BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RONALD A. LABLEU, Claimant, v. CHALLENGER COMPANIES, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2013-013166** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed November 23, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on April 25, 2016. Claimant, Ronald LaBleu, was present in person and represented by Matthew Andrew, of Nampa. Defendant Employer, Challenger Companies (Challenger), and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Matthew Vook, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 11, 2016. Referee Taylor submitted proposed findings of fact and conclusions of law to the Commission for review. The Commission believes that the competing vocational opinions require further analysis. Additionally, the Commission believes it important to address the assertion that Claimant's disability rating should be paid exclusive of his impairment. For these reasons, the Commission adopts this decision in lieu of the Referee's.

ISSUES

The issues to be decided are:

1. Claimant's permanent partial impairment due to his industrial accident; and
2. Claimant's permanent partial disability due to his industrial accident.

CONTENTIONS OF THE PARTIES

Claimant asserts he is entitled to permanent partial impairment of 15% of the whole person and permanent partial disability of 63.75% in excess of permanent impairment due to his industrial accident. He relies upon the vocational opinion of Terry Montague.

Defendants acknowledge Claimant's industrial accident but contend he is entitled to no more than 11% permanent partial impairment. Defendants argue Claimant is entitled to no disability in excess of impairment or, in the alternative, to 25% permanent partial disability inclusive of permanent impairment. They rely upon the opinion of Dr. Mary Barros-Bailey.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Ronald LaBleu taken by Defendants on August 21, 2015;
3. The testimony of Claimant, his wife Tamara LaBleu, and Terry Montague taken at the hearing;
4. Claimant's Exhibits A through T and Defendants' Exhibits A through Q, admitted at the hearing.
5. The post-hearing deposition testimony of Mark Williams, D.O. taken by Claimant on May 13, 2016.

6. The post-hearing deposition testimony of Mary Barros-Bailey, Ph.D., taken by Defendants on May 31, 2016.

All pending objections are overruled.

FINDINGS OF FACT

1. Claimant was born in 1954 in Pocatello. He resided in Quartzite, Arizona and was 61 years old at the time of the hearing. He has lived in Idaho, Wyoming, Colorado, Utah, New Mexico, Oregon, California, Montana, Louisiana, and Texas. He graduated from high school in Wyoming and attended the University of Wyoming briefly. He later attended community colleges in Colorado and California, but earned no degree.

2. **Work and health history.** After graduating from high school, Claimant worked bucking hay, and also worked in the concrete and oil industries in Wyoming. He moved to various states and worked as a dishwasher, railroad track layer, off-shore sandblaster and painter, automobile assembler, and commercial truck driver.

3. Since approximately 1995, Claimant has worked in the construction industry. He learned the pipefitter's trade and became a journeyman pipefitter. As a pipefitter he carried a 56-pound tool belt all day while working. Claimant worked for an excavation company in Salt Lake City. He laid major utility lines including storm sewers. He injured his back, was diagnosed with a ruptured disc, and received conservative treatment. He recovered and resumed work without restrictions. Claimant later took classes at a community college in Utah and trained as an electrician.

4. In 2006, Claimant began working in Boise for Challenger as an electrician's apprentice. He worked in new construction at Micron, pulling one-inch diameter wire and installing electrical fixtures for very large commercial fabricating equipment. He attended four

years of electrical school at a community college and completed his training in 2008. Claimant then became a journeyman electrician. He averaged 40 hours per week performing industrial electrical work and earning approximately $30.00 per hour. He received vision and dental benefits and paid vacation.

5. At Micron, Claimant worked regularly in "hot boxes" on "hot panels," containing very high voltage "live" electrical panels in which the electricity could not be shut off. He wore full-body fire retardant protective gear to withstand arc flash while performing this hazardous work. Claimant also regularly worked pulling one-inch wire in the subfloor at Micron. The subfloor was from three to four feet high, thus Claimant had to crawl, bend, and twist to run wire and conduit through or in the subfloor. When not working in hot boxes or in the subfloor, Claimant frequently used ladders and was regularly on a ladder most of the day doing overhead electrical work.

6. Prior to 2013, Claimant sustained a number of injuries including the previously mentioned back injury, a hernia, and broken feet. However, he recovered from each injury and none permanently diminished his ability to work.

7. **Industrial accident and treatment.** On May 13, 2013, Claimant was working for Challenger lifting electrical fixtures and pulling wire at Micron. As he lifted and maneuvered an 11-foot long power pole assembly, his back "froze up" with pain and he dropped the assembly. This occurred at the end of his shift on the last day of his work week. The next day he could hardly get out of bed due to back pain. Claimant presented to his personal physician, Jay Hansen, M.D., who prescribed pain medications. The following day, Claimant's back pain worsened and he presented to the emergency room. Dr. Hansen referred Claimant to orthopedic surgeon Timothy Floyd, M.D., who ordered x-rays and a lumbar MRI. The MRI documented

L3-4 disc herniation and extrusion with mass effect on the left L4 nerve root. Dr. Floyd restricted Claimant to light-duty work and prescribed physical therapy. Challenger gave Claimant light-duty work and he attended physical therapy; however, his back symptoms did not improve.

8. On December 10, 2013, Dr. Floyd performed L3-4 hemilaminotomy. Claimant's back pain improved; however, post-surgery he was found to have acute urinary retention. From the time he awoke after surgery he was unable to fully empty his bladder voluntarily. Claimant was diagnosed with neurogenic bladder. He was referred to urologist Cynthia Fairfax, M.D., and was discharged from the hospital with a catheter and a bag in place. Since his surgery he has had to self-catheterize three to five times daily. Self-catheterization is painful, time-consuming, and requires a clean area—to avoid urinary tract infection—to insert a catheter tube approximately 18 inches long. Claimant has ongoing bladder issues for which he sees Dr. Fairfax periodically.

9. In March 2014, Kevin Krafft, M.D., examined Claimant at Defendants' request. He rated Claimant's permanent impairment to his lumbar spine at 7% of the whole person and released him to return to work without restrictions. Claimant told Dr. Krafft that his left leg and his right foot were numb. Dr. Krafft documented Claimant's diminished left leg and right foot sensation but assured him that this would resolve within one to three years. Dr. Krafft gave no impairment rating for Claimant's neurogenic bladder condition.

