BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL PICCIRILLI, Claimant, v. AES AN EMPLOYMENT SOURCE, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-017971** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed June 4, 2012**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Sandpoint on December 29, 2011. Claimant was present and represented himself. Paul J. Augustine represented Employer/Surety. Oral and documentary evidence was presented. No post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter came under advisement on March 9, 2012.

ISSUES

By agreement of the parties, the issues to be decided as a result of the hearing are:[1]

[1] Claimant requests costs and attorney fees in his post-hearing briefs. As this was not a noticed issue, and Claimant is not an attorney, that issue will not be considered.

1. Whether Claimant is entitled to reasonable medical care pursuant to Idaho Code § 72-432(1); and

2. Whether Claimant is entitled to total temporary disability (TTD) benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to continuing medical care for an ulnar nerve injury because he has failed to improve after an ulnar nerve transposition surgery and needs to be referred to a specialist in ulnar nerve injuries. Claimant further contends that he is entitled to TTD benefits while ordered off work by his treating physician and that two light-duty job offers by Employer to Claimant were not reasonable, in that he would be required to drive from his home in Newport, Washington, to Post Falls, and he cannot afford to do so.

Defendants contend that Claimant's treating physician, as well as an IME physician retained by Surety, agree that Claimant is at MMI and does not need any further medical treatment. They also each released Claimant to return to work without restrictions, and concurred in a 1% whole person impairment rating. Finally, Defendants argue that Employer's offer of light-duty employment was legitimate and reasonable, that Claimant's rejection thereof was unreasonable and, therefore, his claim for TTD benefits must fail under *Maleug*.[2]

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony presented at the hearing of Claimant and Deborah Vaughn, Employer's branch manager.

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[2] See *Maleug v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986).

2. The pre-hearing deposition of Claimant, taken by Defendants on July 26, 2011.

3. Defendants' Exhibits 1-9, admitted at the hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 35 years of age and resided in Newport, Washington, at the time of the hearing. Employer, a temporary staffing service, hired Claimant in 2007 to work at a furniture store in Post Falls. Claimant "no-showed" because he did not want to drive from his home in Newport to Post Falls.

2. Employer hired Claimant again on July 4, 2010 as a watercraft inspector searching for zebra and quagga mussels in Lewiston, Claimant's home at the time. He was required to handle public relations, physically inspect the towing vehicle and boat, and prepare the appropriate paperwork. Claimant would work with another inspector, and they would take turns with the inspections and paperwork.

3. On July 21, 2010, Claimant tripped over a traffic cone and landed on his right side, injuring his right elbow. He immediately reported his accident to his supervisor and Surety accepted the claim. Claimant reported to St. Joseph Minor Care the next day and was told that he had a bruised right elbow and it should resolve with Ibuprofen and icing. Radiographs were normal. He was not taken off work; however, he was provided a light-duty job limited to visual inspecting. Claimant quit a few days later because he did not believe he could do his job any longer due to right elbow pain.

Dr. Boyea

4. When Claimant's symptoms failed to improve, he eventually sought treatment from Steven R. Boyea, M.D., an orthopedic surgeon in Lewiston, at Surety's request. Claimant's first visit with Dr. Boyea occurred on August 24, 2010, at which time he was complaining of right elbow pain and significant right hand numbness and weakness. Dr. Boyea suspected ulnar nerve pathology and ordered an EMG and nerve conduction studies. Claimant was released to return to work with restrictions of no lifting more than 10 pounds, no pushing or pulling more than 10 pounds, and no repetitive right elbow activity.

5. Claimant returned to Dr. Boyea on September 29, 2010 to review the results of his EMG and nerve conduction studies. Dr. Boyea noted: "The patient still demonstrates evidence of medial epicondylitis and evidence of subluxing ulnar nerve with some nerve irritation." Defendants' Exhibit 2, p. 9. Claimant received an epidural steroid injection and was prescribed physical therapy. Dr. Boyea indicated that if Claimant did not exhibit significant improvement in six weeks, he would recommend an anterior submuscular ulnar nerve transposition.

