

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SANIJE BERISHA,

Claimant,

v.

THE GROVE HOTEL,

Employer,

and

INSURANCE COMPANY OF THE WEST,

Surety,

Defendants.

IC 2002-003038

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

March 25, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Boise, Idaho, on December 12, 2014.¹ Claimant represented herself, *pro se*, at the hearing. Neil D. McFeeley represented Defendants. Kujtin I. Sopoti, an English-Albanian interpreter, facilitated the proceedings. Testimony was taken and documentary evidence was entered into the record. No post-hearing depositions were taken. Defendants filed a post-hearing brief, but Claimant did not. She did, however, file a reply to Defendants' brief. The matter came under advisement on February 27, 2015.

¹ Due to the history of disruptive behavior repeatedly exhibited by Claimant and her husband while visiting the Commission, they were both banned from Commission premises during the pendency of these proceedings. Therefore, the hearing was conducted at the Ada County Courthouse.

PROCEDURAL BACKGROUND AND PREVIOUS FINDINGS

Four previous hearings were held in this case, on October 17, 2003, December 17, 2009, January 10, 2011, and April 11, 2012.

Robert D. Barclay was the presiding Referee at the 2003 hearing and Claimant was represented by attorney Vernon K. Smith with whom she is no longer affiliated. A decision was issued on April 5, 2004 in which the Commission ordered that:

1. Claimant incurred CRPS I (“CRPS”) as a consequence of her February 2002 industrial accident.
2. Claimant is not eligible for any further medical care without further documentation.
3. Claimant is not entitled to any additional temporary partial and/or temporary total disability (TPD/TTD) benefits.
4. Claimant is entitled to a permanent partial impairment (PPI) rating of 5% of the whole person. Surety is entitled to credit for any amount previously paid.
5. Claimant is entitled to a permanent partial disability (PPD) rating of 5% of the whole person inclusive of her PPI.
6. Apportionment under Idaho Code § 72-406 for a pre-existing condition is not warranted.
7. The issue of retraining under Idaho Code § 72-450 has been waived.
8. Claimant is not entitled to attorney’s fees as provided for by Idaho Code § 72-804.
9. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to the matters adjudicated.

On April 6, 2009, Claimant filed a new Complaint seeking additional medical care. Claimant was represented by Andrew C. Marsh with Seiniger Law Offices from May 21, 2009, until October 13, 2009. She appeared *pro se* at the second hearing, at which Susan Veltman was

the presiding Referee. A decision was issued on January 21, 2010. The Commission ordered that Claimant had not met her burden of proof to establish entitlement to additional medical benefits.

On August 21, 2010, Claimant, still acting *pro se*, filed a third complaint seeking additional medical care. Discovery entanglements ensued, leading to an Order Finding Claimant in Contempt, Denying Claimant's Request to Schedule Hearing and Requiring Discovery and Offer of Proof From Claimant, entered November 22, 2010, and a Motion to Dismiss filed by Defendants on December 9, 2010, alleging that Claimant's November 29, 2010 response to the Order was insufficient. That motion prompted the third hearing, on January 10, 2011. At that hearing, Claimant again generally attributed all of her physical and mental difficulties, including itching and scratching leading to skin lesions and a fungal rash, headaches, loss of vision in the right eye and various psychological symptoms to her 2002 right upper extremity ("RUE") crush injury. However, the Commission found insufficient evidence in the record to establish that any of her claims were related to her 2002 industrial injury; therefore, it dismissed Claimant's Complaint without prejudice with respect to her RUE CRPS claims, and with prejudice as to her claims related to all other alleged conditions because they are barred by *res judicata*.

On April 11, 2012, Claimant again represented herself at a hearing seeking additional medical care. As a result of that hearing, the Commission entered an order determining that Claimant had raised no new issues for adjudication, and dismissed her Complaint while affirming her continued eligibility for reasonable and necessary medical treatment related to her RUE CRPS.

These previous decisions were not appealed and have become final.

ISSUE

Pursuant to the Notice of Hearing issued July 21, 2014, the sole issue to be decided is whether and to what extent Claimant is entitled to additional medical care.

CONTENTIONS OF THE PARTIES

Claimant seeks an order from the Commission authorizing additional medical treatment related to the right arm industrial injury she sustained in 2002 when her arm got caught between rollers on a laundry machine. According to her Complaint, Claimant seeks treatment for “chronick [*sic*] severe disabling pain in the right upper extremity.” Claimant offered no documentary evidence at the hearing; however, her husband confirmed during his testimony, after reviewing Defendants’ exhibits, that he was aware of no relevant documents not included therein. The testimony of Claimant and her husband confirm that she continues to seek benefits related to her industrial injury and that she is frustrated that benefits have not yet been authorized.

