 COMPANY OF AMERICA,)
)
 Surety,)
 Defendants.)
 _____)

IC 2008-002988

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

filed Sept. 8, 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 February 5, 2009. The Referee submitted her recommendation, the Commissioners, having reviewed the same, have prepared modified findings and conclusions. Andrew M. Schepp represented Claimant and Eric S. Bailey represented Defendants. 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 June 26, 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 reasonable and necessary medical care as provided for by Idaho Code § 72-432;
2. Whether and to what extent Claimant is entitled to travel expenses;
3. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits;
4. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;
5. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits in excess of impairment;
6. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
7. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804;
8. Whether the Commission should retain jurisdiction beyond the statute of limitations; and
9. Whether and to what extent Defendants are entitled to reimbursements from a third party pursuant to Idaho Code § 72-223.

Neither party presented evidence or argument regarding travel expenses, retention of jurisdiction or reimbursements from a third party. These issues will be considered withdrawn and will not be further addressed in this decision.

CONTENTIONS OF THE PARTIES

Claimant contends that his industrial accident of January 21, 2008 permanently aggravated his spinal condition and resulted in a shoulder injury. He asserts that his PPI rating is 30% with no more than half of the rating attributable to pre-existing conditions. Claimant relies

on the medical opinions of Richard Radnovich, D.O., and the vocational opinions of Nancy Collins, Ph.D., to establish permanent restrictions and PPD of 80%, inclusive of PPI. Claimant denies that his pre-existing spinal condition required modification of activities and asserts that his PPD is attributable to his industrial injury and not subject to apportionment. Claimant seeks an additional eight weeks of TTD benefits from April 3, 2008 through June 2, 2008 because he was prematurely certified at maximum medical improvement (MMI) and continued to be in a period of recovery. Claimant contends that he is entitled to past unpaid medical expenses for treatment rendered by Andrew Kidder, D.C. at Advantage Walk-In Chiropractic (Advantage) and to future medical benefits in accordance with the opinions of Dr. Radnovich. He asserts that an award of attorney fees is appropriate because Defendants unreasonably denied medical treatment after April 2008.

Defendants contend that Claimant's industrial accident resulted in soft tissue injuries and a temporary aggravation of Claimant's pre-existing spinal condition. Defendants assert that Claimant was not entirely forthcoming when describing his past medical treatment and question Claimant's inability to recall information that would potentially allow Defendants to locate additional medical records pertaining to the nature and extent of Claimant's pre-injury treatment and limitations. Defendants further contend that Claimant's PPI rating is 5% with the entire amount attributable to pre-existing conditions. Alternatively, Defendants assert that Claimant's PPI rating should not exceed 7.5%, should it be determined that Claimant suffered a permanent aggravation to his lumbar spine. Defendants rely on the medical opinions of Ralph Sutherlin, D.O., and the vocational opinions of Douglas Crum, CDMS, to establish that Claimant's restrictions are the result of pre-existing conditions and no PPD resulted from his industrial

injury. Defendants maintain that benefits were properly administered and that there is no basis for an award of attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 11;
2. Defendants' Exhibits 1 through 13;¹
3. Testimony taken at hearing from Claimant, Claimant's wife Denise Lisbony, vocational expert Nancy Collins, PhD., and Employer field superintendent Lynn Beus;
4. The post-hearing depositions of occupational medicine physician Ralph Sutherlin, D.O., vocational expert Douglas N. Crum, CDMS, and family/sports medicine physician Richard Radnovich, D.O.

Claimant seeks to exclude the opinions offered by Mr. Crum as a discovery sanction for untimely disclosure and because Mr. Crum's opinions were developed post-hearing in contravention of J.R.P. 10(E)(4). Claimant objects to consideration of both Mr. Crum's report and his deposition testimony. Claimant's objection is sustained with regard to Exhibits 1 and 2 offered at Mr. Crum's post-hearing deposition. Exhibit 1 is Mr. Crum's resume that was not timely identified by Defendants pursuant to J.R.P. 10(C). Exhibit 2 is Mr. Crum's report that was not created until February 9, 2009, four days after hearing. Defendants failed to establish good cause for the post-hearing creation and exchange of Mr. Crum's report. Although the anticipated report was timely identified as a document "to be provided upon receipt" it is excluded pursuant to J.R.P. 10(E)(4) because it was not generated prior to hearing.

¹ Although Defendants' Exhibit 11 was admitted at hearing without objection, the exhibit was not considered because it consists entirely of medical records pertaining to someone other than Claimant and appears to have been inadvertently offered.

Claimant's objection to the deposition testimony of Mr. Crum is overruled. Defendants gave timely notice of Mr. Crum's deposition in accordance with J.R.P. Rule 10(E)(1) by serving the deposition notice on Claimant on January 16, 2009, more than ten days prior to hearing. Claimant's objection based on Defendants' failure to comply with discovery requests seeking disclosure of expert opinions was considered and is well taken. However, the evidence is void of either Claimant's discovery requests to Defendants or Defendants' discovery responses. Absent evidence of Defendants' failure to comply with discovery requests and/or the existence of a motion compelling Defendants' responses to discovery requests, it would be improper to strike the deposition testimony of Mr. Crum. Claimant's assertion that Mr. Crum's deposition testimony should be disallowed because it was developed following the hearing was also considered. J.R.P. Rule 10(E)(4) requires that post-hearing deposition testimony not be based on evidence developed, manufactured or discovered following the hearing. Mr. Crum's interview with Claimant occurred on January 29, 2009, approximately one week prior to hearing. Mr. Crum reviewed and relied upon exhibits and evidence admitted at hearing. In spite of the fact that Mr. Crum's report was not generated until after hearing and that Mr. Crum received medical records "shortly after" his interview with Claimant, his deposition testimony does not reflect that his opinions were based on information that was not known to him and available to the parties prior to hearing.

