BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AMANDA FOMICHEV, Claimant, v. JAMES C. LYNCH, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2005-522775** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed October 17, 2012**

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 Twin Falls, Idaho, on September 28, 2011. Stephen A. Meikle of Idaho Falls represented Claimant. Neil D. McFeeley of Boise represented Defendants. The parties submitted oral and documentary evidence. The parties took two post-hearing depositions and submitted post-hearing briefs. The matter came under advisement on August 1, 2012. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact and conclusions of law.

ISSUES

As set out in the Notice of Hearing, the issues to be decided are:

1. Whether and to what extent Claimant is entitled to the following benefits:

A. Permanent partial impairment (PPI);

B. Disability in excess of impairment (PPD);

C. Attorney fees; and

2. Whether any of the benefits Claimant would normally be entitled to should be suspended or reduced pursuant to Idaho Code § 72-435.

Claimant, in her briefing, raised the issue of total and permanent disability pursuant to the odd-lot doctrine. Defendants argued in response that total and permanent disability was not a noticed issue, and should not be heard, but argued in the alternative that Claimant had failed to establish that she was an odd-lot worker.

Defendants are correct that the issue of total and permanent disability was not noticed for hearing. Though the issue was raised in Claimant's complaint, it was not included in Claimant's request for calendaring and therefore did not appear in the Notice of Hearing. On the subject of noticed issues, the Commission has stated:

> In the workers' compensation arena, many issues raised in a Complaint or an Answer are resolved or partially resolved before hearing, leaving only the remaining disputed issues to be decided. Thus, the parties are required to specify unresolved issues at the time a request for calendaring or a response thereto is filed. The Notice of Hearing sets forth the issues to be decided at hearing. *A major purpose of providing a Notice of Hearing is to give the parties an opportunity to confirm that all issues to be decided have been identified. This procedure affords due process to all parties through notice of the issues to be decided. The parties have an opportunity well before hearing to add or modify the issues so identified.*

Garcia v. State of Idaho, Industrial Special Indemnity Fund, 2007 IIC 0668.7 (09/12/2007) (emphasis added).

Here, the pleadings reflect that a claim of total permanent disability as an odd-lot worker was made at the outset of the proceedings but dropped prior to hearing. Claimant did not include

the odd-lot issue in her request for calendaring, and this issue was not among the issues discussed and agreed upon at hearing. (Tr., pp. 9-10.) Consequently, the issue of whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine is not properly before the Commission and will not be addressed below.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered severe injuries to her lower extremities while working at Employer's car wash. She has undergone fourteen surgeries, including an above-the-knee amputation (AKA), and has taken seven years to reach medical stability.

Claimant asserts that she suffered permanent whole person impairment of 50% as a result of her lower extremity injuries and her post-traumatic stress disorder. Claimant also contends that her permanent disability *exclusive* of her impairment is 70%, resulting in impairment plus disability of 120%. Claimant also asserts that she is entitled to an award of attorney fees. The basis for her attorney fee claim is twofold:

- First, Surety unreasonably suspended her TTD benefits pursuant to Idaho Code § 72-435 when it knew she had diagnosed mental health issues; and
- Second, that disability benefits for an AKA are statutory, and Surety acted unreasonably in not paying Claimant her statutory disability benefit immediately after her industrial accident.

Defendants contend that Claimant has sustained whole person impairment of 42%, including the injuries to her right leg, and the AKA of the left leg, but has not carried her burden of establishing an impairment for a psychological injury as set out in Idaho Code § 72-451. Defendants agree that Claimant does have some disability in excess of her impairment because of the significant injuries she suffered as a result of the industrial accident; however, Defendants argue that Claimant's disability inclusive of her impairment is somewhere between 50% and 55%.

Defendants deny that any award of attorney fees is appropriate in this case. First, Idaho Code § 72-435 allows the suspension of benefits in circumstances where a claimant is non-compliant with medical directives. In this case, Surety repeatedly warned Claimant and her attorney that her non-compliance was threatening her benefits, to no effect. Second, Defendants point out that under the terms of Idaho Code § 72-422, permanent impairment benefits cannot be paid until an injured worker has reached maximum medical improvement; the fact that the amount of impairment is statutory pursuant to Idaho Code § 72-728 is not an exception to the provisions of Idaho Code § 72-422.

