BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS "KEITH" AUSTIN, Claimant, v. MAVERIK COUNTRY STORES, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-006851** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed Feb. 26, 2015**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on September 10, 2014. Claimant was present as was his attorney, Matthew C. Andrew of Nampa. R. Daniel Bowen of Boise represented Employer and its Surety. Kenneth L. Mallea of Meridian represented the State of Idaho, Industrial Special Indemnity Fund (ISIF). Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. This matter came under advisement on December 5, 2014.

ISSUES

The issues to be decided as a result of the hearing are:

1. Whether and to what extent Claimant is entitled to the following benefits:
    a. Medical;
    b. Total temporary disability (TTD);

c. Permanent partial impairment (PPI);

d. Permanent partial disability (PPD);

e. Total permanent disability (TPD);

2. Whether apportionment under Idaho Code § 72-406 is appropriate;

3. Whether ISIF is liable; and, if so

4. Apportionment under the *Carey* formula; and

5. Whether Claimant is entitled to attorney fees for Surety's unreasonable delay or denial in the payment for a Functional Capacity Evaluation (FCE), MRI, and certain prescription drugs.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as the result of a back injury suffered at Employer's C-Store. He has chronic, debilitating pain due to Post-Laminectomy Syndrome that severely limits his ability to concentrate and pay attention. Claimant seeks additional TTD benefits based upon the opinions of his treating pain doctor and his IME physician. Claimant also seeks PPI of 19% based on his IME doctor's opinion. Finally, Claimant requests an award of attorney fees for Surety's unreasonable delay and/or denial of certain medical and prescription benefits.

Surety concedes that Claimant may have incurred some disability above his impairment; however, such disability is nowhere near total. Claimant was only working part-time at the time of his accident and his employment history is comprised mostly of part-time work. He returned to work at Maverik post-surgery until he was terminated for unrelated reasons and was working at the time of the hearing. Surety has paid, or will pay all outstanding medical and pharmacy bills and have not acted unreasonably in handling this claim. Finally, there is no valid reason to increase Claimant's PPI from that given by his treating physician.

ISIF contends that Claimant has failed to prove that he is totally and permanently disabled and, therefore, ISIF cannot be liable. Even if found to be totally and permanently disabled, there is no evidence that such disability arose from any pre-existing physical impairment constituting a hindrance to obtaining or keeping employment.

EVIDENCE CONSIDERED

The evidence in this matter consists of the following:

1. The testimony of Claimant, Claimant's significant other, and senior claims adjuster Carole Carr taken at the hearing.

2. Claimant's Exhibits (CE) 1-53 admitted at the hearing.

3. Joint Exhibits (JE) 1-26 admitted at the hearing.

4. ISIF Exhibits 1-2 admitted at the hearing.

5. Two pre-hearing depositions of Claimant.

6. The post-hearing depositions of: Terry L. Montague taken by Claimant; William C. Jordan taken by ISIF; and Gary M. Cook, M.D., taken by Claimant. All post-hearing depositions were taken on September 18, 2014.

All objections made during the course of taking the above post-hearing depositions are overruled, with the exception of Defendants' objection at page 60 of Mr. Jordan's deposition, which is sustained.

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

FINDINGS OF FACT

1. Claimant was 49 years of age and residing in Boise at the time of the hearing. He was raised in Jacksonville, a small town in northeast Alabama and lived there for about 30 years.

Claimant's parents owned a furniture store, where he and his siblings "helped out" until he was about 14. Claimant and his family also participated in most sporting events in their community.

2. Claimant received his GED at age 18. He believed such a degree was important and was "embarrassed" that he did not formally finish high school. Claimant attempted college, but could not adhere to such a structured environment.

3. Claimant's work history is broad and varied and will be discussed in more detail when discussing permanent partial/total disability.

4. In 1998, Claimant moved to Boise from Portland looking for a better place to raise his young son. Claimant worked primarily as a lumper for local and long-haul moving companies. After Claimant suffered a back injury,[1] he worked as a dispatcher for Cross Town Movers and filled in as a lumper, as needed. Claimant also suffered two separate knee injuries prior to his industrial accident at Employer's. Other than allowing Claimant to "predict the weather," neither injury produced any lasting residual symptoms. Claimant was fired from his job with Cross Town Movers, and returned to Alabama to help his father. He then secured employment in a foundry; however, on the first day at work, Claimant suffered a myocardial infarction resulting in the placement of two stents. Claimant testified that the stents gave him a "burst of energy." HT p. 66.

