BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAY BLUEMER, Claimant, v. CORDER, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2007-038506** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed January 9, 2015**

INTRODUCTION

Pursuant to Idaho Code § 72-506, at the time of hearing the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on June 13, 2014. Clinton E. Miner, of Boise, represented Claimant. Neil D. McFeeley, of Boise, represented Employer and Surety. Oral and documentary evidence was admitted. Post-hearing depositions were taken. The parties filed post-hearing briefs. The matter came under advisement on November 28, 2014.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment on or about November 5, 2007.

2. Whether and to what extent Claimant is entitled to the following benefits;

   a. medical care;
   b. temporary disability payments;
   c. permanent partial impairment;
   d. permanent disability in excess of impairment;
   e. attorney fees.

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

The main thrust of Claimant's argument is that as the result of an industrial accident, he is significantly disabled, to a degree in excess of his permanent impairment rating.

Employer/Surety takes the position that while Claimant may have had an industrial incident, he suffered no impairment or disability beyond his previous ratings from four prior industrial back surgeries. In fact, Defendants seek restitution of impairment benefits previously paid. Claimant is entitled to no additional benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing;
2. Claimant's Exhibits (CE) 1-16, admitted at hearing;
3. Defendants' Exhibits (DE) A-M, admitted at hearing;
4. The post-hearing deposition transcript of Nancy J. Collins, Ph.D., with Exhibits, taken on July 9, 2014;
5. The pleadings contained in the Industrial Commission legal file in this case.

All deposition objections are overruled with the exception of the objection at page 65 of Dr. Collins' deposition, which is sustained.

After having considered 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

CLAIMANT'S PRE-ACCIDENT WORK HISTORY

1. At the time of hearing, Claimant was 59 years old. He maintained a home in Mountain Home, Idaho, but was renting and residing at a residence in Carlsbad, New Mexico, where he was currently employed.

2. Claimant did not graduate high school, but possesses a GED.[1] After a three year stint in the Navy, Claimant joined a carpenter's union, served a four year apprenticeship, and became a journeyman carpenter. He worked in the carpentry and construction field for approximately thirty years.

3. During his time as a carpenter, Claimant focused mainly on commercial construction. He is qualified in all phases of construction, including acting as a foreman, superintendent, and project manager. He has over twenty years' experience in these supervisory positions.

4. In approximately 1990, after injuring his back and neck, Claimant considered changing professions. He enrolled in classes at Boise State University in hopes of becoming a primary education teacher, but withdrew after one semester. Thereafter, he returned to construction, but tried to limit his employment to management positions in order to minimize his physical labor requirements.

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[1] Claimant testified at hearing that he actually has three GEDs.

5. At some point after 1991, Claimant moved to Oregon, where he primarily worked as a construction supervisor. While there, Claimant experienced multiple low back injuries which led to four low back surgeries, as discussed below. After his fourth surgery, and on the advice of his physician, Claimant chose to again leave the construction field and pursue trucking.

6. Although Claimant had experience operating heavy equipment such as road graders, bulldozers, blades, backhoes, and such, he needed a trucking certificate to drive commercial semi-trucks. Claimant returned to Idaho and attended commercial truck driving school. He completed the truck driving course and obtained his certificate. Thereafter he went to work for Employer driving various types of truck and trailer combinations.

7. Employer's work load was seasonal, and would typically slow during the winters. During the slow periods, Claimant would work at the Mountain Home Air Force base (the base), primarily operating heavy equipment and trucks for snow removal projects.

CLAIMANT'S WORKERS' COMPENSATION CLAIM

8. On November 5, 2007, Employer assigned Claimant to take an empty tractor/trailer rig to Rexburg, pick up a load of wood chips, and return with the full load to Employer's yard. The following day he was to haul the chips to Elgin, Oregon.

9. During his pre-trip inspection, Claimant noticed the driver's seat in his assigned truck was not properly fastened down, which caused it to move and wobble. He notified his foreman, but the seat was not fixed before Claimant began his trip.

10. Claimant reached Rexburg without difficulties. Upon loading the trailer with chips, Claimant lowered his trailer drop axles to account for the additional weight.

11. The tires on the drop axle had significant "flat spots" on them. These out-of-round tires caused considerable jarring or "hammering" inside the cab once the rig reached about thirty-five miles per hour. This jarring, coupled with the broken seat, made for an uncomfortable six hour ride from Rexburg to Mountain Home. By the time he reached Employer's yard, Claimant had difficulty walking due to pain and spasm in his lower back and upper buttocks muscles.

12. Claimant informed Employer of his condition. Claimant told his boss he was going to a doctor in the morning, and could not complete the delivery to Oregon.

CLAIMANT'S PRE-ACCIDENT LOW BACK HISTORY[2]

13. A medical report prepared in or around January 1990 references Claimant's history of a low back injury from 1983. A First Report of Injury (FROI) from late 1987 cites a low back strain occurring on December 28, 1987. Claimant again contused his low back in 1992, as per a FROI. No further records related to any of these injuries are in evidence. There is no evidence that any of these injuries caused lasting impairment.