Finally, Defendants assert that Claimant's benefits should be reduced pursuant to Idaho Code § 72-435, noting that Claimant has, since the outset of her claim, engaged in practices that have imperiled or slowed her recovery.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, John Janzen, Shawna Denton, and David Duhaime offered at hearing;

2. Claimant's exhibits 1 through 28 admitted at the hearing;[1]

3. Defendants' exhibits 1 through 13 admitted at the hearing;

4. Post-hearing depositions of Mark B. Wright, M.D., taken January 13, 2012 and Nancy J. Collins, Ph.D., taken April 13, 2012; and

5. The Industrial Commission legal file.

On October 4, 2012, Claimant filed a motion to supplement medical records. Claimant asserts that post-hearing, she was informed that she is no longer a candidate for a prosthesis. She

[1] The first page of CE 28 was withdrawn by Claimant prior to the admission of the remainder of the exhibit.

also states that she recently underwent carpal tunnel surgery "as a result of the overuse of her hands for her crutches and wheelchair." She argues that the medical records establishing these facts are relevant to determining her degree of disability.

Defendants object to the motion, responding that the admission of medical records developed post-hearing would be contrary to J.R.P. 10. Furthermore, it would be unfair to permit Claimant to present supplemental exhibits without giving Defendants the chance to evaluate or rebut the exhibits. Additionally, Defendants argue that the new records would not be relevant to the disability evaluation, as most patients who undergo carpal tunnel surgery experience no permanent impairment from the surgery. Finally, the issue of whether Claimant is a candidate for a prosthesis is also not relevant, because both vocational experts in this case assumed, for purposes of their opinions, that Claimant would be using crutches or a wheelchair for the remainder of her life.

We find Defendants' arguments persuasive. First, there is no provision in J.R.P. 10 that allows for the admission of exhibits that are developed post-hearing. J.R.P. 10(G) provides only that medical records "existing prior to the time of hearing" will be admitted.

Second, it would be inequitable to allow Claimant to present evidence post-hearing without affording Defendants the same opportunity, and Commission procedure must be "as far as possible in accordance with the rules of equity." Idaho Code § 72-708.

Third, considering evidence of a condition that manifested post-hearing, such as Claimant's alleged carpal tunnel syndrome, would be contrary to Supreme Court precedent. In *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012), the Court held that in evaluating a claimant's permanent disability, the Commission should consider the claimant's condition *at the time of hearing*. Presumably, Claimant's alleged carpal tunnel syndrome manifested post-

hearing[2]; the Commission is therefore unable to consider it in evaluating Claimant's disability, even if it be assumed that this alleged diagnosis is related to the subject accident.

Finally, Defendants' argument regarding the prosthesis is well-taken. The experts in this case did not form their disability opinions relying on the assumption that Claimant would be able to use a prosthesis; rather, they assumed that Claimant would continue to rely on crutches and/or her wheelchair.[3] Thus, as the vocational evidence before the Commission does not presume that Claimant would use a prosthesis, it is irrelevant whether Claimant is a candidate for a prosthesis or not.

Claimant's motion to supplement medical records is denied. All objections posed during the depositions are overruled.

After considering the above evidence and the briefs of the parties, the Commissioners make the following findings of fact and conclusions of law.

FINDINGS OF FACT

BACKGROUND

1. At the time of the hearing, Claimant was twenty-six years of age. She lived in Twin Falls with her two young children and the father of her youngest child.

2. Claimant suffered physical and mental abuse throughout her childhood, and had a history of mental and emotional instability prior to her industrial accident.

3. Claimant dropped out of high school in the tenth grade. At hearing she testified that she dropped out because she wanted to work and be independent. Tr., p. 35. Elsewhere in the medical and psychological records, Claimant said she dropped out because she had to take care

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[2] Claimant's motion does not state when she was diagnosed with carpal tunnel syndrome; it only states that she "recently" underwent surgery.

[3] *See* Deposition of Dr. Nancy J. Collins, p. 24, ll. 9-12; CE 4, pp. 3-4.

of her younger siblings. Whatever her reason for dropping out of high school, Claimant did obtain her GED at College of Southern Idaho in 2001.

4. After leaving school, Claimant worked as a carhop at several drive-in restaurants, including Sonic, Arctic Circle, and Dairy Queen. Starting in about 2001, Claimant worked part-time as a car wash attendant for Employer. At the time of her injury, Claimant was earning $180 per week at the car wash ($6.00 per hour for thirty hours per week).

5. During the pendency of her workers' compensation claim, Claimant enrolled in a number of online college-level classes at various private educational institutions. She did quite well in these classes, though she lacked any firm vocational goals. Claimant has good computer skills, and a demonstrated ability to learn independently.