10. **Attempted return to work and relocation.** In March 2014, Claimant returned to work at Challenger. Challenger helped him gradually progress until he was doing his usual heavy electrical work full-time. He noted continued left leg numbness from the knee down. As Claimant continued to perform his usual heavy work he experienced increased back and leg pain

causing difficulty, particularly in pulling heavy wire, and had to rely upon co-workers for assistance in completing some of his assignments.

11. In August 2014, Claimant was working for Challenger from a ladder at Micron. After standing on the ladder for a time, Claimant lost all feeling in his left lower leg. He had to stand on the ladder on his right foot and kick his left foot repeatedly against the ladder for fifteen minutes until he recovered enough sensation in his left leg to feel the ladder rungs under his foot and descend the ladder safely. He became concerned with the hazards of working from a ladder or in a hot box—a work setting also demanding careful balance—because unsteadiness or a fall in a hot box could result in instant electrocution. In August 2014, Claimant quit his job at Challenger because he was concerned about the hazard of his leg going numb when working from high ladders and his leg numbness and resulting unsteadiness when working with or in proximity to hot panels.

12. After leaving his job at Challenger, Claimant and his wife moved to Quartzite, Arizona, a community of approximately 4,000, in late 2014. He presented copies of his medical records to an Arizona physician who prescribed medical cannabis. Claimant's use of medical cannabis in Arizona allowed him to urinate voluntarily for the first time since his lumbar surgery. In Arizona he regularly walked for 30 minutes several times daily and lost 30 pounds.

13. Claimant returned to Idaho in April 2015 to see his orthopedist and urologist. Dr. Floyd examined Claimant's back and took x-rays that documented disc degeneration two levels above his L3-4 surgery. Claimant reported to Dr. Fairfax that he had been using medical cannabis in Arizona which allowed him to urinate voluntarily. After further diagnostic testing; however, Dr. Fairfax advised him that when using cannabis instead of catheterizing, his bladder was only partially draining and that without complete emptying; sediment would accumulate in

his bladder eventually causing renal damage and potentially renal failure necessitating dialysis. She opined that the probability of Claimant regaining voluntary bladder function was remote. Claimant resumed self-catheterization three to five times per day.

14. On April 6, 2015, Claimant was examined by Mark Williams, D.O. He diagnosed lumbar disc herniation with residual neurologic leg pain and numbness and neurogenic bladder. Dr. Williams rated Claimant's lumbar impairment at 12% of the whole person and his neurogenic bladder impairment at 3% of the whole person.

15. In the summer of 2015, Claimant and his wife stayed at a campground in the Donnelly area and were invited to be campground attendants. They kept the restrooms cleaned and stocked, and performed simple maintenance. Claimant's wife performed deep cleaning and took out heavy garbage. Claimant tried but was unable to caulk around the restroom floor because he could not tolerate sitting or kneeling for the time required.

16. On August 5, 2015, Claimant was awarded Social Security Disability benefits.

17. On August 20, 2015, Charles Riddle, PT, DPT, performed a one-day standardized functional capacity assessment and concluded that Claimant was capable of performing a medium duty position requiring lifting up to 50 pounds occasionally with accommodations to reduce his sitting, kneeling, and bending. Dr. Williams accepted this assessment and restricted Claimant to lifting 50 pounds and also required regular position changes.

18. In late 2015, Claimant and his wife returned to Quartzite, Arizona for the winter. He looked for work and was hired at a medical marijuana growing facility. His employer soon discovered Claimant was a very knowledgeable electrician, after which the employer assigned him to do maintenance work, including working from ladders and changing electric motors.

Claimant's balance concerns and his increasing leg and back symptoms compelled him to leave the job after only six days.

19. **Condition at the time of hearing.** At the time of hearing, Claimant noted his left leg continued to be numb from the knee down. He experienced regular back pain and continued to self-catheterize three to five times daily.

20. **Credibility.** Having observed Claimant, his wife, and Terry Montague at hearing, and compared their testimony with other evidence in the record, the Referee found that all are credible witnesses. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

21. The provisions of the Idaho Worker's 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).

22. **Permanent partial impairment.** The first issue is the extent of Claimant's permanent impairment due to the industrial accident. "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 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal

living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. A determination of physical impairment is a question of fact for the Commission. Pain itself can produce functional loss and thus is a medical factor to be considered in determining permanent impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 754-55, 769 P.2d 1122, 1126-27 (1989). The Commission is the ultimate evaluator of impairment and "in conducting a permanent impairment evaluation, is not limited to record or opinion evidence of a physician requested to give a permanent impairment rating." Soto v. J.R. Simplot, 126 Idaho 536, 539-540, 887 P.2d 1043, 1046-1047 (1994).

23. A two-step analysis is generally appropriate in impairment and disability evaluations and requires "(1) evaluating the claimant's permanent disability in light of all of his physical impairments, resulting from the industrial accident and any pre-existing conditions, existing at the time of the evaluation; and (2) apportioning the amount of the permanent disability attributable to the industrial accident." Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 915, 772 P.2d 119, 122 (1989). The record in the instant case reveals no pre-existing permanent impairment and only two conditions relating to Claimant's industrial accident qualifying as permanent impairments: his industrial lumbar spine condition, and his neurogenic bladder condition.

24. Dr. Krafft found Claimant medically stable on March 11, 2014, and rated his lumbar impairment at 7% of the whole person. He gave no impairment rating for Claimant's neurogenic bladder condition. However, when examining Claimant on December 20, 2013, Dr. Fairfax assessed: "Acute urinary retention related to recent back surgery." Claimant's Exhibit K, p. 2. In 2015, Dr. Williams rated Claimant's lumbar spine impairment at 12% of the whole person and his neurogenic bladder at 3% of the whole person. Defendants paid Claimant

11% permanent impairment—the average of the impairment ratings assessed by Drs. Krafft and Williams ([7% + 15%] ÷ 2)—ostensibly pursuant to IDAPA 17.02.04.281.02.