5. Claimant returned to Idaho, where he eventually obtained employment with Maverik. He was an "adventure guide" whose duties included operating the cash register, cleaning, stocking, and performing other, janitor-type, duties. He was paid $7.75 an hour and worked the graveyard shift.

6. On March 8, 2011, Claimant bent over to lock a beer cooler (the hasp and lock were at the bottom of the cooler door) when he felt a pop in his back causing excruciating pain.

[1] Claimant testified that after three or four chiropractic treatments, his symptoms fully resolved.

Claimant thought he had pulled a muscle and tried to work it out. He completed his shift, informed his supervisor, and then went home. Instead of getting better, his back got worse.

7. Claimant presented to Defendants' preferred medical care provider, **Jacob Kammer, M.D.,** on March 10, 2011 with the chief complaint of low back pain. Dr. Kammer diagnosed mechanical low back pain, prescribed medications and physical therapy, and released Claimant to sedentary work. Claimant returned to Dr. Kammer on March 18 complaining of continued low back pain radiating into his right leg. He informed Dr. Kammer that physical therapy was not helping. Dr. Kammer ordered a lumbar MRI and continued Claimant on sedentary work.

8. Claimant underwent the MRI on March 30, 2011.[2] The reading radiologist noted: "Spondylotic changes as detailed above. L3-L4 right far lateral disc herniation with mass effect on the right L3 nerve root. L4-5 mild reduction of the spinal canal caliber to the right of midline and left far lateral disc protrusion abutting the exiting left L4 nerve root." DE-10, p. 209.

9. On April 6, 2011, Dr. Kammer reviewed the MRI results with Claimant and referred him to **Paul Montalbano, M.D.,** a neurosurgeon, for further evaluation and treatment.

10. Claimant first saw Dr. Montalbano on April 13, 2011. Based upon his examination and review of prior medical records, as well as the MRI report, Dr. Montalbano recommended surgery for an L3-4 disc herniation. Claimant testified that for various reasons, he lost confidence in Dr. Montalbano and wanted a second opinion. Dr. Montalbano agreed.

11. Claimant first saw **R. Tyler Frizzell, M.D.,** another neurosurgeon, on April 21, 2011. Dr. Frizzell agreed with Dr. Montalbano that Claimant needed surgery. To that end, Dr. Frizzell performed a right L3-L4 microdiscectomy on April 23, 2011. In his first post-

[2] Claimant's anxiety and claustrophobia delayed his MRI, which was eventually accomplished under conscious sedation.

surgery follow-up on May 17, Dr. Frizzell noted that Claimant was "doing satisfactorily" and his radicular symptoms had resolved. Claimant testified, however, that he was getting worse. Due to Claimant's deconditioning, Dr. Frizzell prescribed physical therapy for a month and kept Claimant off work.

12. Claimant completed physical therapy by June 21, 2011 and Dr. Frizzell declared him medically stable. Dr. Frizzell indicated that Claimant could lift up to 50 pounds occasionally and 25 pounds frequently. Claimant returned to Maverik where he worked until November 2011.

13. Claimant returned to Dr. Frizzell in late August 2011 complaining of right-sided sacroiliac pain with no new radiculopathy. Dr. Frizzell referred Claimant to his colleague, **Michal Sant, M.D.,** a pain specialist. Dr. Sant administered an ESI on September 14, 2011. Claimant returned to Dr. Frizzell on December 20, 2011 now complaining of left-sided sacroiliac pain that was interfering with his activities of daily living. Dr. Frizzell recommended one or two additional ESIs. He did not anticipate any further treatment, imaging studies, or physical therapy.

14. Surety requested clarification from Dr. Frizzell before approving further treatment including ESIs and an MRI requested by Dr. Sant. Dr. Frizzell responded, in an April 16, 2012 letter, that Claimant's left-sided symptoms were unrelated to Claimant's industrial injury, which produced only right-sided symptomatology.

15. In spite of Dr. Frizzell's opinion, Dr. Sant renewed his request for a lumbar MRI reasoning that if it showed a new disc herniation at a different level, then it would be difficult to associate Claimant's left-sided symptoms with his industrial back injury. On the other hand, if the MRI demonstrated a recurrent herniation at the same level, then it would likely be related to his industrial injury.

