

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROY GREEN,

Claimant,

v.

ROY GREEN, dba ST. JOE SALVAGE,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL  
INDEMNITY FUND,

Defendants.

**IC 2006-007698**

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

**Filed January 29, 2014**

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in St. Maries on August 21 and 22, 2012. Claimant was present at the hearing and represented by Starr Kelso of Coeur d'Alene. Eric S. Bailey of Boise represented Employer and Surety (referred to collectively as Surety), and Thomas W. Callery of Lewiston represented the Industrial Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence and five post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on March 21,

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1**

2013. Upon Referee Just's retirement from the Commission in April 2013, the case was reassigned to the Commissioners.

### **ISSUES**

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

1. Whether Claimant's condition is due in whole or in part to a pre-existing or subsequent injury or condition;
2. Whether and to what extent Claimant is entitled to benefits for:
  - a. Medical care;
  - b. Temporary partial and or temporary total disability (TPD/TTD);
  - c. Permanent partial impairment (PPI); and
  - d. Disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine;
3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
4. Whether ISIF is liable under Idaho Code § 72-332; and, if so,
5. Apportionment under the *Carey* formula; and
6. Whether Claimant is entitled to attorney fees under Idaho Code § 72-804.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he is totally and permanently disabled as an odd-lot worker due, at least in part, to his 2006 industrial injury to his cervical and lumbar spine. He primarily relies upon the opinions of Dr. Dirks, his treating orthopedic surgeon, as well as those of Dan Brownell, vocational consultant. Claimant does not advance any arguments regarding ISIF

liability. Claimant also asserts he is entitled to an award of attorney fees for Surety's unreasonable adjustment of his claim.

Surety contends that Claimant suffered no permanent impairment (and, therefore, no disability) due to his 2006 industrial injuries and, further, that Claimant is not totally and permanently disabled. In the event the Commission disagrees on both of these issues, then Surety asserts that ISIF is liable for 57% to 67% of Claimant's benefits because Claimant's total and permanent disablement is due to a combination of Claimant's 1) pre-existing permanent impairments due to prior injuries to his cervical, thoracic and lumbar spine, both of his upper extremities and both of his lower extremities, and 2) the cervical and lumbar injuries Claimant sustained in his last industrial accident in 2006. Surety seeks findings that Claimant's pre-existing impairments were manifest, constituted subjective hindrances to employment, and "combined" with injuries sustained in Claimant's last accident such as to trigger ISIF liability. Surety also seeks a credit for overpaying temporary disability benefits.

ISIF joins Surety in maintaining that Claimant is not permanently and totally disabled under either the 100% method or the odd-lot doctrine. However, if the Commission finds that he is, then ISIF contends it is nevertheless not liable because 1) the evidence fails to establish Claimant had any pre-existing permanent impairments that meet the first three requirements of the *Dumaw* test, and 2) any pre-existing impairment did not combine with Claimant's 2006 industrial accident to cause total and permanent disability.

Surety and ISIF both rely upon the vocational opinions of Nancy Collins, Ph.D.

### **OBJECTIONS**

All pending objections preserved in the deposition transcripts are overruled.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The pre-hearing depositions of:
  - a. Claimant dated January 5, 2007 and February 20, 2009;
  - b. Michael Ludwig, M.D. dated January 5, 2007;
  - c. Bret Dirks, M.D. dated December 23, 2004; and
  
2. The testimony taken at hearing of:
  - a. Claimant;
  - b. Robby Macklin;
  - c. Randy Reynolds;
  - d. Dewey Shawver;
  - e. Shelby Green;
  - f. Wesley Green;
  - g. Mike Roland;
  - h. Dan Brownell; and
  - i. Nancy Collins, Ph.D; and
  
3. Joint Exhibits 1-91 submitted after the hearing, which consist of the following exhibits admitted at the hearing:
  - a. Claimant's Exhibits 1-59;
  - b. ISIF and Employer's Exhibits 1-32; and
  - c. Employer's Exhibits 1-12; and
  
4. The post-hearing depositions of:

- a. Nancy J. Collins, Ph.D. taken December 27, 2011;
- b. Carrie Nordin taken October 5, 2012;
- c. Don Williams, D.O. taken September 17, 2012; and
- d. Bret Dirks, M.D. taken September 18, 2012.

After having considered all the above evidence and briefs of the parties, the Commission renders the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

#### ***PRE-INDUSTRIAL INJURY VOCATIONAL AND MEDICAL HISTORY***

1. Claimant was 53 years of age at the time of the hearing and resided in St. Maries, the seat of Benewah County. He was 46 at the time of his relevant industrial accident in 2006.
2. Claimant left high school after the 11<sup>th</sup> grade (in 1976) to go to work to help support his parents. He later obtained a GED. He has no further formal education.
3. While in high school, Claimant began working at a service station where he changed oil, pumped gas, checked tires, filled propane tanks, and performed other service station work. He left to work in saw mills, including the Potlatch saw mill.
4. In 1980, Claimant was incarcerated for grand larceny after he cut cedar trees from federal land and sold them. He testified that he did it to support two families of cousins who were starving. Claimant has had no other problems with the law. While he was incarcerated, he got his GED and did some teaching. Later, in 1981, Claimant took a job operating a Caterpillar tractor (Cat).
5. Claimant's pre-existing medical history is long and complicated.