All other objections made during the post-hearing depositions are overruled.

After having considered all the above evidence and the briefs of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

Background

1. Claimant was 60 years old and resided in Meridian at the time of hearing. He attended high school through the 11th grade in California and obtained a GED in the early 1970s. He completed a five year apprenticeship program in fire sprinkler installation, after which he was qualified to work as a journeyman and foreman pipe fitter. Claimant has limited computer skills. The majority of his work experience is in the fire suppression industry and pool installation. Other jobs have included automotive work and basic plumbing.

2. Claimant worked for Cosco Fire Protection in Los Angeles for 25 years as a journeyman and foreman where his wages began at \$16 per hour and peaked at \$26 per hour. Claimant had various other jobs in the fire suppression industry that lasted one year or less. He worked laying pipes for custom swimming pools in Las Vegas and had his own pool company from 2005-2006 which was not consistently profitable.

3. While in California, Claimant became a member of the Sprinkler Fitters Union and has maintained union membership with sister local unions in Washington and Idaho. Claimant was able to work both union and non-union jobs, but the union jobs paid better and had better benefits.

4. Claimant began working for Employer in April 2007 pursuant to a union contract. He earned \$30.20 per hour, plus benefits of health insurance and a pension plan. Claimant performed work for Employer in the Twin Falls area and was considered a non-local worker for union purposes since he lived and had union affiliation in the Boise area. Physical aspects of Claimant's job included unloading pipe with up to 75 pounds of lifting; laying out material on the floor and installing pipes overhead, usually from a ladder.

Pre-Injury Medical Treatment

5. In the mid-1990s, Claimant underwent surgery to his right shoulder to repair a torn rotator cuff and arthroscopic surgery to his left knee. The right shoulder injury was handled as a Washington workers' compensation claim and the left knee injury resulted from a non work-related motorcycle mishap.

6. In early 2000, Claimant was evaluated for left-sided radicular pain and was diagnosed with sciatica. The records do not identify an injury or otherwise identify the etiology of Claimant's symptoms. The condition resolved on its own but recurred in December 2000. Claimant was diagnosed with discogenic back pain and referred for an MRI and surgical consultation. Conservative treatment was recommended and Claimant was not found to be a surgical candidate. Claimant's symptoms persisted and Claimant was "living with the pain" and "still on light duties" in April 2001. Claimant's Exhibit 2.

7. A lumbar MRI was performed on May 30, 2001 and revealed multi-level canal stenosis; diffuse degenerative disc bulges at L1-2 and L5-S1 and a broad-based left paracentral protrusion at L1-2.

8. Claimant's back pain and symptoms continued through late 2001, during which time Claimant continued to work. Claimant completed a series of epidural steroid injections in August 2001 and was discharged with his pain "much improved." Claimant received intermittent medical treatment through 2004 for conditions unrelated to his spine and those records do not reflect complaints of back pain. Claimant's Exhibit 2.

9. Claimant initiated treatment at Strickland Family Chiropractic in February 2007 with complaints of monthly low back pain that "comes and goes." Claimant described radicular

pain into his right buttock. Claimant was treated approximately 15 times during April and May of 2007. Defendants' Exhibit 10.

10. Claimant received chiropractic treatment at Stork Spinal Care on approximately 20 occasions from June 29, 2007 through November 9, 2007. Claimant reported a two year history of low back pain in his right sacroiliac region with radiation into his right calf. It was noted that Claimant's condition was aggravated by working. Claimant's wife used to work at Dr. Stork's office and, as a benefit, both she and Claimant received free treatment. Both Claimant and his wife testified that Dr. Stork's practice was limited to adjustment and treatment of the upper neck.

11. Claimant sought chiropractic treatment on two occasions prior to his industrial injury at Advantage with Andrew Kidder, D.C. Billing records reflect services rendered in February 2007 and on January 9, 2008.

Injury and Treatment / Evaluation

12. On January 21, 2008, Claimant was standing on an upper rung of a ten-foot fiberglass ladder while holding a steel pipe near the ceiling of an unfinished commercial building. The pipe was several feet long and a co-worker was holding the other end from a separate ladder. The pipe weighed approximately 100 pounds. Claimant's ladder broke or gave way and he fell to the floor, landing on his back.

13. Immediately following the injury, Claimant was taken by ambulance to the emergency room at Magic Valley Regional Medical Center where he was treated and released. X-rays of Claimant's spine, right elbow and right ankle were negative for fracture. Claimant was diagnosed with lumbar back pain and contusions to his right elbow and ankle. Claimant was

given medication for pain and instructed to follow-up with his primary care physician or to return to the emergency room if his symptoms worsened.

Ralph M. Sutherlin, D.O.

14. On February 18, 2008, Claimant initiated treatment with Ralph M. Sutherlin, D.O., at St. Luke's Occupational Health Clinic in Meridian. Dr. Sutherlin specializes in occupational medicine and family practice. Claimant reported ongoing lumbar pain with new symptoms in his right shoulder and neck. Dr. Sutherlin diagnosed strains and contusions of the cervical and lumbar spine as well as contusions to the right ankle and elbow. Claimant was prescribed medication and given work limitations, including a 15 pound lifting restriction. He was referred to physical therapy.

15. Based on Claimant's cervical complaints, Dr. Sutherlin referred Claimant for a cervical MRI that was performed on February 18, 2008 and revealed multi-level degenerative disc and facet disease with osteophytes and stenosis. Dr. Sutherlin described Claimant's cervical MRI findings as consistent with age and not caused by recent trauma.

16. Claimant participated in physical therapy and continued to treat with Dr. Sutherlin. Claimant underwent a lumbar MRI on February 26, 2008 which revealed multilevel degenerative disc and facet disease as well as stenosis and nerve root impingement at L3-4. Dr. Sutherlin did not attribute Claimant's lumbar MRI findings to the industrial injury. Claimant's work restrictions were modified to include up to 20 pounds lifting; no repetitive stooping, bending or twisting; and change of positions as needed. In mid-March 2008, Claimant was permitted to lift up to 25 pounds.