16. On May 3, 2010, Dr. Frizzell advised Dr. Sant via letter that he did not believe that Claimant needed any further lumbar surgery because there was no clear recurrence of his right lumbar radiculopathy at L3. Dr. Frizzell recommended an FCE by Suzanne Kelly at STAARS. In a response to an inquiry from Surety, Dr. Frizzell wrote on May 23, 2012 that the FCE was needed to assess restrictions related to Claimant's left-sided symptoms. However, he still did not relate the left-sided symptoms to Claimant's industrial right-sided L3-L4 disc herniation. Surety denied Dr. Frizzell's request for the FCE.

17. On June 13, 2012, Claimant, at his own expense, obtained the denied MRI. The radiologist interpreted the MRI to show a recurrent disc herniation at L3. Based on this MRI, Dr. Sant referred Claimant back to Dr. Frizzell.

18. On June 20, 2012, in response to a letter from Claimant's counsel, Dr. Sant opined that Claimant was not medically stable. He issued light duty work restrictions with 30 pounds lifting occasionally, 20 pounds frequently, and 10 pounds continuously.[3] He also restricted Claimant from repetitively bending, twisting, and stooping, and opined that Claimant may need a revision surgery followed by six to eight weeks of post-op therapy.

19. On November 27, 2012, **Gary Cook, M.D.,** performed an **IME** at Claimant's request. Dr. Cook is a retired anesthesiologist residing in eastern Idaho who now confines his practice to conducting IMEs. He is relatively new to the Idaho's workers' compensation system. Dr. Cook reviewed various medical records, examined Claimant, and reviewed with him extensively his subjective physical limitations. Dr. Cook's methodology, opinions, and conclusions will be discussed in more detail below, but his report and deposition testimony may be summed up as follows:

[3] Defendants posit that these restrictions were given at the time when Dr. Sant thought the second MRI showed a recurrent disc and Dr. Sant wanted Dr. Frizzell to see Claimant again.

* Claimant is at MMI.

* Claimant has incurred a 19% whole person PPI as a result of his accident.

* Claimant may not lift more than 12 pounds unassisted.

* Claimant's ability to sit, stand, drive, or walk unassisted is extremely limited. He cannot tolerate any activity involving limited exertion for periods in excess of 20 to 30 minutes.

* Claimant is largely unable to perform any physical tasks that require exertion such as lifting, pulling, reaching, or any work above his shoulders.

* Claimant cannot tolerate any work-related demands and has not returned to work since his accident.

CE-17, p. 20.

20. Claimant next saw Dr. Frizzell on December 27, 2012 to discuss the June 13 MRI findings. Dr. Frizzell and an unidentified neurosurgeon with whom he consulted opined that the radiologist misread the film, and the MRI did not show a recurrent disc at L3. Dr. Frizzell informed Claimant that he was not a surgical candidate. He also recommended that Claimant be provided medications to address his ongoing industrially related radicular pain and renewed his request for an FCE.

21. On June 30, 2013, Claimant participated in an **FCE** conducted by Bret Adams, MPT.[4] Mr. Adams determined that Claimant's efforts on testing were sufficient to return valid and accurate results. He summarized Claimant's restrictions/modifications as follows:

Lifting restrictions:

Floor to mid-thigh: 15 pounds occasionally.

Waist-shoulder: 10 pounds occasionally.

Above shoulders: 10 pounds occasionally.

Carrying: 15 pounds occasionally.

Task restrictions:

[4] This is a different therapist than that originally requested by Drs. Frizzell and Sant.

Walking: occasionally.

Stair climbing: occasionally.

Stooping, squatting, crouching, kneeling, and crawling: never.

Reaching at or above shoulder height: occasionally.

Reaching below shoulder height: occasionally.

Sitting: One hour at a time allowing 5 minutes every hour to stand and/or walk. No more than 8 hours total during Claimant's workday.

Standing: Limit to 5 minutes at a time.

See CE-19, p. 2.

22. Dr. Cook agreed with the limitations outlined in the FCE. Dr. Sant did not agree with the FCE because he believed it relied too much on Claimant's subjective complaints, and Claimant's heart rate and blood pressure were not monitored during the testing. However, Dr. Sant did note, "Certainly Mr. Austin is very limited . . ." CE-12, p. 282.

