

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

RAFAEL CUEVAS, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 NEDEREND DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 ZENITH INSURANCE COMPANY, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2007-035349**

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

filed February 12, 2010

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on March 25, 2009. The Referee submitted her recommendation; the Commissioners, having reviewed the same, have prepared modified findings and conclusions. Richard S. Owen of Nampa represented Claimant. R. Daniel Bowen of Boise represented Defendants. The Parties submitted oral and documentary evidence, took three post-hearing depositions, and submitted post-hearing briefs. The matter came under advisement on July 28, 2009 and is now ready for decision.

**ISSUES**

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

1. Determination of Claimant’s average weekly wage (AWW);
2. Whether and to what extent Claimant is entitled to the following benefits:

- A. Temporary partial and/or temporary total disability (TPD/TTD) benefits;
  - B. Permanent partial impairment (PPI);
  - C. Disability in excess of impairment, but less than total permanent disability (PPD); and
  - D. Attorney fees pursuant to Idaho Code § 72-804;
3. Whether Claimant's condition is due in whole or in part to pre-existing injuries or conditions; and
4. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that as a result of the undisputed industrial accident, he has sustained a whole person permanent partial impairment of at least 9%, of which 3% is fairly attributable to his pre-existing degenerative back condition. Claimant asserts disability inclusive of his impairment of between 65% and 75% based on the expert opinion of Dr. Nancy Collins, and argues that all of his disability is referable to the industrial accident that is the focus of this proceeding.

In addition, Claimant contends that Defendants knowingly calculated his TTD benefits improperly, and made no effort to obtain accurate wage information to correct their known and admitted original error. In fact, Claimant avers that Defendants still had not obtained accurate wage information on the date of hearing, forcing Claimant to subpoena the records from Employer after the hearing. Defendants' inaction delayed payment of Claimant's full TTD entitlement for approximately fourteen months. This delay, Claimant argues, entitles him to an award of attorney fees pursuant to Idaho Code § 72-804. Additionally, Claimant contends that

he is entitled to TTD payments for the period of June 1, 2008 through August 28, 2008. This represents the period from the time his treating physician mistakenly determined Claimant was at maximum medical improvement (MMI) and the date that Claimant actually reached MMI.

Defendants admit that Claimant is entitled to some PPI, but assert that the better-reasoned opinion of Dr. Montalbano best quantifies Claimant's impairment attributable to the industrial injury at bar. Dr. Montalbano rated Claimant's impairment at 7% of the whole person, and apportioned 5% of that impairment to Claimant's pre-existing degenerative back conditions. Defendants also take issue with the disability rating provided by Dr. Collins, arguing that their expert's PPD rating of 50% to 55%, inclusive of impairment, is the uppermost limit of Claimant's disability. Defendants assert that because of the uncertainty regarding the seriousness of Claimant's pre-existing condition, a PPD rating as low as 30%, inclusive of impairment, may be appropriate.

Defendants concede that they miscalculated Claimant's TTD benefit rate, which resulted in an underpayment of the undisputed portion of Claimant's TTD benefits. Defendants continue to assert, however, that Claimant was at maximum medical improvement on June 1, 2008 and is not entitled to additional TTD benefits for the period of June 1 through August 27, 2008. As for an award of attorney fees on the miscalculated but undisputed TTDs, Defendants argue that it was simply a mistake, but not unreasonable, and should not result in an award of attorney fees pursuant to Idaho Code § 72-804. Should the Commission disagree, Defendants urge the Commission to base an award on the difference between what was paid and what should have been paid for the period not in dispute.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The oral testimony of Claimant and Julie Mulder, claims adjuster, taken at hearing;
2. Claimant's Exhibits 1 through 6, admitted at hearing, and Exhibit 7, submitted without objection subsequent to the hearing;
3. Defendants' Exhibits 1 through 16, admitted at hearing; and
4. Post-hearing depositions of Christian Gussner, M.D., taken April 2, 2009, Nancy J. Collins, Ph.D., taken April 20, 2009, Doug Crum, CDMS, taken May 5, 2009, and Paul J. Montalbano, M.D., taken May 13, 2009.

All objections interposed during the post-hearing depositions are overruled.

## **FINDINGS OF FACT**

### ***BACKGROUND***

1. At the time of hearing, Claimant was fifty-two years of age, married, and the father of six adult children. Claimant and his wife resided in Marsing, Idaho, and had lived at the same address since 1991.
2. Claimant was born and raised in central Mexico. He attended school through the sixth grade. Claimant does not read or write English, although he has a limited understanding of spoken English when used in short, simple sentences, and recognizes some written English words. He can speak enough English to communicate with non-Spanish-speaking employers. Claimant speaks and understands Spanish.
3. At the age of fifteen, Claimant traveled to Mexico City, where he worked for approximately two years loading and unloading delivery trucks at the public market. Thereafter, Claimant left Mexico City and came to Idaho, settling in Melba, where his brother also lived. Claimant found work on a cattle ranch, feeding cattle in the winter, and irrigating, mending

fences, and performing other farm work in the warmer weather. Claimant continued to work in dairy, farming, and ranching operations until shortly after his September 6, 2007 work injury. Claimant had a remarkably short list of employers given the nature of his work. He stayed eight or nine years at his first job, and approximately two years at his second, leaving when the farmer sold out. He stayed in his third job for five years, once again leaving when the farmer sold out. Claimant then moved to Marsing, and went to work on land owned by Bill and George Kwai. Claimant remained working the same land for about twelve more years, though the land itself had at least two owners during this period. Employer began leasing the same property in about 2003, and Claimant stayed on working for Employer until laid off about a week after his September 6, 2007 accident.

4. The evidence in the record regarding Claimant's medical history is somewhat confused and frequently contradictory. Claimant's English is quite limited, and is in no way up to the task of exchanging complex medical information with or without the benefit of a qualified interpreter. Such circumstances provide fertile ground for miscommunication and misunderstanding on both sides of any conversation. The same issues arise in Claimant's testimony, both in his deposition and at hearing, despite the assistance of a qualified interpreter. In making findings of fact in this proceeding, with this Claimant, and under these circumstances, the Commission concludes that Claimant is an honest man, and is generally credible, though he is not a particularly good historian. To the extent that there is conflicting evidence on salient points, the Commission finds such conflicts to be the result of genuine communication difficulties and not an intentional effort on the part of any individual to withhold information or provide misleading information.

