

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BENJAMIN MORRIS,

Claimant,

v.

HAP TAYLOR & SONS,

Employer,

and

LIBERTY INSURANCE CORPORATION,

Surety,
Defendants.

IC 2006-525142

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

Filed 12/1/17

This matter went to hearing on January 3, 2017 before Referee John Hummel. Claimant was not present at hearing, but was represented by Starr Kelso, Esq. Defendants were represented by Kent Day, Esq. At hearing, Claimant's Exhibits A-J and Defendant's Exhibits 1-8 were admitted without objection. Claimant's father, Harold Morris, testified at hearing. Claimant also stated his intention to call Teresa Nolen, a representative of Surety, but acknowledged that he had not asked for a subpoena requiring her attendance to be issued. No post-hearing depositions were taken. The case came under advisement on June 2, 2017. The parties have stipulated that the case may be submitted to the Commission for decision.

ISSUES

By order of the Commission dated June 8, 2016, the following matters are at issue:

1. Whether and to what extent Claimant is entitled to temporary partial and/or temporary total disability benefits (TPD/TTD);
2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804. (June 8, 2016 notice of hearing).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 1

At hearing the parties agreed that the Commission's June 8, 2016 order correctly identifies the issues to be heard. Specifically, Claimant's entitlement to further medical care following the Commission's January 19, 2010 approval of the partial lump sum settlement is not at issue. (Transcript at 22/16-24). Accordingly, the Commission will not consider the arguments raised by both Claimant and Defendants in their briefing relating to whether or not Claimant is entitled to some or all of the medical care that he has requested or received since the Commission's approval of the lump sum settlement on January 10, 2010. Unfortunately, this complicates resolution of the noticed issue of whether Claimant is entitled to further TPD/TTD benefits since, as developed below, entitlement to TTD/TPD benefits is tied to the obligation created by the lump sum settlement to provide medical care required by Claimant following approval of the settlement.

CONTENTIONS OF THE PARTIES

Claimant contends that within four days following the execution of the lump sum settlement agreement on January 10, 2010, Claimant's treating physician, Dr. Stanek, recommended further outpatient care to treat Claimant's pain and psychological problems in the hope that such treatment would allow Claimant to successfully transition into the work force. This treatment recommendation was forwarded to Employer/Surety, but approval of such care was not forthcoming. Claimant contends that he has been in a period of recovery since Dr. Stanek's January 15, 2010 recommendation, and that he is entitled to the payment of time loss benefits from January 15, 2010 through the date of hearing, and until such time as he is pronounced medically stable. Claimant acknowledges that time loss benefits were appropriately paid to Claimant following the cervical spine surgery performed by Dr. Larson. Further, at hearing, Claimant acknowledged that he is not seeking time loss benefits for the period of time

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 2

he was incarcerated during a period of recovery. (Transcript 15/22-16/14).¹ Finally, Claimant contends that owing to Defendants failure to timely approve the medical care recommended by Dr. Stanek, and their chronic and unexplained delay in initiating the payment of time loss benefits, Claimant is entitled to an award of attorney fees under Idaho Code § 72-804.

Defendants contend that notwithstanding the fact that Employer/Surety provided psychotherapy treatment between January and May of 2016, there is a failure of the evidence to demonstrate that the need for such treatment is causally related to the subject accident. Defendants contend that Surety's voluntary payment of these benefits does not establish that the need for such care was actually related to the subject accident. Defendants further contend that the proof does not establish that Claimant has been in a period of recovery since the January 19, 2010 lump sum settlement. There is no medical evidence demonstrating that Claimant was taken off work during the period that he received psychotherapy treatment provided by Defendants. Defendants claim that neither Dr. Hanger nor Dr. Crawford imposed restrictions on Claimant that would first be necessary to demonstrate an entitlement to time loss benefits.

FINDINGS OF FACT

1. Claimant suffered a work related injury on or about October 18, 2006 when he was struck on the back of his head by a large stone which had been ejected with some force from a piece of machinery. As a consequence of the accident, he suffered, *inter alia*, a closed head injury, a cervical spine injury, and certain psychological problems related to the closed head injury. He was treated, declared stable by certain of his providers/evaluators, and eventually

¹ In his reply brief of June 1, 2017, Claimant asserts, for the first time, an entitlement to time loss benefits during the period of his incarceration in 2016. (*See* Claimant's reply brief p. 6). Since this claim for additional TTD benefits was made in Claimant's closing brief, Defendants have been afforded no opportunity to respond to this new claim of entitlement. We will not entertain the claim for time loss benefits during Claimant's period of incarceration, since Claimant conceded on the record, that this time period was not an element of his claim, just as he conceded that the period of time during which Claimant received time loss benefits following his cervical spine surgery was not element of his claim.