Defendants contend that Claimant has not met her burden of proof to establish entitlement to additional medical benefits and request that consideration be given to the previous findings on this issue. They seek dismissal, *with prejudice*, of her Complaint on the grounds that Claimant has alleged, but failed to prove, her need for additional medical care multiple times since her industrial injury.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Defendants’ Exhibits 1-6;
 2. Testimony taken at the hearing from Claimant and her husband, Xhevat Berisha;
- and

3. The Industrial Commission's legal file.

After having considered all the above evidence and the 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 at the time of her fifth hearing. She wore opaque wraparound glasses and received assistance walking to the litigants' table from her husband. She wore a brace on her right wrist that extended to her mid-forearm. Her demeanor was subdued in comparison to her prior hearing appearances.

2. Claimant's testimony was brief. She asked for help because she is sick. As to her right arm condition, she explained, "I have pain in my arm that goes all the way up to my head. Not a single doctor has seen me. ... I have pain. Lots of other pains. I just cannot move my arm like this up and down, because it hurts a lot." TR-11. As she spoke, Claimant gestured with her left arm to illustrate what she could not do with her right arm. When questioned further by the Referee, Claimant responded that she had received emergent care, but she could not remember any details.

3. Mr. Berisha confirmed Claimant's testimony that she is sick and needs treatment. He described her problems moving her wrist and her problems in physical therapy, which she evidently underwent since the prior hearing. He said she could not complete her physical therapy because of pain on the right side of her back.

4. Mr. Berisha also testified that Claimant had received emergent treatment three times during the past year. He accompanies her to all of her medical appointments because she cannot drive. The first time, Claimant was treated for dizziness and pain, apparently connected to her physical therapy. The second time, she had pain in her arm and lost consciousness and

memory. The third time, she had just arrived at physical therapy, then left straight away for emergent care.

5. According to Mr. Berisha, Claimant also received in-patient psychiatric care for a few days after a physician called the police during a visit to her physician. “The doctor called the cops, because she was screaming at the time...because she was seeing dreams and the doctor called the police and they took her to the - - to the psychiatric center and at the psychiatric hospital she was in front of a judge and the judge said that the medical should pay.” TR-14, 15.

6. According to Mr. Berisha, no physician has recommended any treatment for her condition because “it’s not only the problem with the nerves that has captured her arm, but the problem is in all her body now.” TR-15. He also offered that Claimant has had difficulties related to her menstrual cycle for the past three years, but no physician has offered any treatment because they do not know the nature of the problem.

Previously admitted medical evidence

7. Defendants placed another copy of the previously admitted report of Troy Watkins, M.D., dated October 8, 2009, into evidence. Findings from this report were published in the January 21, 2010 decision and are reprinted below for convenience:

... On October 8, 2009, Troy B. Watkins, Jr., M.D., evaluated Claimant at the request of Surety. Dr. Watkins utilized an interpreter during the evaluation. He was initially provided with Claimant’s medical records from February 2002 through March 2003 and from July 2004 through February 2009. Dr. Watkins requested records from March 2003 through June 2004 from Surety, but there is no indication that he reviewed additional information.

... Dr. Watkins summarized the medical records he reviewed. Although the actual medical records are not in evidence, Dr. Watkins’ report reflects that Claimant has been evaluated since her October 2003 hearing in July 2004 for complaints of headaches and blindness; in August 2004 for having an “attack” and fainting at a dentist’s office following teeth cleaning; in December 2006 for a right wrist injury after falling in the bathtub; in August 2007 for foot pain; and in February 2009 when her blindness was described as psychosomatic and related to secondary gain. All of Claimant’s treatment, other than the dentist visit, occurred in

emergency rooms. Diagnostic studies of Claimant's chest and brain performed during emergency room visits were normal.

... Dr. Watkins compared Claimant's RUE with her left upper extremity (LUE) and found both to be without evidence of atrophy, hypertrophy or fasciculations (muscle twitching). Claimant's LUE range of motion, vascular supply and neurological function were normal. Claimant was uncooperative regarding examination of her RUE. She screamed loudly when Dr. Watkins initially touched her right finger pads but moments later did not react when he touched the same area while he was simultaneously moving her wrist.