6. In 1981, Claimant underwent cervical imaging that, according to Drs. Westbrook, Zoltani, and Barnard, evidenced some sort of neck injury. (No accompanying medical records were available.)

7. In 1982 and 1983, Claimant worked in Alaska as a night shift foreman on a fish butchering line. He also ran a forklift and organized cold storage, among other things. In addition, Claimant performed some electrical work and “engineered a fishing boat.” JE-339.

8. In 1984, Claimant was seriously injured when a choker belt struck him in the low back, causing him to fall down a mountainside. Claimant was off work for 245 days in recovery. With assistance from the Industrial Commission Rehabilitation Division (ICRD), Claimant received on-the-job training with CC Services, a vehicle repair shop, but he soon left to take another logging job because the pay was too low. Claimant testified that he made a full recovery and returned to logging without further difficulties.

9. Thereafter, Claimant began working as a sawyer and operator of logging equipment including skidders, Cats and log processors, among other machines. Notably, he ran Mike Roland’s salvage logging operation for several years, during which he also logged the timber he used to build his own house.

10. In 1987, Claimant injured his neck and jaw when he was involved in a rollover skidder accident. He initially reported symptoms including right arm and hand pain which his physician ultimately deemed to be unsupported by findings evidencing true neurologic deficits in sensation. Claimant received conservative treatment, including physical therapy (which worsened his symptoms) and medications (including Flexeril, Tylenol 4 and Motrin 800).

11. As time passed, Claimant developed additional symptoms including pain in his right scapula and shoulder, paresthesia in his right upper extremity (RUE) without radiation, and low back pain. He then developed pain in both upper extremities with spasm in his left posterior cervical dorsal muscles, crepitus in his neck and upper back, and neurologic complaints without objectively identifiable source. Claimant's complaints grew to include ear-ringing (worse with a wide open mouth), but his neck and shoulder symptoms remained his worst problems. Claimant also reported temporomandibular joint (TMJ) symptoms that Dr. Westbrook could not connect to an objectively identifiable injury. In addition, Claimant reported his arms would fall asleep if he slept on his back and that he could not carry a half gallon of milk with his right arm because it was too heavy, among other intensifying symptoms, all of which Claimant attributed to the skidder rollover.

12. A panel evaluation by Drs. Powell and Clark on February 29, 1988 produced opinions that Claimant's subjective complaints were out of proportion to the (lack of) objective findings. The panel returned Claimant to work with no impairment and no restrictions. Nevertheless, Claimant continued to report symptoms and obtain medical treatment. In March 1988 Claimant advised Dr. Westbrook that he intended to pursue the matter in the courts. In April 1998, Dr. Lea opined that Claimant's bizarre complaints were likely due to psychophysiologic factors aggravating his pain, but he later opined that EMG findings were consistent with mild right carpal tunnel syndrome. In May 1988, a functional capacity evaluator opined Claimant exaggerated his pain and recommended, among other things, a psychological assessment. Thereafter, Claimant sought treatment from Dr. Gould, a chiropractor, and Drs. Hopwood and Henriksen, who recommended more treatment for cervical strain, chronic

neck pain, and left carpal tunnel syndrome. Dr. Henriksen and Dr. Gould advised Claimant not to return to skidder operating.

13. In 1988, Dr. Gould, a chiropractor, opined that Claimant had weakness at L4-5 that would likely result in a disc problem if not stabilized, and thinning at L5-S1.

14. In approximately October 1988, Claimant submitted a lump sum settlement agreement (LSSA), which was approved by the Commission on November 10, 1988. Claimant's settlement included a general 5% whole person PPI. The LSSA states that Claimant alleged he incurred injuries to his head, neck, back, knee, fingers, shoulder and right arm, specifically including acute strains of his neck and dorsal areas, mild concussion, and residual tinnitus. In addition, Claimant received \$6,147.18 via the LSSA for retraining (presumably truck driver training recommended by ICRD). For whatever reason, Claimant did not follow up after receiving his settlement funds. He testified at the hearing that he did not pursue this option because he could not afford it, he was not interested in a sedentary job, and furthermore, he felt uncomfortable (fearful) with the idea of driving a big rig truck. However, ICRD records indicate that Claimant, at the time, told the consultant that he was very interested in truck driver training and intended to pursue it. By December 9, 1988, Claimant still had not returned to work; however, he ceased obtaining treatment for neck, TMJ, or back conditions. Claimant returned to logging and testified that he was able to perform his job without difficulty.

15. In approximately 1992, Potlatch contracted Claimant to log its property. Claimant hired a sawyer, obtained a business loan and workers' compensation coverage, moved his Cat trailer to Mica Meadows, and went to work. He named his sole proprietorship St. Joe Salvage.



16. Over time, Claimant acquired a log processor, a crane, and a bulldozer, among other equipment. Claimant's work consisted of salvage and cleanup, almost exclusively for Potlatch. "I go through - - they give me areas that the wind blows trees down, or that we have bug kill, and I just pretty much - - they start me in an area and I work my way." 2007 Cl. Dep., p. 8.