given various impairment ratings for his injuries, along with permanent limitations, which arguably reduced his ability to engage in gainful activity. In late of 2009, the parties entered into settlement discussion in an effort to resolve the claim. Not surprisingly, Defendants hoped to resolve the claim in its entirety. However, Claimant was unwilling to do so for the amount offered. Eventually, the parties reached a settlement which left medical benefits open, and also promised to pay Claimant time loss benefits related to such medical treatment. In addition, the lump sum approved by the Commission on January 19, 2010, absolved Defendants from any and all liability whatever for damages, to include disability of both the permanent and temporary type. The following provisions of the settlement agreement treat the Claims that were resolved and those that were reserved:

I.

All damages, disability, loss, expense and injury, past, present, and future, in any way resulting from or related to the alleged accident are finally settled and discharged by this Agreement except that Defendants agree to medical benefits and time loss benefits relating to any future medical treatment that is casually related to the October 18, 2006 injury. The parties agree that no additional permanent partial impairment and/or disability benefits will be paid after approval of this lump sum agreement. This is the case whether or not these damages, disability, loss or expense are now known, recognized or foreseen.

...

III.

It is Defendants' contention that disputes exist in this claim concerning the nature and extent of injuries, the cause and extent of Claimant's permanent impairment and disability, entitlement to temporary partial and total disability benefits and probable amount of future medical expenses. The parties hereto acknowledge that these are serious questions and disputes, and that all differences compromised and settled by this Agreement with the exception of future medical treatment required for injuries sustained in the October 18, 2006 incident and any TTD and/or PTD benefits that Claimant may be entitled to as a result of the casually related future medical treatment.

...

VII.

All parties acknowledge that the nature and extent of temporary and permanent disability, if any, are uncertain and in dispute; that pursuant to I.C. § 72-404, it is in the best interest of the parties that the above-entitled claims be fully, finally and forever discharged upon a lump sum payment by Surety in the amount of \$54,381.00 minus child support as indicated below. Such settlement to discharge all rights and claims to all permanent and temporary compensation, except for reasonable and necessary medical benefits causally related to the October 18, 2006 injury and time loss benefits associated therewith.

...

VIII.

Such settlement to discharge all rights and claims to all permanent and temporary compensation, excepting future medical benefits whether or not known, herein listed, discoverable or contemplated by the parties. Claimant does indemnify and agree to save Defendants harmless from and against any further claim or loss of any and every kind arising out of or related to said alleged accident and any resultant loss, damage or injury, excluding any claim respecting casually related hospital, medical or like expenses to include associated temporary time loss.

...

XI.

Claimant acknowledges that he has carefully read this Agreement and legal instrument in its entirety, understands its contents, and has executed the same knowing that this Agreement forever concludes and fully and finally disposes of any and all claims for indemnity benefits he has or may have against Employer and Surety on account of the alleged accident and injury on October 18, 2006.

...

IT IS UNDERSTOOD THAT IN EXECUTING THIS AGREEMENT THESE PROCEEDINGS ARE CONCLUDED AND FOREVER CLOSED BY REASON THEREOF, SUBJECT ONLY TO COMMISSION APPROVAL AND ORDER, AND THAT CLAIMANT WILL NOT THEREAFTER BE ABLE TO REOPEN THE SAME FOR ANY PURPOSE EXCEPT THAT DEFENDANT'S AGREE TO CONTINUE TO PAY MEDICAL BENEFITS AND TIME LOSS BENEFITS RELATING TO ANY FUTURE MEDICAL NEED THAT THE PARTIES AGREE IS CAUSALLY RELATED TO THE OCTOBER 16, 2006 INJURY OR WHICH IN THE EVENT OF DISAGREEMNT [sic] IS FOUND BY THE COMMISSION TO BE CAUSALLY RELATED TO THAT INJURY. Notwithstanding this knowledge, Claimant and Defendants hereby petition the Industrial Commission for a lump sum settlement as evidence by these presents.

Claimant's Exhibit C, pp. 14, 15, 19, 20, 21, 22 [Emphasis in original].