ACCIDENT

6. On October 10, 2005, Claimant was working at the car wash directing vehicles into the rails that carried the vehicles through the automated wash. As she was directing a vehicle into the wash, the driver applied the accelerator instead of the brake. The accelerating vehicle struck Claimant, pinning her between the car and the wall of the car wash, and then proceeded forward through the wall and into the machinery of the carwash. The accident caused a traumatic amputation of Claimant's left leg above the knee, and severely damaged her right leg.

MEDICAL CARE

7. Claimant received trauma care at the scene then was transported to St. Luke's Magic Valley Regional Medical Center (SLMV). Doctors performed an AKA of her left leg. The accident transected Claimant's femoral artery in her right leg which the surgeons repaired with grafts from veins harvested from her amputated leg. The surgeons then stabilized the fractures in her right leg with plates and screws. At the time of hearing, Claimant had undergone a total of

fourteen surgeries related to her accident. The first three attempts to repair her right leg resulted in non-union of the fractures. A fourth surgery was successful. In addition, Claimant had a debridement of her right knee, a surgical revision of her scar on her right leg, and several revision surgeries on her left AKA.

8. During Claimant's period of recovery, which extended from the date of injury until September 2010, she was divorced, had two children, served prison time on a perjury conviction, attempted suicide three times, was involuntarily committed to a mental health facility for six weeks, and moved frequently among Twin Falls, Buhl, and eastern Idaho.

IMPAIRMENT

9. Dr. Wright, Claimant's treating physician/surgeon, found Claimant to be at maximum medical improvement (MMI) on September 13, 2010. Dr. Wright awarded Claimant a 50% whole person impairment for her left AKA (40%) and her right leg injuries (10%). Dr. Wright based his PPI award on the AMA *Guides to the Evaluation of Permanent Impairment*, 6th ed. (*AMA Guides*, 6th). Dr. Wright provided permanent restrictions including: no lifting of more than ten pounds; no climbing, bending or stooping; and no standing for more than one hour.

10. In February 2011, Claimant saw Robert Ward, D.C., M.D., for an independent medical evaluation (IME). Dr. Ward agreed with Dr. Wright that using the *AMA Guides*, 6th, Claimant was entitled to a rating of 50% whole person impairment for her orthopedic injuries. In addition, Dr. Ward rated Claimant at 10% whole person impairment for her diagnosed post-traumatic stress disorder (PTSD).

DISABILITY

Dr. Janzen

11. Claimant retained John M. Janzen, Ed.D., CRC, as her vocational expert. Dr.

Janzen has been a certified rehabilitation counselor since 1974 and has operated his own consulting firm since 1979. Dr. Janzen's Ed.D. is in counseling and psychology. Dr. Janzen testified that for a ten-year period in the 1980s and 1990s he did a substantial number of workers' compensation evaluations. Recently, he has performed "several" such evaluations per year. Tr., p. 95.

12. Dr. Janzen met with Claimant and reviewed her relevant medical records. He considered Claimant's particular injuries, the permanent restrictions imposed by Dr. Wright in September 2010, and Claimant's educational and vocational history. Based on her injuries and her restrictions, Dr. Janzen determined that Claimant was limited to jobs with a sedentary classification. He did not believe that her pre-injury work provided her with any transferrable skills, as sedentary jobs are often skilled or semi-skilled. Dr. Janzen concluded that Claimant lost the *physical capacity* to perform 90% of the jobs in her labor market. However, he noted that her computer skills would offset part of this loss by opening up additional sedentary jobs for which she would not have been qualified at the time of her accident.

13. Dr. Janzen acknowledged that it would not be difficult for Claimant to return to her time-of-injury wage as she was making only $6.00 per hour in 2005 and the current minimum wage is higher. However, he believed that the accident had reduced Claimant's lifetime earning capacity, due to her time away from the workforce and the difficulty she would have in obtaining work in the future.

14. Dr. Janzen concluded that, based on all of the factors discussed above, Claimant suffered 70% disability *over and above* her impairment.

Dr. Collins

15. Defendants retained Nancy J. Collins, Ph.D., as their vocational expert. The Commission is well-acquainted with Dr. Collins' qualifications and there is no need to restate them here. Dr. Collins met with Claimant, and reviewed relevant medical records, Claimant's educational and vocational history, and Dr. Janzen's report.