17. Dr. Sutherlin explained that Claimant's industrial injury would heal with time. He determined that Claimant suffered soft tissue injuries with a slight exacerbation of degenerative joint disease.

18. Dr. Sutherlin certified that Claimant reached MMI at the time of his evaluation on April 3, 2008. He diagnosed exacerbation of degenerative joint disease in Claimant's cervical and lumbar spine with resolved contusions. Dr. Sutherlin assigned a 5% whole person PPI rating for Claimant's lumbar spine condition in accordance with the 5th Edition of the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*. The rating was based on a Category II diagnoses related estimate (DRE).

19. Dr. Sutherlin concedes that it may have been appropriate to base Claimant's PPI rating on the range of motion (ROM) model of the *Guides*, but he did not do so because Claimant's lumbar range of motion was good at the time of evaluation and would have resulted in an impairment rating of less than 5%.

20. Dr. Sutherlin did not assign PPI attributable to Claimant's cervical spine because he did not feel that Claimant's cervical impairment would be a hindrance to his employment.

21. Dr. Sutherlin assigned permanent restrictions of no lifting greater than 30 pounds; no repetitive stooping, bending, twisting; and the need for frequent change of positions.

22. Significantly, Dr. Sutherlin attributed Claimant's PPI and need for permanent restrictions to chronic pre-existing conditions based on post-injury MRI findings of the cervical and lumbar spine. Dr. Sutherlin felt that, based on Claimant's age and degenerative conditions, he should find alternate employment that was less physically demanding. Claimant's contusions related to the industrial injury resolved by April 3, 2008. Claimant's soft tissue injuries and contusions, alone, would not result in the need for permanent physical restrictions.

23. Dr. Sutherlin did not have access to Claimant's pre-industrial injury medical records prior to evaluating Claimant, but was provided with and reviewed them prior to giving his post-hearing deposition. The pre-injury records reflected chiropractic care and persistent complaints of back pain. Dr. Sutherlin felt that the records supported his earlier conclusions that were based on post-injury MRI findings.

24. If Dr. Sutherlin would, hypothetically, have evaluated Claimant just prior to his industrial injury, he would have advised against Claimant engaging in heavy work as a pipe fitter and would have assigned medical restrictions for medium duty work with a 45 pound lifting limitation. Based on Claimant's pre-injury MRI findings, he should not have been lifting more than 50 pounds prior to the industrial injury.

25. Dr. Sutherlin is aware that Claimant was able to perform heavy labor as a pipe fitter prior to his industrial injury and that his post-injury restrictions preclude Claimant from continuing such employment. Dr. Sutherlin was not aware of any pre-injury work restrictions assigned by a physician. However, Dr. Sutherlin does not attribute Claimant's permanent restrictions to the industrial injury because he opines that Claimant's industrial injury resulted in a short-term aggravation of Claimant's spinal condition that resolved in six to eight weeks.

26. Dr. Sutherlin disagrees with Dr. Radnovich regarding the cause of Claimant's need for permanent limitations. He specifically disagrees with Dr. Radnovich's premise that Claimant did not have chronic back problems prior to the industrial injury.

27. Dr. Sutherlin thinks it is possible for disc bulges to result from a fall such as Claimant experienced, but that it would not be the type of injury he would anticipate. Dr. Sutherlin would find a disc fracture to be more consistent with Claimant's mechanism of injury.

28. Dr. Sutherlin did not compare Claimant's pre-injury lumbar MRI with Claimant's post-injury lumbar MRI prior to his deposition. He reviewed both lumbar MRI reports during his deposition and concluded that the differences were consistent with a typical progression of osteoarthritis. He noted that there was a seven year time span between the two studies, taken in 2001 and 2008.

29. Dr. Sutherlin would not have recommended chiropractic care for Claimant's condition, nor does he agree with the treatment plan recommended by Dr. Radnovich. Dr. Sutherlin feels that physical therapy modalities would be appropriate to treat Claimant with implementation of a home exercise program as a long-term plan. He agrees that use of anti-inflammatories would be appropriate on a short-term basis. Dr. Sutherlin would not recommend use of either narcotic pain medication or anti-inflammatories on a long-term basis because of the potential for addiction and side effects.

Andrew Kidder, D.C.

30. On May 12, 2008, Claimant sought treatment at Advantage with Andrew Kidder, D.C., because he continued to experience pain and stiffness in his neck and back and knew he could get an immediate appointment.² Claimant received treatment on approximately ten occasions through early June 2008 at Advantage. A mild reduction in symptoms was noted after the first five visits.

² Dr. Kidder filed paperwork for Claimant to change physicians from Dr. Sutherlin to himself. This triggered a telephonic hearing on May 28, 2008 regarding change of physician. Claimant participated *pro-se*. Neither party offered documentary evidence regarding the change of physician request at hearing, nor is there documentation included in the Industrial Commission's legal file regarding the change of physician hearing. It appears from the other evidence that Claimant's request to change physician was denied.

Richard Radnovich, D.O.

31. On June 2, 2008, Claimant was evaluated by Richard Radnovich, D.O., at the referral of his attorney. Dr. Radnovich reviewed medical records pertaining to the industrial injury, obtained a history from Claimant and performed an impairment rating evaluation.

32. Claimant reported to Dr. Radnovich that he sought chiropractic treatment during the past three to five years for neck and back symptoms with increased activity. Claimant stated that with each episode the chiropractic treatment would resolve the symptoms in two or three visits.