2. The January 19, 2010, order approving the proposed lump sum settlement provided, in part:

The foregoing stipulation, agreement and petition having duly and regularly come before this Commission and that pursuant to I.C. § 72-404, it is in the best interests of the parties that approving said agreement and Order of Partial Discharge be granted as prayed for,

NOW, THEREFORE, said foregoing stipulation and agreement shall be, and the same hereby is, APPROVED; and further,

Said petition shall be and hereby is granted and the above-entitled proceedings are DISMISSED WITH PREJUDICE as to permanent indemnity benefits and WITHOUT PREJUDICE as to medical benefits and time loss benefits relating to any future medical that is causally related to the October 18, 2006 injury.

Claimant's Exhibit C, p. 24 [Emphasis in original].

3. The settlement approved on January 19, 2010 was negotiated on Claimant's behalf by Michael Walker, Esq., his then attorney.

4. On or about January 15, 2010, Claimant was seen by Karen Stanek, M.D., one of Claimant's treating physicians. Dr. Stanek evidently felt that Claimant had not fully recovered from the accident. She examined Claimant and felt that he continued to experience persistent symptomatology related to the accident. In particular, Dr. Stanek felt that Claimant suffered from unresolved depression, which was, in part, responsible for his failure to recover. She recommended admission to an outpatient program at SLRI. She anticipated that once Claimant completed this program he should be ready to "successfully transition into the work force." (*See*, Claimant's Exhibit D, pp. 31-32). Dr. Stanek's notes reflect that she sent a request for authorization for the treatment she proposed to Surety. There is nothing in the record which confirms Surety's receipt of this request for authorization, or, if Surety did receive the request, that it authorized the recommended outpatient program. Claimant was evidently seen by Dr. Stanek on February 26, 2010, at which time she referred Claimant for a cervical spine injection,

but the note from that visit is not contained in the exhibits. After a long hiatus, Claimant was again seen by Dr. Stanek on January 7, 2013. Dr Stanek noted that Claimant had been scheduled for additional visits which he failed to keep. After examining Claimant, Dr. Stanek concluded that he was “status post closed head injury, resolved.” She felt that he continued to suffer from a mood disorder, chronic pain syndrome, chronic headaches, opioid dependence, and depression. Nevertheless, she pronounce Claimant “Fixed and stable.” noting that he would not benefit from further therapy other than psychological therapy needed to address his mood and anger issues. She discharged Claimant from her care. From Dr. Stanek’s note, it is difficult to understand whether she felt Claimant’s need for further psychological therapy was related to the subject accident. In other words, had she felt that Claimant’s ongoing psychological problems were related to the subject accident, would she have found him fixed and stable?

5. In 2013, Claimant underwent cervical spine surgery performed by Dr. Larson. This surgery was eventually authorized and paid for by Defendants. Additionally, during his period of recovery following cervical spine surgery, Surety authorized and paid TTD benefits from March 7, 2013 through August 13, 2013. (*See*, Claimant’s Exhibit F).

6. By letter dated January 28, 2015, Claimant’s counsel notified Defendants that Claimant was still suffering from ongoing emotional problems. Request was made for a repeat neuropsychological evaluation. Defendants acceded to this request and arranged for Claimant to be evaluated by John Wolfe, Ph.D. From the evidence of record, it appears that Claimant was seen by Dr. Wolfe on April 22, 2015, but from his note of that date it does not appear that he actually performed a neuropsychological evaluation of Claimant. Rather, his note reflects that he spent some time trying to understand the purpose of the evaluation, i.e. whether it was related to Claimant’s workers’ compensation case or to his involvement with the criminal justice system.

Dr. Wolfe did note Claimant’s subjective report of psychological problems including

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 7

sleeplessness, anger, depression, etc. Dr. Wolfe's diagnostic impression was cognitive disorder NOS, personality change due to head injury, major depressive disorder, and generalized anxiety disorder, stable. Dr. Wolfe did not identify any limitations/restrictions for Claimant as of April 22, 2015. Dr. Wolfe did not take Claimant off work as of April 22, 2015.

7. Claimant next appeared to have been seen by Philip Hanger, Ph.D., for the purposes of a neuropsychological evaluation in July of 2015. This evaluation was undertaken at the instance of Claimant's counsel. Dr. Hanger's comprehensive report is found at Defendant's Exhibit 3. In performing his evaluation, Dr. Hanger had the opportunity to compare Claimant's presentation at the time of exam to prior records and testing. Dr. Hanger's synthesis following testing and evaluation of Claimant is found at page 17 of his report:

Impressions

- Mr. Morris' level of general intellectual abilities remains grossly unchanged from previous testing levels (2007), and are consistent with that expected based on his academic and vocational history.
- Specific improvements in cognitive-intellectual abilities were noted in his processing speed and efficient, visuoperceptual problem solving, and abstract reasoning capacities.
- A continued deficit pattern presents within the area of sustained attention. This attention deficit is seen to negatively impact Mr. Morris' encoding memory ability for auditory, verbal information. His verbal memory storage capacity is seen to be intact when adequate structure or cuing is provided to him during learning or retrieval of information. Therefore, when compensation is provided for this attention/encoding deficit, no appreciable impairment in memory performance are noted.
- Mr. Morris is exhibiting significant psychological distress characterized by a depressed mood. In addition, he is displaying increased levels of agitation, irritability, and suspiciousness that may be accounted for by his present life challenges and stressors. However, records suggest this mood and personality style to be a long-standing pattern for Mr. Morris. No indication of an instability of mood or disturbance in reality testing was observed. His emotional distress may be considered as a primary detrimental contributor to his present impairment in attention, as well as serving to decrease the speed and efficiency of his cognitive processing.
- Overall, Mr. Morris' neuropsychological presentation is most consistent with the reduced efficiency associated with emotional distress and pervasive marijuana use, factors which may be produce a deficit in attention efficiency that can be

misinterpreted as residual cognitive sequelae associated with his traumatic brain injury in 2006.

- Mr. Morris appears to have demonstrated a significant resolve in the cognitive deficit pattern he displayed in 2007, an expected recovery in functioning over the intervening period of time. Therefore, it may be considered that the current pattern of cognitive inefficiency demonstrated by his attention deficit may be a treatable condition.
- Mr. Morris' general clinical presentation is considered to reflect an amplification of symptom distress, likely as an intentional effort to gain attention for his perceived level of discomforting emotional experience. His level of expressed distress on psychometric testing is incongruent of that reflected by direct clinical observation, and is in excess of the level of clinical distress typically reported by similar patient populations. This demonstration of feigned psychological symptoms appears to be a long-standing pattern for Mr. Morris, based on previous records.
- While Mr. Morris claimed there is no impairment in daily functioning due to his admitted daily marijuana use, it may be considered that the resulting cognitive impact (decreased attention and concentration), and potential for legal complications (violation of probation guideline) are sufficient examples of a pattern of abuse. Therefore, this pattern of marijuana use meets criteria for a substance abuse disorder.

Claimant's Exhibit H, pp. 67-68.

8. Notwithstanding Dr. Hanger's conclusion that Claimant intentionally amplified his symptoms in an effort to gain attention, Dr. Hanger nevertheless recommended psychotherapy to target Claimant's depressive affect, ineffective interpersonal style and poor emotional regulation. (*See*, Defendant's Exhibit H, p. 68). From Dr. Hanger's report, it is unclear whether he relates Claimant's ongoing psychological problems to the subject accident. Dr. Hanger did not identify limitations/restrictions referable to Claimant. Nor did he take Claimant off of work.

9. By letter dated November 12, 2015, Teresa Nolen, of Defendant Surety, authorized the psychotherapy recommended for Claimant's depression. This care evidentially commenced on January 8, 2016, and by letter dated January 11, 2016, Counsel for Claimant requested reinstatement of TTD benefits effective January 8, 2016 through the date on which Claimant might be "declared medically stable." (*See*, Claimant's Exhibit H, p. 74).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 9

10. On January 8, 2016 Claimant was seen for evaluation by Emily Crawford, Psy.D. After evaluating Claimant, Dr. Crawford proposed that Claimant meets the diagnostic criteria for post-traumatic stress disorder, related to his 2006 accident/injury. Claimant also reported that he had felt depressed since the accident, but Dr. Crawford noted that Claimant later endorsed feeling depressed prior to the subject accident as well. Dr. Crawford concluded that due to Claimant's persistent symptoms of depression, he qualified for a separate diagnosis of persistent depressive disorder. Dr. Crawford made the following treatment recommendation for Claimant:

Treatment Recommendations: In his recent neuropsychological evaluation, Dr. Wolfe made several recommendations that are reiterated here. The client would likely benefit from psychotherapy aimed to reduce symptoms of depression, improve interpersonal interaction skills, and develop more effective emotion regulation skills. The client may also benefit from increased insight regarding the relationship between marijuana use and attention and memory problems. He may also benefit from greater understanding of the relationship between his interpersonal style, even prior to the head injury, and his current relationship problems (e.g., he was charged with stalking prior to his head injury). Finally, the client may require help in learning to set more realistic, achievable goals and to develop strategies for achieving these goals. For example, in his paperwork he indicated his goals for treatment are "wanting to understand" and a "better life." However, achieving these goals may require improved ability to take responsibility for the client's decisions in the past as well as for his current recovery process. Although the client claims marijuana is helpful to him regarding anxiety, he may be overlooking the potential detrimental impact it may have on his cognitive functioning and capacity for new learning.