... Dr. Watkins noted that Claimant had four or five superficial ulcerated areas on her right forearm which Claimant attributed to scratching because of a burning/itching sensation. He observed 30 to 40 well healed scars from previous lesions. Dr. Watkins diagnosed self-mutilization secondary to severe psychiatric issues.

... Dr. Watkins did not recommend additional treatment for Claimant's industrial injury.

Berisha v. The Grove Hotel (January, 2010), paragraphs 5-10.

New medical evidence

8. *X-rays.* On September 17, 2012, Claimant underwent x-rays of her right forearm, right wrist, and right hand. The reading radiologist concluded that none showed any abnormality.

9. *Psychiatric care.* On April 14, 2013, Claimant was involuntarily committed to the inpatient psychiatric department at St. Alphonsus Regional Medical Center on what appear to be multiple successive 24-hour holds ordered either by a physician or the court. In her April 15, 2013 report, Coire Weathers, M.D., psychiatrist, describes the events that precipitated Claimant's commitment:²

The patient presented to Saint Alphonsus Emergency Department alongside her husband who quickly leaves the Emergency Department. The patient apparently

² Dr. Weathers communicated with Claimant and her husband through two interpreters over the telephone. The first interpreter disconnected the call because Claimant was "so verbally aggressive." (DE-12) The second interpreter was more helpful, "able to tolerate the patient's belligerent and labile nature," (DE-14) but stated on several occasions that Claimant was difficult to understand because she was yelling, crying, and parts of her story were difficult to follow.

had presented there at the encouragement of her outpatient doctor, Dr. Whittaker, from Family Practice Residency, who had been seeing the patient alongside her husband. The patient reported to some paranoid delusions relative to a mass murder, killing all of the Family Practice doctors by decapitating them. She also reported that she had been seeing people hanging every night and that these people who were hanging were telling her to hang herself. Apparently, patient was then encouraged to go to the Emergency Department where she was repeatedly yelling about somebody trying to kill all of the doctors. Patient apparently reportedly was responding to internal stimuli, looking directly at something that was standing behind the physicians that were in the room. She was not oriented to day, date, month or year or location in the Emergency Department, at which point she was placed on an involuntary hold.

DE-10.

10. Claimant told Dr. Weathers both that she had been hearing voices for the past 11 years and they had intensified over the past two years, and that she had only been hearing voices for the past two years “and really things have gotten worse since she was informed that somebody was going to deactivate her insurance.” DE-10. She reported nightmares about “the fraud and about her health insurance being terminated,” among other things. *Id.*

11. Along those lines, Dr. Weathers reported that Claimant had presented to the Emergency Department twice before. In 2011, she presented with right arm pain and was angry with the Family Residency staff for their inability to help her, as well as with the Industrial Commission. “She alleged in 2011 that she wanted to put the Commission in prison due to the fact that they have been opening and closing her case 3 times. She believes that nobody has been helping her, not the insurance company, none of her doctors, which is why she wanted to put them in prison as well in 2011.” DE-12. Claimant presented similarly in February 2012 and on this visit. “Presentation again in the Emergency Department yesterday is incredibly similar with ongoing concern for her right hand that she has had no medical treatment for it. She is angry. She is hostile. She is demanding to the point that an interpreter via phone actually disconnected purposefully as she was so verbally aggressive.” *Id.*

12. Claimant initially told Dr. Weathers that she was there in order to receive treatment for her hand. Subsequently, she did not know why she was there.

13. In researching the case, Dr. Weathers learned that Claimant's treating physician, Dr. Whitaker, had opined that Claimant is "completely consumed with the chronic pain in her hand." DE-19.

14. When Dr. Weathers questioned her about suicidal thoughts, Claimant became verbally aggressive by yelling. She also cried and became somewhat hysterical, "only to quickly calm and ask to excuse herself for a smoke break." DE-13. According to the interpreter, Claimant ranted:

...“every minute it crosses my mind, I both have conscious voices and inner voices telling me to kill myself because nobody is going to help me, so there is no point in living.” The patient throughout this assessment is very much consumed with the Industrial Commission, with disability and the fact that they are shortly going to be deactivating her health insurance. At the end of her rant, patient then does very calmly ask this writer if 10 minutes has lapsed and if she is able to excuse herself in order to obtain a smoke break.

DE-14.