25. Referring to Claimant's permanent impairment and the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides), Dr. Williams testified:

> Given the level that he was injured and the associated radiculopathy, in the Guides, they are pretty clear about being Class 2, which is a twelve percent impairment. Dr. Krafft didn't mention anything about the neurogenic bladder. I'm not sure at that time if it had been completely worked up or had not been deemed associated at that point. The Guides are also very clear on a neurogenic bladder, based on what a person has to do to treat or take care of their neurogenic bladder. That was a three percent.

Williams Deposition, p. 25, l. 24 through p. 26, l. 10.

26. IDAPA 17.02.04.281.03 provides an exception when averaging impairments would result in a manifest injustice. The Commission finds the impairment rating of Dr. Williams more current, comprehensive, and supported by the record than Dr. Krafft's rating, which entirely ignores Claimant's neurogenic bladder. Averaging the impairment ratings would result in a manifest injustice.

27. Claimant has proven he suffers permanent impairments totaling 15% of the whole person attributable to his lumbar spine and neurogenic bladder conditions due to his industrial accident.

28. **Permanent disability**. The next issue is the extent of Claimant's permanent disability. "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. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should 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 or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected 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.

29. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72–430(1), and make findings as to her permanent disability in light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). As noted, Claimant in the present case had no pre-existing impairment and there is no basis for apportioning any of his permanent disability to a pre-existing condition.

30. Furthermore, the proper date for disability analysis is ordinarily the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v.

Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Claimant lived in Boise at the time of his accident, but relocated to the substantially smaller community of Quartzite, Arizona by the time of the hearing. One cannot increase his permanent disability by moving to a less favorable labor market after his industrial accident. See Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407 n.3, 565 P.2d 1360, 1364 n.3 (1977), Davaz v. Priest River Glass Co., 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). Claimant's permanent disability must be evaluated in the more favorable Boise labor market.

31. Work restrictions. Work restrictions assigned by medical experts are critical in determining permanent disability. In the instant case, the parties cite work restrictions determined by Drs. Krafft and Williams. Dr. Krafft imposed no work restrictions whatsoever. Dr. Williams provided permanent work restrictions due to Claimant's back and bladder conditions based upon his examination and the functional capacity assessment performed by physical therapist Charles Riddle. Dr. Williams restricted Claimant to lifting no more than 50 pounds occasionally, lifting no more than 25 pounds above shoulder level, and pushing and pulling no more than 100 pounds (assuming a wheeled object). He also restricted Claimant to occasional stair-climbing, minimal ladder climbing, no repetitive bending or twisting, no scaffold work, no prolonged standing more than two hours, and no prolonged sitting more than one hour at a time. Williams Deposition, p. 15. Dr. Williams concluded Claimant's balance issues constituted a significant safety concern as a fall in an electrician's working environment could be life threatening. Dr. Williams noted the 50-pound lifting restriction was to protect against the risk of re-injury or new injury. He explained:

> In my experience, anyone who has had back surgery has to have some restrictions in what they do. The risks of the level above or the level below becoming damaged are quite high. In fact, when we look at that statistically, the risk of having another disc goes up quite a bit any time you have any back surgery.

Williams Deposition, p. 27, ll. 2-8.

32. Dr. Williams also imposed restrictions relating to Claimant's neurogenic bladder and his need to catheterize several times during his work day. Dr. Williams testified that self-catheterization is time-consuming and requires a cleaner and more spacious setting than an outhouse or porta-potty. He noted that the high risk of urinary tract infection requires an area that is as clean as possible, and that infections in older persons can be deadly. Williams Deposition, p. 24.

33. Dr. Williams' restrictions are comprehensive, well-reasoned, supported by the record as a whole, and persuasive.

34. Opportunities for gainful activity. Suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability. In the present case, Claimant's potential for employment is illustrated by his attempts to return to work after his accident and by the opinions of vocational experts Dr. Mary Barros-Bailey and Terry Montague.

35. Defendants emphasize that were Claimant to use cannabis in Idaho, such would hinder his employability because many potential employers require drug testing prior to hiring. While Defendants' assertion is correct, the record establishes only Claimant's use of medical cannabis in Arizona by prescription from an Arizona physician. It does not establish any cannabis use in Idaho. There is no evidence Claimant illegally uses cannabis in Idaho. Claimant's employability in Idaho is thus evaluated without any assumption of cannabis use.

36. *Return to work attempts.* After his industrial accident and back surgery, Claimant returned to his pre-injury full work duties at Challenger for approximately five months.

However he was unable to continue working at Challenger as it became apparent that he could not safely work from ladders. His job description at Challenger required in part:

> Must have the physical ability to:
>
> a) Lift 50+ lbs non-repetitively
>
> ….
>
> c) Access and work from various sizes and types of ladders …
>
> d) Access and work occasionally from heights of up to 50' …
>
> e) Access and work in sub-floor areas that require maneuvering in tight, congested areas on hands and knees.

Barros-Bailey Deposition, Exhibit 11, p. 1. Furthermore, Claimant's time of injury job site evaluation, in response to the question "8. Is employee able to vary physical position or activity to perform job?" provides: "No … Constantly on his feet while working." Barros-Bailey Deposition, Exhibit 11, p. 3.

37. As previously noted, Dr. Williams restricted Claimant to lifting no more than 50 pounds occasionally, minimal ladder climbing, no repetitive bending or twisting, no scaffold work, and no prolonged standing more than two hours. Considering these restrictions and the Challenger job site evaluation, Dr. Barros-Bailey testified:

> Q. Based on this job-site evaluation, and the restrictions assigned by Dr. Williams, would Ron be able to go back and do his time-of-injury job?
>
> A. Let me look. So the one that probably knocks it out more than anything is 8, "Constantly on his feet while working." And Dr. Williams wants him to have no more than two hours.

Barros-Bailey Deposition, p. 113, ll. 16-22.

38. Further consideration of Dr. Williams' restriction of no scaffold work prompts similar concern for work that must be performed from a ladder—as distinguished from work that

merely requires minimal ladder climbing to access a work area. As previously noted, it was Claimant's working from a ladder for an extended period that precipitated complete loss of feeling in his left lower leg and persuaded him to leave his job at Challenger.