### ***PRIOR MEDICAL HISTORY***

5. Claimant has a history of low back pain (LBP) complaints going back to at least 2001. The earliest mention of LBP in the medical records was July 19, 2001 during a visit to Strickland Family Chiropractic. According to the chart note for that visit, Claimant reported: “has had sharp [left] leg pain that goes down lateral thigh and into [left] heel for 7 years. *Now* has LBP since 5 days ago.” Defendants’ Ex. 5, p. 039 (emphasis added.) The note identified the source of Claimant’s LBP to be at L5, and scheduled fifteen chiropractic treatments over a five-week period. There are no notes documenting the recommended treatment, but Defendants’ Ex. 5, p. 041, is a second chiropractic care schedule for ten treatments—two per week for five weeks. The schedule is not signed or dated, but includes this note: “Treat to maximum correction *and strengthen what we’ve accomplished.*” *Id.*, (emphasis added.)

6. In October 2001, Claimant presented at Idaho Physical Medicine and Rehabilitation, where he saw Tracy R. Johnson, M.D. With the assistance of an interpreter, Claimant reported that he experienced an “immediate onset of low back pain” when he picked up an irrigation pipe at work on July 15, 2001. Defendants’ Ex. 14, p. 145. Claimant located the pain in his midline and described it as a “burning and deep aching sensation.” *Id.* Claimant also told Dr. Johnson that he experienced occasional pain in his right or left calf, and had noticed some tingling in the heel of his *right* foot. The chart note does not indicate whether the leg complaints arose concurrently with the LBP on July 15, or whether, as the chiropractic note suggested, were symptoms of long standing duration. Findings on examination were unremarkable with the exception of some SI joint tenderness. Dr. Johnson suspected that SI joint dysfunction was the cause of Claimant’s pain, but ordered an MRI “[b]ecause he has had *long standing pain* and continues to have pain . . .” *Id.* (emphasis added.)

7. Claimant had an MRI of his lumbar spine on October 15, 2001. The most notable finding was at L4-L5:

L4-L5: There is mild disc space narrowing. There is a moderate sized left paracentral focal disc protrusion which fills the left lateral recess and mildly indents the thecal sac. This touches the passing L5 nerve root and also the exiting L4 nerve root. No significant central canal stenosis and the foramina appear patent.

Defendants' Ex. 1, p. 001. The reading radiologist concluded that the disc protrusion had the *potential* to cause L4-L5 radiculopathy.

8. On October 19, 2001, Claimant, accompanied by his case manager, returned to see Dr. Johnson and discuss the results of his MRI. Claimant reported to Dr. Johnson that he was working twelve hours per day, seven days per week. Dr. Johnson advised Claimant of his treatment options, one of which was an epidural steroid injection (ESI). Claimant told Dr. Johnson that he was not interested in seeking further treatment at that time because he was too busy at work.

9. Claimant returned to Dr. Johnson on February 4, 2002. An interpreter and his case manager accompanied him. Claimant reported that his LBP was improved. "He occasionally has some right heel pain but no other radiating pain into the leg, no numbness or tingling in the lower extremities." Defendants' Ex. 14, p. 0150. Claimant advised Dr. Johnson that he was only working eight hours a day, rather than his normal twelve to fourteen-hour day. Claimant had a normal examination, exhibited no pain behaviors, and had no tenderness in the lumbosacral area. Strength, sensation, and range of motion were normal, and straight leg raise was negative, both sitting and when supine. Dr. Johnson concluded:

[Claimant's] back pain has significantly improved. He has been unable to take off any work in order to get any treatment, such as physical therapy or epidural steroid injection. He is not really having any radicular complaints at this point.

He is tolerating full-duty work with no other complaints of pain. Overall, he is doing very well.

*Id.* Dr. Johnson released Claimant from care for his low back injury with no restrictions and no permanent impairment.

10. The next reference to low back pain in the medical records occurs in late May, 2004. Claimant saw Chip Roser, M.D., for an unrelated matter. The chart note includes the following comment under “assessment/plan”: “Chronic lower back pain and knee pain, likely related to osteoarthritis.”

11. A few months later, on July 1, 2004, Claimant presented at Marsing Chiropractic with a chief complaint of LBP, with onset about two months previous. Claimant described the pain as stabbing and achy and radiating into his leg and down to his ankle. Although the intake form asks whether the injury is work-related or the result of an auto accident, that question was not answered. Claimant had two treatments at Marsing Chiropractic. The July 1 treatment note states: “low back.” The July 2 treatment note states: “[right] PSIS” (Posterior Superior Iliac Spine). Defendants’ Ex. 6, p. 0044.

12. Claimant did not return to Marsing Chiropractic for almost two years. Then, on April 6, 2006, Claimant presented with complaints of LBP along with “tightness in [bilateral] hamstrings.” *Id.*, at p. 0045. Although the note is difficult to decipher, it appears to state that the symptoms occurred occasionally over the last fifteen years.<sup>1</sup> Claimant reported that the symptoms did not affect his activities of daily living “even if [it] really hurts.” *Id.* The note indicates that the complaint was a “recent flare up or exacerbation.” *Id.* The note provides no

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<sup>1</sup> It is not clear if the fifteen-year duration relates to the low back, the hamstrings, or both.

clue as to what caused the flare up. Treatment included manipulation of the lumbar, thoracic, and cervical spine and a suggestion that Claimant apply heat to his low back.

13. Claimant returned to Marsing Chiropractic on July 24, 2006, complaining of LBP that came on just a few days before when he was trying to fill a gopher hole by stomping on it. The chiropractor noted an antalgic gait. Treatment included manipulation of the lumbar and thoracic spine.

14. On March 23, 2007, Claimant again presented at Marsing Chiropractic. He reported LBP that did not increase with walking, but did increase with sitting on a tractor. Treatment included manipulation at L4-L5, L5-S1, and T5 through T8. Claimant was again advised to use heat on his low back at night to decrease muscle spasm.

15. Claimant returned to the clinic on March 30, 2007, reporting LBP going into his right hip, and complaining of numbness in right lower extremity. The chart is devoid of treatment notes.

16. Claimant was back at the clinic on April 2, 2007. He reported an onset of LBP the previous Saturday as he was traveling to Walla Walla, Washington. Claimant tried using heat, but it did not work and his back remained very painful. Treatment included manipulation from T1 through T6 and L5-S1. The chart also notes that Claimant's hands were falling asleep at night and that sitting makes his low back pain worse.

### ***THE ACCIDENT***

17. On September 6, 2007, Claimant was moving irrigation pipe out of the fields at the end of the season. Each length of pipe was six inches in diameter and thirty feet long. Because it was the end of the season, the pipes were muddy and heavy. Claimant tied a belt on

the end of a pipe and was moving it by dragging the pipe by the belt when he felt a sharp pain in his left hip. The pain went down Claimant's left leg and up into his low back.