Defendant's Exhibit 4, p. 47

11. There is no indication that the treatment purposed by Dr. Crawford is causally related, in her opinion, to the subject accident. Nor did Dr. Crawford suggest that Claimant had limitations/restrictions relating to his ability to work, or that he should be taken off work during the proposed treatment. Claimant was treated on a periodic basis between January 8, 2016 and May 5, 2016. (*See*, Defendant's Exhibit 6).

12. As noted, by letter dated January 11, 2016, Claimant's counsel requested the reinstatement of TTD benefits to correspond with Claimant's psychotherapy by Dr. Crawford.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 10

The hoped-for reinstatement was not forthcoming. By letter dated February 12, 2016, Teresa Nolen advised Claimant's counsel that she was awaiting response from Dr. Hayes on the question of Claimant's medical stability. By March 3, 2016 Ms. Nolen had not yet obtained Dr. Hayes' response. Claimant's counsel reiterated his request by letter dated April 4, 2016. By letter dated April 5, 2016, Kent Day, representing Defendant Surety advised that Claimant had failed to adequately support his claim for TTD benefits with medical information suggesting that Claimant was in fact in a period of recovery pursuant Idaho Code § 72-408. Nor was there evidence that if in a period of recovery, Claimant had suffered decreased wage earning capacity sufficient to implicate the payment of TTD benefits. Finally, Mr. Day suggested that any claim for TPD/TTD benefits was barred by the provisions of Idaho Code § 72-706 and Idaho Code § 72-719, since the payment of income benefits had been discontinued more than four years following the date of the accident and Claimant had not made a complaint for additional benefits within one year from the date of last payment. In his response of April 12, 2016, Mr. Kelso argued that Defendant's reliance on Idaho Code § 72-706 and Idaho Code § 72-719 was misplaced in view of the language of the approved lump sum settlement agreement, which left open Claimant's entitlement to future medical benefits and time loss benefits associated therewith. Further, Mr. Kelso argued that, in any event, a timely complaint seeking additional medical care and time loss benefits was filed with the Commission on January 16, 2012.

13. The lump sum settlement agreement approved by the Commission on January 19, 2010 was challenged by Claimant on the grounds that Claimant was fraudulently induced to enter into the agreement by his then Counsel, Michael Walker. Claimant moved the Commission to set the lump sum settlement aside but this motion was denied by the Commission. Claimant took appeal from the Commission's denial, and in its opinion dated May 23, 2013, the Court upheld the Commission's decision denying the motion to set aside the lump sum settlement

agreement. In connection with the Commission's January 19, 2010 order approving the lump sum, the Court noted:

The Commission issued its order approving the LSSA on January 19, 2010. The order recited and the above-entitled proceedings are DISMISSED WITH PREJUDICE as to permanent indemnity benefits and WITHOUT PREJUDICE as to medical benefits and time loss benefits relating to any future medical that is causally related to the October 18, 2006 injury." With regard to indemnity benefits, this constituted a final order of the Commission. The Commission's decision to approve a lump sum agreement is a final "decision" of the Commission. *Davidson v H.H. Keim Co., Ltd.*, 110 Idaho 758, 760, 718 P.2d 1196, 1198 (1986). Thus, the order was appealable pursuant to Idaho Appellate Rule 11(d). No appeal was timely filed from the order.

Morris v. Hap Taylor & Sons, 154 Idaho 633, 637, 301 P.3d 639, 643 (2013).

DISCUSSION AND FURTHER FINDINGS

14. Defendants raised a potential statute of limitations defense in Mr. Day's letter of April 5, 2016. However, this defense to the payment of benefits is not among the issues noticed for hearing, nor was it raised by Defendants in their post hearing brief. Nevertheless, Claimant did discuss the issue in his opening brief. (*See*, Claimant's Opening Brief, pp. 13-14). Since Defendants did not notice the issue for hearing or discuss it in their brief, we will not treat this issue except as implicated in the discussion of the finality of the lump sum settlement, *infra*.