39. After leaving Challenger, Claimant sought other work. He worked for approximately one week at a business in Arizona and for part of one summer as a campground attendant near Donnelley. The record demonstrates that Claimant was successful in finding work, but with earnings far less than his time-of-injury wage.

40. *Dr. Barros-Bailey.* Mary Barros-Bailey, Ph.D., a vocational expert retained by Employer/Surety, interviewed Claimant via telephone on February 16, 2016, and prepared a report evaluating his disability. She considered much of Claimant's employment throughout his adult life but acknowledged that under Social Security guidelines only occupations held within the prior 15 years are considered in determining competitiveness for current employment. Occupations performed more than 15 years earlier are not considered sufficiently recent to assure the skills required for current employment. Since 2001, Claimant has worked as a pipefitter, electrical apprentice, journeyman electrician, and RV park attendant.

41. Dr. Barros-Bailey's analysis commenced with a computer program utilizing the Dictionary of Occupational Titles (DOT) and adjusting it for specific worker traits. She affirmed that the DOT categorized electrician as medium level work, although she acknowledged some variation among specific electrician positions. She opined that accepting Dr. Krafft's opinion that Clamant has no permanent restrictions, he would have no disability.

42. Dr. Barros-Bailey testified that accepting Dr. Williams' restrictions, Claimant has lost access to 43% of the Boise/Nampa labor market. She opined that Claimant had sustained less than 7% loss of wage earning capacity due to his industrial accident. She testified that his

actual earning capacity loss was negligible and she added some percentage due to his age to arrive at her estimate of 7% loss of earning capacity, resulting in her estimate of 25% permanent disability ([43% + 7%] ÷ 2) inclusive of impairment.

43. Dr. Barros-Bailey opined Claimant had transferable skills as an electrical inspector or a maintenance electrician in hospitals or factories, as distinguished from an electrician in new construction. She opined that maintenance electrician positions would be compatible with Claimant's skills and restrictions and would typically allow access to public restrooms, more suitable for self-catheterization, rather than porta-potties, as would be typical in new construction areas. She affirmed that the Boise/Nampa area labor market was vibrant, with less than four percent unemployment, and testified there are jobs available within Claimant's restrictions in settings having public restrooms.

44. In support of her conclusion, Dr. Barros-Bailey gave "some indication of some of the jobs that [she] found, and what they paid." Barros-Bailey Deposition, p. 24, ll. 23-24. She then identified specific employment opportunities for Claimant in the Boise area. As more fully developed by cross-examination, each job, its wage, and physical demands included:

- Electrical Technician/Maintenance—Nampa Idaho Food Processor ($22.00 per hour); requiring "the ability to lift heavy boxes 50 pounds, ability to go up and down stairs and ladders, bending, sitting, and walking" (Barros-Bailey Deposition Exhibit 9, p. 2) which Dr. Barros-Bailey opined Claimant could perform in spite of Dr. Williams' restrictions and Claimant's experience of his left leg going numb while working from a ladder at Challenger.

- Combination Electrical/Building Inspector—City of Nampa ($20.00-$22.00 per hour); requiring the ability to climb and crawl in tight places and otherwise move through and around installation and construction sites.
- Electrical Technician—Food Group-Idaho Plant ($29.38 per hour); no physical demands were listed for this position thus compatibility with the work restrictions imposed by Dr. Williams could not be determined.
- Maintenance Electrician—MaintenanceRecruiter.com ($28.00 - $35.00 per hour); no physical demands were listed for this position thus compatibility with the work restrictions imposed by Dr. Williams could not be determined.
- Field Service Electrician—United Electric (no wage listed); no physical demands were listed for this position thus compatibility with the work restrictions imposed by Dr. Williams could not be determined.
- Healthcare Mechanic Engineering Department—St. Alphonsus Health System (no wage listed); no physical demands were listed for this position thus compatibility with the work restrictions imposed by Dr. Williams could not be determined.
- Facilities Maintenance Supervisor—Kindred Healthcare (no wage listed); no physical demands were listed for this position thus compatibility with the work restrictions imposed by Dr. Williams could not be determined.

Thus the only actual positions Dr. Barros-Bailey identified which were shown to be arguably compatible with Claimant's work restrictions paid $22.00 per hour.

45. On cross-examination Dr. Barros-Bailey acknowledged that a number of actual journeyman electrician positions, including Journeyman Electrician (Phoenix, Arizona) (no wage listed), Journeyman Electrician—System Tech, Inc. (Twin Falls) (no wage listed), Journeyman

Electrician—Guerdon Enterprises (Boise) (no wage listed), Electrician—Dworshak National Fish Hatchery (Orofino) ($22.82-$26.62 per hour), and Claimant's time of injury job at Challenger all contained physical demands that were incompatible with one or more of the work restrictions imposed by Dr. Williams.

46. *Terry Montague.* Terry Montague, a vocational expert retained by Claimant, testified live at hearing. He interviewed Claimant and his wife, reviewed Claimant's medical records and work history and prepared a report evaluating his disability. Montague researched the labor market and reviewed current job openings and requirements. He concluded that accepting Dr. Krafft's conclusion that Claimant had no permanent work restrictions, he would have no disability. Montague opined that accepting Dr. Williams' restrictions of 50 pounds lifting and two hours of standing, Claimant would have substantial disability.

47. Montague looked for actual jobs for Claimant. To evaluate journeyman electrician job requirements, Montague contacted Todd Sellman, the owner of a Boise area company. Sellman is a master electrician who as a contractor has 20 journeyman electricians and two master electricians working for him. Sellman reviewed Dr. Williams' work restrictions and concluded they were incompatible with a journeyman electrician's work, which required standing most of the day and regular ladder use. Furthermore, although the Dictionary of Occupational Titles classifies a journeyman electrician as medium duty work with lifting of up to 50-pounds, Sellman observed that a journeyman electrician must often lift more than 50 pounds. Montague concluded that Dr. Williams' restrictions would preclude Claimant from journeyman electrician positions.