#### ***POST-ACCIDENT MEDICAL CARE***

18. On September 7, Claimant presented at Marsing Chiropractic complaining of LBP as a result of a work injury the previous day. He reported numbness down his left leg into his foot. On exam, Claimant exhibited pain in the right SI joint and right paraspinal muscles. Assisted lumbar range of motion was within normal limits with pain noted with anterior flexion and lateral flexion bilaterally. Treatment consisted of manipulation at L4-5 and ultrasound.

19. Claimant returned to Marsing Chiropractic on September 10. His primary complaint was pain in his left shoulder area, and Claimant was tender to palpation over his left levator scapulae. Claimant's LBP had decreased in severity and he had *no* numbness in his left leg. Treatment consisted of manipulation of his thoracic spine, his lumbar spine at L4-5, and his left SI joint.

20. On September 17, Claimant presented at Healthy Family Chiropractic with what the chart note describes as "extreme pain in [low back and left] side." Defendants' Ex. 8, p. 0059. Claimant's intake form states that the symptoms first occurred "at work—4 days."

21. On September 19, Claimant presented at Better Life Chiropractic, with a chief complaint of left leg pain of one-week duration. The chart also notes that Claimant had experienced similar symptoms two years before. Roy Strickland, D.O., performed several scans of Claimant's low back, using electromyography and infrared sensors. The tests reportedly showed Claimant had increased muscle tension throughout his cervical, thoracic, and lumbar spine, and asymmetry, primarily in the thoracic and upper lumbar spine. Claimant apparently

returned on September 20 for additional treatment, but the record contains no meaningful treatment notes.

22. On September 20, Claimant presented at Marsing Medical with a chief complaint of back pain. Claimant reported that he hurt his back two weeks prior while lifting pipe at work. Three chiropractic visits did not provide relief. Claimant described severe pain in his lumbar spine with radiation down his left buttock to the heel, particularly noting pain in the left calf. He reported no tingling, but increased numbness in the left leg. On exam, Faith Peterson, FNP, characterized Claimant as “in marked acute distress.” Defendants’ Ex. 9, p. 0068. He was “hardly able to stand upright [due to] pain. Found to be laying across the exam table holding his head. . . . Unable to walk on heels or toes. Has marked left ipsilateral pain with sciatic nerve stretch. Has marked limp.” *Id.* Ms. Peterson ordered a lumbar MRI, took Claimant off work, provided pain medication, advised Claimant to limit activity, use moist heat and ice, and to take pain medication as directed.

23. Claimant had his MRI on September 22, 2007. Evidently, his 2001 MRI was not available for comparison. However, it is noteworthy that the 2007 study, like the 2001 study before it, demonstrates the existence of a left sided L4-5 lesion, with the potential for causing nerve root compromise. In pertinent part, the 2007 report states:

At L4-5, there is a very large rounded extradural defect which demonstrates cephalad extension compatible with a large focal disc extrusion with migration superior to the disc space. This results in moderate mass effect on the anterolateral thecal sac as well as compression of the traversing left L5 nerve root. There may be potential for radiculopathy of the L3 nerve root as well from this disc extrusion.

Defendants’ Ex. 1, p. 0003.

24. Claimant returned to the clinic on September 25 to discuss the results of the MRI. Ms. Peterson continued Claimant’s medications, and advised him to continue with her previous

recommendations regarding activity, heat, and ice. She referred Claimant to Paul J. Montalbano, M.D., and set up an appointment for Claimant on October 3, 2007.

***Dr. Montalbano***

25. Dr. Montalbano saw Claimant on October 3. Claimant reported:

low back pain as well as left lower extremity pain involving his hip and thigh with further radiation into his lateral calf and toes. He reports numbness and tingling as well as weakness. He also complains of right hip pain.

Defendants' Ex. 3, p. 0011. Claimant told Dr. Montalbano that he had experienced LBP and right lower extremity pain in the past, "but this was treated with chiropractic manipulation and he reports being 100% pain-free prior to this specific incident." *Id.* When asked by Dr. Montalbano, Claimant said that forty percent of his pain was in his low back and sixty percent was in his left lower extremity. Dr. Montalbano noted severely antalgic gait and a positive straight leg raise on the left. Dr. Montalbano reviewed the September 22 MRI and agreed with the radiologist's report. Based on a review of the medical records from Marsing Medical, Claimant's reported history, an examination, and a review of the MRI film, Dr. Montalbano recommended a left L4-5 discectomy. In the meantime, Dr. Montalbano provided Claimant with a work release, stating that he was totally incapacitated until further notice.

26. In the concluding paragraph of Dr. Montalbano's letter report to Ms. Peterson, he opined as to the etiology of Claimant's symptoms:

I would attribute his left lower extremity pain, which the patient denies experiencing prior to September 6, 2007, to the work related injury on that date. The symptomatology correlates with the left L4-5 disc herniation and once again the etiology of his symptomatology as well as the need for the above surgery is related to that work related injury.

Defendants' Ex. 3, p. 0012.

27. Claimant returned to Dr. Montalbano on January 23, 2008. As a result of that visit, Dr. Montalbano contacted Julie Mulder, the adjuster handling the claim for Surety. He was concerned that it had been some months since the September MRI and his initial examination of Claimant. Dr. Montalbano felt a new MRI was mandatory before proceeding with the L4-5 discectomy. Evidently, the requested MRI was approved, as a new lumbar MRI was done on January 25. Dr. Montalbano's reading of the films indicated that Claimant's condition was essentially unchanged. Although Claimant had MRI imaging from September 2007, the report did not include a comparison of the two films by the radiologist.<sup>2</sup>

28. Dr. Montalbano performed the left L4-5 microdiscectomy on February 25, 2008 without complications. Claimant had a normal recovery, including three weeks of physical therapy. By April 23, 2008, the physical therapist noted that Claimant's LBP had decreased (reporting 1-4/10), his tolerance for activity had increased, and his lumbar range-of-motion had increased. Claimant still reported some stiffness in his low back.

29. Dr. Montalbano saw Claimant on April 23, 2008. By letter of even date, Dr. Montalbano advised Surety that two months following his surgery, Claimant was doing quite well, and was neurologically intact. The Claimant did have some nonspecific complaints of left buttock discomfort as well as distal lower extremity discomfort, but Dr. Montalbano found no evidence of lumbar radiculopathy. Dr. Montalbano continued Claimant's physical therapy, but changed the referral from Caldwell Physical Therapy to St. Lukes/Idaho Elks Rehabilitation Services (SLIERS). He released Claimant to return to work for four hours per day for two

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<sup>2</sup> In the January 2008 MRI, the radiologist identifies the extrusion/herniation to be located at L5-S1, whereas the September 2007 MRI locates the pathology at L4-5. Dr. Montalbano explained during his deposition that Claimant had a transitional segment with a rudimentary disc. As a result, some radiologists would read it as L4-5 and other radiologists would read the same disc as L5-S1, but that whichever reference they used, it was the same disc.

weeks, with a two-hour increase every two weeks until Claimant reached an eight-hour workday. Dr. Montalbano also imposed a forty-pound lifting restriction.