33. Dr. Radnovich concluded that Claimant did not have ongoing chronic problems with his neck or back prior to the industrial injury. However, Dr. Radnovich reviewed Claimant's MRI studies and concluded that Claimant had severe underlying cervical and lumbar disease. He did not find evidence of an acute disc herniation prior to the industrial injury and felt it was likely that Claimant's multi-level disc bulges were caused by the industrial injury. His conclusion was based on the fact that Claimant had an absence of symptoms before the injury and was able to do heavy labor without restriction. He explained that a fall from a ten foot ladder would be expected to cause significant symptoms in a 60 year individual.

34. Dr. Radnovich concluded that Claimant's industrial injury caused his left shoulder complaints and ongoing neck and back pain. Claimant's symptoms were consistent with the mechanism of injury of falling more than six feet from a ladder.

35. Dr. Radnovich utilized the 5th Edition of the *Guides* and the ROM model to calculate Claimant's impairment rating. He explained that the ROM method was appropriate because Claimant's injury included multiple levels of the spine. He assigned PPI attributable to Claimant's lumbar and cervical spine ROM deficits and related diagnoses. He considered

Claimant's shoulders but did not diagnose a ratable condition of the shoulders. Dr. Radnovich utilized the combined values chart of the *Guides* to calculate a 30% whole person impairment rating. Defendants correctly point out a typographical error in Dr. Radnovich's report (determination of 8% for loss of cervical ROM that was transcribed on the following page as 10% instead of 8%). Defendants' Exhibit 7, pp. 110-111. Utilizing Dr. Radnovich's calculations with correction of the apparent transcription error yields a whole person PPI rating of 29%.

36. Dr. Radnovich apportioned half of Claimant's PPI to pre-existing conditions. Dr. Radnovich's opinion that a 50/50 apportionment is appropriate is based on his conclusion that Claimant suffered from underlying and well documented degenerative spinal changes. Dr. Radnovich testified that he did not apportion the range of motion component of Claimant's impairment rating. He stated that it was his assumption that Claimant had no limitation on range of motion prior to the subject accident, and that the range of motion deficit he noted on exam was entirely referable to the subject accident. Dr. Radnovich has testified that in order to apportion the range of motion component of his impairment rating, he would need to see some evidence that Claimant had a range of motion deficit on a pre-injury basis. Per Dr. Radnovich, he would look for evidence of pre-injury range of motion deficit in physical therapy notes, or from a third person, such as a family member, with information that Claimant could never "bend right". As Defendants have noted, a critical review of the pre-injury medical record does suggest that from time to time Claimant was noted to have cervical and/or lumbar deficits on range of motion; The very last pre-injury chiropractic note of 11-9-07 reflects that Claimant lumbar spine was "stiff with flexion". Accordingly, contrary to the assumptions made by Dr. Radnovich, the medical record could be read to support the proposition that the Claimant's

impairment rating should be further apportioned to the pre-existing condition. However, except for their own supposition concerning what that apportionment should be, Defendants have adduced no medical evidence that would allow the Commission to adopt an apportionment scheme different than the one proposed by Dr. Radnovich. Also, it should be noted that the “record” of pre-existing range of motion deficits is far from unambiguous. In none of these records does it appear that formal ROM testing was ever performed. Nor is there evidence that would allow any pre-existing ROM deficit to be quantified. For these reasons, Dr. Radnovich’s opinion on apportionment of PPI is the most persuasive of record.

37. Dr. Radnovich compared Claimant’s lumbar MRIs performed on May 30, 2001 and February 26, 2008 and found the findings to be very similar. It is likely that Claimant had disc bulges that became more pronounced because of the industrial injury but Dr. Radnovich could not confirm that any new findings were absolutely traumatic in origin. He explained that the disc bulges on the 2008 MRI were probably caused by the industrial injury but that he did not have enough information to make a determination on a more probable than not basis.

38. Dr. Radnovich testified that his impairment rating and restrictions were not based on the comparison of the 2001 and 2008 MRIs.

39. Dr. Radnovich suggested permanent restrictions to avoid aggravation of Claimant’s condition to include avoidance of overhead work; no lifting over 40 pounds on a repetitive basis; avoid frequent bending, stooping and crawling; and avoid work with low frequency vibration.

40. Dr. Radnovich attributes Claimant’s need for work restrictions to the industrial injury because the forces applied to Claimant’s body during the accident were more than he could absorb given his age and underlying pathology. Claimant’s ability to lift more than 40

pounds repetitively was permanently impaired by the industrial injury. Dr. Radnovich does not attribute Claimant's need for restrictions to his pre-existing conditions because Claimant was previously able to perform a labor intensive job and because of the traumatic nature of the injury sustained by Claimant. Dr. Radnovich would not have restricted Claimant's work duties based on pre-injury degenerative changes alone.

41. Dr. Radnovich would not have recommended chiropractic treatment for the industrial injury but felt that Claimant was reasonable to pursue it based on his past success.

42. During his deposition, Dr. Radnovich acknowledged that Claimant under-reported the frequency of past chiropractic treatment when he took Claimant's history. Subsequent review of Claimant's chiropractic records did not change his opinion. The records do not identify a previous traumatic injury to the spine or an inability to function normally.

43. Dr. Radnovich suggests additional treatment to maintain or improve Claimant's functional status and to control his symptoms. He recommends diagnostic studies and conservative treatment for the left shoulder; repeat spinal MRIs to check for myelopathy or radiculopathy; physical therapy for flare-ups; and use of electrotherapeutic treatment such as a TENs unit.

44. Dr. Radnovich evaluated Claimant on a one time basis in the capacity of an independent medical evaluation and does not have plans to treat or evaluate Claimant in the future.

Post-Injury Employment

45. Claimant returned to work in a modified duty capacity the day following his injury. He was permitted to sit in a chair and supervise. After two days of modified duty, Claimant took two days off in addition to the weekend. Claimant returned to work on Monday,

January 28, 2008, and worked his regular schedule through February 6, 2008, when he was laid-off.