16. Dr. Collins concluded that Claimant would not have any difficulty in obtaining work that replicated her time-of-injury wage. She described Claimant's pre-injury work as unskilled to semi-skilled, as she had customer service and cashier experience. Relying on the *Occupational Employment Quarterly 2011* for the Twin Falls labor market, Dr. Collins concluded that prior to her injuries, Claimant would have had access to 36% of the jobs in her labor market. Following her accident, and with her restrictions, Claimant's access was reduced to 3.5% of the jobs in her labor market—a 90% loss of labor market access.

17. Dr. Collins explained that it was her practice to factor both loss of labor market access and loss of earning capacity into her disability analysis. Dr. Collins noted that if both factors have equal weight, Claimant's disability, inclusive of her impairment, would be 45% (0 + 90 ÷ 2 = 45). However, Dr. Collins opined that in this case, the loss of access was so large, that it deserved slightly more than equal weight. Dr. Collins concluded that Claimant's disability was between 50% and 55%, inclusive of her impairment.

DISCUSSION AND FURTHER FINDINGS

IMPAIRMENT

18. "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).

19. Two physicians provided impairment ratings for Claimant after she had reached MMI. Both used the *AMA Guides* 6th to support their evaluations. Both Drs. Wright and Ward rated Claimant's orthopedic impairments at 50% of the whole person—her left AKA was 100% of the lower extremity, which converts to 40% of the whole person and the right leg impairments were 10% whole person. Additionally, Dr. Ward awarded 10% whole person impairment for Claimant's diagnosed PTSD.

20. In rating Claimant's orthopedic impairments, both Drs. Ward and Wright erred slightly in their calculations. While the *AMA Guides* 6th provide for 40% whole person impairment for an AKA, Idaho Code § 72-428 rates the impairment for an amputation above the knee joint with a functional stump at 36%. Using the same methodology as Drs. Wright and Ward, this would constitute PPI of 46%, not 50%. However, both physicians erred in adding the two impairment ratings, rather than using the Combined Values Chart set out in the *AMA Guides* 6th. Using the combined values chart, Claimant's whole person PPI for her orthopedic impairments is 42%.

21. Dr. Ward awarded an additional 10% PPI for Claimant's PTSD. Idaho Code § 72-451 imposes a number of requirements upon a claimant who seeks to establish a claim for

psychological injury. A complete analysis of those statutory provisions is unnecessary because subsection (5) of Idaho Code § 72-451 *requires* that any PPI rating for a psychological injury "must be made by a psychologist or psychiatrist." A number of Claimant's treaters diagnosed Claimant's PTSD and related it to the accident; however, no psychologist or psychiatrist provided an impairment rating for psychological injury.

22. Claimant is entitled to PPI of 42% of the whole person.

DISABILITY

23. The burden of proof is on the claimant to prove disability in excess of impairment. Expert testimony is not required to prove disability. The test is not whether the claimant is able to work at some employment, but whether a physical impairment, together with non-medical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho*, 110 Idaho 32, 714 P.2d. 1 (1986).

24. The Idaho workers' compensation law defines a "disability" 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.

25. In *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d (1995), the Idaho Supreme Court discussed disability rating within the statutory framework of Idaho's workers' compensation provisions. "[A] disability rating must include the level of *medical impairment*, but the *medical impairment* rating will not necessarily be the same as that for disability. *Fenich v. Boise Elks Lodge No. 310*, 106 Idaho 550, 553, 682 P.2d 91, 94 (1984)" (emphasis added). With regard to

the non-medical factors that the Commission must consider, the Court cited to Idaho Code § 72-430(1), which provides:

> In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

26. Both parties in this proceeding retained vocational experts. Both experts considered Claimant's medical impairment, and both considered her age, her occupation, her education, and her vocational history. Dr. Collins's report specifically addressed Claimant's local labor market; Dr. Janzen based his report on national labor statistics. Both experts agreed that because Claimant's pre-injury wage was so low, she could easily meet or exceed her time-of-injury wage in any job within her restrictions and for which she possessed the requisite skills. Both experts agreed that as a result of the physical restrictions placed on Claimant because of the accident, she has lost access to 90% of the labor market that had been available to her prior to her injury. Both experts attributed the loss of access to the labor market to Claimant's loss of light and medium exertion level jobs.