17. Potlatch provided 90 to 95% of the logging salvage work for St. Joe Salvage. Claimant did not need to bid jobs; Potlatch contacted him when logging work was available and paid just under \$40 per ton delivered to the mill. After expenses, such as a 34% charge for loading and hauling, fuel costs, payroll, payroll taxes, and workers' compensation, Claimant figured he averaged \$314 or \$340 (apparently he could not remember which) per day over five or six years.

18. Claimant developed bilateral carpal tunnel syndrome while working for Mr. Roland's salvage logging operation. He underwent bilateral corrective surgeries in 1993. The surgeries were ultimately successful. Claimant testified he fully recovered from his carpal tunnel conditions, with no residual difficulties and no PPI.

19. In August 1995, Claimant separated his right AC (shoulder) joint while running down a hill with chokers, when the line tangled and abruptly stopped, yanking his arm. Claimant underwent surgery by Dr. Cody in Spokane. The surgery was successful and Claimant returned to work without permanent restrictions or pain.

20. In February 2000, Claimant was diagnosed with a hernia. He underwent hernia repair surgery, after which he returned to logging work. Complications with the repair mesh ensued, and Claimant underwent a second hernia surgery. Following this procedure, Claimant

fully recovered without any residual symptoms and returned to logging. No related PPI or medical restrictions were assessed.

21. On September 25, 2001, Claimant separated his left AC joint pulling on a winch line. At his 2009 deposition, Claimant described being hit by a root wad (stump with roots attached) rolling down the mountain. At the hearing, however, Claimant described the accident differently. “Running down the mountain with a choker and the winch came loose and stopped, and it just yanked you [*sic*].” TR1, p. 80. “[S]o I’m kind of just like hanging by one arm, but you [*sic*] don’t know it’s coming, so...[y]our [*sic*] collar bone just pops out of that socket right there and pops up.” *Id.* Claimant also described wrapping his collar bone with an Ace bandage to keep it stable, and using his other arm at work until breakup in March or February because he did not want to take time off from work to have it repaired. Apparently, Claimant did not accurately remember which of his shoulder injuries occurred first. In any event, on March 14, 2002, Claimant underwent left AC repair surgery with Dr. McNulty. The surgery was successful. Claimant returned to work without restrictions or residual pain. The date of Claimant’s return to work is not discernible from the record.

22. On January 14, 2003, Claimant reported to William Ganz, M.D., a neurosurgeon, that he had injured his mid-back limbing a tree on April 29, 2002:

I was just cutting a big bull pine limb, pulling up on it, because the way it was bent, I couldn’t cut it down, I had to pull up. And it felt like somebody shot me right in the back and paralyzed me. And I ended up in a puddle on the ground. And three days later I could work and I went back to work. I laid on the couch for three or four days, though.

TR1, p. 82. Claimant was eventually diagnosed with a herniated disc with spurring at T12-L1, for which Dr. Ganz performed a T12-L1 fusion surgery in January 2003. After conducting a

record review, Dr. Weiss opined that Claimant's medical records did not support his claim that his back problem was the result of an April 2002 industrial accident. Claimant first reported back pain in May 2002; however, at that time, he attributed it to a November 2001 accident. Also, Dr. Weiss opined that Claimant's long history of arthritic problems in his neck and shoulders, long smoking history, the suggestion of a chronic degenerative process not yet ruled out, and Dr. Ganz's intraoperative findings of significant osteophytes suggesting an underlying degenerative process all complicated the question of what brought on Claimant's disc herniation. As well, after reviewing Claimant's prior records that were not available to him at the time he performed surgery in 2003, Dr. Ganz became suspicious that Claimant's injury was due to natural degeneration, and not an April 2002 injury.

23. In recovery, Claimant wore a back brace for four months. Dr. Ganz initially restricted Claimant from heavy lifting and bending on a regular basis; however, Claimant did not heed these restrictions. "Well, that's impossible. That entails tying your shoe. You know? So I just ignored him and took my time and got better because I could." TR1, p. 85.

24. Claimant returned to work after about four months. As detailed in the Safety Video section below, Claimant testified inconsistently in these proceedings with respect to his actual abilities following his thoracic spine surgery. However, he consistently testified that he does not believe he was employable by anyone else as a logger following his 2003 spinal fusion, regardless of his actual abilities, because of the perception that he was an unreasonable insurance risk. Claimant believed that, had he not been running his own logging business, he could have obtained employment as a mechanic or mill worker running a debarker, forklift, or other equipment in 2003.

25. Claimant's children, Shelby and Wesley, addressed Claimant's condition following his 2003 surgery. Shelby did not know how her dad did after his 2003 back surgery because she was only 10 years old at the time. Wesley was 11 years old at the time. He recalled that his dad worked just about every day, but when he got home he mostly just relaxed. "He wouldn't do as much after that." TR2, p. 17. Dr. Williams (see below) recalled that Claimant told him he no longer did any heavy work after the 2003 surgery.

26. Dewey "Duke" Shawver, a long-time salvage logger in the St. Maries area who has worked with Claimant and respects his work ethic and logging abilities, agreed that Claimant was not employable as a logger following his 2003 surgery.

27. No PPI has been assessed to Claimant's thoracic spine condition, and Dr. Ganz released Claimant without restrictions in 2004. On the other hand, Dr. Dirks endorsed restrictions for Claimant following his 2003 thoracic spine surgery of no heavy lifting and limited bending. Dr. Ludwig agreed that he would assess similar restrictions, but deferred to Dr. Ganz in Claimant's case.

