

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JASON SMITH,

Claimant,

v.

OX INDUSTRIAL, LLC,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,
Defendants.

IC 2012-013082

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

Filed June 27, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Idaho Falls on May 27, 2015. Andrew Adams represented Claimant. V. Dean Dalling represented Defendants. After obtaining post-hearing depositions the parties submitted briefs. The case came under advisement on February 22, 2016. The Commission has reviewed the findings of fact, conclusions of law and recommendation authored by Referee Donahue and the Commission in large part concurs with Referee Donahue's recommendations. However, the Commission declines to adopt the Referee's recommendation in order to give different treatment to the issue of attorney's fees and to address whether Claimant's conduct is sufficient to warrant forfeiture of benefits pursuant to Idaho Code §72-801.

ISSUES

According to the Notice of Hearing, the issues are as follows:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether and to what extent Claimant's condition is due in whole or in part to a subsequent intervening cause;
3. Whether and to what extent Claimant is entitled to benefits for

- a. Permanent partial impairment,
 - b. Disability in excess of PPI,
 - c. Medical care, and
 - d. Attorney fees;
4. Whether Claimant is entitled to total permanent disability under the odd-lot doctrine; and
 5. Whether apportionment of permanent disability for a preexisting condition is appropriate under Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant contends that his industrial accident—while welding, a piece of hot slag dropped into his left ear canal—has caused significant impairment and disability. Hearing was totally lost in that ear; vestibular sense was impaired; he suffers vertigo. Defendants’ IME physicians rated Claimant’s impairment at 6% for hearing loss and 42% for vestibular impairment. These physicians inappropriately retracted the vestibular impairment rating after being made aware of a surveillance video. Claimant’s treating physician rated Claimant’s vestibular impairment at 27% and did not change his opinion as a result of the surveillance video. The surveillance video shows ongoing vestibular issues. Disability analysis should consider that Claimant can no longer wear a welding helmet because of the implantation of a bone-amplified hearing aid (“BAHA”), a cochlear implant, together with his permanent loss of balance, tinnitus, headaches and non-medical factors. Vocational experts who opined based upon physicians’ retractions of PPI should not be given weight. Claimant will require future medical care. Surety unreasonably relied upon their physicians’ retraction of PPI amounts. Surety unreasonably failed to install protective equipment needed in Claimant’s home. Defendants should be liable for attorney fees under Idaho Code § 72-804.

Defendants contend they have paid all benefits due him for this accident, including a 6% PPI. Claimant is not a credible witness. He has falsified his claim for permanent disability.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2

Surveillance video was taken in May 2013 and April 2014. It shows he intentionally misrepresented his condition to physicians. The surveillance video shows Claimant lied in deposition. Claimant's deception and dishonesty should preclude any finding of permanent disability in excess of the 6% PPI. Defendants acted reasonably at all times.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, surveillance investigator Anthony Reyna, and former coworker Travis Greene;
2. Joint exhibits 1 through 32 admitted at hearing, except that Exhibit 13, identified "Swedish Medical Center" includes no documents; and
3. Post-hearing depositions of treating physician Terry Baker, M.D., ear, nose, and throat (ENT) specialist Arthur Jones III, M.D., and physiatrist Beth Rogers, M.D. All objections in post-hearing depositions are Overruled.

FINDINGS OF FACT

1. Claimant worked for Employer as a welder. On May 23, 2012, hot metal slag dropped deep into his left ear as he welded. After some minutes of initial confusion about the best course of action, medical attention was obtained. In post-hearing deposition treating otolaryngologist Terry Baker, M.D. opined the slag was "hot and smoldering" in Claimant's ear for at most a few minutes before it cooled and ceased to cause injury. The delay in obtaining treatment did not exacerbate Claimant's injury.

2. The hot slag perforated Claimant's eardrum and burned nerves and structures in his inner ear. Multiple surgeries were required. Unable to repair the eardrum to functionality with a graft, the ear canal was sewn shut. Claimant lost all hearing in his left ear and required the implantation of a BAHA to restore it. Dr. Baker has never experienced complaints of chronic pain or headaches from other BAHA recipients. Such recipients generally return to their former

occupations.

3. Claimant continued to report pain, dizziness, and dysequilibrium of a severe nature to his physicians. He received substantial treatment and was deemed to be in an extended period of recovery which prevented his return to work.

4. A late-April 2014 surveillance video showed Claimant functioning at levels inconsistent with his representations to physicians. Among other things, it showed him changing from driver to passenger and back again out of view of doctors' offices with apparent intention to provide a false impression to medical providers who might observe him arriving or leaving from these appointments.

5. A few weeks after the video was taken, in deposition on June 12, 2014, Claimant testified to continued symptoms and functional incapacity. That testimony was frankly inconsistent with Claimant's function as observed in the lengthy video. At hearing Claimant admitted he gave false and misleading testimony to specific questions in his deposition.

Medical Care: Beginning May 23, 2012

6. Claimant was taken to a Mountain View Hospital quick care facility for treatment. Complaints included "room spinning, nauseated, HA [headache], left ear pain, vomiting." Examination included a finding of balance problems. The extent of inner ear damage was not fully appreciable by the physician. Nevertheless, Claimant was given a release to return to work limited only from operating machinery while on narcotic pain medication. The accident was recorded as having happened at 9:00 a.m. with discharge at 10:20 a.m. The record does not identify the time Claimant arrived at Mountain View. Upon discharge Claimant was referred to ENT physician Richard Lee, M.D. for immediate additional care.

7. Dr. Lee examined Claimant's burned ear canal and found a perforated tympanic

membrane. He ordered an audiogram. He restricted Claimant from all work for one week.