46. Claimant recalls modification of his duties and reliance on co-workers from January 28, 2008 to February 6, 2008. He was told that his lay-off was due to a reduction of force but suspects that his injury at least played a factor in the decision to lay him off.

47. Lynn Beus is the field superintendant for Employer and supervised Claimant. He met Claimant at the hospital and assisted him in getting out to his car upon discharge. He was aware that Claimant performed light-duty work the first two days following his injury but testified that Claimant worked regular-duty as of January 28, 2008. Claimant worked by himself during the last three days of his employment.

48. Mr. Beus explained that Claimant was laid-off due to lack of work and that, pursuant to the union contract, Claimant was laid-off before less senior workers because he was considered non-local.

49. Claimant has not worked since February 6, 2008.

50. Claimant pursued job leads from the Industrial Commission Rehabilitation Division (ICRD) for a fire sprinkler plans examiner and fire code inspector for the City of Boise but learned that he did not meet the qualifications for those positions, such as holding an engineering license. Claimant expressed concerns to his ICRD counselor about jeopardizing early retirement benefits if he were to take a low paying job. Claimant considered starting his own business, but did not do so.

51. Claimant's ICRD file was closed in August 2008 because Claimant was not continuing to receive workers' compensation benefits and had indicated that he was not interested in returning to work at that time. A labor market survey was not performed based on

Dr. Sutherlin's determination that Claimant's restrictions were the result of pre-existing conditions.

52. Claimant explained that his comments about returning to work were misconstrued or inaccurately recorded by ICRD. He is not interested in returning to a minimum wage job and feels that he needs to earn at least \$15 per hour to make ends meet.

53. Claimant applied for a job with the City of Boise to install parking meters but received no response to his application. He has also submitted applications to Home Depot, Lowe's, Costco and plumbing supply stores. He has not received an interview.

Vocational Opinions

Nancy Collins, PhD

54. Dr. Collins is a vocational consultant who was hired by Claimant to perform a vocational assessment and render an opinion regarding his current employability and future vocational disability. She reviewed medical records, vocational records and interviewed Claimant.

55. Dr. Collins considered the restrictions assigned by Dr. Sutherlin on April 3, 2008 and by Dr. Radnovich on June 2, 2008. Restrictions from Drs. Sutherlin and Radnovich are very similar. She noted that Claimant was able to perform very heavy work without restriction or limitation prior to the industrial injury of January 2008. However, Claimant reported having aches and pains during his work life for which he sometimes pursued medical treatment.

56. Based on Claimant's post-injury permanent restrictions, he is unable to return to sprinkler pipefitter work.

57. Claimant's pre-injury work in the fire suppression industry was very heavy and highly skilled. As a result of his permanent restrictions, he has lost access to 85% of the labor

market and has a 50% to 75% loss of earning capacity, not including loss of the value of his union benefits. Dr. Collins concluded that Claimant's disability, considering his age and the current labor market, is between 70% and 80%.

58. Claimant's loss of job market access was determined by comparison of appropriate jobs based on his restrictions and transferable skills. Claimant is able to work in supervisory jobs or inspection jobs that fall within his restrictions.

59. Claimant's pre-injury wage of over \$30 per hour with a benefits package that equated to an additional \$14.50 per hour made him an exceptionally high wage earner for his education level.

60. Claimant is currently employable in jobs that pay approximately \$9 per hour and it is not likely that Claimant will be able to find work that pays \$15 or more per hour. The type of jobs for which Claimant is qualified may be part-time and might not offer a benefits package.

61. Job openings listed with the Department of Labor which are appropriate for Claimant were security guard, school bus driver and production supervisor. Pay for those jobs ranged from \$8.50 per hour part-time to \$15.00 per hour full-time.

62. Based on Claimant's age, Dr. Collins does not think that retraining would significantly improve his earning capacity.

63. Dr. Collins noted that a dispute exists as to causation and apportionment but explained that she did not apportion Claimant's PPD because no pre-existing restrictions had been assigned.

Douglas N. Crum, CDMS

64. Mr. Crum is a vocational rehabilitation consultant who was hired by Defendants to assess Claimant's disability. Mr. Crum interviewed Claimant and subsequently reviewed

Claimant's medical records. During the interview, Mr. Crum did not specifically ask Claimant about past chiropractic treatment and Claimant did not volunteer the information in response to questions about past medical issues that impacted his employment.

65. Based on Claimant's self-employment in the swimming pool business, Mr. Crum determined that Claimant has transferrable skills pertaining to bidding, purchasing and customer service.

66. Mr. Crum determined from Dr. Sutherlin's report that Claimant had no reduction in physical capacity as a result of the industrial injury and, therefore, had no reduction in his ability to engage in gainful activity. Mr. Crum was unable to determine from Dr. Radnovich's report whether the restrictions he assigned to Claimant were related to the industrial injury or to Claimant's pre-existing condition.

67. In light of Dr. Sutherlin's opinion that Claimant's restrictions are related to pre-existing conditions, Mr. Crum determined that Claimant does not have PPD in excess of his impairment rating.

68. Employment options identified by Mr. Crum include sales or estimating jobs in the construction or automotive industry.

69. Mr. Crum reviewed Dr. Collins' report and does not agree with her conclusions. Specifically, he felt that she disregarded the opinions of Dr. Sutherlin with regard to causation and that she failed to identify transferable skills based on Claimant's past sales experience.

70. Mr. Crum declined to give an opinion as to Claimant's disability with the assumption that permanent restrictions assigned by Dr. Radnovich were related to the industrial injury.

Claimant's Credibility

71. Claimant under-reported the nature of his pre-existing back problems, and the type and extent of his pre-injury medical treatment. Although he tended to minimize his pre-existing back problems, he eventually acknowledged the existence of significant pre-injury back problems when confronted with his medical records.