28. Claimant received a check for temporary disability benefits related to his surgery with Dr. Ganz because he had been required to miss ten weeks of work. Claimant testified that he refused the check, however, because he had saved enough money to cover his wage loss. "Associated Loggers, yeah. They told me, "Well, you got 10 weeks coming." And I said, "Well, I don't need it, man. Put it somewhere else." They thought I was crazy." TR1, pp. 84-85.

29. MRI and other imaging techniques in 2003 and 2004 revealed diffuse disc bulges at every lumbar level, and other pathology, but no spinal impingement. By November 2004, Claimant's L4-5 diffuse posterior disc bulge was accompanied by moderate bilateral apophyseal

spondylosis and ligamentous hypertrophy, contributing to mild central canal stenosis and mild bilateral neural foraminal narrowing. Also, a November 2004 EMG nerve conduction study produced findings consistent with right-sided S1 radiculopathy, according to Dr. Dirks, even though his lumbar spine MRI revealed no impingement.

30. In 2004, Claimant fractured his right calcaneus showing his son how (not!) to jump a motorcycle. He worked in a cast for a period before fully recovering without work restrictions or limitations. Following this event, however, Claimant cut down on his motorcycle-riding. He also contracted pneumonia, from which he fully recovered with no residual effects.

31. In November 2004, Claimant hit his head while getting into the cab of his dozer. Dr. Dirks obtained an MRI on November 24, 2004 that identified minor disc bulging and minor arthritic changes, but no frank disc herniations or compression on the spinal cord. "I did not see anything that was surgical or might explain any of his pain complaints." 2004 Dirks Dep., p. 10. Further, he opined that any future care related to Claimant's neck would be due to a new accident. Claimant's industrial claim related to this injury was settled by LSSA approved January 27, 2005. No related PPI or medical restrictions were assessed.

32. Claimant also complained of numbness in his feet in 2004 that Dr. Dirks opined could not be explained by his MRI findings. "It may be residual problems from the previous surgery and herniated disk problems." 2004 Dirks Dep., p. 12. Claimant also reported persistent pain down his back and into his legs with numbness, increased electrical shocks down the back of his thighs, calves, and into his heels (right worse than left), incontinence, sleeping problems, and tingling with motion, which Dr. Dirks opined were attributable to his injuries and surgery at T12-L1, from which he had reached medical stability.

33. Claimant settled his industrial claim related to his 2002 (thoracic spine) and 2004 (cervical spine) injuries by LSSA approved January 27, 2005. Therein, Claimant acknowledged PPI of 5% of the whole person due to his 1984 back injury.

34. In 2005 and 2006, Claimant was awarded the Potlatch Logger of the Year Award. To Claimant's knowledge, no one else has been twice honored with this distinction.

35. At the hearing, Claimant testified that there isn't much salvage work left anymore because "they're" now "[j]ust clear cutting everything." TR1, p. 170. Mr. Shawver agreed. "Getting to be less and less all the time." TR1, p. 214.

36. Claimant's tax returns show his gross receipts/adjusted gross income (AGI) from 2001 through 2008:

- 2001 - \$187,349 / \$53,286
- 2002 - \$204,757 / \$41,052
- 2003 - \$346,596 / \$17,180
- 2004 - \$303,757 / \$60,107
- 2005 - \$200,288 / \$27,345
- 2006 - \$150,177 / \$42,321
- 2007 - \$244,396 / \$70,295
- 2008 - \$187,673 / \$50,016

**SAFETY VIDEO: JUNE 25, 2006**

37. On June 25, 2006, just eight days before his industrial accident, Claimant and his employee made a Safety Video that captured images of Claimant doing salvage work. He is featured climbing, jumping down from logs, walking across logs, and falling and limbing trees

with a large chainsaw in a canyon, as well as driving and operating a log processor, among other things. In 2009, Claimant testified that, immediately before the July 3, 2006 accident, he could do everything he used to do, except install a winch line on a Cat. "I could run and jump. Everything. Ride motorcycles. I could do anything I wanted to." JE-345. He said he could still hook a tree, set chokers, saw down and skid trees, limb trees, and carry buckets of oil, and he did not feel at all disabled. He recalled that Dr. Ganz told him to avoid only extremely heavy lifting, which he did:

Q. And what do you mean by extremely heavy lifting?

A. Oh, like putting a winch line on a Cat. Eighty, ninety, hundred pound winch line.

Q. So you did avoid that?

A. Yes, I did.

Q. Anything else?

A. No.

Q. Did the doctors recommend that you get out of logging?

A. Yeah, possibly. I don't remember.

Q. Did you ever think about getting out of logging after the T-12 L-1 surgery?

A. No, sir.

JE-345.

38. At the hearing, Claimant contradicted his 2009 testimony:

Q. ...Does the video accurately reflect what you were doing on a regular eight-hour-a-day basis?

A. Well, no. I didn't - - that was a - - I didn't saw much. I mostly run the Cat. I sawed maybe two hours a day, if that.

Q. Okay. And was there a reason - - was the reason because your employee did most of the falling?

A. Well, that, and the fact that it did bother me. Because you have to bend over to cut the stump or get on your hands and knees or on your knees.