8. May 24, 2012 audiological testing was consistent with a perforated left tympanic membrane.

9. On May 29, 2012, Dr. Lee reviewed the audiogram. It showed traumatic left ear hearing loss. He noted Claimant's symptoms, including continued ear pain, diminished hearing in that ear, ear drainage, tinnitus, neurological disturbance in taste, and sensory issues in his tongue. He noted "dizziness and nausea has resolved." After examination he recommended a CT scan to determine whether slag remained in the ear canal.

10. Also on May 29, 2012, after a follow-up visit, a Mountain View physician released Claimant to return to work without restrictions but with a recommendation to "use earplugs when welding."

11. On June 5, 2012, Dr. Lee noted complaints including, ear pain radiating into Claimant's face and jaw, dizziness, tinnitus, headaches, and neurological symptoms all increasing. Upon examination he noted Claimant's ear was still draining and the burn injury was improving.

12. On June 6, 2012, Claimant visited ENT surgeon Terry Baker, M.D. He recommended surgery to repair the perforated eardrum. He took Claimant off work. A CT scan showed some slag remained in the ear. Dr. Baker provided treatment at follow-up visits for this and for developing infection.

13. On June 12, 2012, repeat audiological testing showed no change.

14. On June 14, 2012, Dr. Baker performed a tympanoplasty.

15. On July 26, 2012, Dr. Baker removed some slag and incompletely repaired the eardrum. Some slag remained deep in his eustachian tube. Despite this, on August 20, 2012,

Dr. Baker noted he had no plans for further surgical intervention. He recommended physical therapy to ameliorate the dizziness which Claimant reported.

16. Claimant began physical therapy at the Belnap Hearing and Balance Center on August 10, 2012. He attended 4 sessions in August, then missed two, then attended 9 in September and 11 in October. The therapist noted steady improvement.

17. After additional treatment Dr. Baker recommended a second surgery which was performed on November 6, 2012. He removed scar tissue and attempted a new tympanoplasty.

Medical Care: 2013

18. On January 4, 2013, Dr. Baker requested a consultation by Clough Shelton, M.D., at the University of Utah.

19. On February 12, 2013, Dr. Shelton evaluated Claimant's condition. Claimant reported "daily" vertigo since the accident with "occasional" tinnitus. Hearing loss in the left ear was essentially total. Dr. Shelton recommended closure of the ear canal.

20. On February 13, 2013, Dr. Shelton performed surgery. He removed scar tissue and the incus and malleus, polished the mastoid, closed the ear canal in a blind sac, and reported, "There was no foreign body found in the middle ear or in the mastoid. I was not able to see anything that would explain his chronic pain."

21. The following day Claimant complained of dizziness and some nausea. By the next day he reported the nausea was gone but the dizziness remained.

22. Claimant returned to physical therapy on March 27, 2013. He attended 10 sessions in March and April, 4 in May, and one in June. At the last May visit the therapist noted Claimant "much improved."

23. On February 28, 2013, Dr. Baker prescribed home health care, 16 hours per day,

for vestibular complications including severe vertigo. He recommended Claimant's wife be allowed a leave of absence from her work in order to provide the home health care.

24. On March 11, 2013, Dr. Baker continued Claimant's off-work status until April 11.

25. On March 22, 2013, Reed Ward, D.O. examined Claimant for complaints of vertigo and tinnitus. On examination he noted, "The patient appears to be very off balance, having a difficult time with balance issues when rising out of a chair or sitting back down." This was Claimant's first visit for pain management.

26. On March 26, 2013, Holly Zoe, M.D., first evaluated Claimant to begin pain management. She noted hypersensitivity to light touch and scheduled a nerve block injection. Claimant reported 30% relief. Others followed. In follow-up visits Dr. Zoe's PA noted Claimant used a walker for balance until mid-October. Dr. Zoe considered using Dysport ("Botox"). Eventually this was authorized by Surety. The first was administered May 23. Claimant reported 50% relief. Upon successive injections Claimant reported varying relief from the Botox. More than 18 months later, Dr. Zoe reported that other Botox injections had been and continued to be helpful.

27. On April 2, 2013, testing by the Hearing and Balance Center confirmed Claimant's hearing loss and reported, ". . . 3. A positive post headshake nystagmus was present, consistent with a probable peripheral vestibular finding. 4. All other subtests were within the range of normal." Certain tests were omitted "due to poor balance."

28. On April 8, 2013, Dr. Baker suggested a BAHA to ameliorate Claimant's hearing loss. Dr. Shelton concurred.

29. Dr. Ward saw Claimant for follow-up visits at intervals of about 30-60 days

through October for management of chronic ear pain. He expressed caution about having two pain management providers potentially both providing narcotics.

30. On April 29, 2013, Dr. Baker noted, "Evaluations over at The Hearing and Balance Center confirm pretty significant instability and disequilibrium." In post-hearing deposition Dr. Baker opined that the audiological test results would be considered consistent with instability and disequilibrium. These tests did not actually test for or establish the presence of such problems.

31. On May 1, 2013, Claimant's home was evaluated and recommendations made to accommodate Claimant's reported balance issues. Recommendations included 8 hours of paid home care service to be provided by his wife.

32. On June 10, 2013, Dr. Baker confirmed the BAHA was recommended for hearing loss and not for vestibular problems.

33. On June 17, 2013, Dr. Baker implanted the socket for the BAHA just behind and above Claimant's left ear.

34. On June 19, 2013, Dr. Baker prescribed personal homecare, four hours per day. He later clarified that this care was prescribed for a period of two weeks for wound care and dizziness.

35. On July 29, 2013, the BAHA became operational for Claimant.

36. On August 28, 2013, Dr. Baker consulted with Claimant to determine a historical timeline of the extent of Claimant's balance and dizziness issues since the accident. Dr. Baker considered him capable to care for himself as of this date and in the future.