30. Claimant underwent an initial physical therapy evaluation at SLIERS on April 28. According to the chart note, Claimant reported *constant* pain of 5-7/10 along his low back and down both legs, with the right leg more painful than the left. He reported decreased ability to sleep, decreased lumbar range-of-motion, decreased muscle strength, decreased tolerance for standing, and altered posture. A comparison of Claimant's subjective complaints between the April 23 physical therapy note and the April 28 physical therapy note almost cause one to wonder if both therapists saw the same patient. Laura Townsend, MPT, recommended therapy two to three times per week for six weeks. Claimant attended five sessions of therapy, with chart notes reflecting a gradual increase in tolerance for activity and improvement in his LBP. Inexplicably, Claimant did not return to physical therapy after May 9, 2008.

31. By letter dated June 1, 2008, Dr. Montalbano reported to Surety that he found Claimant to be medically stable as of May 30, and had released him to return to work without restrictions. Dr. Montalbano did note that Claimant reported some posterior hip discomfort on the left, which he attributed to disc height settling, and which was treatable with anti-inflammatories.

32. Evidently, there was some confusion on the part of the Surety as to Claimant's medical condition following Dr. Montalbano's letter. Surety and Dr. Montalbano exchanged correspondence confirming that Dr. Montalbano released Claimant without restrictions and with no permanent impairment resulting from the industrial injury.

33. Claimant returned to Dr. Montalbano on August 13, complaining of LBP as well as bilateral lower extremity symptomatology involving his posteriolateral thighs and calves.

Claimant asserted that he had been having the pain since his surgery. Dr. Montalbano ordered an MRI and AP and lateral flexion/extension x-rays to rule out canal or foraminal stenosis and instability. The imaging, completed on August 27, did not reveal any evidence of a recurrent disc herniation or of canal or foraminal stenosis or instability. There was evidence of scar tissue encircling the traversing left L5 nerve root. Dr. Montalbano recommended that Claimant continue with conservative treatment.

***Dr. Gussner/IME***

34. Christian Gussner, M.D., conducted an independent medical evaluation (IME) of Claimant on August 18, 2008. Dr. Gussner found Claimant to be a good historian and observed that the information Claimant provided (with the assistance of his daughter, Christina) was consistent with the medical records he reviewed. Dr. Gussner reviewed the medical records of Dr. Montalbano, the September 2007 and January 2008 MRIs, and the post-surgical physical therapy notes. In addition to performing a physical exam of Claimant, Dr. Gussner administered some simple psychological tests. Findings on exam included mildly antalgic gait favoring the left leg, tenderness bilaterally over lower lumbar paraspinal muscles and upper gluteal muscles, lumbar range of motion limited by pain, negative straight-leg raise on the right, and positive on the left. Strength, sensation, and circumference of lower extremities were equal bilaterally.

Dr. Gussner concluded:

**DIAGNOSIS:**

1. Persistent low back and left much greater than right leg pain. Differential diagnosis includes recurrent disk herniation, myofascial pain, or scar tissue irritating nerve roots.
2. Left L4-5 disk extrusion resulting in left L5 radiculopathy related to work injury of 09/06/07.
3. Pre-existing history of mild intermittent low backache and chiropractic treatment once or twice a year. He reports no low back pain for greater than six months predating the injury of 09/06/07. He denies any history of leg symptoms prior to 09/06/07.

CAUSATION: Based up on [sic] the available information, to a reasonable degree of medical certainty, there is a causal relationship between the examinee's current complaints and the reported injury.

Defendants' Ex. 2, p. 0009. Dr. Gussner opined that Claimant's prognosis was "guarded" due to his residual back and leg symptoms following surgery. Neither did he believe Claimant was medically stable in light of his on-going symptoms and a pending MRI. Because he did not believe Claimant was stable, Dr. Gussner did not think that a permanent impairment rating was appropriate, but nevertheless calculated a "preliminary" rating of 9%. Dr. Gussner agreed with Dr. Montalbano's temporary lifting restrictions, but suggested that if the scheduled MRI did not show significant findings, then Claimant would be looking at permanent medium duty activity restrictions, including occasional lifting of fifty pounds and repetitive lifting of twenty-five pounds. Dr. Gussner also recommended that Claimant avoid "repetitive bending, twisting or torquing of the low back. He should avoid prolonged low frequency vibration. He should be allowed to change positions as needed." *Id.*, at p. 0010. Subsequent to the office visit, the MRI showed no recurrent herniation or lumbar instability, but did identify some scar tissue around the L5 nerve root.

### ***Temporary Exacerbation***

35. On November 12, 2008, Claimant returned to Dr. Montalbano. He reported that he had been driving a tractor and clearing weeds and his left lower extremity symptoms worsened. Dr. Montalbano ordered an MRI, but there is nothing in the record to suggest that one was done. A month later, on December 19, Claimant returned to Dr. Gussner, reporting that his low back and leg pain was about the same as it had been at the time of his last visit in August. Dr. Gussner found no new or changed symptoms and diagnosed chronic low back and leg pain that had been exacerbated temporarily and returned to baseline. Dr. Gussner prescribed OTC

anti-inflammatories and suggested a trial of Neurontin. He concluded that Claimant was medically stable, and gave Claimant an impairment rating of 9% whole person with no apportionment, “since he did not have lumbar radicular pain prior to the injury.” Defendants’ Ex. 2, p. 0010C. Dr. Gussner recommended permanent light-medium duty activity restrictions, including thirty-five pounds occasional lifting and twenty pounds repetitive lifting, and retained the restrictions on bending, lifting, twisting, torquing and low-frequency vibration.

36. On February 2, 2009, Dr. Montalbano responded to a letter from Defendants with the following opinions:

- That Claimant’s impairment was due in large part to his pre-existing degenerative lumbar spondylitic condition, but deferred to Dr. Gussner’s expertise;
- That Claimant did have *some* impairment that was attributable to the September 2007 industrial accident, but deferred to Dr. Gussner;
- That Claimant did not need further testing or treatment as a result of his September 2007 industrial injury; and
- That Claimant should not have *any* work restrictions.

Dr. Montalbano concluded his letter with the following caveat: “Of note, there is a significant disparity between his symptomatology and his radiographic studies.”