DISCUSSION AND FURTHER FINDINGS

Medical care

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is

not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

23. Claimant seeks compensation for "denied medical care." *See* Claimant's Brief, p. 17. He specifically seeks reimbursement for the second MRI, the FCE (not a medical benefit), and various prescription medications. There was some confusion regarding the need for the MRI as it relates to the industrial accident (left vs. right sided symptoms). Nonetheless, Surety had agreed to pay for not only the MRI, but the FCE as well. There was also some delay in providing certain medications that involved a mix-up with the pharmacy that was apparently straightened out. Simply, there are no medical benefits outstanding that are in need of payment. While a delay in paying benefits may lead to an award of attorney fees, that is a different issue than the outright denial of medical care and will be discussed in more detail in the attorney fee section below.

24. Claimant has proven he is entitled to reimbursement for the June 13 MRI, the FCE, and any unpaid prescription bills related to his industrial accident. *Neel v. Western Construction Inc.,* 147 Idaho 146, 206 P3d 852 (2009).

TTD benefits

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

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

25. Claimant asserts that he is entitled to TTD benefits from July 10, 2012 through November 27, 2012, based on the records of Drs. Sant and Cook. Claimant argues that even though Dr. Frizzell declared him medically stable on June 21, 2011, he continued to experience symptoms and Dr. Frizzell himself referred him to Dr. Sant for continuing pain management. Further, Employer acknowledges that Claimant continued to treat and to maintain that he was unable to work. Subsequent records of Dr. Frizzell do not indicate that even though Claimant was in need of maintenance treatment, that he was not medically stable. Dr. Frizzell was Claimant's treating physician and surgeon; he is in a better position to determine whether Claimant was at MMI in June 2012 than either Drs. Sant or Cook. Dr. Sant was under the mistaken impression that Claimant needed surgery when he indicated that Claimant was not at MMI and released him to work with restrictions. Further, Employer had provided Claimant modified work within his restrictions until he was fired, thus satisfying the *Malueg* requirements.

26. Claimant has failed to prove his entitlement to further TTD benefits.

PPI

"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 the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

27. On June 21, 2011, Dr. Frizzell assigned an 11% whole person PPI rating without apportionment. After receiving some chiropractic records regarding Claimant's previous back injury from Surety, Dr. Frizzell adjusted his PPI rating to reflect 3% for Claimant's pre-existing back condition. Thus, his final PPI rating was 8% whole person. Dr. Frizzell utilized the 5th Edition of the AMA *Guides to the Evaluation of Permanent Impairment (Guides)* in arriving at his PPI rating.

28. Because Dr. Cook is relatively new to Idaho's workers' compensation system and unfamiliar to this Referee, a brief introduction in his own words is warranted:

> I was trained as an anesthesiologist and did anesthesia/pain management for about 28 years. And then in 2007 I suffered a cardiac arrest while I was scuba diving, so I thought I should get out of the stress of the operating room. And I joined a multidisciplinary clinic that had a chiropractor, an occupational, a medicine specialist, message therapist, and a couple other modalities.
>
> And the occupational physician, he encouraged me to start doing independent medical evaluations. And, you know, I kind of found that I enjoyed them, and so I ended up leaving the group and started doing evaluations on my own.

Dr. Cook Deposition, p. 5.

29. Dr. Cook has never testified before the Industrial Commission or in any Idaho District Court.

30. Dr. Cook testified that while he normally uses the 6th Edition of the *Guides*, in this case he used the 5th Edition because it resulted in a higher impairment than the 6th Edition and was, therefore, more appropriate. Dr. Cook gave Claimant 3% for pain, 3% for erectile dysfunction relating to chronic pain, and 13% for radiculopathy for a total of 19%.[5] He admitted that the 6th Edition does not require a finding of causation regarding erectile dysfunction.

31. The Referee adopts the PPI rating given by Dr. Frizzell with the exception of his 3% reduction for a pre-existing condition based on some chiropractic records. There is no evidence that Claimant suffered from any functionally limiting pre-existing back condition. He returned to heavy work thereafter without problems. Dr. Cook used an "outdated" edition of the *Guides* specifically in order to increase Claimant's PPI rating, which calls into question his objectivity.