37. On October 6, 2013, Claimant visited EIRMC emergency room for redness and tenderness. Exam showed some pus drainage as well. Antibiotic was administered. The next

day Dr. Baker noted infection at the BAHA implant site.

38. On December 31, 2013, Dr. Baker opined Claimant was not yet medically stable but nevertheless rated Claimant's vestibular disorder at 27 % PPI.

Medical Care: 2014

39. On January 13, 2014, Dr. Baker opined Claimant was unlikely to be able to return to welding as a result of chronic pain and disequilibrium. He noted Claimant required a cane.

40. On February 10, 2014, Dr. Baker opined Claimant was "pretty much status quo . . . unchanged."

41. On March 12, 2014, Dr. Baker confirmed that he found Claimant medically stable. He emphasized that testing confirmed vestibular disequilibrium. He rated PPI for this at 27%.

42. On April 28, 2014, at Surety's request a panel evaluated Claimant's condition. The panel consisted of physiatrist Beth Rogers, M.D., and otolaryngologist Arthur Jones III, M.D.

43. Dr. Jones took Claimant's history and examined him. He ordered audiogram and other electronic testing which was performed by and otologist, Dr. Bateman. Claimant fell during a CDP (Equitest) procedure. He rated Claimant's hearing loss at 6% whole-person PPI and vestibular dysfunction at 42% whole-person PPI. In post-hearing deposition he explained that inner ear damage similar to Claimant's can cause balance issues, but that the brain can accommodate to overcome such issues.

44. Dr. Rogers reviewed records, took a history from Claimant, and examined him. She diagnosed: 1. total hearing loss, left ear, 2. vestibular dysfunction with chronic vertigo, and 3. chronic left ear pain with headache. She imposed restrictions which prohibited jobs

involving climbing, bending, twisting, lifting from the floor, squatting, and kneeling. She noted a probable permanent inability to drive. She opined a need for continued Botox and probable permanent narcotic medication. She opined a 6% PPI for hearing loss and 42% PPI for vestibular issues, which combined to 45% PPI. However after viewing the surveillance video and reading Claimant's deposition testimony, on July 18, 2014, Dr. Rogers opined as follows: additional medical care was unnecessary except for continued follow-up for the BAHA; she reduced her PPI opinion to the 6% hearing loss only; restrictions were lifted except for a restriction against any job requiring binaural hearing. She identified specific passages of deposition testimony which were inconsistent with her observation of him in the surveillance video. She stated, "it was evident that Mr. Smith had perjured himself more than 25 times. There is no other conclusion, but that Mr. Smith had committed fraud."¹ She opined, "on a more probable than not basis, Mr. Smith has used the prescribed narcotic medication as a reason for him not to be able to work." In post-hearing deposition, Dr. Rogers well described her bases for changing her opinions upon seeing the video and reviewing the deposition. She described specific inconsistencies which indicated Claimant had not been truthful with her about his subjective symptoms and ability to function.

45. Relying upon Dr. Rogers' revised opinions after she viewed the surveillance video, Dr. Jones concurred that only 6% PPI was appropriate. Rating PPI for vestibular dysfunctions is largely arbitrary based upon observation of a patient's subjective abilities or function. Dr. Jones did not personally observe Claimant's function as depicted on the video. Once he had ascertained that Claimant had been untruthful, Dr. Jones declined to spend more than minimal time in additional evaluation. In post-hearing deposition he declined to opine

¹ The record does not show that Dr. Rogers is familiar with the legal requirements involving perjury or fraud or Idaho Code section 72-801.

about restrictions.

46. On May 13, 2014, after reviewing surveillance video Dr. Baker rescinded his prescription for home health care and opined Claimant did not need any. Surety asked Dr. Shelton to review the video, but the record does not show it was willing to pay him for his time to do so. Dr. Shelton refused to review the video.

47. On September 2, 2014, Dr. Baker refused to revise his PPI rating based upon video surveillance. He opined Claimant's restrictions appeared to be "far less" than Dr. Baker's prior understanding. He equivocated about the medical necessity of care provided after the date of the panel evaluation. He refused to opine about whether pain medication was indicated. He confirmed "definite discrepancies" between Claimant's representations and the video but would not commit to use the words "perjury" or "fraud."

48. On November 4, 2014, Claimant sought out ear, nose, and throat physician Gary Johnson, M.D., to establish care. Dr. Johnson took a history and upon examination noted "very mild" inflammation at the implant site. On November 14, 2014, Dr. Johnson refilled Claimant's hydrocodone prescription at Claimant's wife's telephone request.

49. On December 2, 2014, Dr. Zoe, having reviewed the surveillance video, agreed with the IME restriction, and with discontinuance of narcotics and future medication. She disagreed about post-IME treatment, opining it medically necessary and expressly included the Botox as effective. She declined to opine about limitation of treatment or the possibility of perjury.

Medical Care: 2015

50. Vocational expert William Jordan sent Dr. Baker several questions and allowed a single checkmark to confirm or dispute the IME opinions. On April 6, 2015, Dr. Baker

checked a box which, by context, indicated he agreed with Drs. Rogers and Jones that Claimant's only vocational restriction was from jobs requiring binaural hearing. It is unclear whether he intended his checkmark to represent changes in his opinions from September 2, 2014 about other related issues. A single checkmark does not constitute a preponderance of evidence that Dr. Baker changed his other opinions.