27. Despite their many areas of agreement, Drs. Janzen and Collins reached different conclusions regarding the extent of Claimant's disability. Dr. Janzen drew a clear distinction between Claimant's impairment rating and the disability that arose from that impairment, stating that Claimant's disability of 70% is in *addition* to whatever impairment she suffered as a result of the subject accident. However, Dr. Janzen also testified that in making his assessment of

disability, he considered Claimant's permanent limitations and restrictions and the impact these would have on Claimant's ability to engage in gainful activity. Tr., pp. 128-129. Thus, it is evident that despite Dr. Janzen's statement that his disability rating is separate and distinct from the impairment rating, his opinion on Claimant's disability is nevertheless informed by the medical factor of impairment and by the pertinent nonmedical factors, as provided by Idaho Code §§ 72-425 and 72-430. Accordingly, although Dr. Janzen unambiguously testified that his assessment of Claimant's 70% disability excludes consideration of her physical impairment, his testimony reveals that, by taking her limitations and restrictions into account, he did in fact consider it. It is therefore difficult to ascribe a specific disability rating to Claimant under Dr. Janzen's opinion; what is clear is that he considers her very significantly disabled.

28. Dr. Janzen acknowledged that his report probably overstated Claimant's pre-injury access to the labor market by assuming that she was capable of heavy and very heavy labor on a pre-injury basis. He conceded that this type of work was probably unreasonable for her on a pre-injury basis, and adjusted his opinion accordingly. He was willing to concede that Claimant has probably lost access to only 80% of her labor market, as opposed to 90%, as a consequence of the subject accident.

29. In other respects, however, Dr. Janzen's opinion credibly addresses the significant impediment to employment caused by an injury of the type that both he and Claimant have suffered. The loss of the leg above the knee, with the attendant phantom limb syndrome, creates many obstacles to performing even sedentary work. Even so, Dr. Janzen candidly acknowledged that Claimant's prospects for future employment are not hopeless; she is intelligent, shows a capacity to learn new skills, and is young enough to adapt to her condition. This would seem to

indicate that while Dr. Janzen believes Claimant's disability is significant, he does not believe it to be total.

30. Dr. Collins reached her opinion on Claimant's disability using the same numbers as Dr. Janzen but applying a slightly different methodology. As set out in Idaho Code § 72-102(11), the fundamental measurement of disability is the loss of wage-earning capacity. Dr. Collins looked at two different measures of wage-earning capacity: 1) the loss of access to the labor market that results from the injury; and 2) the wage that an injured claimant will be able to command in their labor market. In this case, Claimant suffered a 90% loss of access to the labor market, but no real wage loss because any job she gets is likely to pay more than she made in 2005. Dr. Collins testified that often, just averaging the two figures provides a fair estimation of disability that encompasses all of the factors set out in Idaho Code § 72-430(1). Had she done that in this case, Claimant's disability would have been 45% — 3% in excess of her impairment. Because Claimant's injuries were so severe, and because she was so young, and because she was working only part-time at a low-wage job, Dr. Collins determined that giving equal weight to the factors of wage-earning ability and loss of market access was not a fair representation of Claimant's disability. Dr. Collins afforded slightly more weight to the loss of market access, and concluded that Claimant's disability was in the range of 50% to 55%.

31. Dr. Collins's report was comprehensive, taking into consideration the many factors that affect disability assessment. Her methodology was consonant with Commission practice and statutory provisions as interpreted by the Idaho Supreme Court. On the other hand, Dr. Janzen credibly described the impact of Claimant's above the knee amputation from his unique perspective. The Commission finds that both opinions make valuable contributions to the Commission's ultimate goal of arriving at an appropriate synthesis of Claimant's present and

probable future ability to engage in gainful activity. Most significant to the Commission is Claimant's 80-90% loss of labor market access. While the severity of this loss is somewhat mitigated by the fact that Claimant suffered no appreciable wage loss, we find that Claimant's labor market access is nevertheless so limited as to be the dominant factor in assessing Claimant's disability. Having considered the opinions of both experts, and having determined that the particular circumstances of this case justify attributing a greater-than-usual weight to diminished labor market access, the Commission concludes that Claimant's permanent disability inclusive of her impairment is 75%.

REDUCTION OF BENEFITS

32. Defendants argue that Claimant's benefits should be reduced pursuant to Idaho Code § 72-435, which provides that "if an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery, the Commission *may* order the compensation of such employee to be suspended or reduced" (emphasis added). Thus, such a suspension or reduction is not mandatory, but rather is ordered at the discretion of the Commission.