32. The Referee finds that Claimant has incurred whole person PPI as the result of his industrial accident of 11%.

PPD

"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 impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that, in determining

[5] The combined values chart of the 5th Edition converts 3+3+13 to 18%.

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 the 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, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, 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).

33. Claimant retained **Terry Montague, M.A.,** to assess vocational issues. Mr. Montague's qualifications are well-known to the Commission and will not be repeated here.[6] Mr. Montague prepared his initial report on August 1, 2013 (CE-52), and an addendum on August 29, 2014 (CE-53) to address some medical records generated since his original report.

34. Mr. Montague performed the following tasks in preparation of his report:

> I reviewed all the medical records in Mr. Austin's case, and vocational records. I met with Mr. Austin and took an employment history from him to establish what his preemployment opportunities were. I completed a transferrable skills analysis on Mr. Austin.

[6] Mr. Montague testified as to his qualifications and experience at pages 4-6 of his deposition.

> And then, based on the medical documentation that I had for review, including an IME report from Dr. Gary Cook and an FCE that had been completed with Bret Adams in Boise, I determined that Mr. Austin would meet the test for an odd-lot worker under the Idaho workers' compensation law, if the Commission considered all of the information that I did.

Mr. Montague Deposition, p. 8.

35. Mr. Montague blames Claimant's "Chronic Post Laminectomy Syndrome" and the chronic pain associated with that diagnosis along with the medications he needs to take to function, as the primary cause of Claimant's disability:

> Well, one of the issues that is raised from that - - in addition to the chronic pain that he undergoes, Dr. Sant addressed correspondence from Mr. Dan Luker, who is an attorney in Boise that's representing Mr. Austin in a social security disability case.
>
> And in the record Dr. Sant had indicated that he frequently experiences pain of such level that it impacts his ability to concentrate and do simple tasks at work. That's pretty significant. If he has difficulty with concentration and attention that kind of thing, that's going to be problematic for him regardless of what the work setting is.

Id., p. 10.

36. When considered in connection with Claimant's vocational background, Mr. Montague is even more concerned about Claimant's difficulties with concentration and attention:

> The majority of employment that Mr. Austin has performed is unskilled or semiskilled. He has limited education. He only has a GED. By his own admission, he did poorly in school. Most of the jobs he has performed are physical in nature.
>
> He's been a lumper, he's been a roofing tile installer, he's been a furniture mover, he's worked in cotton mills and that kind of thing. A lot of - - he's been a janitor. He's done labor intensive work.
>
> And so for somebody who now have been restricted to, essentially, working in jobs that would be more classified as light or sedentary and require more cognitive skill and ability, that would be problematic, given his education.

Id., p. 11.

37. Mr. Montague's second report addresses additional records, including Social Security Administration documents, and sets forth additional concerns regarding Claimant's pre-

existing heart and low back conditions, and his bilateral knee surgeries. Mr. Montague did not change his opinion regarding Claimant's disability, but he did indicate that ISIF has no exposure here because none of Claimant's pre-existing conditions resulted in any physical restrictions and Claimant had returned to heavy labor well before his subject accident and injury without problems. Therefore, it was Claimant's accident with Employer, alone, that created his total and permanent disability.

38. Mr. Montague was aware that, at the time of the hearing, Claimant was working at the ARC, a nonprofit organization that employs individuals with intellectual and developmental disabilities. He considers the ARC an "atypical" employer in that it is more flexible in allowing accommodations considering the population it serves. Further, because the ARC is under new management, Claimant is concerned that he may not be able to abide by its attendance policy, and he may ultimately be terminated.

39. Mr. Montague was under the impression that Dr. Sant had restricted Claimant to four hours of work a day and he based a portion of his disability opinion on that assumption. However, when Dr. Sant was interviewed by Employer's vocational expert, William C. Jordan, Dr. Sant (according to Mr. Jordan), backed off the four-hour restriction and indicated that Claimant could work an entire eight-hour day. Mr. Montague was skeptical of Mr. Jordan's comments regarding what Dr. Sant said and would want to talk to Dr. Sant himself because he could find nothing in Dr. Sant's subsequent office notes indicating an increase to an eight-hour work day.[7] Ultimately, Mr. Montague testified that the length of the work day is largely irrelevant:

> I would hope that the Industrial Commission, in reviewing this case, would not get caught up in how many hours Mr. Austin can work, whether it's four, five,

[7] Dr. Sant first indicated a four-hour work day when he thought Claimant needed further surgery, and before Dr. Frizzell said that he did not.

seven, eight, ten. I don't think that has much relevancy. I don't think it matters how much Mr. Austin can physically lift or carry.