#### ***AVERAGE WEEKLY WAGE***

37. As noted briefly in the introductory portions of this Decision and Order, neither party had accurate wage information for Claimant until *after* the hearing. Wage information was submitted post-hearing without objection, and Defendants’ did not dispute the new wage information in their brief. Claimant’s earnings in the thirteen-week period immediately preceding his industrial accident were \$12,185.25, which is an AWW of \$937.33. The

compensation rate for an AWW of \$937.33 was 90% of the average state wage (ASW) in 2007, or \$525.60 per week. That amount increased to \$556.20 on January 1, 2008.

### ***TTD Benefits***

38. Defendants concede that they paid Claimant's TTD benefits based on an inaccurate calculation of his AWW, resulting in an underpayment of TTD benefits. Calculating the underpayment requires three pieces of information: Claimant's last day of work, the date Claimant reached medical stability, and Claimant's AWW. The parties now have the correct AWW for Claimant, as set out in paragraph 37. The Commission was unable to determine Claimant's last date of work, merely that he worked for about a week after his September 6, 2007 injury before he was let go by Employer. Presumably, the parties can identify Claimant's actual termination date. Claimant's date of stability remains a matter in dispute and is addressed in the "Further Discussion and Findings" portion of this Decision and Order.

### ***VOCATIONAL EVIDENCE***

#### ***Douglas Crum***

39. Defendants retained Douglas N. Crum, C.D.M.S., to evaluate Claimant's disability in excess of his impairment. The Commission is well acquainted with Mr. Crum's experience and qualifications, and they are not set out with particularity in this Decision and Order. Mr. Crum's report is dated March 12, 2009, and he was deposed on May 5, 2009. In preparing the report, Mr. Crum reviewed most, if not all, of the medical records admitted into the adjudicatory record.<sup>3</sup> As is usually the case, Mr. Crum's summary of the relevant medical history is thorough and accurate, as is his review of Claimant's work history and education.

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<sup>3</sup> Mr. Crum's initial listing of medical records he examined in preparing his report is incomplete. A review of his summary includes every provider with the possible exception of Marsing Medical, which was Claimant's primary medical provider.

Mr. Crum did not have accurate wage data at the time he prepared his report, so portions of his report relating to loss of wages understate Claimant's actual wage loss.

#### ***Labor Market Access***

40. Mr. Crum had some difficulty assessing Claimant's pre-accident physical capabilities in light of the divergent opinions of Drs. Montalbano and Gussner regarding Claimant's pre-existing condition. For purposes of his analysis, Mr. Crum assumed that Claimant had no permanent physical restrictions prior to the September 2007 injury. As it happens, the record is clear that, regardless of Claimant's actual physical condition as documented since at least 2001, no physician had imposed permanent work restrictions prior to his industrial injury. Subsequent to the discectomy, Dr. Gussner restricted Claimant from lifting in excess of thirty-five pounds occasionally and twenty pounds repetitively, and from repetitive bending, lifting, twisting, and torquing of his spine. Additional relevant restrictions included *ad lib* position changes, and avoiding prolonged low-frequency vibration.

41. Mr. Crum acknowledged that Claimant had few transferable skills, was not fluent in English, and had little formal education, all of which significantly limited his pre-injury labor market. Based on statistical data for the Boise Metropolitan Statistical Area labor market, Mr. Crum determined that before his accident, Claimant had access to approximately 3.9% of the jobs in the labor market. Factoring in the restrictions imposed by Dr. Gussner post-injury reduces the number of jobs available to Claimant to about 1.5% of the labor market, a reduction in labor market access of 59%.

#### ***Wage Earning Capacity***

42. Using Claimant's 2006 tax returns showing an income of \$41,693.00, Mr. Crum determined that Claimant was earning \$20.00 per hour based on a 2080-hour work year.

Mr. Crum opined in his report that Claimant could expect to earn between \$8.50 and \$10.00 per hour in the jobs that he could perform post-injury, resulting in a 50% to 57% loss of earning capacity. Mr. Crum suggested that the best way for Claimant to increase his wage-earning capacity would be to improve his English language skills.

***Permanent Disability***

43. Mr. Crum opined that Claimant's loss of access to the labor market, together with the reduction in his wage earning ability, would constitute between 50% and 55% permanent disability inclusive of impairment.

***Dr. Collins***

44. Claimant retained Nancy J. Collins, Ph.D., to evaluate Claimant's disability in excess of his impairment. The Commission is well acquainted with Dr. Collins' experience and qualifications, and they are not set out with particularity in this Decision and Order. Dr. Collins' report, dated February 13, 2009, includes accurate summaries of Claimant's education and work history. Although Dr. Collins did not include a summary compilation of the medical records, she did have all of the records admitted into evidence and did review them. Based on his work history, Dr. Collins categorized Claimant's prior work as unskilled or semi-skilled, with physical exertion levels of medium-to-heavy and some lifting in the very heavy category.

***Labor Market Analysis***

45. Using a software application that matches Claimant's skills and restrictions with occupational titles, Dr. Collins determined that pre-injury, Claimant had access to twenty-three occupations. Dr. Collins noted that Claimant's thirty-five pound lifting restriction would disqualify him from some medium exertion jobs, which allow up to fifty pounds occasionally. Using a light exertion level and only occasional bending, only two occupational titles remained

available to Claimant post-injury. This represents a 91% loss of labor market access. Dr. Collins noted that her software did not allow her to adjust for restrictions on twisting and torquing, or to allow for *ad lib* position changes. Because *some* medium exertion level positions might be within Claimant's lifting restrictions, Dr. Collins also analyzed the job loss using a medium exertion level and found fourteen occupational titles remained available to Claimant after his injury. This represents a 39% loss of access to the job market. Again, this calculation overstates the number of occupational titles available to Claimant because Dr. Collins could not factor in the limited twisting and torquing, nor the need for position changes as needed. Dr. Collins ultimately concluded that, using Dr. Gussner's restrictions, Claimant's loss of access to the job market exceeded 65%.

#### ***Wage Earning Capacity***

46. In forming an opinion as to Claimant's loss of wage-earning capacity, Dr. Collins used the same calculation as Mr. Crum. Based on an annual income of \$41,693.00 per year, Dr. Collins calculated Claimant's wage rate to be \$20.00 per hour, assuming a 2080-hour year. Dr. Collins noted that it actually appeared as though Claimant was on a salary for nine months per year and, in the winter, was paid on an hourly basis at \$10.00 per hour. Dr. Collins opined that Claimant might find work during the summer that paid \$10.00 per hour, which represented a 50% reduction in wage-earning capacity following his accident. Dr. Collins also noted that during the winter months, his loss of wage-earning capacity could be as high as 65%.