48. Montague evaluated other work, including sedentary or light-duty jobs allowing position changes. He also considered reliable access to clean bathroom facilities for safe self-

catheterization. He identified counter attendant positions at electrical supply companies in the Boise area such as Alloway Electric and Grover's Pay and Pack. While multiple positions were available, starting wages approximated $9.75 per hour. Montague also researched employment positions within 60 miles of Quartzite, Arizona and identified some apparently suitable positions with wages of less than $11.50 per hour. He concluded Claimant sustained a labor market access loss of 55 to 60%, a wage earning capacity loss of 62 to 67.5%, and a "disability ranging from a low of 58.5 to a high of 63.75% in excess of his permanent impairment." Claimant's Exhibit P, p. 13.

49. *Weighing the vocational opinions.* In his report of January 22, 2016, Montague opined that as a consequence of the subject accident Claimant suffered a loss of access to the labor market of between 55 to 60 percent. Montague's report contains no explanation of the methodology he utilized to arrive at these figures. He did, however, testify to his methodology at hearing:

> A. (Montague) Well, one of the –I'll tell you how I did it and, again, this is an estimate, but we know, for example, that based on Dr. Williams' work restrictions, Mr. LaBleu can no longer do heavy or very heavy work.
>
> Q. (Mr. Vook)Okay.
>
> A. That accounts for about 10 percent of all work in the national labor market, so that's excluded now. Even though he did it before, he can't do it now according to Dr. Williams. As far as medium work, when we talk about medium work, medium work generally involves work that is performed while on your feet. In Mr. LaBleu's case, he can no longer do repetitive, or not repetitive, prolonged standing for more than two hours, and he needs to be able to change his position as needed from standing to sitting. What happens when that occurs is that he's going to still have access to some medium jobs because of the 50 pounds lifting occasionally, but because of the - - because of the other work restrictions imposed, including ability to change position as needed, I calculated that he would probably see a 15 to 20 percent loss of medium jobs.

> Light work makes up about 50 percent of all work in the national labor market. The problem is, again, because he has to have the ability to stand or sit as needed and he has minimal bending, twisting, and so forth, I estimated he'd lose about half of those, and when it comes to sedentary work because he has restrictions for no sitting for longer than an hour at a time, there's only 11 percent of occupations that are classified as sedentary and I estimated that he'd probably lose close to half or about five percent of those, and that's how I arrived at a 55 to 60 percent loss of labor market access.

Hearing Transcript, 43/8-44/15.

50. Mr. Montague did not testify to what percentage of the labor market consists of medium duty work, but from what he did say, it can be deduced that medium work comprises 29% of the labor market. (100 – 10 – 50 – 11 = 29). Per Montague, Claimant lost all access to heavy labor (10% of the labor market), 20% of medium jobs (29 x 20%, or 5.8% of the labor market), 50% of light jobs (50 x 50%, or 25% of the labor market), and 50% of heavy jobs (11 x 50%, or 5.5% of the labor market). Mr. Montague's explanation does not support a loss of access to the labor market in the range of 55 to 60 percent. Rather, it supports a loss of access to the labor market in the range of 46%. (5.5% + 5.8% + 25% + 10% = 46.30%).

51. However, a more significant shortcoming of Mr. Montague's analysis is also illustrated by the hearing testimony quoted above. Mr. Montague testified that the limitations/restrictions imposed by Dr. Williams differentially impact Claimant's ability to perform work in the various segments of the total labor market. For example, ten percent of the jobs in the total labor market are "heavy labor" jobs. Mr. Montague testified that Claimant has lost the ability to perform any type of heavy labor, and therefore opined that as a result of the accident, Claimant has lost access to this entire segment of the labor market. The problem with this approach is that it presupposes that on a <u>pre-injury</u> basis, Claimant had the skills and abilities to perform <u>all</u> of the heavy labor positions in the total labor market. Clearly, he did not. To

illustrate, let it be hypothesized that the job of brewmaster at a microbrewery is a heavy job; it requires the ability to lift and move heavy containers of grain and other ingredients. Claimant could have performed the physical demands of this job on a pre-injury basis, but this job did not comprise a part of his pre-injury labor market because he knows nothing about brewing beer. In other words, though possessing the physical capacity to perform this type of work on a pre-injury basis, he was not otherwise qualified or skilled to brew beer. Therefore, it cannot be said that on a pre-injury basis, Claimant's labor market included all heavy duty jobs.

52. For this reason, the 46.3% loss of access to the labor market suggested by Mr. Montague's calculations is even less helpful in explaining Mr. Montague's opinion on labor market access loss.

53. In summary, Mr. Montague's hearing testimony does not adequately support the conclusion stated in his report that Claimant has lost access to 55 to 60 percent of his pre-injury access to the labor market as the consequence of the subject accident.

54. Dr. Barros-Bailey's estimated 43% loss of labor market access assumes that Claimant can access many journeyman electrician jobs. However, this assumption is not supported by the actual jobs Dr. Barros-Bailey identified at her deposition as representative of positions available to Claimant. Furthermore, this assumption is refuted at least in part by Dr. Barros-Bailey's acknowledgement that the physical requirements of Claimant's job at Challenger and the journeyman electrician positions discussed by Claimant's counsel during Dr. Barros-Bailey's cross-examination exceeded his work restrictions. The assumption is further refuted by Montague's conclusion after his discussion with Sellman—who employs more than 20 journeyman electricians—that journeyman electricians must lift more than 50 pounds and work from ladders for extended periods.

55. As developed above, we believe that Mr. Montague's methodology is seriously flawed, and does not actually support his eventual conclusion on labor market access loss. On the other hand, we conclude that while Dr. Barros-Bailey's methodology is sound, she made an erroneous assumption about the demands of journeymen electrician work which probably led to an understatement of Claimant's loss of access to the labor market. While we believe that both experts made mistakes in calculating Claimant's loss of access to the labor market, the methodology utilized by Dr. Barros-Bailey is more transparent to the Commission and the errors she made allow the Commission to conclude, with some conviction, that she understated Claimant's loss of access to the labor market. Ironically, although we do not understand how Mr. Montague reached his conclusion that Claimant has a loss of labor market access in the range of 55 to 60 percent, he is probably closer to the mark than Dr. Barros-Bailey.