14. On July 20, 1989, Claimant hurt his back and neck at work. He treated with injection therapy, non-steroidal medication, physical therapy, and a home exercise program. By mid January 1990, IME physicians Ercil Bowman, M.D., and Mark Holmes, M.D., noted Claimant was much improved, although he still reported some complaints of pain. By the end of that February, these IME physicians determined Claimant was at MMI. They also found Claimant suffered no measurable permanent impairment from

[2] Medical Records for Claimant's past treatments are sparse. Much of what follows has been patched together from references in other documents, such as IME reports, IDVR notes, and Industrial Commission records. Further, Claimant's testimony as to dates, sequences of surgeries, and even number of surgeries he has had bears little correlation to the records in the exhibits. Complicating matters, records were produced by the parties with no regard to chronology, thus making sorting out Claimant's medical history even more difficult.

this accident. Conversely, Claimant's treating doctor, Michael McMartin, M.D., assessed a 2% whole-person impairment rating for Claimant's mid-lumbosacral back pain. For Claimant's mid and upper back pain, Dr. McMartin assessed an 8% whole person impairment rating and imposed limitations on lifting, prolonged sitting, and overhead work. He also suggested Claimant find work outside of the construction field. Claimant enrolled at BSU. Claimant settled this claim with a lump-sum settlement in September, 1991. Immediately thereafter he quit school and returned to the construction trade.

15. Eventually, Claimant moved to Oregon. There he suffered an industrial low back injury on March 24, 1997. This injury led to a left sided semi-hemilaminectomy for a ruptured disc at L4-5 on April 3, 1997.

16. On August 18, 1997, Claimant returned to Julio Ordonez, M.D., the Portland, Oregon neurosurgeon that had performed Claimant's back surgery. Claimant had developed a sudden onset of severe, sharp pain in his lower back and both legs. After an MRI scan, Claimant underwent a re-exploration and discectomy at L4-5 on August 21, 1997.

17. On June 16, 1998, Claimant again presented to Dr. Ordonez for re-evaluation of recurring back and leg symptoms. MRI scans revealed a left sided disc recurrence at L4-5 and narrowing of the nerve root canals of L4 on both sides. While Dr. Ordonez discussed with Claimant the option of a fusion surgery, Claimant opted for a discectomy surgery at L4-5 instead. This operation took place on June 29, 1998. Shortly thereafter Claimant returned to his job doing construction supervisory work.

18. On July 13, 1999, Claimant returned to Dr. Ordonez, this time complaining of daily back pain, worse upon rising in the morning and in the evening after work. He

controlled the pain with Advil. Claimant had very little leg pain. Dr. Ordonez felt no further curative treatment was necessary at that time, although he noted Claimant's long term prognosis for recurrent L4-5 disc herniation was likely. Dr. Ordonez predicted Claimant might well need a fusion in the future. He also warned Claimant that if he returned to doing repeated bending and lifting he could have another recurrent disc herniation.

19. On February 3, 2003, Claimant injured his back while lifting a heavy door with a co-worker. Dr. Ordonez performed an anterior lumbar interbody fusion at L4-5 with Ray Cages and autologous bone graft on August 26, 2003. By early April, 2004, Claimant reached MMI from this accident, albeit with limitations.

20. Dr. Ordonez assigned the following restrictions to Claimant; ten pounds lifting, five pounds frequently; sitting, standing, and walking, eight hours per day, with hourly breaks; driving no more than two hours between breaks; no stooping, twisting, or bending; occasional squatting, crawling, kneeling, pushing, pulling, climbing ten-foot ladders, and reaching above shoulders. Claimant's hourly and weekly hours were not restricted to below full time.

21. Upon his release from care on April 8, 2004, Dr. Ordonez noted Claimant would not be able to return to doing labor work. He could do supervisory or appraisal work, and perhaps finish carpentry work or painting within his work restrictions. Dr. Ordonez further pointed out that Claimant would likely experience waxing and waning of lower back symptoms in the future.

22. In May, 2007, after Claimant had returned to Idaho and obtained his trucking certificate, he strained his low back while working at the base. He was operating a truck

with no front suspension and a failed air cushion, which jarred Claimant, and caused his low back to become symptomatic. He sought treatment with Layne Roberts, D.O., of Mountain Home, on May 14, 2007. Dr. Roberts diagnosed an acute thoracolumbar strain after obtaining an MRI on May 19, 2007. The MRI also showed Claimant to be neurologically intact. Claimant recovered uneventfully from this episode, and returned to work by the end of May.

CLAIMANT'S POST-ACCIDENT LOW BACK TREATMENT

23. On November 6, 2007, the day after Claimant's eventful trip from Rexburg to Mountain Home, Claimant presented at Dr. Roberts' office, complaining of neck, back and low back pain. Claimant was experiencing shooting pain from his right sciatic notch down into his foot, and was quite tender to the touch. Dr. Roberts observed "a tremendous amount of muscle spasm in his thoracic and lumbar spine" to the point it was difficult for the doctor to conduct his physical examination. (CE 4, p. 34.) Dr. Roberts diagnosed an acute strain, and prescribed OxyContin and Flexeril.

24. On November 9, 2007, Claimant returned to Dr. Roberts for followup. At that time, Claimant was improved with medication, but still experiencing pain across his low back, which radiated down both legs, worse on the right. Dr. Roberts referred Claimant to Boise neurologist Richard Wilson, M.D.

25. Once he gained Surety approval for the visit, Claimant saw Dr. Wilson on December 4, 2007. Claimant was still having pain in his lower lumbar region, radiating to the left lateral thigh. He also had been having momentary pain at various locations in both legs. Dr. Wilson did not feel Claimant's symptoms were indicative of an active lumbar radiculopathy, but warranted a lumbar MRI.

26. An MRI was performed on December 5, 2007. Thereafter, on December 12, 2007, Claimant returned to Dr. Wilson for followup. Dr. Wilson reviewed the MRI findings, noting there were no significant changes since Claimant's previous MRI. Claimant desired to return to work at the air base, and Dr. Wilson agreed that would be reasonable, although he suggested physical therapy through Dr. Roberts if Claimant did not continue to improve.

27. On December 13, 2007, Claimant returned to Dr. Roberts, who maintained his diagnosis of acute lumbar strain. Dr. Roberts prescribed three weeks of physical therapy, while allowing Claimant to return to work at the base.