15. Dr. Weathers opined that Claimant lacks significant insight into psychiatric hospitalization, that she was primarily concerned with medical issues associated with her hand, and that she was angry and feeling somewhat hopeless and helpless. On April 16, 2013, Claimant reported that the Industrial Commission was out to get her, telling her to hang herself, and that she wanted her hand cut off due to the pain, among other things. Dr. Weathers opined many of Claimant's statements were related to paranoia and that it is difficult to know what statements are accurate because Claimant is a poor historian.

16. After speaking with Mr. Berisha, Dr. Weathers reported:

The patient's husband denies adamantly that patient has ever experienced auditory hallucinations, that she has ever experienced any sort of thoughts of wanting to

kill herself or harm herself. He further denies that she has ever made any attempts to take her own life. The patient's husband indicates that patient gets this way because she is "very angry" regarding the situation having to do with a Workman's [sic] Comp claim that occurred about 9 years ago.

DE-11. Dr. Weathers observed that Mr. Berisha was "somewhat fed up with her." DE-20.

17. Dr. Weathers was under the impression that Claimant had also injured her arm in a car accident 11 years ago.

18. On discharge, Claimant was diagnosed with psychosis, not otherwise specified, but post-traumatic stress disorder, schizophrenia, and schizoaffective disorder still needed to be ruled out.

19. *Medical records review.* On May 27, 2014, Michael Weiss, M.D., a psychiatrist, authored a report of a record review he conducted related to Claimant's care since her industrial accident, which included his opinion regarding Claimant's current condition and need for additional evaluation for medical treatment related to her CRPS. Dr. Weiss was a member of a panel of independent medical evaluators who examined Claimant on March 18, 2003. The report of that evaluation, in which no further treatment was recommended to treat Claimant's CRPS, was entered into the record during the first hearing.

20. Dr. Weiss reviewed additional medical records compiled through 2013, as well as the exhibits from the hearings on January 10, 2011 and April 11, 2012. His observations with respect to all of these records will not be addressed here. He concluded, "If anything, the records reviewed further support the diagnoses and recommendations of the panel evaluation in 2002. Reevaluation in 2003 did not reveal significant change and, while I have great sympathy [sic] her persistent symptoms and suffering, I see no reason for her to undergo repeat evaluation regarding the 2002 work injury." DE-22. Instead, Dr. Weiss recommended treatment for Claimant's psychiatric issues to moderate her symptoms. He strongly cautioned against any interventions,

especially surgery, without very clear indications based on objective exam and clinical test findings.

21. Panel evaluation. On November 20, 2014, Claimant was evaluated by a panel of two independent medical evaluators, including Rodde D. Cox, M.D., a physiatrist, and Paul Collins, M.D., an orthopedic surgeon. Each evaluator authored a separate opinion after reviewing Claimant's past medical records.³ Together, they interviewed Claimant, with language interpretation assistance, and conducted an examination. They also reviewed Dr. Weiss' 2014 records review report.

22. On exam, both Dr. Weiss and Dr. Collins reported that Claimant appeared to be exaggerating her pain and impairment at times. For example, she was able to move when distracted in ways she reported she could not move on exam. In addition, she refused to cooperate in a vision examination by Dr. Weiss and in a cervical spine examination by Dr. Collins. Both physicians noted abrasions and scars on Claimant's upper extremities that appeared to be the result self-inflicted wounds from scratching or similar. Dr. Collins noted that Claimant's right and left forearms each measured 27 centimeters. "That would indicate obliquely that the strength in the right and left forearms were equal." DE-32.

23. Both Dr. Weiss and Dr. Collins concluded that Claimant's CRPS is medically stable, and no treatment is indicated. Dr. Weiss added that there were no objective findings consistent with CRPS. Both physicians recommended treatment for Claimant's non-industrial psychiatric issues, and neither identified any new condition attributable to the 2002 industrial accident.

³ Some of the medical records reviewed by the panel are not in evidence in these proceedings. No facts will be ascertained from these third-party reports. None of the information cited by Dr. Weiss or Dr. Collins that is not in evidence is inconsistent with the facts found herein.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts 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).

24. **Reasonable medical care.** Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident arising out of and in the course of employment. *Wichterman v. J.H. Kelly, Inc.*, 144 Idaho 138, 158 P.3d 301 (2007). It is clear that in order to recover medical benefits, the injured worker must prove both that the need for medical care is causally related to the accident and that the medical care is "reasonable." See *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006).

25. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by 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 is reasonable. See, *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

26. Claimant seeks additional medical care to treat right arm pain due to CRPS. However, she has not provided any medical evidence to establish that any such treatment has been recommended, or even exists. In fact, she and her husband both testified, to the contrary,

that they have been told by one or more physicians that no treatment exists. Further, the physicians retained by Surety to evaluate Claimant and her course of treatment all agree that no further treatment is recommended for her right arm CRPS pain.

27. Claimant's reply brief raises issues of discrimination that were not raised at the time of the hearing or by Defendants' brief. Therefore, will not be addressed herein. Her complaint regarding the absence of a translator at her medical appointments is groundless as it pertains to the panel evaluation facilitated by Defendants, as well as Claimant's 2013 inpatient psychiatric treatment, in which a translator was made available even after Claimant's behavior caused the first one to quit. Claimant has likely had language difficulties since emigrating from Bosnia to America in 1999; however, she has failed to establish that these difficulties have affected her care related to her industrial accident such that Defendants should be liable for additional benefits. It would appear from the record that Claimant's communication difficulties are more directly related to her angry and abusive behavior toward her care providers, and her refusal to cooperate in examinations, than to her English language deficits.

28. Claimant has failed to meet her burden of proving that she is entitled to further medical treatment related to her 2002 industrial injury.

Motion to dismiss with prejudice

29. Defendants seek dismissal, with prejudice, of Claimant's claims related to her 2002 industrial accident on the grounds that no further medical care has been found reasonable or necessary since at least the second hearing herein on December 17, 2009. They rely upon Idaho Code § 72-432(1) in arguing that any further care, under the circumstances of this case, would fall outside the reasonable care required under Idaho Workers' Compensation law. Defendants also cite *James Clark v. Cry Baby Foods, LLC*, I.C. 2008-013505 (May 2, 2012),

aff'd *Clark v. Cry Baby Foods, LLC*, 155 Idaho 182, 307 P.3d 1208 (2013) in asserting that a claimant is not entitled to medical benefits indefinitely. In that case, the Commission found that Mr. Clark had demonstrated his entitlement to certain medical benefits already conferred, but had not proven entitlement to medical benefits in the future. Relevantly, at page 45 of the decision, "Claimant failed to show it likely he is entitled to future medical care, including mental health care in the future." In its Order, the Commission held, "Claimant is entitled to benefits for medical care to the date of hearing, but not in the future." On appeal, the Idaho Supreme Court was not presented with any issue specifically implicating this finding, and it was not addressed in the resultant order.

30. There are striking similarities between this case and the *Clark* case. However, Mr. Clark's Complaint was not dismissed with prejudice.

31. The Commission determined in Mr. Clark's case that he was not presently eligible for future medical benefits. This determination is not, however, sufficient grounds for a dismissal with prejudice. There is a difference between a present holding that a claimant is not entitled to future medical benefits, and a holding barring a claimant from seeking reasonable medical benefits in the future based on some relevant change regarding a condition attributable to an industrial accident. Idaho Code § 72-432(1) provides for reasonable and necessary medical care, for a reasonable amount of time following an industrial injury. It is possible that no reasonable medical care will ever be available to Claimant; however, insufficient medical evidence has been presented to draw such a conclusion at this time. The medical evidence of record, like in *Clark*, establishes that Claimant is not presently entitled to additional treatment, but it stops short of proving that her CRPS is, for example, cured. Therefore, Defendants' motion to dismiss Claimant's Complaint with prejudice should be denied.

CONCLUSIONS OF LAW

- 1. Claimant has failed to prove she is entitled to further medical care benefits, now or in the future, related to her right arm CRPS pain or her 2002 industrial accident.
- 2. Defendants’ motion to dismiss with prejudice should be denied.
- 3. Claimant’s Complaint should be dismissed without prejudice.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusion of law and issue an appropriate final order.

DATED this 12th day of March 2015.

INDUSTRIAL COMMISSION

/s/
LaDawn Marsters, Referee

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

SANIJE BERISHA
408 EAST 46TH STREET, #9
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NEIL D MCFEELEY
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sjw

/s/

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SANIJE BERISHA,

Claimant,

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THE GROVE HOTEL,

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INSURANCE COMPANY OF THE WEST,

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IC 2002-003038

ORDER

March 25, 2015

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her 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 recommendations 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 failed to prove she is entitled to further medical care benefits, now or in the future, related to her right arm CRPS pain or her 2002 industrial accident.
2. Defendants' motion to dismiss with prejudice should be denied.
3. Claimant's Complaint should be dismissed without prejudice.

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

DATED this 25th day of March, 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 25th day of March, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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/s/