56. While the difference in estimates of labor market access is significant, the greater disparity lies in Montague's and Dr. Barros-Bailey's differing estimates of Claimant's loss of wage earning capacity—from 62% to 7%—respectively. Dr. Barros-Bailey opined that Montague's analysis seemed to disregard other practice settings that pay nearly the same as Claimant's pre-injury employment. Certainly Montague's conclusions are strongly influenced by his discussion with Sellman and by Claimant's job requirements at Challenger. Dr. Barros-Bailey's conclusion that Claimant suffers negligible wage earning loss is based upon the assumption that he can perform journeyman electrician jobs in maintenance positions as distinguished from new construction. However, as noted above, the majority of the actual jobs identified in the record do not support this assumption. Considering this evidence, the electrician positions identified by Dr. Barros-Bailey that do not list physical requirements are not assumed

to be compatible with Claimant's work restrictions. Dr. Barros-Bailey's rating underestimates Claimant's disability.

57. Montague has convincingly explained that Claimant has suffered wage loss in the range of 62% to 67.5% as a consequence of the subject accident. Dr. Barros-Bailey has opined that Claimant's wage loss is only in the range of 7%, but as developed above, her opinion in this regard may be criticized for her failure to understand that many journeymen electrician jobs are now foreclosed to Claimant. On balance, we believe that Mr. Montague's opinion of Claimant's wage loss is the more accurate, and we conclude that Claimant has suffered wage loss of 64% as a consequence of the subject accident.

58. For the reasons discussed above, we are skeptical of Montague's opinion concerning Claimant's loss of access to the labor market attributable to the work-related injury. Based on his report and his testimony, it is as though he first assembled a gestalt from all of the data and after the fact adopted a (faulty) methodology to explain his findings. Even so, his assessment of Claimant's loss of access to his pre-injury labor market is probably closer to reality than Dr. Barros-Bailey 's opinion, which was founded on a well-known methodology, but employed a flawed assumption. We conclude that as a consequence of the limitations resulting from the subject accident Claimant has suffered a loss of access to his pre-injury labor market of around 55%. Considering both Claimant's wage loss, loss of access to the labor market, age, and other non-medical factors, we conclude that Claimant has suffered a disability of 60% of the whole person as a result of the subject accident.

59. Finally, Montague proposed that the disability rating he arrived at for Claimant is not inclusive of Claimant's PPI rating. On the other hand, Dr. Barros-Bailey stated that her proposed disability rating is inclusive of Claimant's permanent physical impairment. We have

concluded that Claimant has suffered permanent physical impairment of 15% of the whole person. As developed above, we have further concluded that Claimant has suffered permanent partial disability of 60% as a consequence of the subject accident, based on the effects of the accident on Claimant's wages and access to the labor market. The remaining question for consideration is whether Claimant's 60% disability is inclusive or exclusive of his 15% PPI rating. At 2013 rates, a 60% permanent partial disability award equals $111,210.00. A 15% PPI rating equals $27,882.50. Including or excluding Claimant's PPI rating in his disability award will result in Claimant receiving either $111,210.00 or $139,092.50, respectively.

60. Application of a rule that disability is not inclusive of impairment would be enormously consequential to the Idaho workers' compensation system. This case is a good illustration: if impairment is not a component of the injured worker's disability, then Surety must pay the 60% disability award and the 15% impairment rating. This amounts to a significant expansion of the benefits payable in cases where a disability award is given, for there can be no disability without impairment. Selzer v. Ross Point Baptist Camp, 2013 IIC 0015; (citing Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989) (Absent permanent impairment, there can be no permanent disability.)) If these ratings pass in space, and must be paid separately, then indemnity payable to the injured worker will be increased in almost every case where disability is at issue. While this inures to the benefit of the injured worker, such increase will eventually be reflected in premium, for someone must pay.

61. The workers' compensation laws recognize a distinction between permanent impairment and permanent disability. Sund v. Gambrel, 127 Idaho 3, 896 P.2d 329 (1995); Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014). Quoting from Seiniger Law

Offices, P.A. v. State of Idaho ex rel Industrial Commission, 154 Idaho 461, 299 P.3d 773 (2013), the Corgatelli Court observed:

> In worker's compensation cases, the claimant's recovery is typically categorized into types of benefits, such as medical expenses, temporary disability, permanent impairment, and permanent disability (disability in excess of impairment). Because those benefits are determined separately, the claimant's recovery for each type of benefit is an identifiable sum of money.

Permanent impairment is defined at Idaho Code § 72-422 as follows:

> "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability. (Emphasis supplied.)

Permanent disability is defined at Idaho Code § 72-423 as follows:

> "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.

Under Idaho Code § 72-424, the rating of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects claimants' functional abilities. Permanent disability is evaluated pursuant to Idaho Code § 72-425 and Idaho Code § 72-430. Idaho Code § 72-425 provides:

> "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 as provided in section 72-430, Idaho Code.

Idaho Code § 72-427 also speaks to the role of permanent impairment in evaluating disability:

> The "whole man" for purposes of computing disability evaluation of scheduled or unscheduled permanent injury (bodily loss or losses or loss of use) for conversion to scheduled income benefits, shall be a deemed period of disability of five hundred (500) weeks.

Finally, Idaho Code § 72-428 addresses the numerical calculations for disability and impairment:

> SCHEDULED INCOME BENEFITS FOR LOSS OR LOSSES OF USE OF BODILY MEMBERS. An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five percent (55%) of the average weekly state wage stated against the following scheduled permanent impairments respectively: . . .

Therefore, permanent impairment is a "basic consideration" in evaluating disability and is a contributing factor to, but not necessarily a measurement of, the entire extent of an injured worker's permanent disability. Similarly, Idaho Code § 72-425 makes it clear that disability is assessed by considering how the injured worker's ability to engage in gainful activity is impacted by two things; the injured worker's permanent impairment and the relevant non-medical factors identified at Idaho Code § 72-430. Finally, the calculations used to establish scheduled and unscheduled impairments are not the exclusive measure of permanent disability.