The critical thing, for me, is that Mr. Austin has a diagnosis of Post-Laminectomy Syndrome, Failed Back Syndrome, and chronic pain syndrome. He's being treated for chronic pain, and has been for several months with Dr. Sant.

Dr. Sant's own medical records indicate that not only has Mr. Austin's pain had not improved, he has found at times, he's either had to give him injections to give him temporary relief or he's had to upgrade or increase his pain medication.

That tells me he's not getting better. If anything, he's getting worse. That seems, to me, the most critical issue, from a vocational perspective. How do you employ somebody who has constant pain?

Id., pp. 24-25.

40. Mr. Montague conceded that Dr. Sant was in a better position comparatively to evaluate Claimant's pain. Mr. Montague is aware that Dr. Sant approved numerous job descriptions provided by Mr. Jordan. Nevertheless, he maintains the opinion that Claimant is totally and permanently disabled.

41. ISIF retained **William C. Jordan** to prepare an employability report. Mr. Jordan's qualifications are well known to the Commission and will not be repeated here. Mr. Jordan's CV can be found at Exhibit 1 to his deposition. Mr. Jordan described what he was hired to do in his deposition:

In the employability report, I have reviewed the medical history. I have gotten an idea of the claimant's current feelings subjective feelings about how he is doing.

I have reviewed the physician - - or vocational issues with Dr. Sant and he approved a number of different jobs.

I performed a social and family history, took a social and family history. I looked at his financial history and wage rate, his education and employment history, any vocational objectives that he developed and vocational services that were provided through the Industrial Commission Rehab Division. I looked at his placability of social skills, interview behavior.

I use all that in the employability analysis to determine what a realistic vocational objective is after an injury. And all of that information is put to the appropriate test before making a conclusion.

Mr. Jordan Deposition, pp. 7-8.

42. Mr. Jordan opined that there were no pre-existing hindrances or obstacles to Claimant's employment.

43. Mr. Jordan considers all physicians opinions regarding physical limitations because he is not qualified to choose between competing opinions.

44. Regarding the process he used in arriving at his conclusions concerning Claimant's employability, Mr. Jordan testified:

> I did a vocational diagnostic interview, met with him and his attorney on May 7th 2014. And at that time we reviewed his medical history, his perception of the situation, and then we talked about the standard format for a vocational interview is to look at the social history, financial history, educational history, and those types of things.
>
> And then I categorize those, determine whether they have sedentary, light, medium, heavy lifting type of activities, what the job would be classified as. And then I look at what he could still be doing based on the doctor's restrictions. In this case I met with Dr. Sant and we reviewed a number of jobs.

Id., p. 13.

45. Mr. Jordan described his meeting with Dr. Sant in which Dr. Sant approved proposed job descriptions:

> No. He read every one of the job descriptions, read the physical activities involved in the job, made comments on the bottom on some of them before he signed them. And he talked about wanting to make sure the claimant stayed within the restrictions that he outlined.
>
> So I thought he was thorough in his review of the job descriptions, his understanding of what the jobs were, and clarifying any aspect of the job. If he had any questions, he asked me about what the jobs were.[8]

Id., p. 14.

46. He also explained how he selected job descriptions to present to Dr. Sant:

> Those were based on the transferrable skill study that I did, based on the work history I took, the classification of his jobs, and my understanding of the medical restrictions that he had.

[8] The job descriptions presented to Dr. Sant and his selected comments to some of them can be found at page 470 of DE-22. There is also a comment by Mr. Jordan that Dr. Sant approved Claimant to work an eight-hour day; Dr. Sant signed and returned the confirming letter without additional comment or corrections on July 9, 2014.

> And then I ran those by Dr. Sant to see if those would be reasonable options for the claimant based on his injury and the restrictions. And also, it takes into consideration, as I said, the transferrable skill study that I did.

Id., pp. 16-17.