28. When Claimant returned to work, his back spasms increased. He saw Dr. Roberts on December 18, 2007, complaining of increased symptoms in his thoracolumbar spine. Claimant had not yet been to physical therapy, due to a mix up in scheduling. Dr. Roberts diagnosed recurrent thoracolumbar strain, kept Claimant on anti-inflammatory and muscle relaxant medications, and helped him schedule physical therapy. Dr. Roberts took Claimant off work.

29. Physical therapy helped reduce some of Claimant's symptoms, but did not succeed in eliminating his back pain and spasms. After several more office visits, Dr. Roberts felt Claimant should consult with a neurosurgeon. Dr. Roberts' impression in early 2008 was that Claimant likely should not continue to drive trucks and heavy equipment.

30. On February 12, 2008, Claimant saw Thomas Manning, M.D., a Boise neurosurgeon. Dr. Manning reviewed Claimant's past MRIs, and ordered a series of further diagnostic studies, including a CT scan, a bone scan, lumbar spine X-rays, and an

EMG to further help the doctor formulate a course of treatment.

31. When the above studies were completed, Claimant met again with Dr. Manning on March 18, 2008. Dr. Manning at that time confirmed his diagnosis of adjacent level disease at L3-4, and recommended a revision fusion with instrumentation from L3 through L5. Claimant agreed to this procedure. The surgery was performed on May 14, 2008.

Claimant's Post-Surgery Medical History

32. As of June 6, 2008, Claimant was "tremendously improved" from his pre-operative condition, and was happy with how his healing was progressing, according to Dr. Manning's office notes. (CE 14, p. 421.) It was Dr. Manning's goal to enroll Claimant in a comprehensive physical therapy program in mid-August.

33. On August 15, 2008, Claimant returned to Dr. Manning for followup. At that time Claimant stated his back was significantly improved by surgery. He was anxious to return to hiking in the mountains and riding horses. He was not yet working, and observed that "bouncing around in his truck" caused a bit of pain into his groin area. Dr. Manning prescribed physical therapy with the goal of returning Claimant to his truck driving job.

34. On September 30, 2008, Claimant returned to see Dr. Manning. He was complaining of a new pain, which came on when he began physical therapy treatments. This pain was predominately in Claimant's very low back, at the lumbosacral junction. Claimant had not yet returned to work. Dr. Manning ordered CT and bone scans.

35. Following the scans, Dr. Manning saw Claimant on October 14, 2008. The scans came back negative for any new developments. Dr. Manning felt Claimant's issue could be muscle spasm. For that he prescribed Baclofen and pool therapy.

36. On November 17, 2008, Claimant presented at Dr. Manning's office feeling improved overall. Dr. Manning felt it was appropriate to enroll Claimant in a work hardening program.

37. In early December, 2008, Claimant began the work hardening program at St. Alphonsus, under the care of Kevin Krafft, M.D.

38. Work hardening did not go well for Claimant - his pain symptoms increased with the increased activities.

39. Dr. Krafft indicated Claimant might not be able to return to long distance truck driving due to the vibrations and prolonged sitting. He felt Claimant would need frequent stretching breaks in order to tolerate that kind of work. Claimant expressed an interest in local driving.

40. Dr. Krafft prescribed a series of chiropractic treatments for Claimant, which helped alleviate some symptoms. However, Claimant was not able to progress sufficiently in the work hardening program, and was discharged at the end of December, 2008.

41. On February 2, 2009, Claimant underwent a functional capacity assessment. He was able to perform all critical job duties of a truck driver for Employer, with the exception of sitting for up to ten hours per workday.

42. Dr. Krafft declared Claimant medically stable on February 6, 2009. Utilizing the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Ed., Dr. Krafft assigned Claimant a 15% whole person PPI due to his lumbar spine condition. He acknowledged Claimant's pre-existing lumbar impairment, and in the absence of an actual value for the previous impairment, calculated a default impairment of 12%, leaving Claimant a 3% whole person residual impairment in regard to his most recent injury and L3-4 fusion. Dr.

Krafft imposed the following restrictions; lifting, 35 pounds on an occasional basis; no working from unprotected heights; no walking on rough, uneven surfaces. Dr. Krafft also recommended that Claimant change positions approximately every half hour, since Claimant had difficulty sitting for prolonged periods. Finally, Dr. Krafft suggested Claimant avoid low frequency vibration, such as driving heavy equipment or 18-wheelers. He could continue to drive smaller trucks or other vehicles.

43. Thereafter, Claimant went to Richard Radnovich, D.O., for an independent examination and alternate impairment rating. On March 31, 2009, Dr. Radnovich issued his report. He rated Claimant at 7% whole person impairment for his low back, with no apportionment. While he acknowledged Claimant's past back problems and surgeries, he relied on Claimant's statement that he was unrestricted in work and symptom free to assign a 0% past impairment for Claimant's four prior surgeries. Dr. Radnovich restricted Claimant to no repetitive (greater than 30% of the workday) bending, twisting, lifting, with a maximum lifting capacity of 40 pounds. He also restricted Claimant from exposure to low frequency vibration, such as operating heavy machinery.

44. On August 7, 2009, Claimant returned to Dr. Manning. Claimant told Dr. Manning he was eager to get back to work and felt he could drive a truck. He was still getting some lumbar muscle spasms, which were aggravated by prolonged sitting or standing, but the pain was nothing Claimant "couldn't live with". X-rays taken that day showed a "very satisfactory" lumbar fusion construct. Claimant walked with a stable gait and "perfect" sagittal balance. Dr. Manning noted Claimant's MRI, CT, and x-rays all looked good. He found no objective evidence to prevent Claimant from returning to truck driving. He released Claimant to full duty with a lifting limit of 60 pounds, but noted

Claimant should just use common sense when lifting to take care of his back. (CE 14, p. 439.)