Vocational Factors and Opinions

51. At the time of accident Claimant earned \$12.00 per hour on a full-time basis with additional overtime being common.

52. Claimant moved to Washington State in October 2014. (Transcript, 10). At the time of hearing Claimant was employed overseeing night operations for sweeper truck drivers. They cleaned and maintained parking lots. He also used a backpack leaf blower in that job. He earned \$15.00 per hour. His employment earnings reduced his monthly Social Security Disability income which was set at \$1,167 per month.

53. Claimant is a high school graduate. He is just short of obtaining an associate's degree in fire science and conservation. He is certified for most types of welding.

54. Physicians agree that Claimant's only restriction is from jobs requiring binaural hearing.

55. William Jordan reviewed records, watched the surveillance video, met separately with Dr. Rogers and Dr. Jones, and evaluated Claimant by telephone. He considered both Menan, Idaho and Arlington, Washington as local labor markets. Based upon the post-surveillance video opinions, Claimant has no disability. If Claimant's subjective complaints are considered valid, disability would include 27% loss of access, but no wage loss, for an overall disability of 14-15% inclusive of PPI.

56. Ken Granat reviewed records and evaluated Claimant. He used Claimant's job as a parking lot sweeper as a measure of his functional capacity. If avoidance of loud workplaces is considered, Claimant's loss of labor market access would be at least 47.6% and loss of wage earning capacity ranges from 18.1% to 35.9%, resulting in an overall disability range from 32.9% to 41.8%.

57. A prior felony conviction precludes him from certain occupations.

58. Claimant did not cooperate with ICRD attempts at evaluation and job placement. ICRD attempted to provide service from June 2012 through August 2014. In January 2015 ICRD consultant Ken Blanchard conducted a labor market survey and identified job categories available to Claimant.

Expert Medical Opinions

59. In post-hearing deposition, Dr. Baker opined that objective electrical testing was consistent with hearing loss. While the objective electrical testing was consistent with a complaint of dizziness, it does not test for or independently confirm whether or to what extent a patient experiences vestibular issues. These tests require and allow no subjective input. Dr. Baker's opinions were based upon examination, testing, and Claimant's representations. He does not consider surveillance video a relevant basis for making or changing his opinions. He opined Claimant will need future medical care consisting of annual adjustment of the BAHA.

60. Dr. Baker opined that the difference between a Class 0 (0% PPI), a Class I (1% to 9% PPI) and a Class II (in this case 27% PPI) rating depends wholly upon a patient's reported symptoms.

61. Again in post-hearing deposition, Dr. Baker refused to "go that far" when comparing his opinions to Dr. Rogers' conclusions after viewing the surveillance video.

DISCUSSION AND FURTHER FINDINGS OF FACT

62. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hogle*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

63. Claimant made inaccurate representations in deposition and at hearing.

64. Surveillance video shows Claimant functioning at a level inconsistent with his representations to medical providers.

65. At hearing Claimant admitted to specific instances of false deposition testimony.

66. Claimant's testimony is impeached. His representations to physicians and testimony about subjective conditions and symptoms are given no weight.

Causation

67. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a

reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

68. A preponderance of objective medical evidence shows Claimant suffered total hearing loss in his left ear as well as destruction of specific parts of his inner ear. Surgeries performed including the closure of his ear canal and implantation of the BAHA were causally related to the accident.

69. Claimant's persisting claims of chronic vertigo and related conditions, as well as claims of chronic pain and headaches, are not credible. The weight of medical opinions shows these conditions likely resolved before the surveillance video was taken.

70. Dr. Baker well explained that certain objective testing, while consistent with a subjective claim of vertigo, was neither diagnostic nor indicative that such conditions were actually present. Objective evidence fails to show it likely that Claimant suffers any amount of vertigo or chronic pain. Claimant's subjective representations are, at best, hyperbole.

Medical Care Benefits

71. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris, supra*. One factor among many in determining whether post-recovery

palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also, Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(overruled to the extent *Sprague* may have suggested its articulated factors were exclusive by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015)).

72. Medical treatment provided to the date of stability was reasonable and related to the accident. Vertigo and pain resolved at some point, but was initially related to the accident. Claimant is entitled to medical care benefits for treatment provided to the date of medical stability. Thereafter to the date of hearing, Claimant is entitled to medical care benefits for infections, adjustments, and other care related to his BAHA and/or left ear canal. Claimant is not entitled to narcotic and other medication prescribed for vertigo and/or chronic pain after the date of medical stability.

73. Medical evidence shows it likely Claimant will require occasional, perhaps annual, maintenance for his BAHA. Additionally, infections and other complications related to the BAHA may arise. Claimant is entitled to future medical care to treat conditions arising from the BAHA usage. Further, should Claimant obtain employment as a welder in the future, he will be entitled to benefits related to obtaining a welding hood which will accommodate his BAHA.

Permanent Impairment

74. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 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*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

75. Drs. Rogers and Jones concur in establishing Claimant's PPI for hearing loss at

6% whole person. Dr. Baker agrees that his rating was too high without expressly limiting PPI to the panel's number. The preponderance of evidence shows Claimant suffered PPI rated at 6% of the whole person as a result of the accident. Surety has paid this amount.

76. Claimant failed to meet his burden of establishing that he was likely eligible for permanent impairment benefits in excess of the 6% whole man impairment previously paid by Defendants.

Permanent Disability

77. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430.

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

79. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory

opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

80. Claimant has returned to work at a job paying more than his time-of-injury employment. Weight is given to Dr. Rogers' opinion that Claimant's only restriction is from jobs requiring binaural hearing. Mr. Jordan's evaluation most appropriately incorporates that restriction. He opined that, using this as the sole restriction, Claimant suffered no permanent disability in excess of PPI.

81. Jobs are available for which Claimant can compete and perform. Claimant failed to show he is entitled to permanent disability in excess of PPI. Claimant failed to show he is likely totally and permanently disabled as an odd-lot worker.