#### ***Disability***

47. Considering all of the relevant factors, including loss of access to the labor market, and loss of wage-earning capacity, his language limitations, and his cultural milieu, Dr. Collins opined that Claimant sustained permanent disability between 65% and 75%,

inclusive of impairment. She also recommended that Claimant should seek vocational rehabilitation assistance to find a job that would not exacerbate his condition.

### ***CREDIBILITY***

48. As noted at the outset, although the Commission has no reason to believe the Claimant intentionally dissembled the truth, he is a poor historian, with a somewhat fallible memory, both problems which are compounded by his limited education and language difficulties.

## **DISCUSSION AND FURTHER FINDINGS**

### ***TTD Benefits***

49. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. Idaho's workers' compensation statutes do not define the period of recovery, but the Idaho Supreme Court has determined that it ends when the worker is medically stable. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001). The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980).

50. The date Claimant became medically stable is the only remaining piece of information needed to calculate the amount of TTD benefits owed to Claimant. Dr. Montalbano found Claimant was at MMI on May 30, 2008. However, Claimant continued to complain of low back and leg pain and returned to Dr. Montalbano on August 13, 2008, at which time Dr. Montalbano ordered an MRI to determine whether there was a physiological basis for the on-going pain complaints. Five days later, on August 18, Claimant saw Dr. Gussner for the IME. Dr. Gussner did not believe that Claimant was medically stable because of the pending

MRI. The August 27, 2008 MRI revealed only the expected post-operative changes that resulted from the discectomy. Claimant did not return to either Dr. Gussner or Dr. Montalbano until much later in the fall (Dr. Montalbano on November 12, 2008; Dr. Gussner on December 19, 2008). At that time, Dr. Gussner determined that there was no new injury, and that Claimant's complaints in the fall of 2008 were the result of a temporary exacerbation and a return to baseline. He declared Claimant at MMI. Against this background, Defendants assert that Claimant was at MMI on May 30, and Claimant asserts that he could not have been medically stable in May, when Dr. Montalbano ordered an MRI in August for on-going symptoms.

51. In light of subsequent events, including Dr. Montalbano's order for a new MRI and x-rays in August, the doctor's initial May 30, 2008 stability date was clearly premature. As pointed out by Claimant in his briefing, Dr. Montalbano's chart note from May 30 describing Claimant's condition as stable is markedly at odds with the contemporaneous physical therapy records, as well as Dr. Montalbano's later chart note on August 18. Dr. Gussner did not believe Claimant was stable on August 18, 2008, because Dr. Montalbano had ordered further imaging. The pending imaging was the only reason Dr. Gussner gave for his opinion that Claimant was not stable on August 18. Once the MRI results were known on August 27, neither physician had any further treatment to offer Claimant. The Commission finds that Claimant was medically stable on August 28, 2008.

52. Claimant is entitled to the TTD benefits owed as a result of improper calculation of his compensation rate from the date he was first off work in September 2007 through May 29, 2008. Claimant is entitled to TTD benefits, calculated at the correct compensation rate, from May 30 through August 27, 2008.

## ***IMPAIRMENT***

53. “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 non-progressive 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 non-specialized 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).

54. In his IME report, Dr. Gussner imposed permanent restrictions on Claimant and awarded Claimant a 9% whole person permanent impairment rating. Dr. Gussner calculated his rating using the *AMA Guides to Permanent Impairment*, 6<sup>th</sup> ed. (*AMA Guides*). Dr. Gussner did not apportion any of Claimant’s PPI to his pre-existing condition. At the time of the IME report, Dr. Gussner was not aware of the extent of Claimant’s previous low back pathology. Nor was he aware of the 2001 MRI, demonstrating prior left sided L4-5 disk compromise. By the time of his deposition in April 2009, Dr. Gussner was aware of the earlier medical records, and he opined that it was appropriate to apportion 3% of the 9% whole person PPI to Claimant’s pre-existing conditions.

55. Dr. Montalbano consistently stated that he did not believe that it was appropriate to place activity restrictions on Claimant following his lumbar surgery. This opinion appears in both his chart notes and his correspondence. In part because he imposed no restrictions, and in

part because Dr. Montalbano believed that the need for Claimant's surgery was primarily the result of his degenerative disc condition and not his work injury, Dr. Montalbano did not give Claimant any impairment rating. Dr. Montalbano remained unwavering in his positions until his deposition. In his deposition, he testified that he agreed with the activity restrictions that Dr. Gussner had imposed on Claimant. However, he maintained his position that the limitations were necessary because of Claimant's pre-existing degenerative disc disease and were not prophylactic. Dr. Montalbano also changed his position on impairment and gave Claimant an impairment rating of 7% of the whole person, with 2% of that impairment apportioned to the industrial accident and 5% the result of his pre-existing conditions. Dr. Montalbano based this rating on the *AMA Guides*.

56. Dr. Gussner explained the process he used to calculate his 9% PPI rating. Using the most current edition of the *AMA Guides*, and Table 17-4 on p. 570, he classified Claimant's condition as a motion segment lesion, Class 1, with a range of impairment from 5% to 9%. When using this table, the rating defaults to the median rating (7% in this case) and is then adjusted upward or downward based on functional history, physical examination, and clinical studies, using the adjustment formula (p. 582). Dr. Gussner determined values for the functional history and physical examination and deferred the clinical studies. Using the adjustment formula, Dr. Gussner adjusted the default rating upward to the maximum 9% permitted in Class 1.

57. Although Dr. Montalbano did not explain how he came to his 7% impairment rating, it appears as though he used the same methodology as Dr. Gussner to find his starting point—7% impairment. Dr. Montalbano made different adjustments to the default rating, or made no adjustments at all. The former represents an acceptable difference of opinion between

professionals, the latter a misuse of the methodology set out in the Guides.

58. The Commission adopts Dr. Gussner's impairment rating, including his apportionment. Three reasons support such a finding. First, Dr. Gussner clearly set out and explained his methodology in calculating Claimant's impairment. Second, Dr. Gussner correctly applied the methodology set out in the *AMA Guides*.<sup>4</sup> Finally, Dr. Gussner's impairment rating is in line with Claimant's actual impairment as documented in the medical records.

### ***DISABILITY***

59. Under the Idaho worker's compensation law, a "disability" is defined as "a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors." Idaho Code § 72-102(11). A claimant's permanent disability rating is determined by appraising the combined effect of those medical and nonmedical factors on the "injured employee's present and probable future ability to engage in gainful activity." Idaho Code § 72-425.

60. Doug Crum and Dr. Collins both offered expert opinions regarding the extent of Claimant's disability, and both agreed that Claimant had sustained substantial disability in excess of his impairment. Both experts relied on Dr. Gussner's recitation of Claimant's permanent limitations/restrictions in formulating their opinions on Claimant's disability in excess of impairment.