45. On September 25, 2009, Claimant presented at Dr. Roberts' office for his commercial driver's license re-certification examination. His back was doing well and he wanted to return to work. Claimant passed this examination with no restrictions.

46. Claimant's final visit with Dr. Manning came on February 12, 2010, at which time Dr. Manning noted Claimant was "getting along relatively well." Claimant had full and symmetric motor strength and the fusion looked solid, with "satisfactory alignment". (CE 14, p. 441.)

Claimant's Post-Accident Work History

47. After his May 14, 2008 surgery, Claimant returned to his truck driving job with Employer in the fall of 2009. Claimant did well enough doing short-haul driving assignments, but was laid off in December, 2009, due to a lack of suitable work.[3]

48. Claimant next found employment at the base, where he worked in a "temporary" clerical position for two years. That position eventually ended. Claimant stayed on at the base, doing snow removal over the winter months of 2011 – 12.

49. Thereafter, Claimant returned to work with Employer on what appears from the records to be a sporadic basis up through early fall, 2012. It appears on occasion, Claimant quit, and other times he was laid off.

50. Claimant testified in his deposition that he returned to the air base in the winter of 2012, driving truck and heavy equipment, often for snow removal duties, until

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[3] Claimant testified he was laid off because he refused to drive long haul. Employer's records state Claimant was laid off due to "lack of work." (DE L, p. 337.) Those two concepts are not mutually exclusive, as lack of work could well mean lack of short haul work.

being laid off due to lack of work in March 2013.

51. Claimant next began working full time in August, 2013, with the Idaho Department of Fish and Game. His job title was field maintenance technician; his duties included driving dump trucks, operating heavy machinery, forming concrete, installing and maintaining handicap accesses, boat docks, boat ramps, and similar structures. Claimant remained at that job for approximately seven months.

52. In late March, 2014, Claimant left the Fish and Game job to pursue employment with Watson Construction in Carlsbad NM. His son, who works as a superintendent for Watson, was instrumental in Claimant landing the position as a foreman. Watson is in the business of constructing pipelines from oil/gas wells to tank farms. Claimant's duties run from ordering and managing materials, to overseeing and supervising crews to make sure the job is done correctly and runs efficiently. The physical labor involved in this job is minimal. As of the date of hearing, Claimant was so employed.

DISCUSSION AND FURTHER FINDINGS

CLAIMANT'S CREDIBILITY

53. There is a threshold issue regarding Claimant's credibility. Clearly, at hearing he was confused and mistaken regarding the details of his medical past. His testimony in this regard is given less weight than the medical records, which provide a more accurate time line and history than Claimant's memory. The same applies when addressing Claimant's memory of his past limitations, pain levels, and status at any given time; written records are given more weight than Claimant's oral testimony. On the other hand, Claimant was forthright and candid when testifying on other matters, and where not rebutted by the written records or as otherwise noted herein, Claimant is deemed to be a credible witness.

CLAIMANT'S INDUSTRIAL INJURY CLAIM

54. The first issue for resolution is whether Claimant suffered a compensable injury on November 5, 2007. Under Idaho law, an injury is defined as "a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law." Idaho Code § 72-102(18)(a). 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, 785, 890 P.2d 732, 736 (1995). A preexisting disease or infirmity of the employee does not disqualify a workers' compensation claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

55. As well, Claimant bears the burden of proving that the injury is the result of an "accident" defined as an "unexpected, undesigned and unlooked for mishap or untoward event connect with the industry in which it occurs and which can be reasonably located as to time when and place where it occurred . . . ." *See* Idaho Code § 72-102(18)(b). Here we must initially determine whether Claimant has met his burden of reasonably locating the claimed accident in time and space. Claimant did not articulate the occurrence of a specific mishap. Instead, he described the onset of discomfort following six hours of driving a truck with a broken seat and out of round tires, on a date certain.

56. The Commission has dealt with situations similar to the present case. For example, in *Baune v. R&V Oil Company and Industrial Indemnity Co.,* IC 95-937938, February 18, 1998, the claimant was awarded benefits when, as a result of driving his poorly-riding truck over a very rough section of road while delivering heating oil on August 17, 1995. The

Commission determined claimant had sufficiently located his injury to a time and place, as required by statute.

57. So too, in *Bodkin v. Andrus Distributing and Liberty Northwest Ins.,* IC 90-684667, April 8, 1992, the claimant suffered compensable injury when his back became symptomatic while driving a particularly harsh-riding truck repeatedly from November 13 through 16, 1989 over a rough stretch of highway near Malad. The Commission ruled that claimant had established a compensable accident, since he could reasonably locate his accident and injury to a time and place it occurred.

58. Finally, in *Kiehle v. Excel Transport, Inc. and Liberty Northwest Ins.,* IC 89-673112, August 31, 1992, the claimant received benefits for back injury sustained while driving a chip truck with a defective seat. The Commission noted claimant was injured while working at his usual and ordinary labor, when the stress of the constant jarring overcame his body's resistance, causing a back strain.

59. Based on the foregoing, we conclude that Claimant has identified his accident with sufficient particularity to satisfy the demands of Idaho Code § 72-102(18)(b). As explained below, we also conclude that Claimant has met his burden of demonstrating that the accident caused injury to the physical structure of his body, notwithstanding that he had significant low back problems on a pre-injury basis.