72. Testimony provided by both Claimant and his wife regarding post-injury functional limitations was credible. Claimant's ability to work his regular schedule for eight days following a two day period of light-duty and four days of rest does not establish that Claimant was able to return to his full-duty job without restriction. Claimant has not returned to his pre-injury level of functioning and continues to have physical limitations as a result of his industrial injury.

73. Claimant presented as a proud individual who was inclined to work through aches and push his physical limitations in order to work. The evidence establishes that this was true during intermittent periods before Claimant's industrial injury and during the eight days of working his regular hours following the injury.

DISCUSSION AND FURTHER FINDINGS

Causation and Medical Care

74. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability, only his or her plain and unequivocal testimony

conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P. 3d 211, 217-218 (2001).

75. Idaho Code § 72-432(1) mandates that an employer provide reasonable medical care that is related to a compensable injury. The claimant bears the burden of proving that medical expenses were incurred as a result of an industrial injury. *Langley* at 785. The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson V. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d1365 (1997). The fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006). However, an employer takes an employee as it finds him or her and a pre-existing infirmity does not eliminate compensability provided that the industrial injury aggravated or accelerated the injury for which compensation is sought. *Spivy v. Novartis Seed, Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002).

76. It is undisputed that Claimant's right ankle, right elbow and right shoulder injuries were soft-tissue in nature and have resolved. Causation is in dispute with regard to Claimant's left shoulder and spine.

77. Claimant failed to meet his burden to prove that his industrial injury includes a left shoulder AC separation or any other on-going left shoulder pathology. The opinions of Dr. Radnovich raise the possibility of such an injury but fall short of establishing the existence of left shoulder AC separation or the need for additional left shoulder treatment on a more likely than not basis. Left shoulder symptoms are first noted in the medical records on March 11, 2008 and Dr. Radnovich is the only physician to make a left shoulder diagnosis. His physical examination

revealed crepitation at the left AC joint with normal neurological exam, strength and orthopedic exam. Dr. Radnovich did not identify a ratable condition of either of Claimant's shoulders with regard to permanent impairment.

78. Claimant met his burden of proof to establish that his industrial injury includes a permanent aggravation to his pre-existing degenerative conditions of his cervical and lumbar spine. Both Drs. Sutherlin and Radnovich diagnosed an aggravation of Claimant's degenerative spinal condition. The opinion of Dr. Radnovich that the aggravation is permanent is adopted over the opinion of Dr. Sutherlin that the aggravation is temporary. Although the Commission tends to favor the findings of a treating physician over those of an independent medical examiner, this particular aspect of Dr. Radnovich's opinion is more credible than Dr. Sutherlin's. Both physicians noted that Claimant's MRI findings did not absolutely establish acute traumatic pathology. However, Dr. Radnovich opined that Claimant's lumbar disc bulges were probably worsened by the injury. Dr. Radnovich also gave weight to the traumatic nature of Claimant's injury and the worsening of Claimant's functional abilities that is credible and supported by the other evidence. Moreover, the fact that Dr. Sutherlin gave Claimant additional permanent limitations/restrictions following the accident, calls into question his conclusion that Claimant suffered no permanent injury as a result of the accident.

79. With regard to future spinal treatment, both Drs. Sutherlin and Radnovich agree that short term anti-inflammatories and physical therapy for flare-ups is appropriate. Dr. Radnovich's suggestions for additional diagnostic studies, low dose sustained release opioids and a TENs unit appear to be a possible protocol but Claimant failed to establish that such treatment is medically necessary for his current condition.

80. Claimant failed to establish entitlement to chiropractic services from Advantage. Claimant pursued chiropractic treatment at his own referral and neither Dr. Sutherlin nor Dr. Radnovich would have recommended it. Although Claimant may have experienced a slight degree of symptom relief with chiropractic treatment, the medical evidence fails to establish medical necessity of such treatment or sustained improvement from the treatment.

81. Claimant continues to be entitled to medical treatment pursuant to Idaho Code § 72-432 for his cervical and lumbar spine to include short-term anti-inflammatories and physical therapy for flare-ups of symptoms.

Temporary Disability

82. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Generally, a claimant’s period of recovery ends when he or she is medically stable. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001).

83. Dr. Sutherlin certified that Claimant reached maximum medical improvement (MMI) on April 3, 2008. By that date, Claimant completed physical therapy and was assigned permanent medical restrictions. No physician has assigned an alternate MMI date.

84. Claimant’s improvement from April 3, 2008 through early June 2008 is more accurately described as a temporary reduction in symptoms as opposed to material improvement.

85. Claimant has failed to meet his burden to establish entitlement to additional TTD benefits beyond April 3, 2008.

Permanent Partial Impairment

86. “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).

87. Dr. Sutherlin’s 5% PPI rating failed to take Claimant’s cervical impairment into consideration. Dr. Sutherlin’s rationale for rating only the lumbar spine, that cervical spine impairment would not be a hindrance to Claimant’s employment, is not supported by the *Guides* or legal precedent.

88. Dr. Radnovich’s explanation for use of the ROM model over the DRE model of the *Guides* is accepted and Dr. Radnovich’s rating is adopted, with correction of the transcription error noted in preceding paragraph 35.

89. Claimant’s whole person PPI for his cervical and lumbar spine is 29%. Dr. Radnovich’s apportionment of half of Claimant’s PPI to pre-existing conditions is supported by the medical evidence and is adopted.

90. Claimant met his burden to prove that he has 14.5% PPI as a result of the industrial injury.

Permanent Partial Disability

91. 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.

92. When a Claimant has relevant pre-existing conditions, it is necessary to make findings as to a claimant’s PPD in light of all physical impairments, including pre-existing conditions, and then perform an analysis pursuant to Idaho Code § 72-406 to apportion the pre-existing PPD from PPD attributable to the industrial injury. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 309, 179 P.3d 265, 272 (2008).