61. Both experts utilized Claimant's annual income spread over 2080 hours to determine that his pre-injury wage was \$20.00 per hour. Both noted that, at the high end, jobs he would be able to perform post-accident paid \$10.00 per hour. This 50% reduction formed the

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<sup>4</sup> Physicians are not required to use the *AMA Guides*, but if they do so, it is expected that they will use the Guides appropriately.

basis of their ultimate opinions regarding wage loss. The record and the testimony reflect that Claimant's hourly earnings were \$10.00 per hour. As noted by Dr. Collins, he was paid on a salaried basis from February through November, and then on an hourly rate the remaining three months. But dividing his monthly salary by his work hours, it turns out that his "salary" is a fair approximation of the \$10.00 per hour rate he was paid in the slower months. Claimant had a high income for a farm laborer because he worked many hours. Claimant will certainly suffer a significant decrease in his earning capacity as a result of his injury; however, the decrease occurs not because his *wage rate* drops, but because of the significant reduction in the number of hours he will be able to work. The outcome remains the same whether one starts with wages or hours, but intellectually it is more honest to recognize that it was the hours worked, and not the wage rate that accounted for Claimant's income.

62. As discussed above, Mr. Crum determined that Claimant had access to approximately 3.9% of the jobs in the labor market before his accident, due to Claimant's limited transferable skills, little formal education and not being fluent in English. After the accident, Claimant's access to the jobs in the labor market decreases to about 1.5%, representing a reduction of 59%. Dr. Collins determined that Claimant's loss of access to jobs in the labor market exceeded 65%, based on a range of 91% loss of access (not accounting for *some* medium exertion level positions that might be within Claimant's lifting restrictions) to 39% loss of access (not accounting for all of Claimant's limitations in twisting, torquing or the need to change positions).

63. Given a 59% loss of access to the job market and up to a 75% loss of earning capacity, Mr. Crum's ultimate opinion on Claimant's disability inclusive of impairment (up to 55%) is on the low side. Similarly, given a loss of access over 65% (possibly up to 91%) and up

to a 65% loss of earning capacity, Dr. Collins' ultimate opinion on Claimant's disability inclusive of impairment (up to 75%) is a bit on the high side. Ultimately, the Commission finds that Claimant's disability inclusive of impairment is 70%, an amount well supported by the record.

### ***APPORTIONMENT***

64. Idaho Code § 72-406(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.

65. Claimant argues that no part of his disability should be apportioned to any pre-existing cause because no physician ever authored permanent limitations/restrictions for Claimant on a pre-injury basis, and because Claimant's lack of physical limitation is demonstrated by the type of work he was capable of performing prior to the subject accident. Defendants contend that restrictions would have been appropriate prior to the accident and injury, given that Claimant had disc pathology in his L4-5 disc of a progressive nature, which had not been surgically remedied. Defendants argue that the uncertainty connected with Claimant's pre-existing conditions warrants a PPD rating of 30% and some apportionment of that rating to Claimant's pre-existing condition.

66. Apportionment of disability and medical costs is a factual issue. The Commission's evaluation of permanent disability requires the evaluation of multiple factors, both medical and non-medical, that impact a Claimants earning capacity. Defendants are only responsible for the additional disability connected with the September 2007 accident. The existence or absence of physician authored limitations/restrictions which predate the subject

accident is not a factor which, standing alone, is dispositive of the issue of apportionment. *See, Poljarevic v. Independent Food Corporation*, filed Jan. 13, 2010.

67. In this case, easy analysis of the Idaho Code § 72-406 issue is hampered by certain assumptions made by Mr. Crum and Dr. Collins in their analyses. Both Mr. Crum and Dr. Collins appear to have assumed that since no physician had imposed limitations/restrictions on Claimant prior to the subject accident, Claimant was essentially unhindered in his ability to engage in physical activities prior to the subject accident. However, as noted above, the question of whether or not some portion of Claimant's disability should be apportioned to a pre-existing impairment is not dependent on whether or not there is a physician imposed limitation/restriction which pre-dates the subject accident, even though existence or absence of such a physician imposed restriction is, assuredly, relevant to such an analysis.

68. Although we are cognizant of the fact that, on a pre-injury basis, no physician ever gave Claimant a set of permanent limitations/restrictions, other facts of record persuade us that some portion of Claimant's permanent disability should be apportioned to his pre-existing impairment.

69. First, it is clear that some portion of Claimant's permanent physical impairment pre-dates the subject accident. When presented with a better picture of Claimant's pre-injury medical history, Dr. Gussner proposed that Claimant is currently entitled to a 9% PPI rating, with 3% apportioned to pre-existing conditions. As noted, we have found Dr. Gussner's reasoning in this regard to be more persuasive than the opinion authored by Dr. Montalbano. Therefore, the first requirement of Idaho Code § 72-406 is satisfied; Claimant does have a pre-existing physical impairment.

70. Moreover, it is clear that Claimant's pre-existing physical impairment contributes to his current disability. For the reasons set forth below, we conclude that Claimant's 70% disability should be apportioned 15% to his documented pre-existing physical impairment and 55% to the subject accident.

71. In arriving at this decision, it is first worth noting that Dr. Moreland would assign all of Claimant's current limitations/restrictions to his pre-existing condition. Although Claimant has argued that Dr. Gussner has taken the opposite view and assigned all of Claimant's current limitations/restrictions to the subject accident, a careful review of Dr. Gussner's testimony demonstrates that he is not entirely hostile to the proposition that Claimant's pre-existing impairment did impact his functional abilities prior to the subject accident. Dr. Gussner testified that the 2001 MRI did demonstrate a left sided extrusion/protrusion at the L4-5 level. His testimony is to the effect that this lesion was worsened by the subject accident. Importantly, Dr. Gussner testified that an individual with a known disc lesion should avoid certain types of physical activities, the purpose of such limitations being to prevent further injury to the disc. *See*, Gussner deposition, pp. 15-18. On cross examination, Dr. Gussner acknowledged that it "might" have been appropriate to give Claimant restrictions against lifting more than 50 lbs. on a pre-injury basis. *See*, Gussner deposition, p. 36. Of course, as Claimant has pointed out, Dr. Gussner's musings in this regard never did mature into an opinion that Claimant "should" have so limited himself on a pre-injury basis. However, in this regard, it is critical to note that Dr. Gussner arrived at his opinion because he "believed" Claimant when Claimant asserted that he no symptomatology prior to the subject accident. However, we find that the medical records in evidence make it clear that Dr. Gussner's reliance upon Claimant as a good historian is misplaced. Again, we find no evidence that Claimant has consciously dissembled the truth in

this matter. However, it is impossible to reconcile Claimant's testimony with the pre-injury medical records, which, as noted above, demonstrate steady, if not increasing, low back symptomatology in the years immediately preceding the subject accident.