47. Mr. Jordan was aware that Claimant had been working for the ARC as a part-time telephone surveyor earning minimum wage. He was also aware that Claimant received job offers for similar employment while employed at the ARC but he turned them down because they would require him to work an eight-hour day, and Claimant thought he was restricted to four-hour days. Mr. Jordan does not believe the ARC is a sympathetic employer because Claimant has to productively perform work, just like the 20-30 other employees there, and it is not the only type of employer that would hire him for similar types of work.

48. Mr. Jordan explained that he properly utilized the VDARE process to arrive at appropriate SVP levels for certain jobs he presented to Dr. Sant. According to Mr. Jordan, there is much professional judgment and experience involved in reaching vocational opinions and arriving at expert vocational opinions is not an exact science.

49. Mr. Jordan summed up his vocational assessment of Claimant this way:

> Q. (By Mr. Bowen): Are you comfortable, based upon your experience and the review that you have given this matter, that you don't believe this gentleman is permanently and totally disabled?
>
> A. I am comfortable saying that I don't believe he is permanently and totally disabled. He is working presently.
>
> Q. Does he have any sort of loss of wage-earning capacity as a result of the accident and injury for which my client is responsible, his low back injury at Maverik?
>
> A. It looks like no wage loss or loss of earning capacity.
>
> Q. If he has any disability, I gather it would have to be done, pretty much, under the loss of job market access kind of analysis that we traditionally see?
>
> A. Yes.
>
> Q. Do you believe, when you examined Mr. Austin's situation, the accident that he suffered and all the other factors that have gone into your analysis, that he has some degree of disability due to a loss of access of job market access kind of argument?

A. Yes.

50. Over Claimant's objection, Mr. Jordan testified that Claimant has incurred disability above his impairment of between 10 and 30 percent.

51. The Referee is aware that Claimant may not be mentally and/or physically able to perform all of the jobs approved by Dr. Sant. Nonetheless, when utilizing the restrictions imposed by Drs. Sant and Frizzell, as well as the results of the FCE, the evidence of record established that there are jobs that Claimant is capable of performing within his restrictions. If one utilizes the restrictions imposed by Dr. Cook, Claimant is probably totally and permanently disabled. However, Dr. Cook's restrictions are unrealistic when Dr. Sant's 4-hour workday is removed from the equation. The inescapable fact is that Claimant had been working for over a year at the time of the hearing and had returned to work at Maverik until he was fired. It is true that he was making minimum wage and was only working part-time. However, Claimant's pre-accident employment was also generally low wage and part-time. Dr. Cook's opinion is given less weight than the opinions of Drs. Sant and Frizzell because Dr. Cook clearly went out of his way to advocate for Claimant. Recall, Dr. Cook utilized the edition of the *Guides* that produced the highest level of partial permanent impairment even though he generally used the 6th edition. Also, Dr. Cook noted Claimant's pain behaviors but reasoned that such behavior was expected in an IME in order to convince the examiner that the claimant was hurting. Finally, Dr. Cook was unaware that Claimant had returned to work at Maverik following his surgery or that he was working at the ARC at the time of the hearing. This fact does not square with Dr. Cook's and Mr. Montague's opinions that Claimant cannot work.

52. The Referee agrees with Mr. Jordan that Claimant has incurred some loss of access to his pre-injury labor market. The Referee also acknowledges that Claimant suffers from chronic pain of varying degrees of debilitation and that he takes pain medications to control the

same. However, the Referee also noted that Claimant has a "gift for gab," and was quite articulate at hearing considering his education. In the event he loses his job at the ARC, there are many light/sedentary jobs identified by Mr. Jordan as being continuously and regularly available in Claimant's labor market that he would have a reasonable chance of securing and maintaining. It has been this Referee's experience that many injured workers continue to work with chronic pain, as difficult as it may be. Claimant has demonstrated that he can work and there is no persuasive evidence that he cannot continue to do so.

53. The Referee finds that Claimant has incurred PPD of 35% in excess of his PPI.

54. The Referee further finds that, in light of the above finding, that ISIF is not liable, and the Complaint against them should be dismissed with prejudice.

Attorney fees

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

55. Claimant seeks an award of attorney fees for Surety's unreasonable denial of an MRI, FCE, and prescription medications. Surety does not argue that the above were in any way unreasonable, only that there were various legitimate reasons why they were not timely paid.