93. Claimant’s relevant non-medical factors include his age, educational level and past experience in primarily heavy-type work. Medical factors include permanent impairment as described in the preceding paragraphs. It is undisputed that Claimant’s permanent medical restrictions prevent repetitive lifting over 30-40 pounds on a repetitive basis; frequent bending, stooping and crawling.

94. Dr. Collins and Mr. Crum addressed Claimant’s pre-existing conditions in different manners. Dr. Collins evaluated Claimant’s PPD in light of all physical impairments and noted that there was a causation/apportionment issue to be addressed by the Commission. She determined that Claimant had 70 to 80% PPD. Mr. Crum adopted the opinion of Dr. Sutherlin regarding causation and determined that Claimant would not have PPD since his restrictions were based on pre-existing conditions.

95. Dr. Collins' assessment of 70 to 80% PPD reflects Claimant's current disability picture without regard to apportionment and is consistent with the PPD calculation required by the *Page* decision. Because Dr. Collins considered Claimant's loss of wage earning capacity without consideration of the loss of the value of Claimant's union benefits, the higher end of her PPD range is adopted and Claimant is assigned 80% PPD.

Apportionment

96. Idaho Code § 76-406(1) provides:

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.

97. The parties took all-or-nothing positions on the issue of apportionment of PPD. Claimant relies on the absence of pre-injury restrictions to establish that he had no permanent disability prior to his industrial injury. Defendants assert that Claimant's current restrictions relate back to the natural progression of his pre-existing spinal condition and that there is no permanent disability resulting from the injury.

98. The record does not reflect that Claimant was given any physician imposed limitations/restrictions prior to the accident of 1-21-08. He argues that since he has been given specific limitations/restrictions subsequent to the subject accident, it follows that his current limitations/restrictions are entirely referable to the subject accident, and that any disability he has suffered in excess of permanent physical impairment is entirely referable to the subject accident, Dr. Radnovich's apportionment of Claimant's PPI rating notwithstanding. Defendants counter that a fair reading of Claimant's pre-injury medical records can only lead to the conclusion that Claimant did have significant pre-injury limitations/restrictions as a consequence of his well documented pre-existing lumbar and cervical spine disease. Defendants argue that Claimant

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 27

suffered a temporary aggravation, at most, as a consequence of the accident, and that Dr. Sutherlin has correctly opined that Claimant's current limitations predate the subject accident.

99. In this regard, Defendants have noted that the medical testimony, i.e. the testimony of Drs. Sutherlin and Radnovich, fails to support the proposition that there is any significant interval change in Claimant's lumbar spine between the 2001 and 2008 MRI studies. Indeed, the record reflects that Dr. Radnovich is unable to articulate any identifiable changes in the pre-injury and post-injury studies. (Radnovich deposition, 25/2-26/9).

100. Claimant has testified extensively concerning the extent and degree of his ability to engage in gainful activity prior to the subject accident, as he has to his ability to engage in physical activities subsequent to the subject accident. On direct examination, Claimant testified that in the one year period immediately preceding the subject accident, he had had no difficulty performing the requirements of his job. Claimant's testimony in this regard is unambiguous:

Q. Mr. Lisbony, in the months prior to your accident of January of 2008, did you have any difficulty in performing any aspect of your job with Delta Fire?

A. None whatsoever.

(Hearing Transcript, pg 62, 12-16)

On cross-examination, however, this issue was revisited, and Claimant was forced to acknowledge that the pre-injury medical records do reflect that he had significant problems with his low back on a pre-injury basis, for which he had required chiropractic and other care over a period of years immediately prior to the subject accident. The following excerpts from Claimant's testimony on cross-examination are illuminating:

Q. Okay. The reality is every symptom you've had that you've talked about today related to this accident you've had before, haven't you?

A. I have and there's no questions about that. 35 years in the construction trade and you're going to have all of these.

Hearing Transcript, pg 85, 1.22-86, 1.2.

Q. Okay. Do you remember seeing Dr. Dux for left shoulder problems?

A. I might have. You know, like I said, it's just things that come up and they irritate you for a day or two, he puts you on an anti-inflammatory or a muscle relaxer and, you know, you don't think about it again for the next several months or years

Q. His chart note says has pain in left shoulder that has been going on for months, getting worse. This wasn't just a couple-day deal, was it?

A. I don't know. I don't remember even discussing it with Dr. Dux at the time, but like I said, being in construction, you know, you have things all the time. It was a constant with pain and such and you get used to it and you ignore it and, you know, finally it gets to the point where it's been irritating you for long enough you need to get somebody to give you some medication to help it relax.

Hearing Transcript, p. 87, l. 19-p.88, 1.11.

Q. So as you're sitting here today, you don't ever remember having to perform light duty work to modify your job activities due to left shoulder, your back, your neck, your legs, anything?

A. I don't remember any particular thing there. I just, you know, I remember I didn't lose work over it. If it was modified to light duty, you know, for a week or two or something, you know, it may have been. I don't remember. Like I said, unfortunately, it's just a way of life in construction with pain and stuff, so you get used to these things, but I had not had any problems that I remember in the last, you know, prior to this accident in months with shoulders or anything.

Hearing Transcript, p. 88, l. 25-p. 89, l. 12.

101. Although Claimant was questioned by defense counsel about a number of his pre-injury medical records, the examination concerning the records generated by Dr. Stork is of particular interest due to the fact that Dr. Stork treated Claimant on 22 occasions between 6-29-07 and 11-9-07, inclusive. Concerning his pre-injury chiropractic care, Claimant initially testified that in the year prior to the 1-21-08 accident, he could not recall having had any chiropractic treatment, with the exception of an occasional treatment by a Dr. Kidder. (Transcript 61/6-18). Claimant did not even mention possible care by other providers during this

time frame. On cross-examination, however, Claimant acknowledged that he had, in fact, consulted with Dr. Stork on at least 22 occasions in the months prior to the injury. However, Claimant denied that Dr. Stork treated him for anything other than neck problems. (Transcript, 81/1-81/8). Dr. Stork's records reflect that on 6-29-07, Claimant presented with complaints of right-sided sacroiliac pain radiating down to the right calf, two years duration. Per Dr. Stork, Claimant described the intensity of pain at a level of 1-2 out of 10, and that the pain could be severe with activity, to a level of 10 out of 10. Under the heading "major complaint", the chiropractic consultation record reflects that Claimant's major problem and "story" had been extant for 25 plus years.