15. In connection with Claimant's claim for the payment of time loss benefits following Dr. Stanek's note of January 15, 2010, it is first helpful to recognize that this is not the usual manner in which a claim for time loss benefits comes before the Commission. Ordinarily, our deliberations on this issue are governed by the provisions of Idaho Code § 72-408 and cases construing that section, notably *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2nd 1217 (1986) which establishes when, and under what circumstances, a Claimant's entitlement to time loss benefits, having been established pursuant to Idaho Code § 72-408, may be curtailed. This case is not the usual case because certain elements of this case have been resolved via a lump

sum settlement approved by the Commission pursuant to the provisions of Idaho Code § 72-404. As noted by the Court in its earlier decision in this case, the LSS became a “final” order of the Commission under Idaho Code § 72-718 when the Commission approved the lum sum agreement on January 19, 2010. The Court noted only that the settlement is final as respects indemnity, but did not specifically address whether, or to what extent, the order approving the settlement is “final” as respects future medical care and time loss benefits associated therewith. It might be argued that since the lump sum settlement does not resolve Claimant’s entitlement to these benefits, it is not “final” as to such benefits, and the provisions of Idaho Code § 72-706 ought to apply to govern the time within which Claimant might file an application for hearing (complaint) seeking further benefits. We reject this construction because the settlement approved by the Commission specifies that Defendants will pay for all future medical care related to the subject accident, as well as time loss benefits associated with that medical care. The settlement does not limit this entitlement in any way except that Claimant will continue to bear the burden of demonstrating that the need for prospective care is related to the subject accident. By agreement of the parties, no other limitations are engrafted to the obligation Defendants assumed pursuant to the lump sum settlement. Specifically, Defendants did not reserve a right to rely on the provisions of Idaho Code § 72-706 to deny future time loss benefits that might otherwise be subject to the provisions of Idaho Code § 72-706, and we will not insert such a limitation where the language of the lump sum makes it clear that Claimant is entitled to future medical care for life and to time loss benefits related to the provision of such care so long as he can demonstrate that the need for medical care is related to the subject accident. The lump sum settlement agreement is “final” in this respect, just as it is final in adjudicating Claimant’s entitlement to other indemnity benefits.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 13

16. It is Claimant's argument that the lump sum settlement agreement essentially left TTD/TPD benefits "open," i.e. the lump sum settlement did not resolve Claimant's entitlement to time loss benefits going forward should he again find himself in a period of recovery after January 19, 2010. This position is reflected in Claimant's January 13, 2017 supplemental answers to interrogatories:

INTERROGATORY NO. 13: If you claim temporary total disability in addition to any previously paid, please set forth all facts pertaining to it, including the dates during which you claim such disability, why you believe disability is owed, and the name, address and phone number of the physicians who support your claim for disability.

ANSWER NO. 13: Claimant's industrially caused condition has never been stable and under the LSSA he is entitled to temporary total disability benefits. Most recently, treatment was authorized by the Surety with Dr. Hayes by letter dated November 12, 2015 and Claimant's first apportionment with Dr. Hayes was on January 9, 2016. See medical records.

Claimant's Exhibit I, p. 104 Accordingly, Claimant claims entitlement to time loss benefits from the date of Dr. Stanek's January 15, 2010 report forward, on the theory that this report, at the very least, demonstrates the commencement of a period of medical instability which implicates entitlement to the payment of time loss benefits.

17. Defendants, too, seem to acknowledge that this is the proper way to frame the issue. However, they simply assert that there is no medical evidence proving that if in a period of recovery, that Claimant was subject to physician imposed limitations/restrictions that would have interfered with his ability to engage in gainful activity during the period that he received psychotherapy treatment in 2016. Defendants do not address Dr. Stanek's recommendation that Claimant required psychotherapy in 2010 in order that he might be transitioned into the work force. Dr. Stanek appears to have endorsed the proposition that Claimant was in a period of recovery, at least in January of 2010, that he was unable to work because of his psychological condition and that he required medical treatment in order to return to gainful activity. In the

usual case, this is the type of medical opinion that would suffice to demonstrate an entitlement to time loss benefits during a period of recovery.

18. However, we must consider what was settled and what was not settled by virtue of the January 19, 2010 order approving the lump sum settlement. From the excerpts above quoted, it seems clear that the parties acknowledged disputes concerning Claimant's entitlement to past and future indemnity benefits, inclusive of permanent and temporary disability. The agreement does not reflect that the parties came to an understanding concerning Claimant's date of medical stability, although it does reflect that a PPI award of 10% of the whole person had been previously paid by Defendants. The agreement clearly purported to resolve disputes over Claimant's entitlement to past and future, permanent and temporary, indemnity benefits. However, that agreement did not come without one important exception. This exception is expressed at numerous places in the agreement in almost, but not quite, identical language:

“...except that the Defendants agree to medical benefits and time loss benefits relating to any future medical treatment that is causally related to the October 18, 2006 injury.”