72. Based on the foregoing, it is impossible for the Commission to conclude that Dr. Gussner's testimony lends significant support to the proposition that Claimant had no limitations on his physical capacity to perform gainful activity prior to the subject accident. Indeed, when carefully reviewed, Dr. Gussner's testimony supports the proposition that Claimant reasonably did have some loss of functional capacity on a pre-injury basis, notwithstanding that he was evidently capable of performing his time of injury job. However, even though Claimant may have been able to perform his time of injury job prior to the subject accident, he did not do so without low back pain/discomfort.

73. Although we have found that Dr. Gussner's testimony tends to support the proposition that Claimant did have certain limitations/restrictions which pre-dated the subject accident, we find that the record fails to support the opinion of Dr. Montalbano, an opinion which seems to lie at the other end of the spectrum. Although the medical record tends to support the conclusion that Claimant did have a loss of functional capacity which pre-dated the subject accident, the record also lends abundant support to the proposition that the subject accident significantly worsened Claimant's condition, causing him to become more symptomatic, and to require the medical treatment that has led to his current limitations and impairment rating. Accordingly, we reject Dr. Montalbano's testimony that Claimant's current limitations/restrictions are entirely unrelated to the subject accident.

74. On balance, Defendants have presented a supportable argument that Claimant was limited, to some extent, following the 2001 accident. The Commission is persuaded that

Claimant's pain complaints and medical history auger in favor of granting some limited apportionment of disability to Claimant's pre-existing impairment. We find that the evidence supports the conclusion that Claimant was reasonably limited to lifting less than 50 lbs. prior to the subject accident, and that his impairment therefore precluded him from some heavy-duty and medium-duty jobs. Following the September 2007 accident, Claimant's lifting restriction of 35 pounds eliminates most heavy-duty *and* medium-duty jobs. In addition, Claimant's limited English abilities, education and work experience are not conducive to medium-duty or low-duty work. Claimant is in a much worse position now than he was after his 2001 accident, because he is now limited from working in the heavy duty area for which he was accustomed and able to perform with his non-medical limitations. The Commission agrees with Dr. Gussner's insistence that most restrictions should be referable to Claimant's 2007 accident. Claimant's wage-earning capacity has been more severely impacted following his 2007 accident because heavy-duty and most medium-duty jobs are no longer reasonable avenues for Claimant, whereas Claimant would have had more opportunities in those areas with restrictions of around 50 pounds.

75. Based on the foregoing, the Commission concludes that Claimant's disability inclusive of his impairment is 70% is properly apportioned in the amount of 15% to Claimant's documented pre-existing condition pursuant to Idaho Code § 72-406. Defendants remain liable to Claimant for 55% disability inclusive of his impairment.

#### ***ATTORNEY FEES***

76. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides in pertinent part:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the

employer or his surety . . . neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, . . . the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. (Emphasis added.)

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

77. Claimant seeks attorney fees for Defendants' delay in correctly calculating Claimant's TTD benefits. Claimant's argument is well taken. Surety has an obligation to pay TTD benefits at the correct rate. Julie Mulder, Claims Adjuster, testified regarding the handling of the payment of TTD benefits. It appears that Ms. Mulder made an initial rough calculation of Claimant's TTD benefits, and started paying Claimant that amount. At hearing, Ms. Mulder was forthcoming that this was not the correct way to calculate Claimant's benefit amount, and indicated that she intended to correct the payment amount when she had the appropriate information. Ultimately, Defendants neglected to timely follow-up and adjust the rate of TTD benefits. The necessary information for correctly calculating Claimant's TTD benefits rests solely with Defendants. Claimant is not under any obligation to remind Defendants of their responsibility to pay TTD benefits at the correct rate. Defendants simply failed to appropriately obtain Claimant's wage information, and failed to promptly correct the underpayment of benefits when the error was discovered. The Commission finds that Claimant is entitled to an award of attorney's fees for Defendants' unreasonable delay in calculating Claimant's TTD benefits.

78. The parties reasonably disputed Claimant's date of medical stability. The Commission finds that Claimant did not reach medical stability until August 27, 2008. Defendants' actions with respect to TTD benefits for the period from May 30 through August 27,

2008 do not support an award of attorney fees for that portion of Claimant's TTD benefits.

79. Unless the parties can agree on an amount for reasonable attorney's fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 900 (1984). Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendant may file a memorandum in response to Claimant's memorandum. If Defendant objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendant's response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

#### **CONCLUSIONS OF LAW**

1. Claimant's average weekly wage at the time of his injury was \$937.33;
2. Claimant is entitled to temporary partial and/or temporary total disability benefits from the period beginning the day following his last day of work in September 2007 through August 27, 2008 at the statutory rate calculated using his average weekly wage;
3. Claimant is entitled to permanent partial impairment (PPI) of 9% of the whole person, of which 3% is apportioned to his pre-existing conditions and 6% is referable to the September 2007 accident;
4. Claimant's disability inclusive of his impairment is 70%. Claimant's disability is not due solely to his September 6, 2007 industrial accident, and apportionment of 15% disability

pursuant to Idaho Code § 72-406 is appropriate. Defendants are responsible for 55% of disability inclusive of impairment.

5. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for unreasonable handling of TTD benefits accrued from the day following Claimant's last day of work through May 30, 2008. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

### **ORDER**

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

1. Claimant's average weekly wage at the time of his injury was \$937.33.
2. Claimant is entitled to temporary partial and/or temporary total disability benefits from the period beginning the day following his last day of work in September 2007 through August 27, 2008 at the statutory rate calculated using his average weekly wage.
3. Claimant is entitled to permanent partial impairment (PPI) of 9% of the whole person, of which 3% is apportioned to his pre-existing conditions and 6% is referable to the September 2007 accident.
4. Claimant's disability inclusive of his impairment is 70%. Claimant's disability is not due solely to his September 6, 2007 industrial accident, and apportionment of 15% disability pursuant to Idaho Code § 72-406 is appropriate. Defendants are responsible for 55% of disability inclusive of impairment.
5. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for unreasonable handling of TTD benefits accrued from the day following Claimant's last day of

work through May 30, 2008. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this \_12th\_ day of \_\_February\_\_\_\_\_, 2010.

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 \_12th\_ day of \_\_\_\_\_February\_\_\_\_\_, 2010, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS, and ORDER** were served by regular United States Mail upon each of the following persons:

RICHARD S OWEN  
PO BOX 278  
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R DANIEL BOWEN  
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cs-m/cjh

\_\_\_\_\_/s/\_\_\_\_\_