60. The fact that Claimant's back injury in question is causally related to his ill fated trip of November, 5, 2007 was confirmed by Peter Reedy, M.D., a neurosurgeon hired by Defendants to evaluate Claimant. In his report of April 25, 2008, he stated "I think (Claimant's condition) is clearly due to the jarring accident of November 7 [sic] because his

spinal progression has continued all along and never became symptomatic until this work-related injury in November." (CE 5 p. 52.) There are no contrary medical opinions in the record.

61. While it is true Claimant suffered from degenerative disc disease with occasional flare ups in pain prior to November 5, 2007, the disease and flare ups did not result in continuous, unresolving pain complaints, and inability to perform all job duties in Claimant's employment. Claimant testified at hearing that after the November accident, riding in vehicles for prolonged periods of time was painful to the point of interfering with his job performance. He refused to drive long haul after the accident. He complained about the driving/sitting requirements of the Fish and Game job.[4] While he tried to work, and every indication is that he wanted to work, it is apparent he had more difficulty with certain aspects of his time-of-injury employment post accident. The pain and limitations resulted in a second fusion surgery.

62. Claimant suffered a compensable industrial accident involving his lumbar spine on November 5, 2007. The accident produced the symptomatology and the disability from which Claimant suffered thereafter. Claimant's medical treatment from the accident until he was declared MMI on February 6, 2009, including his surgery of May 14, 2008, is causally connected to his accident of November 5, 2007.

MEDICAL AND TEMPORARY DISABILITY BENEFITS CLAIMS

63. The parties listed Claimant's entitlement to medical and temporary benefits as issues for resolution. Neither party briefed these issues, nor was any testimony taken at hearing on them. Dr. Radnovich indicated it would be reasonable to perform additional diagnostic film studies to assess Claimant's continuing complaints post-surgery. It is not clear if Dr. Radnovich

[4] Ironically, he said he could do the manual labor and drive heavy equipment without problems, but it was the riding to the jobs which aggravated his back to the point he left the F&G job and went to work in New Mexico.

knew of the post-surgery CT scan, plain film x-rays, and nuclear bone scan studies which had been done when he made his comment. Furthermore, after Dr. Radnovich's suggestion, Claimant had x-rays taken to make sure his most recent fusion was intact. There is no indication Surety failed to pay for these films. Dr. Radnovich's suggestions were accomplished, and there is no proof further medical treatment is warranted beyond the films. Defendants' answer to Claimant's complaint claims they paid almost $93,000 in medical benefits and $33,000 in temporary disability benefits prior to Claimant's complaint filing. Claimant did not argue he is not medically stable, nor has he proven he is entitled to any additional medical or temporary disability benefits beyond those paid previously.

64. Claimant is not entitled to any further medical or temporary disability benefits related to his November 5, 2007 claim.

PERMANENT PARTIAL IMPAIRMENT CLAIM

65. Claimant alleges entitlement to permanent partial impairment benefits. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss is considered stable at the time of evaluation. Idaho Code § 72-422. While utilizing the advisory opinions of physicians, the Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

66. At the time Claimant reached MMI, Dr. Krafft evaluated Claimant's impairments and assigned him a PPI rating of 15% whole person, with a 12% apportionment for prior lumbar surgeries. The 12% apportionment rating was calculated by Dr. Krafft as a "default"

apportionment, since he was not aware of any actual impairment ratings given by prior doctors from the prior surgeries.[5]

67. Defendants claim the "default" impairment rating given by Dr. Krafft is inaccurate. They argue Dr. Ordonez gave Claimant a 16% impairment for his lumbar spine in 2004, and before that, Dr. McMartin assigned Claimant a 2% impairment rating for his lumbar spine in 1990. When these ratings are subtracted from Dr. Krafft's 15% rating, Claimant is entitled to no additional rating, and in fact, must reimburse Defendants the 3% impairment benefits Defendants paid to him in accordance with Dr. Krafft's miscalculated rating.[6]

68. Defendants' argument is not well taken. They rely upon a handwritten "Notice of Closure Worksheet" prepared by an adjuster for Crawford and Company to deduce Dr. Ordonez's impairment rating. This document is not sufficient to prove the matter asserted. It is a hearsay document, and lacks foundation for the proposition that Dr. Ordonez actually assigned such a rating, how he arrived at the rating, whether the rating was a final determination of Claimant's whole person impairment, etc. There are other notations on the worksheet which further create ambiguity as to what Dr. Ordonez may or may not have finally concluded with regard to Claimant's whole person impairment for his lumbar spine in 2004. Dr. Krafft calculated a 12% pre-existing impairment for Claimant's lumbar spine, which calculation took into account all of Claimant's previous impairments, presumably including the impairment for which Dr. McMartin assigned a 2% impairment in 1990. In other words, Dr. McMartin's 2%

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[5] In his March 31, 2009 report, Dr. Radnovich discussed how and when the "default" apportionment is used to apportion impairment. He noted *The AMA Guides to the Evaluation of Permanent Impairment*, 6th Ed. provides that if there is a previous comparable impairment, that rating should be subtracted from the current impairment. If no such previous comparable is known to the rating physician, the examiner must use the best available information to calculate the impairment rating that would have existed at the time of the new injury, and subtract that number from the current impairment.

[6] The argument for reimbursement was not noticed as an issue for hearing, and even if meritorious, would likely have been considered waived for this reason.

impairment is included in Dr. Krafft's 12% apportionment, and would not be further subtracted from the 15% whole person impairment.

69. Dr. Radnovich's opinion of 7% impairment without apportionment carries less weight than Dr. Krafft's 15% impairment with a 12% pre-existing apportionment. Dr. Radnovich's statement that at the time of the subject accident, Claimant was "unrestricted and symptom free" is simply inaccurate. Since he bases his decision to find no apportionment on inaccurate facts, his final impairment rating is likewise inaccurate.