6. On November 10, 2010, Dr. Boyea reported: "The patient demonstrates what appears to be a fairly significant subluxing ulnar nerve on the right with now worsening symptomatology and now with evidence of an ulnar neuritis and possible scarring around the cubital tunnel." *Id.*, p. 16. Due to Claimant's failure to improve, Dr. Boyea recommended surgical intervention.

7. On November 14, 2010, Dr. Boyea restricted Claimant from using his right arm pending surgery and prohibited him from returning to his inspector job.

8. On December 6, 2010, Dr. Boyea performed a right elbow anterior submuscular ulnar nerve transposition.

9. Four days post-surgery, Dr. Boyea noted that Claimant was doing well and would begin physical therapy. Claimant was counseled on activity modification, such as no high-risk or sports activities, and routine cast care.

10. On January 25, 2011, Claimant reported to Dr. Boyea that he was doing well other than a bit of stiffness and soreness in his right elbow and swelling in his right hand. Claimant was continued on physical therapy. He was allowed to increase activities as tolerated lifting up to five pounds, but no repetitive activities with his right elbow. Dr. Boyea anticipated that Claimant could return to work without restrictions in about six weeks. In the interim, he was released to return to work with no use of his right arm, shoulder, wrist, and fingers.

11. Claimant's last visit to Dr. Boyea was on March 8, 2011. He was complaining of constant pain in his right elbow shooting into his right hand. Dr. Boyea noted that Claimant got some motion back in his right elbow, but he still had very poor function and weakness. Claimant did not think he could work and was frustrated by his failure to improve. Dr. Boyea assessed: "The patient is now about three months status post a right anterior submuscular ulnar nerve transposition now with worsening symptomatology again and questionable scarring at the tunnel sites of the transposition and possible adhesive neuritis." *Id.*, p. 28. Although Dr. Boyea recommended a follow-up visit in six weeks, Claimant, as explained below, never returned.

Dr. Greendyke

12. Spencer Greendyke, M.D., a board certified orthopedic surgeon practicing in Coeur d'Alene, conducted an IME of Claimant on April 27, 2011 at Surety's request. Dr. Greendyke was to provide a diagnosis and treatment recommendations and assess MMI and PPI. Dr. Greendyke took Claimant's history, examined him, and reviewed pertinent medical records.

13. Claimant's chief complaints were right medial elbow pain, right small and ring finger tingling, and swelling in all fingers of his right hand. He reported that the pain in his right elbow was worse than before surgery. Dr. Greendyke opined that, based on his examination, prior medical records, and diagnostic testing, there was no objective evidence that supported a diagnosis of ulnar nerve entrapment neuropathy of Claimant's right elbow. He reasoned as follows:

> The upper extremity EMG/NCV study was performed by a neurologist, and determined by him to be a normal study. A cubital tunnel injection was performed by Dr. Boyea and according to the patient produced no improvement in his symptoms. The surgical procedure including submuscular transfer of the ulnar nerve produced no improvement, not even temporarily, in the claimant's reported symptoms. It therefore seems to me to be reasonable to conclude that Mr. Piccirilli did not actually suffer from an ulnar nerve condition of the right elbow.

Id., p. 9.

14. Because Claimant was evaluated shortly before the subject accident in an emergency room for numbness in his fingers and toes, Dr. Greendyke surmised that his current symptoms continue to relate to his preexisting disorder. Dr. Greendyke did not find that Claimant had reached MMI because he could be suffering from a different problem with his right elbow related to his industrial accident. Dr. Greendyke ordered further

diagnostic studies.[3] If these studies revealed no pathology, Claimant would be deemed at MMI. However, further treatment may be indicated depending on what the studies reveal. Dr. Greendyke continued Claimant's one-arm only work restriction, pending the results of the proposed testing.

15. Interestingly, the EMG/nerve conduction study and MRI ordered by Dr. Greendyke did not end up supporting his theory that Claimant did not actually suffer from an ulnar nerve condition of the right elbow.