56. Dr. Sant ordered the lumbar **MRI** in question on March 13, 2012. At that time, Surety had concerns that the MRI was ordered to address nonindustrial left-sided symptomatology, which were supported by Dr. Frizzell. The MRI was eventually accomplished on June 13, 2012 at Claimant's own expense. It was interpreted by the radiologist to show a recurrent disc herniation on the right (remember that Dr. Frizzell disagreed with the radiologist's interpretation). Carole Carr, Surety's senior claims adjuster, testified that they had originally denied the MRI because it was ordered to address right-sided sided symptomatology. However,

when it was determined that the MRI may show pathology on the left, Surety agreed to pay for the MRI once they get billed for it. The Referee finds that Surety's original denial was not unreasonable, and cannot support an award of attorney fees.

57. In May 2012, Dr. Frizzell requested an **FCE** to be performed by Suzanne Kelly. He did not relate the need for the FCE to Claimant's industrial injury. Nevertheless, Surety approved that FCE. Claimant testified that he was never made aware of the approval and, in June 2013, at his own expense, he obtained the FCE from a different physical therapist than Dr. Frizzell recommended. Eventually, Claimant, at his own expense, obtained the FCE in June 2013 from a different facility and physical therapist than Dr. Frizzell recommended. Even so, Ms. Carr testified that Surety would pay for the FCE if Claimant would submit a bill for it. She was not sure of the "details" regarding how she may have given notice to Claimant regarding her approval of the FCE. Again, as with the MRI, Dr. Frizzell initially indicated that the FCE was not related to Claimant's industrial accident and injury, but Surety decided to pay for it anyway. Surety's delay in paying for the FCE under these circumstances cannot support an award of attorney fees.

58. Claimant also requests attorney fees for the unreasonable delay in paying for certain **prescriptions**, primarily in the summer of 2013. There were times when Claimant would go to his pharmacy to pick up his pain medications, only to find they were either not approved and/or not paid for. Ms. Carr testified that Surety reimbursed Claimant for two prescriptions in July and September 2013. Apparently, there was a problem between Claimant's pharmacy and Surety's vendor that reviewed the pharmacy's billings. According to Ms. Carr, there have been no problems since (Claimant corroborated this at hearing). Surety's delay under these circumstances will not support an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has proven he is entitled to reimbursement for the June 13 MRI, the FCE, and whatever prescription bills related to his industrial accident that have not been paid. *Neel v. Western Construction Inc.,* 147 Idaho 146, 206 P3d 852 (2009).

2. Claimant has failed to prove he is entitled to further TTD benefits.

3. Claimant has proven he is entitled to 35% whole person PPD in excess of PPI.

4. Claimant has failed to prove he is entitled to attorney fees.

5. The Complaint against ISIF should be dismissed with prejudice.

RECOMMENDATION

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

DATED this _12th_ day of February, 2015.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __26th___ day of __February___, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MATTHEW C ANDREW 1226 E KARCHER RD NAMPA ID 83687	R DANIEL BOWEN PO BOX 1007 BOISE ID 83701-1007	KENNETH L MALLEA PO BOX 857 MERIDIAN ID 83680-0857

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS "KEITH" AUSTIN, Claimant, v. MAVERIK COUNTRY STORES, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2011-006851** **ORDER** **Filed Feb. 26, 2015**

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

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

1. Claimant has proven he is entitled to reimbursement for the June 13 MRI, the FCE, and whatever prescription bills related to his industrial accident that have not been paid. *Neel v. Western Construction Inc.,* 147 Idaho 146, 206 P.3d 852 (2009).

2. Claimant has failed to prove he is entitled to further TTD benefits.

3. Claimant has proven he is entitled to 35% whole person PPD in excess of his PPI.

4. Claimant has failed to prove he is entitled to attorney fees.

5. The Complaint against ISIF is dismissed with prejudice.

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

DATED this __26th__ day of __February___, 2015.

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 __26th__ day of __February__ 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MATTHEW C ANDREW	R DANIEL BOWEN	KENNETH L MALLEA
1226 E KARCHER RD	PO BOX 1007	PO BOX 857
NAMPA ID 83687	BOISE ID 83701-1007	MERIDIAN ID 83680-0857

ge Gina Espinosa