70. Claimant is entitled to PPI benefits equal to a 3% whole person rating (15% whole person with regard to his lumbar spine injuries and surgeries, with a 12% apportionment for previous surgeries) for the November 5, 2007 industrial injury.

PERMANENT DISABILITY CLAIM AND APPORTIONMENT

Permanent Disability

71. 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 nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing

the injury, 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. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced [the claimant's] capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing his claim for permanent disability benefits.

72. Claimant hired Nancy Collins, Ph.D. to conduct a vocational assessment and render an opinion as to his current employability and the extent of his disability in light of his various medical and non-medical factors. Dr. Collins looked at Claimant's medical and related records, and employment-related documents. She considered his educational and vocational history. She interviewed Claimant via telephone while he was at work near Carlsbad, NM.

73. Dr. Collins noted Claimant had pre-existing light/medium permanent restrictions in lifting, overhead use of his arms, walking on uneven ground, working from unprotected heights, bending and twisting. He had been advised to discontinue working in the construction industry by 2004.

74. Utilizing the *Idaho Occupational Employment and Wage Survey – 2013 for Southwestern Idaho,* Dr. Collins calculated that prior to the 2007 industrial accident in question, Claimant had lost 40% access to his labor market due to his preclusion from working in the construction field. She reached that figure by looking at the number of available jobs in the geographical area in question for the following categories; construction carpenter, construction

laborer, construction supervisor, equipment operator, truck driver - heavy, and truck driver - light. She eliminated all the available jobs beginning with "construction", and divided that number (363) from the total number of all available jobs in those selected categories (903), which equates to 40%.

75. Dr. Collins next concluded that Claimant is currently unable to perform any of the jobs in the previously-listed categories without accommodation, or a "sympathetic employer." She was inclined initially to conclude Claimant was totally disabled under the odd-lot doctrine, but recognized Claimant could do seasonal harvest or local driving with smaller trucks. As such, she opined that Claimant has suffered a 90% loss of access to the labor market, with 40% of that figure due to pre-existing conditions and limitations.

76. Dr. Collins next figured Claimant's loss of wage earning capacity. She consulted labor market databases, and paired that information with vocational information germane to the Claimant's local geographic area, which she assumed was the greater Mountain Home area.[7] She noted Claimant made approximately $15.00 per hour working for Employer, and up to $21.60 per hour while working at the air base. Dr. Collins felt that if Claimant took work as a seasonal harvest driver, a local delivery driver, or a school bus driver, his wages would decrease to between $8.00 and $12.00 per hour. She also felt Claimant's work would be affected by a "part year" work schedule. Factoring all these considerations, Dr. Collins determined Claimant suffered an earning capacity loss of 33 to 50 percent, depending on whether the $15.00 or the $21.60 hourly wage was used as Claimant's pre-accident earning capacity.

[7] Claimant still owns a home in Mountain Home. At the time of hearing he was living and working in Carlsbad, NM.

77. Dr. Collins ultimately concluded Claimant suffered a permanent disability of between 41.5% and 50% from his industrial accident of November 5, 2007.

78. Dr. Collins' report is given little weight due to a number of defects. The idea that Claimant was rendered little more than totally disabled by the 2007 surgery ignores Claimant's work history. Once released to work after that surgery, Claimant had little trouble finding employment. He has worked regularly from 2009 to the present. His employment included two trucking companies, the Mountain Home Air Force base, and Watson Construction in New Mexico.

79. Dr. Collins admitted under cross examination, but did not consider in her report, that under Dr. Manning's restrictions, Claimant would have suffered *no* additional disability due to the 2007 accident. She was also unaware of Claimant's functional capacity evaluation, but admitted it is something she would have considered had she seen it.

80. Dr. Collins apparently was unaware of the Oregon limitations, which included severe limits on how long Claimant could sit, and would have impacted his truck driving duties long before the 2007 accident. In fact, the only "new" limitation given Claimant since his 2007 accident is to avoid low frequency vibration, and this restriction was not given by all of the doctors who examined Claimant. Had Dr. Collins applied Claimant's previous restrictions, including the requirement that Claimant stand and stretch as much as three times per hour, Claimant would have, beginning years ago, been precluded from the same job categories Dr. Collins eliminated after the accident in question. If that was the case, Claimant would have suffered no additional disability in the 2007 industrial accident. This issue was not adequately addressed and resolved in Dr. Collins' report.

81. Dr. Collins also minimized Claimant's current employment, suggesting it is not a real job, and should be ignored when considering Claimant's disability. Her description of Claimant's current job as one where he is asked to simply "sit in a truck…pointing at stuff" (Collins' depo. p. 66.) mischaracterizes his duties, as per his sworn hearing testimony. She is likewise dismissive of his two year stint doing clerical work, characterizing it as "he can answer a phone" (*Id.)*, suggesting that was the extent of his duties at the base. Remarks like these tend to cast doubts upon the objectivity of her report.

82. Dr. Collins also failed to examine transferrable jobs outside of trucking. She made no mention of jobs not connected to driving, such as hotel front desk clerk, fast-food preparation crew member, customer service representative, car rental company representative, and various retail positions, to name a few.[8] By limiting her focus of Claimant's employment opportunities to trucking, she inflated his loss of market access. Granted, these jobs would likely not pay what Claimant was making at the time of his injury, but jobs outside of trucking should have been considered.