82. In the absence of permanent disability in excess of PPI, apportionment under Idaho Code § 72-406 is moot.

Attorneys' Fees

83. Claimant contends that an award of attorneys' fees under Idaho Code § 72-804 is justified because Surety declined to provide any of the home improvements recommended by James A. King, MS, OTR/L, following his May 1, 2013 evaluation. As a result of his site visit, Mr. King recommended, *inter alia*, the installation of grab bars in Claimant's bathroom, a three-in-one commode chair for Claimant's toilet and safety railing around Claimant's back deck and front porch. From the record, it appears that family friends installed the front porch and back deck railings. However, without explanation, Surety failed to provide any of the other improvements recommended by Mr. King.

84. Mr. King's May 1, 2013 site visit has its genesis in a March 11, 2013 letter from Surety to Dr. Baker. In that letter, Surety indicated that if Dr. Baker believed that Claimant required non-skilled personal home care, the Surety would find it necessary to schedule a home evaluation in order to document the medical necessity for continued services. The Surety invited Dr. Baker to order such an evaluation, and Dr. Baker so ordered by letter dated March 14, 2013. As noted, the evaluation was performed on May 1, 2013. On May 10, 2013, surveillance of Claimant was conducted at the instance of Surety. (See Joint Exhibit 23). This surveillance purportedly demonstrated that Claimant was less physically disabled than might be suggested by his contemporaneous presentation to Dr. Baker. The Surety forwarded the videotape surveillance to Dr. Baker for his review. By letter dated May 31, 2013, Dr. Baker stated:

I received your letter and was able to review the video. Based on the video it is my opinion that Mr. Smith does not require personal care for 16 hours a day since the video indicates that his wife leaves him for much of the day by himself anyway. Based on the video it appears that the patient really does not require any personal care services in my opinion.

Joint Exhibit 2 at 66.

Therefore, while the surveillance evidently persuaded Dr. Baker that Claimant did not need in-home care, Dr. Baker did not address the recommendations made by Mr. King concerning safety improvements for Claimant's home. The record does not reflect that Dr. Baker was ever asked to comment on whether Claimant required the improvements recommended by Mr. King. It must be supposed that Surety, having reviewed the surveillance performed on May 10, 2013, independently concluded that the improvements recommended by Mr. King were not needed in view of Claimant's demonstrated physical capacity. However, Surety did not seek a medical opinion to support its decision in this regard. Regardless of the revelations later supplied by the April 2014 surveillance, it does not appear that at the time it declined to provide the

improvements recommended by Mr. King, the occupational therapist the Surety retained to perform an assessment, the Fund had any appropriate medical predicate to deny the recommendations. Accordingly, pursuant to Idaho Code § 72-804, the Surety's failure to provide the improvements recommended by its own expert is unreasonable. We conclude that Claimant is entitled to an award of attorneys' fees on this basis. Dr. Baker's determination that Claimant did not need in-home care as of May 31, 2016, does not mean that he also felt the safety improvements recommended by Mr. King were unnecessary. Unfortunately, he was not asked to comment on these recommendations. Surety's failure to provide the improvements without a medical opinion that they were unnecessary was unreasonable.

85. Claimant also challenges the reasonableness of Surety's reliance on the opinion of Dr. Jones, who opined that Claimant was not entitled to an impairment rating for balance/vestibular injury without having actually reviewed the surveillance performed in April of 2014. Instead, it appears that Dr. Jones revised his opinion on Claimant's impairment based on a secondhand appraisal of the surveillance provided by Dr. Rogers. Claimant charges that Dr. Jones acted unreasonably and that this taint should also be visited upon Surety, who relied on Dr. Jones' opinion to deny payment of the 42% rating for vestibular disturbance. First, Dr. Jones' was not the only opinion Surety relied upon in declining to pay the 42% impairment rating. It also solicited the opinion of Dr. Rogers, who did watch every second of the video and prepared a detailed report comparing Claimant's video presentation to Dr. Rogers on April 28, 2014.

86. Second, we cannot say that Dr. Jones acted unreasonably or inappropriately in relying on information provided to him by another physician, a member of the panel with whom he had been directed to evaluate Claimant. For these reasons, we find that Surety did not act

unreasonably when relying (in part) on Dr. Jones' opinion to inform its decision to refuse payment of the 42% PPI rating.

Idaho Code § 72-801

87. The parties freely acknowledge that this case turns largely on Claimant's credibility; he claims to be significantly disabled by dizziness/vestibular dysfunction, yet this assertion must be squared with the April 2014 surveillance tending to demonstrate that his functional capacity is much greater than he asserts. In treating the issues of impairment and disability we have determined that the surveillance is a better indicator of Claimant's functional capacity, and that any insistence to the contrary by Claimant lacks credibility. The surveillance, Claimant's contemporaneous representations to physicians and his June 12, 2014 deposition also require us to examine whether Claimant has made false representations for the purpose of obtaining workers' compensation benefits under the provisions of Idaho Code § 72-801. That section provides:

False representation a misdemeanor – forfeiture of compensation. – If, for the purpose of obtaining any benefit or payment under the provisions of this law, either for himself or for any other person, any one wilfully makes a false statement or representation, he shall be guilty of a misdemeanor and upon conviction for such offense he shall forfeit all right to compensation under this law.