Claimant's Exhibit C, p. 14

“...with the exception of future medical treatment required for injuries sustained in the October 18, 2006 incident and any TTD and/or TPD benefits Claimant may be entitled to as a result of the causally related future medical treatment.”

Defendant's Exhibit C, p. 15

“...such settlement to discharge all rights and claims to all permanent and temporary compensation, except for reasonable and necessary medical benefits causally related to the October 18, 2006 injury and time loss benefits associated there with.”

Claimant's Exhibit C, p. 19

“...Such settlement to discharge all rights and claims to all permanent and temporary compensation, accepting future medical benefits whether or not known, herein listed, discoverable or contemplated by the parties. ... excluding

any claim respecting causally related hospital, medical or like expenses to include associated temporary time loss.”

Defendant’s Exhibit C, p. 20

“...Except that Defendant’s agree to continue to pay medical benefits and time loss benefits relating to any future medical need that the parties agree is causally related to the October 18, 2006 injury or which in the event of disagreement is found by the Commission to be causally related to that injury.”

Claimant’s Exhibit C p. 22. Absent a lump sum settlement, Claimant would be entitled to time loss benefits while in a period of recovery, until, and unless, the occurrence of factors outlined in *Malueg* that would allow Defendants to legally curtail the payment of time loss benefits. However, Claimant’s right to such time loss benefits was resolved via the Commission’s order approving the lump sum settlement and the payment of the consideration outlined therein. Following the Commission’s approval of the January 19, 2010 lump sum, no longer does Claimant have the ability to claim entitlement to past or prospective time loss benefits, as those rights are governed by statutory and case law. And yet, this unambiguous portion of the settlement is burdened with an exception which, at first blush, causes some confusion. It is easy enough to understand that component of the exception which leaves future medicals owed pursuant to Idaho Code § 72-432 open. This is a not unusual element of a lump sum settlement, particularly in the years since The Center for Medicare and Medical Services (CMS) began enforcing rules relating to its status as a secondary payer. What is unusual about this agreement is the additional caveat that time loss benefits will, in some respect, remain payable, even though Claimant’s entitlement to such benefits, both past and prospective appears to have been resolved by the superior clauses of the agreement. It might appear that one right that was resolved by the settlement has been returned to Claimant. Therefore, Claimant argues

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 16

that he is entitled to the payment of time loss benefits from January 15, 2010 forward because he is in a period medical instability as the result of Dr. Stanek's January 15, 2010 chart note.

19. However, careful scrutiny of the aforementioned subordinate clause reveals that it can be reconciled with the superior clauses which fully, finally and forever resolve claims of entitlement to past and prospective temporary disability. Very plainly, the settlement states that time loss benefits shall be paid only in connection with causally related future medical treatment. In order to receive the payment of future time loss benefits, it is not sufficient for Claimant to demonstrate that he is again medically unstable, or unable to work. Rather, Claimant must demonstrate that his inability to work is due to medical treatment Employer is required to provide pursuant to the agreement. This important distinction is unwittingly illustrated in the following excerpt from Claimant's brief:

The Court's decision in the Morris v. Hap Taylor & Sons appeal, reference above held that the Commission's approval of the lump sum settlement agreement constituted a final order of the Commission with regard to the indemnity benefits. It is the "law of the case" that, as of the date of the Commission's approval of the settlement agreement, Claimant was entitled to medical benefits and (indemnity) time loss benefits while he is still within a period of recovery. Taylor v. Maile, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009).

The settlement approved by the Commission thus awarded Claimant the following: "Defendants agree to medical benefits and time loss benefits relating to any future medical treatment that is causally related to the October 18, 2006 injury."

Claimant's Opening Brief, p 14.

Claimant argues that the lump sum settlement agreement anticipates that Claimant is entitled to prospective time loss benefits any time he is within a period of recovery. However, the agreement approved by the Commission does not endorse this proposition. Rather, Claimant is only entitled to prospective time loss benefits related to future medical care.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 17

20. In this fashion, it is easily understood why Defendants commenced the payment of time loss benefits as of the date of the cervical fusion performed by Dr. Larson. Claimant's return to medical instability was caused by the surgical procedure performed by Dr. Larson. Time loss benefits were payable to Claimant until he recovered from the surgical intervention. Similarly, the language of the agreement anticipates that Claimant should be entitled to time loss benefits for every medical visit/appointment reasonably required in the future as a consequence of the subject accident. However, even if Claimant is deemed to be unstable at one or more of those medical visits, he is not entitled to time loss benefits for other than the time lost from work in connection with the attendance at the medical visit. Even if Claimant is medically unstable, his inability to work before or after such medical visit was compromised by the lump sum settlement. Again, the settlement clearly anticipates that it is only where Claimant's inability to work is due to the medical care he requires that he is entitled to the payment of time loss benefits. This will manifest as temporary partial disability benefits payable under Idaho Code § 72-408 representing the decrease in his earning capacity due to time lost from work related to medical care received.