62. Prior cases construing the interplay between the statutes referenced above make it clear that permanent impairment is a component of an injured worker's disability.

63. In Baldner v. Bennett's, Inc., 103 Idaho 458, 649 P.2d 1214 (1982), it was argued that the Commission erred in basing claimant's disability on a comparison between pre-injury and post-injury wages. The Court reviewed the distinctions, discussed above, between impairment and disability evaluation, then noted that claimant had received a permanent impairment rating of 15% of the whole person. With respect to this impairment rating, the Court then stated:

> A claimant's impairment evaluation or rating is one component or element to be considered by the Commission in determining a claimant's permanent, partial disability, I.C. § 72-425, and is not the exclusive factor determinative of the disability rating fixed by the Commission. I.C. § 72-427. A disability rating may exceed the claimant's impairment rating. (Citations omitted).

If impairment is a "component" of disability, but not the "exclusive" factor determinative of disability, then it seems to follow that disability is inclusive of impairment. Other cases support this reading.

64. In Bennett v. Clark Hereford Ranch, 106 Idaho 438, 680 P.2d 539 (1984), the claimant was given a 15% impairment rating for low back injury which surety paid. The case went to hearing on the question of whether claimant was entitled to an additional award of permanent disability. In evaluating this issue, the Commission noted that even following his work accident, claimant retained his ability to work as a truck driver and was so employed at the time of hearing. For this reason, the Commission concluded:

> As such, claimant has failed to sustain his burden of proof in establishing a disability greater than a 15% whole man permanent physical impairment award. All workmen's compensation benefits due claimant as a result of the industrial accident have heretofore been paid by defendant-surety.

65. The Commission specifically found that claimant failed to prove that he had a disability greater than his 15% impairment rating. In so ruling, however, the Commission did not make a separate award of disability to claimant in an amount equal to 15% or some lesser amount. Rather, after stating that claimant failed to prove entitlement to disability greater than impairment, the Commission concluded that claimant was not entitled to any additional workers compensation benefits as a result of the subject accident. The Commission's decision makes it clear that it treated disability as being inclusive of claimant's impairment.

66. On appeal, claimant argued that the Commission used the wrong legal standard in determining that he was not entitled to a disability award greater than his medical impairment. He argued that the issue was not whether he could work at some job, but rather whether his physical impairment, taken in conjunction with other relevant non-medical factors, had reduced his ability to engage in gainful activity. In treating the issue, the Court did not take issue with

the Commission's inclusion of impairment within the larger category of disability. Rather, the Court held that the Commission erred in failing to consider whether the accident had reduced claimant's ability to engage in gainful activity; the fact that claimant could continue to work as a truck driver following his recovery from his work accident was not an accurate measure of his ability to engage in gainful activity. The case was remanded to the Commission with instructions to determine whether claimant was entitled to an award of disability in excess of his medical impairment rating. The Commission was instructed to consider all non-medical factors listed in Idaho Code § 72-425. On remand, the Commission determined that claimant suffered disability of 35% of the whole person, inclusive of his 15% impairment.

67. Nothing in the Bennett case suggests that impairment and disability must be paid separately. To the contrary, the case strongly suggests that impairment is a component of disability and that under Idaho Code § 72-425, the question is whether relevant non-medical factors justify an award of disability over and above (but inclusive of) the impairment rating.

68. That impairment is but a component part of a disability rating is unambiguously demonstrated by Sund v. Gambrel, *supra*. After noting the distinction to be drawn between impairment and disability, the Court stated:

> An "evaluation (rating) of permanent *disability*," on the other hand, is an appraisal of the employee's present and probable future ability to engage in gainful activity as it is affected by (1) the medical factor of permanent impairment and (2) by pertinent nonmedical factors set forth in I.C. Section 72.425. *See also* I.C. Section 72-422 and -423 for specific definitions of the terms "permanent impairment" and "permanent disability." Thus 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*.

69. Sund makes it clear that an injured worker's impairment is a part of his disability. An injured worker's disability rating must include his impairment rating, but the impairment rating need not define the full extent of a claimant's disability. Ordinarily, consideration of

relevant non-medical factors will justify the award of additional disability over and above the impairment rating. This holding of Sund was cited with approval in the subsequent case of Fenich v. Boise Elks Lodge No. 310, 106 Idaho 550, 682 P.2d 91 (1984).

70. Consistent with the statutory scheme and cases construing the same, the Commission has historically considered an injured worker's impairment to be a component of that worker's potentially larger award of disability, such that it is customary to speak of the award of disability as being "in excess of the impairment rating", and allowing surety to credit impairment paid prior to the assessment of Claimant's disability to the eventual disability award.

71. This convention, supported by the statutes and case law discussed above, is called into question by Corgatelli v. Steel West, Inc., supra. In Corgatelli, prior to the Commission's determination that Claimant was entitled to total and permanent disability benefits, surety had paid to claimant the sum of $11,964.00, representing the permanent impairment referable to claimant's industrial injury. Surety attempted to apply this payment as a credit against the subsequent award of total and permanent disability benefits, and this was endorsed by the Commission, which reasoned that to disallow the credit for impairment previously paid would amount to a windfall to claimant after surety's finite responsibility for its share of total and permanent disability was identified by application of the *Carey* formula.

72. Per the Court, the Commission relied only on Idaho Code § 72-425 to conclude that Steel West was entitled to a credit for impairment previously paid. While the Court acknowledged that permanent disability must be calculated "in relation to permanent physical impairment", it held that nothing in Idaho Code § 72-425 anticipates that in calculating permanent disability defendants should be entitled to take a credit in the amount of impairment previously paid. Idaho Code § 72-425 relates to the evaluation of permanent disability, not the

computation of benefits. Benefits for total and permanent disability are calculated pursuant to I.C. § 72-408. Nothing in that section recognizes a deduction or credit for previously paid impairment. Therefore, the Court concluded that there is no statutory basis to credit employer for impairment paid to the employee prior to the award of total and permanent disability. It is less clear whether the rule of Corgatelli is intended by the Court to apply in less-than-total disability cases where there has been a payment of impairment prior to the determination of disability. The Court held that the provisions of I.C. § 72-406 (2) did not avail employer because that section only allows a credit for prior income benefits paid in connection with a particular body part where it is shown that due to a new accident or change in condition, Claimant has suffered additional injury to that body part. The Court then stated:

> Although partial permanent disability benefits are calculated in relation to permanent physical impairment benefits, Idaho Code § 72-427 to -429, partial permanent disability benefits and permanent physical impairment benefits are two separate forms of compensation. . . .