Although the EMG/nerve conduction study performed by Dr. Lea at Greendyke's instance was negative, the MRI study was not. In his letter of August 9, 2011, Dr. Greendyke described the results of that study as follows:

> MRI of the right elbow is available for review on Stentor, and was visualized by me. The medial epicondyle displays a signal change consistent with mild inflammation. This translates into mild medial epicondylitis. The ulnar nerve shows slight inflammations consistent with postoperative change. There is no compressive lesion visible on the nerve. The remaining bony and soft tissues structures appear normal.

16. Even though the MRI was positive for mild medial epicondylitis and slight inflammation of the ulnar nerve, Dr. Greendyke did not feel that these findings were significant enough to warrant further operative intervention. He opined that Claimant's pathology should "resolve with time." Paradoxically, however, although Dr. Greendyke felt that Claimant's symptoms would resolve over time, he also felt that Claimant would not make significant improvement in his condition over the next twelve months, such that it was appropriate to find Claimant at MMI as of August 9, 2011. He reiterated that Claimant did not require further medical intervention and that he could return to full-duty, full-time work without restrictions. He gave Claimant a 1% whole person PPI rating based on the 6th edition of the *AMA Guides*.

[3] Dr. Greendyke ordered a right elbow MRI and bilateral upper extremity EMG/NCVs.

Dr. Boyea agrees

17. On December 12, 2011, Dr. Boyea concurred, without explanation, with the findings of Dr. Greendyke's IME as well as his August 9, 2010 letter to Surety.

DISCUSSION AND FURTHER FINDINGS

Medical care

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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, 890 P.2d 732 (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). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

18. While Claimant contends that he is still symptomatic and in need of further medical care, he has proffered no medical evidence to support his position. He testified that the only treatment he has received since Surety terminated benefits based on Dr.

Greendyke's IME is a few trips to emergency rooms. The only such visit of record was made on May 12, 2011. (Defendants' Exhibit 9). The report for that date merely indicates that Claimant should follow-up with an orthopedic surgeon. This "referral" was made without the benefit of prior medical records and Dr. Greendyke's IME, and is afforded no weight.

19. Dr. Greendyke indicated in his IME, " . . . that the independent medical examination would not constitute a comprehensive medical examination, provide advice or treatment, substitute for evaluation and treatment by his own physician, or establish a physician/patient relationship." Defendants' Exhibit 3, p. 2. Therefore, according to Claimant, Dr. Boyea remained his treating physician and his recommendation for further treatment and work restrictions are still in effect. This position ignores the fact that Dr. Boyea concurred with Dr. Greendyke's IME opinions. Dr. Boyea did not pick and choose which part of the IME he agreed with. He indicated, in "check the box" form, without reservation, that he agreed with all of Dr. Greendyke's findings in his original report and supplemental letter. Claimant's argument would be stronger, had Dr. Boyea disagreed with Dr. Greendyke; however, he did not. Therefore, the only conclusion that can be reached is that Dr. Boyea agreed that Claimant was at MMI, could return to work without restrictions, needed no more treatment related to his industrial accident, and had a incurred a 1% whole person PPI.

20. The Referee finds that Claimant, who bears the burden of proof, has failed to prove by credible medical evidence that he is entitled to continued medical care as a result of his industrial accident.

TTD benefits

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to total temporary disability benefits unless and until evidence is presented that he or she has been medically released for light work and that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light-duty work release and which employment is likely to continue throughout his or her period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light-duty work release. *Malueg, Id.*

21. Claimant contends he is entitled to TTD benefits from May 23, 2011 until the present. In his brief, Claimant alleges that he saw Eric Bowton, M.D., on May 20, 2011 on referral from an emergency room physician. Dr. Bowton allegedly agreed with Dr.

Boyea's opinions. However, ignoring for the moment that Dr. Bowton's records are not in evidence, this visit was before Dr. Greendyke authored his final opinion based on the diagnostic testing results and before Dr. Boyea expressed his agreement therewith.

22. Claimant also alleges in his brief that he is currently under the care of a Dr. Bell, who has taken Claimant off work "for the next 12 months." However, Dr. Bell's records are not in evidence and therefore, cannot support Claimant's assertion that he is currently off work in relation to his industrial accident per doctor's orders.