83. Dr. Collins also failed to consider jobs within the construction industry which Claimant could still undertake. Claimant testified he supervised crews for over twenty years. Some of those positions involved little physical labor. In fact, such is the case with his current job; supervisory skills are a key part of this employment. Dr. Collins stated Claimant could not do construction supervision without also doing the manual labor, because such supervisory-only jobs require a college degree. However, the source she cited as authority for that proposition

[8] Those examples came from a report prepared by Dr. Collins in a case involving a similarly situated Claimant, and are included herein not to suggest Claimant would qualify for each or even any of these positions, but rather to illustrate that a thorough analysis should include jobs outside of a claimant's previous employment, for which the claimant would possess the requisite skills or abilities. *See, e.g. Duncan v. Varsity Contractors and Travelers Prop. & Cas. Co.,* IC 2010-013130, 2012-001259.

also noted that on occasion sufficient experience could suffice, even without a college degree. While a lack of college education might preclude some supervisory positions, Claimant's proven track record in this area would undoubtedly open doors for him. For example, Claimant testified that his current supervisory position exists with other employers, but he would not, for the time being, qualify for these jobs. He has researched and determined other employers in the area require, not a college degree, but rather two years supervisory experience in this particular field. Every day Claimant works, he is one day closer to obtaining that requisite experience, even without a college degree.

84. Dr. Collins implied Claimant would not have his current job if it were not for a "sympathetic employer" arrangement. While that term is typically used when discussing odd-lot "total perm" situations, whatever relevance the term may have to this discussion is misplaced. Claimant testified that the job was not created for him. There is no sworn testimony that if someone other than Claimant held this position, that person's job duties would be any different than Claimant's. Claimant's son helped Claimant land the job, but the position is legitimate.

85. Defendants did not utilize the services of a vocational rehabilitation specialist. Instead they relied upon medical records and Claimant's work history to support their position that Claimant did not suffer additional disability above his impairment rating from his most recent industrial accident. Defendants list the following facts to support their proposition;

- In 2009, Claimant returned to his time-of-injury employment at the same pay rate;
- Claimant was able to return to work at the air base at the same pay rate;
- Claimant also worked a two-year clerical job at the base;
- Claimant worked for seven months for Idaho F&G at a higher pay rate and better benefits than with Employer;

- Claimant's F&G job included manual labor, operating heavy equipment, setting concrete forms, and riding to and from remote work sites;
- Claimant maintained his F&G job for seven months, until he quit to take a foreman job in New Mexico at a much higher hourly rate than any work he was doing in Idaho;
- In 2009, when released from his most recent surgery, Dr. Manning's only restriction for Claimant was a 60 pound lifting limit. Dr. Manning specifically released Claimant to full duty work driving trucks;
- Claimant passed his commercial driving license medical examination;
- Claimant admitted in his discovery answers that he "has no current limitations or restrictions."[9] (DE A, p. 15.);

86. Defendants also compare limitations placed on Claimant by various physicians previous to 2007 to those imposed after his industrial accident. They note as far back as 1990, Dr. McMartin imposed a three hour sitting limit, and then only if Claimant was able to stand and stretch every twenty to thirty minutes. He also imposed a 35 pound occasional, ten pound frequent lifting restriction, as well as limits on bending and climbing ladders. In 2004, Dr. Ordonez, after Claimant's first fusion surgery, imposed a ten pound lifting restriction, and limited Claimant to two hours driving without a break. After the 2007 fusion surgery, Dr. Manning's limitations were far less severe, as noted above. Finally, a functional capacity evaluation done on January 28, 2009 stated Claimant could perform the critical work demands of

[9] Claimant's answer to the interrogatory continued "However, stemming from the November 5, 2007 incident, Claimant can not sit for long periods and endures chronic pain, which cause him difficulty at work and in this personal life."

his truck driving job with Employer, with the exception that Claimant could not sit for ten hours per workday.

87. Utilizing the facts and records stated above, Defendants argue Claimant has not lost access to the labor market, as he was released to trucking work by his surgeon. He has not lost wage earning capacity for the same reason, and in fact is currently earning nearly twice as much as his time-of-injury wage.

88. Defendants' position relies on two main prongs; first Dr. Manning placed no substantial restrictions on Claimant, and released him to full duty with Employer. Second, the restrictions placed on Claimant by other physicians after his 2007 surgery were generally no more severe than those imposed on Claimant long before the accident in question. Therefore, Claimant suffered no additional disability in 2007.

89. On paper, Defendants' arguments make sense. However, in this case the effects of Claimant's 2007 surgery have had time to come to light in the real world. Claimant has been working for over five years post surgery, and has established a track record of what he can do and what he can not.

90. Claimant's most significant limitation since he returned to work is sitting/riding/driving for long periods of time. His complaints are in line with physician predictions, and his FCE.[10] This complaint only surfaced after his most recent low back surgery.

91. It is true that since 1990 doctors have restricted Claimant from sitting for prolonged periods. Historically, Claimant was able to tolerate sitting in excess of the restrictions

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[10] Defendants seem to imply the FCE allow Claimant to sit *up to* ten hours per day. This is not accurate; it simply points out that one requirement of Employer's trucking jobs require drivers to sit for up to ten hours per workday, and Claimant can not meet that requirement. The FCE overview stated Claimant could sit for 3 to 4 hours with breaks as needed.

placed on him. He may have had physician-imposed restrictions, but he was not restricted in what he could do as far as his duties for Employer, until the accident of November 5, 2007.[11] Unfortunately, after his 2007 surgery, Claimant can no longer tolerate sitting for hours at a time.

92. Claimant's inability to sit for several hours without changing positions precludes him from certain jobs which were available to him prior to his industrial accident of 2007. While he is currently employed and suffering no wage diminishment from his time-of-accident job, Claimant's universe of jobs has shrunk due to his most recent back injury. He can no longer do long haul trucking work, nor can he operate heavy equipment or other machinery which vibrates, jostles, or shakes him. Claimant's future ability to engage in gainful activity is decreased.