Q. So would it be fair to say two hours a day you did the activities in the video and the rest of the time you would work on the Cat or the log processor?

A. Not every day. Some days I didn't even saw.

Q. Some days you did no sawing?

A. Yeah.

Q. Would there be some days you did eight or ten hours of sawing?

A. No. Never. Two is about tops.

Q. Did you ever think about getting out of logging after the T12-L1 surgery?

A. No, not really. I figured I'd give it a shot anyway and see if I could do it.

Q. Your testimony is that you avoided the sawing part of the job after your T12-L1 surgery. Correct?

A. Yeah.

TR1, pp. 161-162.

**SUBJECT INDUSTRIAL ACCIDENT: JULY 3, 2006**

39. On July 3, 2006, Claimant was working alone when he was struck on his hardhat by a falling tree. Claimant's employee had previously cut the tree that hit Claimant, but left it standing. The draft created by a tree Claimant had just fallen apparently knocked the rogue tree loose, unbeknownst to Claimant. Fleeing the tree he had just cut, Claimant ran smack into it. A nearby stump prevented the tree from crushing Claimant. When he came to, Claimant wriggled out from under the tree. His legs were tingling and numb. He couldn't lift his chainsaw. He



made his way to his pickup and drank a soda. When he tried to walk, he knew he had seriously injured himself. "I was clumsy and my legs were like - - it was like, I'm done." TR1, pp. 102-103. Claimant drove to the emergency department at Benewah Community Hospital in St. Maries.

#### **POST-INDUSTRIAL INJURY MEDICAL CARE**

40. **July 3, 2006 initial evaluation (Dr. Katovich).** At Benewah Community Hospital, Claimant was examined by John R. Katovich, Jr., M.D. Claimant reported he had been momentarily stunned by the accident, but he did not believe he had lost consciousness for a significant period of time, and he remembered everything after the event. He had a 9/10 headache, as well as pain in his neck, elbow, and back. He was taking Neurontin daily. He smoked two packs of cigarettes and drank a six pack of beer per day. On exam, Claimant had "no evidence of ecchymosis, swelling or anything on the scalp and occiput, evidently to the credit of his hard hat. Tenderness to the neck but full range of motion." JE-2. Claimant did have a small bruise on his left side at the pelvic brim. A cervical x-ray revealed degenerative changes, but no fracture. Dr. Katovich diagnosed multiple contusions, prescribed medications (Flexeril and Lortab), took Claimant off work for 24 hours, and recommended follow-up with his primary care physician.

41. **July 7, 2006 follow-up (Dr. Ludwig).** Claimant was certain he had injured his back, but he felt Dr. Katovich had not properly evaluated him for a spinal injury. Claimant testified at the hearing for the first time that, the next day, he had clear fluid running out of his ears, so he called Mary Cronin, adjustor. She approved an evaluation by Dr. Ludwig, a physiatrist, in Coeur d'Alene.

42. Dr. Ludwig evaluated Claimant on July 7, 2006. Claimant reported 9/10 pain in his back, left leg and neck, worse while standing and looking up/down, walking or bending forward. He also reported bladder incontinence, but no worse than before the tree hit him. There is no mention of ear drainage in these or any other medical records. Claimant was taking three Neurontin pills per day. On exam, Dr. Ludwig noted no gross ecchymosis over the area of impact, pain localized to the left temporal region, diffuse tenderness over the cervical spine, tenderness over the vertebral prominence, no evidence of instability, good bilateral upper limb strength, lower extremity strength testing inhibited by pain, diminished Achilles reflex on the right as compared to the left, mildly positive adverse neural tension to seated slump exam,<sup>1</sup> tenderness over his lower lumbar spine “well inferior to the area of his previous surgery,” no rash or erythema, intact distal pulses and no edema or swelling. Dr. Ludwig reserved his diagnosis, but recommended cervical and lumbar MRIs due to the nature of Claimant’s recent trauma, his vague symptoms including pain, his recurrence of problems similar to those he experienced prior to his 2003 spinal fusion surgery, and his asymmetric reflexes, which Claimant could not identify as either pre-existing or new. In the meantime, Dr. Ludwig returned Claimant to work, restricting him from overhead work, bending and lifting no more than 30 pounds.

43. **July 11, 2006 lumbar spine MRI.** The radiologist’s report indicates Claimant had lower extremity pain, worse on the left, and that Claimant’s March 17, 2004 lumbar spine MRI (or at least its report) was available for comparison. The radiologist noted four findings in his “Impression” section. At L4-5, a left lateral disc extrusion was compressing the left L4 nerve

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<sup>1</sup> Dr. Ludwig described the seated slump exam: “The patient is in a seated position and with cervical flexion and concomitant extension of a leg at a time. They have varying degrees of pain and reproduction of back pain, leg pain with extension of the knee. A grossly positive test is reproducible at the same angle usually corresponding to exact symptoms. A mildly positive test usually refers to some diffuse pain either nonlocalizing to a nerve distribution or with varying reproducibility.” Ludwig Dep., p. 42.

root, with a superimposed disc bulge now compressing the thecal sac to 6-7 mm. There was worsening at L3-4 with a disc bulge compressing the thecal sac to 6 mm and moderate foraminal narrowing. There was mild worsening at T10-11 with a left paracentral disc protrusion that might be contouring the thoracic cord. Finally, the radiologist noted a mild left lateral disc protrusion at L5-S1.