23. It will be recalled that Dr. Greendyke found Claimant to be medically stable as of August 9, 2011. If true, Claimant is not entitled to temporary total disability benefits after that date. However, Dr. Greendyke's letter of August 9, 2011 contains some contradictory findings. On the one hand, Dr. Greendyke proposed that Claimant was not expected to make any improvement in the twelve-month period following August 9, 2011. On the other hand, he proposed that Claimant's right elbow symptoms should resolve with time. This implies that Claimant's right elbow symptoms would be expected to improve and this, in turn, suggests that Claimant might not yet be stable. The internal inconsistency in Dr. Greendyke's observations do not rule out that Claimant is still in a period of recovery subsequent to the August 9, 2011 report of Dr. Greendyke. Setting this internal contradiction aside, it is still clear that Claimant is not entitled to TTD benefits subsequent to August 9, 2011. Dr. Greendyke unambiguously stated that Claimant was released to return to full-duty work without any temporary or permanent limitations as of August 9, 2011. Dr. Boyea concurred with Dr. Greendyke's opinion in this regard. The opinions concerning Claimant's ability to return to full-time, unrestricted work are unrebutted in the record. Therefore, even if Claimant continued to be in a period of recovery subsequent to August 9, 2011, the unrebutted medical evidence establishes that he was

nevertheless allowed to return to work without any restrictions whatsoever. Therefore, Claimant has failed to establish that he is entitled to temporary total or temporary partial disability benefits subsequent to the date of Dr. Greendyke's August 9, 2011 report.

24. Prior to August 9, 2011, Claimant was released to light-duty, one-arm work. Such work was offered to Claimant at Employer's Post Falls office. Claimant declined this offer because he decided it would be too expensive to drive from Newport to Post Falls. A subsequent offer was made; Claimant again refused, so TTD benefits were terminated. The question here is whether Employer's offer of employment was reasonable considering the distance between Claimant's home and the work site, which is approximately 40 miles each way.

25. The Referee finds that the offer was for legitimate work at $11.00 an hour for a full day's work, and Claimant's refusal of Employer's offer was unreasonable.[4] However, Defendant are liable for TTD benefits from the time Claimant was released to return to work and the time the first offer of employment was communicated to Claimant in September 2010, if not already paid.

26. The last time Claimant saw Dr. Boyea was on March 8, 2011, at which time he was taken off work completely. If not already paid, Claimant is entitled to TTD benefits from March 3, 2011 to August 9, 2011, the date of MMI.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that he is entitled to further medical care.

[4] Factored into this finding is the fact that Claimant quit his job because he did not think he could continue doing it (visual-only inspections), and voluntarily moved back to Newport for economic reasons.

2. Claimant has failed to prove he is entitled to additional TTD benefits except for the period of time he was initially released to return to work and the time Defendants communicated their light-duty job offer in September 2010. Defendants are entitled to a credit for any TTD benefits paid within this period.

3. Claimant is entitled to TTD benefits from March 3, 2011 to August 9, 2011. Defendants are entitled to a credit for TTD benefits paid within this period.

RECOMMENDATION

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

DATED this __21st__ day of May, 2012.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __4th_____ day of _June__, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHAEL PICCIRILLI
507 S WARREN ST
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PAUL J AUGUSTINE
PO BOX 1521
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ge _Gina Espinosa_

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL PICCIRILLI, Claimant, v. AES AN EMPLOYMENT SOURCE, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-017971** **ORDER** **Filed June 4, 2012**

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

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

1. Claimant has failed to prove that he is entitled to further medical care.

2. Claimant has failed to prove he is entitled to additional total temporary disability benefits, except for the period of time he was initially released to return to work and the time Defendants communicated their light-duty job offer in September 2010.

Defendants are to receive a credit for any total temporary disability benefits paid within this period.

3. Claimant is entitled to total temporary disability benefits from March 3, 2011, to August 9, 2011. Defendants are entitled to a credit for total temporary disability benefits paid within this period.

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

DATED this __4th___ day of __June___, 2012.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

_____
R. D. Maynard, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __4th___ day of __June___ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL PICCIRILLI
507 S WARREN ST
NEPORT WA 99156

PAUL J AUGUSTINE
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ge

___/s/_____