88. In *Berglund v. Potlatch Corp.*, 129 Idaho 752, 932 P.2d 875 (1996), claimant suffered a thumb injury while playing basketball in 1991. He later claimed that his thumb injury actually occurred at work. He pursued a workers' compensation claim for this injury and eventually received over \$23,000 in medical and time-loss benefits. Claimant applied for permanent and total disability benefits, and eventually Surety discovered that claimant had actually injured his thumb playing basketball. Claimant's physicians then opined that the ostensible work-related thumb injury was actually not work related. Surety sought

reimbursement for benefits paid pursuant to Idaho Code § 72-801. In the interim, claimant was charged with violation of the former Idaho Code § 41-1325. However, before his criminal trial on insurance fraud, the Commission held a hearing on the issue of whether claimant had been injured in a work-related accident in 1991, whether he had submitted false information in seeking Workers' Compensation benefits and whether Surety was entitled to reimbursement. After the Workers' Compensation hearing, but before a decision was issued, claimant was convicted of insurance fraud in district court. Thereafter, the Commission issued its decision, concluding that claimant did not suffer a work accident, that his testimony was inconsistent, that he was not a credible witness, that he had been convicted of insurance fraud under Idaho Code § 41-1325, that he forfeited his right to Workers' Compensation, and that he must reimburse Surety pursuant to Idaho Code § 72-801 for Workers' Compensation benefits paid to date. Claimant appealed, arguing, *inter alia*, that pursuant to the provisions of Idaho Code § 72-801, he could only forfeit his right to compensation upon a criminal conviction pursuant to that section. Claimant argued that since he was, instead, convicted of insurance fraud pursuant to Idaho Code § 41-1325, he could not be subject to the penalty of forfeiture under Idaho Code § 72-801. Rejecting this argument, the Court noted that the Commission's decision that claimant forfeited his right to Workers' Compensation benefits was not based solely on the criminal conviction for insurance fraud. The court noted that the Commission independently determined that claimant was not credible in his testimony before the Commission and had misrepresented how his injuries actually occurred. Upholding the Commission's decision on forfeiture, the court stated:

On appeal, Berglund does not dispute the Commission's factual findings that his testimony was inconsistent, that he was not a credible witness, and that he did not sustain a compensable work-related injury. Those determinations were made independently of the criminal conviction, and provide a sufficient basis for the

Commission's finding that Berglund "willfully ma[d]e a false statement or representation" for the purpose of obtaining workers' compensation benefits. Therefore, we uphold the finding of the commission that Berglund violated I.C. § 72-801, and must reimburse the Respondents for amounts they had already paid Berglund.

The quoted language could be read to suggest that even absent a misdemeanor conviction under Idaho Code § 72-801, the Commission is, itself, empowered to make findings and conclusions that will support an order of forfeiture. However, it must also be recalled that claimant was found guilty of insurance fraud under the former Idaho Code § 41-1325, which contains the essential elements of proof necessary to a misdemeanor conviction under Idaho Code § 72-801. Therefore, we do not read Idaho Code § 72-801 as allowing the Industrial Commission to enter an order that Claimant has forfeited his right to Workers' Compensation absent criminal conviction pursuant to either Idaho Code § 72-801 or the current Idaho Code § 41-293, dealing with insurance fraud. However, the Commission finds that this case could be prosecuted under either Idaho Code § 72-801 and/or Idaho Code § 41-293, as explained below. The Commission believes it necessary to retain jurisdiction over this case pending the resolution of any criminal charges that are pending, or which may be filed in this matter.

89. At the heart of this matter are representations made by Claimant to his treating/evaluating physicians, and in the course of sworn testimony contemporaneous with the surveillance conducted in the spring of 2014. At the time he was pronounced medically stable by Dr. Baker on March 12, 2014, Claimant told Dr. Baker that he continued to suffer from chronic dizziness, and stated he was unable to work. Based on the diagnosis of vestibular disequilibrium, Dr. Baker felt that Claimant would be unable to perform activities of daily living with the exception of self-care, household duties, walking, and riding in a motor vehicle which is operated by a different person. Dr. Baker noted Claimant's unsteady gait. (See Joint Exhibit 2 at

103). When seen by Dr. Rogers on April 28, 2014, Claimant gave the following history of his subjective sense of what he was and was not able to do:

Mr. Smith still requires assistance with ambulation in the form of a single point cane and/or walker. If he arises from a supine position too quickly he experiences significant vertigo. He has a constant sensation of dizziness. He awakens every morning with a “pounding” headache. He experiences a fairly constant sharp pain behind his ear and posterior neck. He is unable to drive. He is unable to run and play with his grandchildren. He showers in the seated position. He cannot bend over to tie his own shoes due to dizziness. He states he needs stand by assistance when he uses the commode. He has constant tinnitus, which he states is amplified by the BAHA implant, but the hearing improvement far outweighs this.

Joint Exhibit 16 at 320.

90. When seen by Dr. Jones, also on April 28, 2014, Claimant reported that he suffered from persistent vertigo and disequilibrium, and required a cane when walking. He reported to Dr. Jones that due to narcotic use and vertigo, he was unable to drive.

91. As developed *infra*, several hours of sub rosa surveillance were conducted on April 28 through April 30, 2014, while Claimant was in Boise for the aforementioned independent medical evaluations, and following his return to eastern Idaho.

92. On or about June 12, 2014, Claimant’s deposition was taken. At that time Claimant was still unaware that the April 28, 2014 surveillance had been conducted. Claimant’s deposition testimony is consistent with the representations he made to both Dr. Jones and Dr. Rogers but provides significant elaboration on the extent and degree of Claimant’s professed functional capacity. Claimant testified that as of June 12, 2014, he did not need to use his cane if he was only walking a block or two. However, he testified that when not using his cane he has to have someone with him to steady him while walking. He described his vertigo as constant, 24 hours a day, 7 days a week. It is something that does not come and go. (Smith Deposition, 36/1-38/5). He testified that even with standing, he has to have someone or something next to him to

keep him steady. (Smith Deposition, 38/25-39/7). Without his cane or something or someone to lean against, he can stand for only about three seconds unsupported. (Smith Deposition, 63/24-64/18). He testified that turning his head while standing causes a loss of balance, as does moving his head up and down while in a standing position. Doing this will put him “on the floor”. Likewise, if standing unsupported, turning his head to the left or right will cause him to lose balance and fall. (Smith Deposition, 60/21-61/21).