From this it is possible that the Court intends the rule of Corgatelli to apply in less-than-total cases. If there must be a statuory authority to support a credit in a case of total and permanent disability, there must also be statutory authority for a credit in a less-than-total case.

73. Of course, as developed above, it is not just Idaho Code § 72-425 which speaks to the role of impairment in calculating disability. Idaho Code § 72-422 and Idaho Code § 72-427 also suggest that impairment is but a component of a disability award. Further, past cases of the Court construing these sections affirm this notion. Corgatelli did not expressly overrule any of these earlier cases. Moreover, there are cases subsequent to Corgatelli which seem to make it clear that impairment, at least in a less-than-total case, is a component part of disability.

74. In Fairchild v. Kentucky Fried Chicken, 159 Idaho 208, 358 P.3d 769 (2015), claimant suffered injuries to his knees as the result of a work related fall. He was eventually

given a three percent impairment rating for these injuries by Dr. Sims. The Commission also accepted Dr. Sims' opinion that claimant had no permanent limitations/restrictions as a consequence of his injuries. On the issue of disability, the Commission accepted the opinion of defendant's vocational rehabilitation specialist who testified that given the fact that claimant did not have permanent limitations/restrictions, it was difficult to conclude that he had suffered any disability in excess of impairment. On appeal, claimant argued that since he had been given a three percent impairment rating, it followed that he must have physical limitations/restrictions. The Court disagreed, ruling that an impairment rating does not necessarily implicate the existence of limitations/restrictions. It also noted that even if claimant had been given limitations/restrictions, this did not necessarily require a finding that claimant had suffered disability in excess of impairment. In this regard, the Court quoted with approval from Graybill v. Swift & Co., 115 Idaho 293, 766 P.2d 763 (1988).

75. In Graybill, claimant was given an impairment rating equal to 6.5% of the whole person, based primarily on his subjective complaint of pain. On appeal, claimant argued that the Commission should have enhanced his disability rating, over and above the impairment evaluation, because of non-medical factors as referenced at Idaho Code § 72-425. In particular, he argued that his subjective pain complaints should have been considered as a non-medical factor impacting his ability to engage in gainful activity. Upholding the Commission's decision that claimant was not entitled to an award of disability over and above his 6.5% impairment rating, the Court stated:

> This Court has recognized that a permanent disability rating need not be greater than the impairment rating if, after consideration of the nonmedical factors in I.C. Sec. 72-425, the claimant's "probable future ability to engage in gainful activity" is accurately reflected by the impairment rating. Where a claimant has produced "no significant evidence in the record which bears on a disability in excess of the

> permanent impairment rating," an additional award in excess of the impairment may not be sustained.

76. Therefore, claimant's impairment rating was deemed to adequately represent his disability, and yet the Court did not conclude that claimant was entitled to both a 6.5% impairment rating and a 6.5% disability rating. If impairment and disability pass in space, as suggested by Corgatelli, and if claimant's disability equals, but does not exceed, his impairment, it seems that he should be entitled to a 6.5% impairment and a 6.5% disability. However, the Graybill Court endorsed the Commission's refusal to make any award in addition to the 6.5% impairment, clearly demonstrating that impairment is a component of disability.

77. More to the point, is the recent case of Mayer v. TPC Holdings, Inc., 160 Idaho 223, 370 P.3d 738 (2016), reh'g denied (May 9, 2016). In connection with the interpretation of Idaho Code I.C. § 72-428, the Court observed:

> TPC attempts to make much of the fact that Idaho Code section 72–428 uses the term "permanent disability" to describe awards specified under section 72–428's "scheduled permanent impairments." This interchange of terms, TPC argues, makes the use of the term "permanent disability" ambiguous in section 72–431. However, the forerunner of Idaho Code section 72–428 was enacted in 1917, and since that time the Idaho Code has always referred to a disability award, not an impairment award. Although the term "impairment award" has crept into the vernacular of the workmen's compensation bar, Idaho's Workmen's Compensation Law only provides for an award of income benefits based on disability, not impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 3 n. 5, 773 P.2d 269, 271 n. 5 (1988) ("Income benefits payable under the Workmen's Compensation Law, with the exception of retraining benefits, I.C. § 72–450, are based upon disability, either temporary or permanent, but not merely impairment."). A "permanent impairment" as the definitions themselves make clear, is simply a component of a "permanent disability." I.C. §§ 72–422, –423. Thus, any final award made under Idaho's Workmen's Compensation Law is properly referred to as a disability award. *Fowler*, 116 Idaho at 3 n. 5, 773 P.2d at 271 n. 5 ("While in some cases the non-medical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the impairment rating."); *see also Woodvine v. Triangle Dairy*, 106 Idaho 716, 722, 682 P.2d 1263, 1269 (1984). (*Emphasis supplied*.)

Mayer v. TPC Holdings, Inc., 160 Idaho 223, 370 P.3d 738, 742 (2016), reh'g denied (May 9, 2016).

Therefore, the real measurement of entitlement is not impairment plus disability, but disability alone, of which impairment is only a part.

78. Without further direction from the Court, we decline to apply *Corgatelli* to less-than-total cases. Disability is inclusive of impairment in such cases. It follows that Defendants are liable for the 60% disability award, and are also entitled to credit for any impairment paid to date.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven permanent impairment to his lumbar spine and bladder of 15% of the whole person due to his industrial accident.

2. Claimant has proven permanent partial disability due to his industrial accident of 60% of the whole person inclusive of the 15% permanent partial impairment as a result of the subject accident.

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

DATED this 23rd day of November, 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 23rd day of November, 2016, 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:

MATTHEW C ANDREW
1226 EAST KARCHER ROAD
NAMPA ID 83687-3075

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707-6358

____/s/_____