93. Claimant has not suffered a loss of wage-earning capacity. He currently is making $28.00 per hour, which is far more than his time-of-injury wage. There is no indication Claimant is in danger of losing that job in the foreseeable future. However, should that job come to an end prior to his retirement, Claimant is still able to operate light trucks. Dr. Collins' report lists an average wage for light truck drivers to be approximately $23.00 per hour. Construction supervisor, another job Claimant is qualified to do, pays approximately $21.00 per hour. Jobs at the air base pay in the range of Claimant's time-of-injury wage, and Claimant has preferred access to those jobs due to his veteran status and prior work history there. Claimant can also do seasonal work, but it is unlikely he will need to resort to such jobs as his sole source of income, given his proven ability to find work at more suitable wages.

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[11] Claimant testified he understood the restrictions to be for the period of recovery, and he could work to whatever level his body tolerated thereafter.

94. Claimant has suffered a permanent disability in excess of PPI, as defined by statute.

Apportionment

95. Idaho Code § 72-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

96. Under I.C. § 72-406 and *Page v. McCain Foods, Inc.,* 145 Idaho 302, 179 P.3d 265 (2008), where apportionment is at issue, a two step analysis must be employed. First, Claimant's disability must evaluated in light of all his physical impairments resulting from the industrial accident, and any preexisting conditions. Thereafter, the amount of permanent disability attributable to the industrial accident must be apportioned.

97. The record is clear that Claimant suffered from pre-existing conditions as regards his lumbar spine which constitute a pre-existing physical impairment. Claimant had four previous lumbar spine surgeries, which resulted in substantial disability payments. Claimant has suffered additional disability from the subject accident, as discussed below. Based upon the following analysis, Claimant suffered a 50% disability in excess of impairment from all relevant physical impairments and conditions, both pre-existing and those caused by the industrial accident of November 5, 2007.

Pre-existing physical disability

98. Dr. Collins opined Claimant's pre-existing loss of labor market access was 40% based on her belief he could no longer perform any construction activities, including supervisor. While there may be some construction supervisor jobs for which Claimant would qualify, given

the relatively low number of available supervisor jobs (96) in Southwestern Idaho, it is unlikely Claimant's pre-existing loss of job access percentage would change significantly if those supervisor jobs not requiring significant construction labor were removed from the total. A 40% pre-existing disability figure is reasonable, and adopted herein.

Current accident physical disability and apportionment

99. Claimant is precluded, by his own admission and the evidence, from driving older, rough-riding trucks, long haul driving requiring sleeping in the truck, and heavy equipment operation on a continuous basis. He admits he can drive newer trucks with smooth rides, so long as he does not sleep in them. He also admits there are other jobs, and work activities such as those he did for F&G (without the long truck rides) which Claimant could still do. Those jobs would reduce Claimant's loss of job access accordingly. Of course, if Dr. Manning's opinion is taken at face value, Claimant has suffered no disability from the subject accident. While it is clear Claimant has indeed lost some job access from his most recent industrial injury, that number is far less than opined by Dr. Collins, yet more than argued for by Defendants. Considering all the factors, and the availability of suitable jobs in the Southwestern Idaho market, Claimant has suffered an additional 10% loss of access to the job market by the November 2007 industrial accident.

100. As of the time of hearing, Claimant suffered a 50% disability in excess of impairment from all relevant physical impairments and conditions, both pre-existing and those caused by the industrial accident of November 5, 2007. Apportionment is proper in the following ratio; 40% to pre-existing conditions, and 10% in excess of impairment to the subject accident.

ATTORNEY FEES

101. Claimant has not demonstrated an entitlement to attorney fees under Idaho Code § 72-804. Defendants' conduct was not unreasonable.

CONCLUSIONS OF LAW

1. Claimant suffered personal injury arising out of and in the course of employment on or about November 5, 2007.
2. Claimant is not entitled to additional medical or temporary disability benefits beyond those previously paid.
3. Claimant is entitled to 3% whole person PPI benefits, which appear to have been previously paid.
4. Apportionment under Idaho Code § 72-406 is appropriate.
5. After applying Idaho Code § 72-406 apportionment to the facts, Claimant is entitled to PPD benefits of 10% exclusive of PPI.
6. Claimant is not entitled to an award of attorney fees under Idaho Code § 72-804.

RECOMMENDATION

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

DATED this 8th day of January, 2015.

INDUSTRIAL COMMISSION

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 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:

CLINTON MINER
4850 N ROSEPOINT WAY STE 104
BOISE ID 83713

NEIL MCFEELEY
PO BOX 1368
BOISE ID 83701

_____/s/_____

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAY BLUEMER, Claimant, v. CORDER, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2007-038506** **ORDER** **Filed January 9, 2015**

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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 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 suffered personal injury arising out of and in the course of employment on or about November 5, 2007.
2. Claimant is not entitled to additional medical or temporary disability benefits beyond those previously paid.
3. Claimant is entitled to 3% whole person PPI benefits, which appear to have been previously paid.

4. Apportionment under Idaho Code § 72-406 is appropriate.

5. After applying Idaho Code § 72-406 apportionment to the facts, Claimant is entitled to PPD benefits of 10% exclusive of PPI.

6. Claimant is not entitled to an award of attorney fees under Idaho Code § 72-804.

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

DATED this 9th day of January, 2015.

INDUSTRIAL COMMISSION

/s/
R.D. Maynard, Chairman

Recused
Thomas E. Limbaugh, Commissioner

/s/
Thomas P. Baskin, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2015, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

CLINTON MINER
4850 N ROSEPOINT WAY STE 104
BOISE ID 83713

NEIL MCFEELEY
PO BOX 1368
BOISE ID 83701

_____/s/_____

jsk