93. Claimant has never gone to the mall by himself since the subject accident. Nor has he gone to a restaurant by himself. He testified that as of June 12, 2014, he had not been to any establishment “on his own” since the subject accident. (Smith Deposition, 41/3-15). He is unable to read because his eyes can’t focus. When he does go to a restaurant, he is unable to order from a menu. (Smith Deposition, 160/20-161/9).

94. Although Claimant owns a cell phone, he is unable to use it while ambulating. He testified that in order to use his phone he must stop and find something to lean against while using it. (Smith Deposition, 139/11-23).

95. Claimant testified that he gets along a little bit better in the morning than later in the day. He testified, however, that he always suffers from dizziness and what he described as “scared footing”. (Smith Deposition, 142/19-143/16). Curbs and stairs are problematic for him. His inability to negotiate stairs led him to install a ramp at his home. (Smith Deposition, 65/17-66/16). His vertigo, dizziness and inability to focus leave him all together unable to drive. Even as a passenger he cannot ride for too long before requiring breaks due to nausea. (Smith Deposition, 66/17-69/9; 146/11-150/6).

96. Claimant’s history to his physicians and the sworn testimony he gave at the time of his June 12, 2014 deposition, stand in stark contrast to the sub-rosa surveillance performed on

April 28 through 30 of 2014 during Claimant's visit to Boise for evaluation by Dr. Jones and Dr. Rogers and following his return to eastern Idaho.

97. First, and most notably, Claimant is observed to operate a large gray crew cab pickup truck without apparent difficulty. Second, and equally notable, is the effort Claimant went to in order to conceal his ability to operate a motor vehicle and to walk about unassisted. Claimant travelled to Boise with two adult companions. Claimant did most of the driving during the trip. However, before arriving at the medical facility where he was scheduled to be evaluated, Claimant stopped the vehicle, exited the driver's seat and allowed one of his companions to drive him the short distance remaining to the medical facility. There, Claimant was observed to exit the vehicle and walk with some hesitancy from the parking lot to the facility while using a one-point cane. After the completion of the evaluation this procedure was reversed. Claimant walked back to his vehicle using the one-point cane, climbed into a passenger seat, but then returned to the driver seat after putting several blocks between his vehicle and the medical facility. With one exception, every place else Claimant thought himself free from observation Claimant walked without the assistance of a cane, and in a manner that did not suggest any dizziness or disequilibrium.² While stopping at convenience stores, going to dinner and while going to and from his vehicle at the La Quinta Inn, the Claimant was able to walk unassisted while smoking, carrying things and while using his cell phone. He was also noted to be able to engage in unassisted walking while turning and nodding his head. He was able to negotiate curbs without any apparent difficulty whatsoever.

98. Claimant's performance on the sub rosa surveillance is at dramatic odds with the representations made by Claimant during his June 12, 2014 deposition, and the inconsistency

² For whatever reason, Claimant was seen to use his cane briefly when he first arrived at the La Quinta Inn, the facility which Surety had arranged for him to stay at during his Boise IME.

between stated and observed abilities is not cured by Claimant's feeble attempts to reconcile his deposition testimony with the surveillance at hearing. From the foregoing, we conclude that Claimant's representations to his treating/evaluating doctors in the spring of 2014 and during his sworn testimony were knowingly false representations about his functional capacity.

99. There remains for consideration whether these false representations were made for the purpose of obtaining workers' compensation benefits to which Claimant was not otherwise entitled. Unfortunately, this question was never put to Claimant in point-blank fashion at hearing. The closest is the following exchange between Claimant and his attorney:

Q. About a month after - - or about a month after you were there, took your deposition in this case, there's - - I think one of the issues that we're going to hear, we're going to talk about, is in your deposition, you stated that you attempted to drive around your property, and you tried to use your lawnmower, but you hadn't done any other driving than that.

The video that we're going to see shows you doing some driving, shows you driving over in Boise and over here in Idaho Falls. Can you explain why you were driving in the video and why your deposition said you hadn't driven?

A. Yeah. First of all, I'll cover my deposition, if that's all right. The reason I made the statement in the deposition, knowing that Mr. Dalling had asked the question about the driving, and I answered it no, was prior history of my accident and the felony. Knowing that there were narcotics in my system, I was a little intimidated and fearful of if I would have admitted to Mr. Dalling that I had been driving, knowing that there's - - I'd been on narcotics, it's documented that I was on narcotics - - not that I took narcotics the day that I drove - - but just the long-term effects of being on narcotics that, you know, to sum it, that he was going to go from Andy's office across the street and go, "Hey, this guy's out driving around under the influence, we may need to do something about it," and fearful that, you know, I'm going to get busted for that and go back to prison, when I wasn't really trying to do anything wrong.

The situation in Boise that I drove under was my uncle, who went with me, and my father-in-law just came down for the ride, but he was - - my father-in-law's incapacitated to where he can't do those things - - my uncle was getting just sick. I don't know if he got something from what he ate or - - but he wasn't feeling that he could drive and just not feeling I had any option being where I was. I just drove to finish out our trip so I could get back.

You know, you can see that - - and you'll see in the video, the guy's a pretty good cameraman - - that, you know, I'm not driving as I would, let's say, today. The movements of driving and everything are a lot less - - I mean, I'm not turning fast, you know. I'm not whipping around corners. I mean, everything's a little slower pace. I was a lot more timid behind the wheel.