44. **July 11, 2006 cervical spine MRI.** The radiologist's report indicates Claimant had neck pain following his industrial injury and that Claimant's July 3, 2006 cervical spine x-ray film and November 24, 2004 cervical spine MRI report were available for comparison. The radiologist noted three findings in his "Impression" section. At C5-6 Claimant had an interspinous ligament sprain with adjacent paraspinous musculature strain involving C4-5 without malalignment or evidence of longitudinal ligament disruption. Also at C5-6, a broad-based right paracentral disc bulge causing mild contouring of the cervical cord was identified, as was minimal spinal stenosis. There was also multilevel facet arthropathy and variable-to-moderate foraminal narrowing at other cervical levels.

45. **Dr. Ludwig's initial diagnoses.** Claimant followed up with Dr. Ludwig on July 12, 2006. Claimant's Achilles reflexes were symmetric on this exam, and he had tenderness over his mid cervical spine. Given Claimant's imaging results and his exam findings, Dr. Ludwig diagnosed a C5-6 ligament sprain and a left L4-5 disc extrusion, consistent with his left leg complaints, along with mild progression of the same degenerative changes demonstrated on his November 2004 lumbar spine MRI. As to Claimant's left leg complaints, Dr. Ludwig clarified in his deposition that Claimant's reported pain did not follow the typical dermatomal pattern associated with compression of the L4-5 nerve root. The typical expectation is pain in

the lateral hip and anterior lateral thigh, extending across the medial knee and medial ankle. However, Claimant reported pain down both the back and front of his thigh. Dr. Ludwig recommended relative rest for Claimant's neck, which he believed would heal on its own.

46. For Claimant's lumbar disc extrusion, Dr. Ludwig recommended a diagnostic/therapeutic transforaminal epidural steroid injection. A positive response to the injection would indicate an inflammatory component to Claimant's pain, signaling an acute (within six months) injury. Chronic conditions, on the other hand, like chronic herniations, are associated with less inflammation and do not respond well to steroid injections. "Lack of response to the injection is also helpful in that it may not be the structure causing the pain." Ludwig Dep., p. 59. "Pain could be coming from other structures; bone, muscle." *Id.* In response to the injection, Claimant had "[m]inimal improvement, at best." *Id.*, p. 56. Dr. Ludwig released Claimant to modified duty work as described above, and prescribed 70 more Lortab pills for pain control.

47. On July 27, 2006, Dr. Ludwig noted Claimant still had pain in his neck, but his motion was improved and there was no evidence of instability or step-off. Claimant still had positive adverse neural tension bilaterally to seated slump exam and diminished sensation in a "subjective pattern in the bilateral thighs." JE-19. Dr. Ludwig recommended an EMG study to confirm whether or not there was acute axonal loss or denervation in the L4 myotomal distribution and to reevaluate Claimant's right leg. He also noted Claimant's history of underlying peripheral neuropathy diagnosed via EMG testing several years previously.

48. Claimant returned to work at some point, but he was still having trouble walking. "I tried, yes, and I - - my legs wouldn't work, and I couldn't - - I was floundering half the time."

TR1, p. 104. On July 28, 2006, Claimant was unable to get out of the way fast enough and was struck on the left arm (as he was protecting his face) by a falling tree top. Claimant's son, Wesley, testified that Claimant's arm was pretty torn up as a result. The next day, Claimant attended the Idaho State Championships at Fossil Bowl, a motorcycle race in which his son was competing. There, Claimant spoke to a nurse about his left arm swelling. She encouraged him to seek medical treatment. Surety obtained surveillance video of Claimant attending this event, among other things (see below).

49. On July 30, 2006 Claimant sought treatment for his left forearm injury. X-ray imaging showed no acute changes, and he was diagnosed with contusions and abrasions of his left forearm and wrist. Claimant's arm was placed into a sling, Norco (26 pills total) was prescribed, and Claimant was instructed to rest and ice the arm.

50. **July 29 and 30, 2006 Surveillance Video.** Surety obtained video recordings of Claimant on July 29 and 30, 2006, as he drove in his truck and attended his son's motorcycle competition. The video is of poor quality for the most part, apparently shot from a significant distance, and most of the frames are shaky. Claimant is depicted standing and walking around without a limp, talking to people, and a couple of times he bent deeply at the waist to look more closely at the engine areas on motorcycles. At one point, it appears as if Claimant is limping and the camera is shut off for no reason that is apparent from the video. Claimant is also depicted climbing a mobile stair unit, standing on it videoing the action, and sometimes sitting down on one of the steps.

51. **Social Security Disability Insurance (SSDI).** Claimant applied for SSDI benefits on July 31, 2006, alleging disability based upon a broken back and a neck injury. His

application was denied because he retained the ability to perform a wide range of medium duty jobs. Claimant either appealed or reapplied several times after this initial denial. On October 8, 2008, he was denied because he was still making management decisions for St. Joe Salvage. Around this same time, Claimant ceased operations. Following Claimant's retention of an attorney in 2009, and his subsequent non-industrial accident in 2010 (see below), his SSDI application was eventually approved.