102. Claimant was asked to reconcile the history contained in the aforementioned chiropractic records, with his hearing testimony. Claimant was unable to do so in a convincing fashion. (*See*, generally Claimant's testimony 79/14-92/9). First, contrary to his testimony on direct examination, Claimant testified that he did not complete the course of treatment recommended by Dr. Stork, because it started hurting him so bad. (Transcript 79/12-21). Concerning the somewhat ambiguous reference to a 25 plus year history of a major complaint contained in Dr. Stork's initial chiropractic consultation note of 6-29-07, Claimant explained that this meant he had a 25 year history of working as a pipe fitter and going to chiropractors. (Transcript 81/9-16). On cross-examination, Claimant initially denied the accuracy of Dr. Stork's records concerning his lumbar spine complaints, but later acknowledged that he has no clear recollection of what he told Stork, and suggested that he could not quarrel with Dr. Stork's records. (Transcript, 89/21-90/13).

103. Ultimately, Claimant acknowledged that his pre-injury treatment history for cervical and lumbar spine problems was more significant than he originally testified to, and more

significant than he originally admitted to Dr. Radnovich and Nancy Collins. He testified that he simply did not think his pre-injury medical history would be significant to either Dr. Radnovich or Dr. Collins. (Transcript, 91/7-92/9).

104. On the whole, Claimant's pre-injury medical records, and particularly the records of Dr. Stork, challenge his assertion that he was symptom free on a pre-injury basis. The records speak clearly to significant pre-injury symptomatology in both the cervical and lumbar spine, symptomatology that increased with physical activity, and was frequently severe.

105. Dr. Radnovich appears to have concluded that because Claimant was asymptomatic on a pre-injury basis, and because he was capable of performing all aspects of his time of injury job without limitation on a pre-injury basis, it follows that all limitations/restrictions appropriately assigned to him as the result of his current condition arise as the result of the subject accident. Dr. Radnovich's premise is flawed, since it clearly appears that Claimant was symptomatic on a pre-injury basis, and, that his pre-injury symptomatology did impact his ability to engage in physical activity; it is noted in the chiropractic records that Claimant's pain complaints and lower extremity symptomatology were "aggravated by work," and that his pain complaints sometimes approached the level of 10 out of 10 "with activity." Indeed, even Claimant acknowledged, on cross-examination, that his work activities produced physical pain/discomfort, such that he sought treatment for his symptoms on a pre-injury basis.

106. Even so, however, it must be acknowledged that despite his pre-existing degenerative condition, and despite the discomfort he suffered on a sometimes basis as a consequence of that condition, Claimant was nevertheless capable of performing the requirements of his time of injury position to the satisfaction of his employer. Although there is evidence, in the form of testimony from Lynn Beus, that Claimant was physically capable of

performing his job on a post-injury basis, as well, the Commission is persuaded that the subject accident did increase Claimant's symptomatology such the Claimant is no longer capable of performing the demands of heavy duty employment. Although there are certain credibility issues raised by Claimant's testimony, the Commission is persuaded that Claimant is a credible witness when it comes to describing the increase of his symptomatology following the subject accident. However, the testimony and evidence clearly establishes that Claimant suffered from a pre-existing impairment which increased Claimant's disability per Idaho Code § 72-406. The clearest evidence of the contribution of the pre-existing impairment is found in the pre-injury medical records, as eventually confirmed by Claimant, showing significant pre-injury symptomatology.

107. Based on the foregoing, the Commission concludes that Claimant's 51% disability in excess of impairment is properly apportioned in the amount of 20% to Claimant's documented pre-existing condition pursuant to Idaho Code § 72-406. Defendants remain liable to Claimant for 31% disability in excess of Claimant's impairment.

108. Claimant's total PPD is 80%, inclusive of 29% PPI which yields 51% PPD in excess of PPI. After apportionment of 20% PPD, Defendants remain liable for 31% PPD in excess of 29% PPI.

Attorney Fees

109. Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

110. Defendants paid benefits in accordance with the opinions of the treating physician, Dr. Sutherlin. Although the opinions of Dr. Sutherlin were not ultimately adopted

with regard to all of the disputed issues, Defendants reliance on Dr. Sutherlin's opinions was not unreasonable.

111. Claimant's assertion that Defendants improperly participated in a telephonic change of physician conference without Claimant's attorney's participation is not a basis upon which attorney fees may be awarded. Further, the evidence establishes that Claimant's employment agreement with his attorney of June 27, 2008 supersedes all other agreements and there is no indication that Defendants were made aware of attorney representation at any time prior to or during the change of physician hearing held on May 28, 2008, referenced in footnote 2 of this decision.

112. Claimant failed to establish entitlement to an award of attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 for treatment to his cervical and lumbar spine in the form of short-term anti-inflammatories and physical therapy for flair-ups of symptoms.

2. Claimant is not entitled to additional TTD benefits beyond April 3, 2008.

3. Claimant is entitled to PPI benefits of 14.5% (29% total PPI with half apportioned to pre-existing conditions).

4. Claimant's PPD is 51% in excess of his 29% PPI.

5. Apportionment of 20% of Claimant's 51% PPD to pre-existing conditions is appropriate pursuant to Idaho Code § 72-406.

6. Claimant is entitled to 31% PPD benefits in excess of his 29% PPI.

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

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

DATED this 8th day of September, 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 8th day of Sept. a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon:

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jkc/cjh

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