The Idaho Falls incident, my wife was dealing with an injury, and she had to receive treatment on a regular basis in Idaho Falls. And we had - - our family and friends were helping us out with rides getting her to and from. An occasion arose where we had no way to get her there if I didn't take her. The insurance company she was dealing with had cut her off once for missing an appointment and threatened to do the same.

I just did what I thought was right, take care of my wife. I got behind the wheel and drove back roads from Menan into Idaho Falls to Mountain View Physical Therapy and get her to appointment and back.

I wasn't driving every day. It wasn't a regular thing I was doing. It was kind of an isolated - - couple isolated incidents.

But I do want to make it clear, though, that I had not taken anything prior that day of driving. I mean, I know it was probably in my system from the continued use of it, but I didn't go and pop pills that morning and get behind the wheel.

Hearing Transcript, 37/5-39/20.

Therefore, Claimant would have the Commission believe that he lied about his ability to drive during his deposition because it occurred to him that if he admitted to operating a motor vehicle, Defense Counsel, knowing that Claimant was on a narcotic drug regimen, would immediately leave Mr. Adam's office and repair to some place across the street (the police station, the court house?) to report that Claimant was operating a motor vehicle under the influence of narcotics and this would leave Claimant, a convicted felon, in a tough spot with the authorities. This testimony lacks substantive credibility. First, Mr. Dalling is not the only individual to whom Claimant insisted he could not drive in the spring of 2014. Claimant also made this misrepresentation to Dr. Baker, Dr. Jones and Dr. Rogers. Second, if Claimant was careful not to operate a motor vehicle while under the influence of his narcotic medications, one must

wonder why he would be concerned about Mr. Dalling's much feared consultation with the authorities. Claimant's explanation about how he found himself behind the wheel of the vehicle in Boise is similarly unconvincing. If Claimant is to be believed, his uncle was too ill to drive only while not in the immediate neighborhood of the two medical offices at which Claimant was to be evaluated by Defendant's IME physicians. It is a funny sort of illness that becomes asymptomatic within a tight radius of a physician's office. We find Claimant's proffered explanation for why he lied about his ability to drive to be all together unconvincing. From the sub rosa surveillance, it is evident that Claimant misrepresented his ability to drive and to walk without assistance, as illustrated by his conduct while in the immediate vicinity of the offices of the physicians who had been assigned to conduct the April 28, 2014 evaluations. If they were watching out their office windows as he ingressed and egressed each facility, he wanted them to see that he had to be driven to the facility and that he walked only with difficulty. Claimant was well aware that how he presented to the evaluating physicians on April 28, 2014 would inform their judgment about what he could and could not do from a physical standpoint:

Q. Okay. In your deposition, you testified that you told Dr. Rogers that you could not stand for more than just a few seconds before balance became a problem. Do you recall that?

A. Yes, sir.

Q. And you also told her that you were unable to drive at that point?

A. Yes, I did. I think I testified to that, yes.

Q. And you told her that when she had asked you what you're able to do and not do so she could determine her opinions for her report; isn't that correct?

A. Yes, sir.

Hearing Transcript, 70/14-25.

100. From the foregoing, we conclude that Claimant's misrepresentations were made for the purpose of obtaining Workers' Compensation benefits in the form of an inflated impairment/disability award, which he was not otherwise entitled to receive, and would not receive had he honestly and accurately described his true functional capacity.

101. As developed above, we believe that the unambiguous provisions of Idaho Code § 72-801 require a criminal conviction, either under the provisions of Idaho Code § 72-801 or Idaho Code § 41-293, before we can address forfeiture of benefits or require the repayment of benefits paid to date. We order the payment of benefits as set forth elsewhere in this decision, but retain jurisdiction to order forfeiture and repayment in the event of a successful criminal prosecution. We are cognizant of the fact that unlike the facts before the Court and the Commission in *Berglund*, the Claimant here did actually suffer a work-related injury which left him with complete hearing loss in the affected ear. However, where forfeiture is warranted, Idaho Code § 72-801 draws no distinction between benefits Claimant is entitled to, and those he wrongly sought to obtain.

CONCLUSIONS OF LAW AND ORDER

1. Claimant suffered a compensable accident which caused a permanent loss of left ear hearing. Claimant also suffered temporary problems with dizziness, balance and disequilibrium, which problems resolved prior to the date of medical stability;
2. Claimant is entitled to benefits for all medical treatment to the date of medical stability and for all treatment related to his permanent hearing loss, but not for claims of vertigo, loss of balance, disequilibrium and pain after the date of medical stability;
3. Claimant is entitled to future medical care to treat conditions related to his loss of hearing only;

4. Claimant is entitled to permanent physical impairment for loss of hearing at 6% of the whole person;

5. Claimant is not entitled to permanent disability in excess of PPI. Nor is Claimant an odd lot worker;

6. The issue of apportionment is moot;

7. Pursuant to Idaho Code § 72-804, the Surety's failure to provide the safety improvements recommended by Mr. King was unreasonable. 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; and

8. Claimant willfully made a false statements/representations to treating/evaluating physicians and in the course of his June 12, 2014 deposition for the purpose of obtaining workers' compensation benefits; and

9. It is appropriate for the Commission to retain jurisdiction of this matter for possible further action pending criminal prosecution of the Claimant pursuant to Idaho Code § 72-801 or Idaho Code § 41-293.

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

DATED this 27th day of June, 2016.

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 27th day of June, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

ANDREW ADAMS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

DEAN DALLING
859 S YELLOWSTONE HWY STE 306
REXBURG ID 83440

_____/s/_____