52. **Follow-up with Dr. Ludwig.** On August 7, 2006, Claimant followed up with Dr. Ludwig. His cervical sprain was unchanged, with some stiffness but not much interference with his range of motion. He still had tenderness over his occiput and claimed he could make his legs go numb by pressing on it. With respect to his low back, Claimant had numbness and tingling in his right leg and left posterior calf and thigh. Claimant's recent EMG testing revealed no evidence of acute denervation of his left leg. On exam, Claimant's Achilles reflex testing revealed symmetric results, and he no longer demonstrated adverse neural tension to seated slump examination. Claimant walked without significant foot drop. Dr. Ludwig noted some twitching of the left medial gastrocnemius, but no edema or swelling. Claimant had a little crepitus over his posterior cervical spine to active motion, with no instability and no upper limb weakness.

53. Dr. Ludwig diagnosed, among other things, multi-level lumbar degenerative disc disease. Given Claimant's EMG results, he was uncertain whether his L4-5 herniated disc was acute. He wrote, "Interval development of a left L4-5 herniated nucleus pulposus without evidence of acute denervation. It is unclear if this actually [*sic*] from his trauma or if he had developed this in the interval." JE-22. "At this point, the L4-5 [...herniation] does not appear to

be acute in such that it is not showing any acute denervation potentials into the left leg.” JE-23. Dr. Ludwig also opined that Claimant’s cervical sprain was stable. He opined that Claimant would reach medical stability from his July 3, 2006 injuries in about a month, prescribed pain medications, including gabapentin and 50 hydrocodone pills, and returned him to modified duty work. “I do feel that Roy has a number of medical problems pre-dating his on-the-job injury which are contributing to his ongoing problems including his peripheral neuropathy and known right S1 radiculopathy.” JE-23.

54. On August 24, 2006, Dr. Ludwig again evaluated Claimant. Since the last examination, Dr. Ludwig learned that Claimant obtained unauthorized refills of his prescription pain medication.<sup>2</sup> Accordingly, he ceased Claimant’s Lortab prescription and looked into Claimant’s past medical records, which evidenced 1) Dr. Lea’s opinion in April 1988 that Claimant demonstrated significant symptom amplification, and 2) left leg numbness following his 2003 spinal fusion surgery, among other things. Dr. Ludwig administered Waddell’s testing on exam, which he detailed in his report and summarized was “positive by multiple accounts.” JE-29.

55. Dr. Ludwig opined that Claimant’s cervical sprain appears acute on his July 2006 MRI, but those findings are insufficient to explain his current cervical symptoms of tingling in his hands, in his legs with motion, and when pressing on his back. Along those lines, he noted Claimant’s “motion with distraction is significantly improved as opposed to his motion during active testing.” JE-30. With respect to Claimant’s left leg numbness, “His interval MRI does show a left L4-5 disc extrusion but there is no correlation with his electromyogram findings

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<sup>2</sup> Dr. Ludwig believed at the time that Claimant had altered his prescription to obtain more narcotic pain medication. By the time of his deposition, however, the parties agreed that Claimant’s friend had admitted to altering the prescription to obtain more medication for Claimant.

and given his symptom amplification and denial of previous symptoms despite documented medical record reports of left leg numbness, I cannot say this is a new complaint given his date of injury.” *Id.* “At this point I feel that the patient is manifesting significant symptom amplification of his relatively benign injuries.” *Id.* Dr. Ludwig opined Claimant had reached maximum medical improvement (MMI), recommended an impairment evaluation, and released Claimant to modified duty work of “no significant repetitive bending or heavy lifting due to his ongoing condition of chronic S1 radiculopathy on the right as well as his history of lumbar fusion, but not due to his date of injury of 07/03/2006.” *Id.*

56. At his deposition, however, Dr. Ludwig had softened his stance. “I do not know whether or not that disc herniation occurred with his work injury dated 7/3/06 and whether or not the surgery recommended by Dr. Dirks is required for the work injury or for the preexisting condition.” Ludwig Dep., p. 34. He pointed out that disc herniations are not always due to a traumatic event, and can be due to degeneration. Although Claimant’s MRI showed an L4-5 disc herniation impacting the nerve, Claimant’s response to the diagnostic nerve block did not confirm that this was the source of his pain, and his EMG did not suggest any acute nerve damage, which Dr. Ludwig opined would be expected. “So I had nothing at that point to date his pain or the change of the disk at the L4-5 level to his date of injury. It was new since ’04. That was all I knew.” *Id.*, p. 74.

57. Dr. Ludwig did not consider somatoform disorder in diagnosing Claimant’s conditions. Somatoform disorder as “[a] pain process that is - - has a large psychogenic component not necessarily from a[n] anatomic defect or disease.” Ludwig Dep., p. 92.



58. **Dr. Ludwig's ultimate opinion.** By the end of his deposition, Dr. Ludwig opined that Claimant's L4-5 disc herniation was likely due to the 2006 industrial accident, and that the L3-4, L4-5 bi-level fusion performed by Dr. Dirks in 2007 was reasonable. His change of heart was based upon new information, including Dr. Dirks' opinion, Claimant's history of left leg radicular symptoms (indicating a chronic problem), and Claimant's pre-injury functionality as depicted on the Safety Video. "His previous level of function was - - did not appear to be significantly inhibited by his stenosis that was known to be present at that time. So being the new change being [*sic*] the disc herniation, that appears to be what was likely due to his injury dated 7/3/06." Ludwig Dep., p. 114.