33. Defendants assert, and the record supports the assertion, that Claimant has, throughout the course of her recovery, persisted in practices that potentially imperiled or retarded her recovery. She failed to attend medical and physical therapy appointments, and she failed to cooperate with ICRD counselors. Claimant's behavior might have complicated and extended an already complicated course of treatment, but the appropriate time to seek an order from the Commission to suspend or reduce benefits was during the period of Claimant's delinquency — that is, during the period of time when Claimant most needed to be compelled to comply with the requirements of her treatment. Instead, Surety unilaterally suspended payment of TTD benefits

for a three-week period in March 2007, an improper action that will be discussed in further detail below. Because Surety failed to ask for the reduction at the appropriate time, the Commission declines to order it.

ATTORNEY FEES

34. 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:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney's 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).

35. Claimant raised two arguments in support of her claim for attorney fees. The first argument is that Surety discontinued Claimant's TTD benefits in March 2007 without reasonable grounds. Claimant's second argument is that because Claimant's amputation was a statutorily scheduled impairment, Surety acted unreasonably when it failed to pay her impairment benefits immediately after the accident.

Suspension of Benefits

36. As noted above, Idaho Code § 72-435 provides that the Commission may order a suspension or reduction of a claimant's benefits in certain circumstances. The record establishes that during March 2007, Surety suspended payment of Claimant's TTD benefits after Claimant canceled or no-showed at more than forty appointments with various providers and her ICRD consultant. The record is also clear that Surety, the ICRD consultant, and her attorney advised Claimant verbally and in writing that her benefits were in jeopardy because her behavior imperiled or delayed her recovery. Surety thus had ample grounds to request an order from the Commission suspending Claimant's workers' compensation benefits during the period of time that her actions imperiled her recovery. However, no such motion was filed with the Commission. Instead, Surety itself suspended Claimant's benefits. The provisions of Idaho Code § 72-435 do not vest Surety with this right. The statute clearly specifies that the *Commission* may order the suspension of benefits, and vests Surety with no authority to undertake this suspension without first having obtained an order from the Commission. Compare Idaho Code § 72-435 to Idaho Code § 72-434. The latter specifies that when an injured worker unreasonably fails to submit to an Idaho Code § 72-433 medical examination, no compensation is payable to the injured worker so long as his refusal to participate continues. Notably, there is nothing in the provisions of Idaho Code § 72-434 that require Surety to obtain Commission approval before curtailing benefits. However, for whatever reason, the Legislature found it appropriate to include such a provision in Idaho Code § 72-435. Although the facts of this case might have warranted the suspension of benefits for the period in question had an order been sought at the appropriate time, Surety was not authorized by statute to suspend benefits without the approval of the Commission. Thus, it was unreasonable for Surety to discontinue benefits in derogation of the

statute such as to justify an award of attorney fees under Idaho Code § 72-804 for the failure of Surety to pay TTD benefits during the period from March 7 through March 27, 2007.

Payment of Impairment

37. Claimant's assertion that Surety should have paid her PPI benefits while she was still in the hospital recovering from her amputation is specious. Impairment benefits are not payable until a claimant reaches MMI, regardless of whether they are a scheduled benefit under Idaho Code § 72-728 or awarded by a physician pursuant to the *AMA Guides*. Surety began paying Claimant's impairment benefits as soon as Dr. Wright found her stable and gave her an impairment rating. Claimant is therefore not entitled to attorney fees on this basis.

CONCLUSIONS OF LAW

1. Claimant is entitled to whole person PPI of 42%.

2. Claimant has established disability of 75% inclusive of her impairment.

3. Claimant's benefits shall not be reduced pursuant to Idaho Code § 72-435.

4. Claimant has established that she is entitled to an award of attorney fees by reason of Surety's failure to first obtain approval of the Commission before suspending payment of Claimant's benefits.

ORDER

Based on the foregoing analysis, it is hereby ordered that:

1. Claimant is entitled to whole person PPI of 42%.

2. Claimant has established disability of 75% inclusive of her impairment.

3. Claimant's benefits shall not be reduced pursuant to Idaho Code § 72-435.

4. Claimant established that she is entitled to an award of attorney fees by reason of Surety's failure to first obtain approval of the Commission before suspending payment of Claimant's benefits.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

If the parties are unable to agree regarding the amount of attorney fees, Claimant's counsel shall, within twenty-one (21) days of entry of the Commission's order, file with the Commission a memorandum requesting attorney fees and an affidavit in support thereof. Defendants shall have fourteen (14) days within which to respond. Claimant's counsel shall reply no later than seven (7) days thereafter. The parties are instructed to address the factors set forth in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The Commission, upon receipt of the foregoing pleadings, shall then review the pleadings and issue an order determining reasonable attorney fees.

DATED this _17th_____ day of October, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __17th__ day of October, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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eb _/s/_____