21. With this understanding of the provisions of the lump sum settlement, Claimant's entitlement to time loss benefits turns entirely on whether he has received or will receive medical care causally related to the subject accident. For example, even if one of Claimant's psychotherapists should opine, in the future, that Claimant is incapable of working because of his precarious accident-related psychological condition, no benefits, except for time lost due to the medical visit, would be payable, because all other claims for time loss were resolved via the lump sum settlement. On the other hand, if the same psychotherapist proposed that Claimant would benefit from inpatient psychotherapy for a period of weeks or months, such time loss

would be payable pursuant to the lump sum settlement agreement because this would represent time loss caused by required medical care.

22. It is easy to see that to understand whether, and to what extent, Claimant is entitled to the payment of time loss benefits for the period of January 15, 2010 through the date of hearing, it is necessary to understand whether the medical care received or recommended for Claimant since January 19, 2010 is causally related to the subject accident, and represents care that Defendants are obligated to provide under Idaho Code § 72-432. Unfortunately, Claimant's entitlement to this care is specifically not at issue in this matter, leaving us unable to evaluate whether Claimant is entitled to the payment of time loss benefits for that medical care he has received, and which falls outside of the period of his incarceration. It is not acknowledged by Defendants that Claimant's need for the 2016 psychotherapy sessions is causally related to the work accident, so we are unable to say that the parties are in agreement on this point. Regardless, Claimant's entitlement to medical care is not at issue.

23. In summary, we conclude that the lump sum settlement agreement governs Claimant's right to ongoing benefits, and that the agreement is not ambiguous. It clearly provides for the payment of time loss benefits causally related to the medical care which Defendants are required to provide. To receive such time loss benefits, Claimant must demonstrate that his inability to work is due to the medical care he is entitled to, as opposed to disability flowing from the subject accident. However, without the ability to decide whether, or to what extent, the care Claimant has received between January 19, 2010 and the date of hearing is causally related to the subject accident, we are unable to articulate the extent and degree of Claimant's entitlement to additional time loss benefits on either side of his period of incarceration.

24. For the same reason, we are unable to make any judgment on the claim for attorney fees pursuant to Idaho Code § 72-804. Claimant may be entitled to an award of

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER - 19

attorneys fees for Defendants' failure to pay time loss benefits related to Claimant's medical care, but only if Defendants are ultimately held responsible for disputed medical care. Absent a determination that Defendants are in fact responsible for certain medical care related to the subject accident, it cannot be said that they unreasonably declined medical and associated time loss benefits "justly due" following the approval of the lump sum settlement. *Salinas v. Bridgeview Estates*, 162 Idaho 91, 394 P.3d 793 (2017). Therefore, in order to make some judgment as to whether Claimant is entitled to an award of attorney fees related to Defendants failure to pay time loss benefits on either side of Claimant's period of incarceration, we must first understand whether Claimant is entitled to the care recommended or provided since January 19, 2010. This, of course, is not an issue that is before us at this time.

CONCLUSIONS OF LAW AND ORDER

1. The January 19, 2010 lump sum settlement agreement defines the rights and obligations of the parties relating to the payment of future medical and time loss benefits.
2. That agreement resolves the issues of Claimant's entitlement to past and prospective temporary disability benefits related to the injuries he suffered as a consequence of the October 18, 2006 accident. However, the agreement carves out an express exception for the payment of future time loss benefits due to the reasonable medical care which Defendants are obligated to provide.
3. The payment of such time loss benefits is dependent on whether Claimant is entitled to the medical care in question, and this is an issue not before the Commission.
4. Therefore, the Commission is unable to address Claimant's entitlement to time loss benefits, if any, within the parameters of this decision. For the same reason, the Commission is unable to address the claim for attorney fees pursuant to Idaho Code § 72-804.

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

DATED this ___1st___ day of _December_, 2017.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___1st___ day of __December_____, 2017 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:

STARR KELSO
PO BOX 1312
COUER'D'ALENE, ID 83616

KENT DAY
PO BOX 6358
BOISE, ID 83707

el

_____/s/_____