59. **September 11, 2006 IME (Dr. Stevens).** On September 11, 2006, Claimant underwent an independent medical evaluation (IME) at Surety's behest by Craig Stevens, M.D., a physiatrist. Dr. Stevens reviewed medical records pertaining to Claimant's pre-existing conditions prior to examining Claimant. He apparently did not have the chart note corresponding to Claimant's initial evaluation by Dr. Katovich or Dr. Ludwig's records prior to July 12, 2006, but he did review the July 2, 2006 cervical spine x-ray films and the July 11, 2006 cervical and lumbar spine MRI films.

60. Claimant reported continuing back and neck pain.

61. On exam, Dr. Stevens noted positive Waddell's signs and nondermatomal sensory loss, among other things. Dr. Stevens found Claimant's presentation lacking in credibility:

I did note signs of malingering and symptom magnification, in particular the positive Waddell's signs as noted above with multiple inconsistencies noted on the physical examination including inconsistency of SLR, nondermatomal sensory loss, described pain and numbness of the entire left leg with grams of pressure applied to the top of his head and description of increased low back pain on various postural maneuvers that in no manner stress the low back.

JE-45. Dr. Stevens also admitted that he controlled for a possible bias against Claimant by leaving his knowledge of information in Claimant's past medical records out of his considerations:

I have come to these conclusions independent of his previous medical records which reveal multiple previous workmen's compensation claims which I feel may cause me to become biased in my approach to this evaluation. I tried to maintain an unbiased approach and come to my conclusions separately from knowledge of those previous events.

*Id.*

62. Dr. Stevens diagnosed chronic pre-existing cervical and lumbar disc degeneration and left S1 radiculopathy. In addition, he diagnosed cervical strain (temporary and now medically stable), as a result of the July 3, 2006 industrial accident, with no permanent impairment related to his industrial injury and no recommendation for further treatment. "Certainly he may eventually experience some increase in impairment as a result of his progressive lumbar degenerative disc disease but again no further impairment has occurred as a result of the date of injury of July 3, 2006." JE-46.

63. Dr. Stevens also noted, in his answers to questions posed by counsel for Surety, that Claimant's prior injuries precluded him from heavy lifting and heavy work. "Certainly it had already been established previously that the claimant not engage in heavy lifting or heavy work because of his prior injuries. It is very likely that, if the claimant were not to engage in such work, he would be less likely to have sustained cervical strains or other injuries such as occurred on the date associated with this injury." JE-46.

64. **Additional treatment sought by Claimant (Drs. Norce and Dirks).** On September 11, 2006, Claimant consulted Brian Norce, D.C., who referred him to Dr. Dirks. (As

discussed, above, Claimant had previously seen Dr. Dirks in 2004.) Dr. Dirks and his nurse practitioner first saw Claimant regarding this injury on September 18, 2006. Claimant reported long-standing pain and numbness in his right heel, for which he was taking Neurontin, as well as details concerning his industrial accident. He had some neck and elbow pain, and back pain, and he reported that his left leg just did not work anymore. Dr. Dirks' nurse practitioner diagnosed neck pain without radiculopathy ("He does have a disc bulge at C5-6, but this does not seem to be clinically significant for the patient") and back pain with a radicular component and weakness ("left leg sensory dysesthesias, longstanding in the right leg, correlating with MRI findings of disc bulges at L3-4 and L4-5 with moderate to severe neural foraminal [*sic*] as well as central canal stenosis from L3 to L5"). JE-54.

65. On September 26, 2006, Dr. Dirks recommended lumbar fusion surgery, from L3 to L5 with decompression. On October 5, 2006, Claimant left a telephone message for Dr. Dirks advising that his left leg was sore, and very weak. Claimant sought an estimate for surgery, because Surety denied benefits for further treatment. On November 10, 2006, Dr. Dirks wrote to Claimant's attorney, "Roy Green has been [*sic*] a patient of mine for quite some time....I believe his current injury in his lower back requiring surgical intervention, which would include a lumbar decompression and fusion from L3 to L5, is directly related to his worker's compensation injury that he sustained on July 3, 2006." JE-59. At his 2012 deposition, Dr. Dirks reasoned that the changes demonstrated on Claimant's July 2006 MRI, in comparison to his former MRI studies, were consistent with further injury to Claimant's lumbar spine due to a tree falling on his head in July 2006.

So if I put together the mechanism of injury, in this case the tree falling on him, the temporary relationship of that, knowing I have a previous MRI before that

does not show a herniated disc, then on a 51 percent basis or better, I have to say the accident caused the current problem and caused him to come in and see me, which culminated in the surgery.

2012 Dirks Dep., p. 20.

66. On October 4, 2006, Dr. Ludwig responded to a letter from Surety's counsel, essentially confirming opinions he set forth previously in Claimant's chart.

67. By the time of his deposition in January 2007, Claimant had two employees to assist him at work (instead of his usual one) because he had to hire someone to replace himself. Claimant testified that he had no problems driving out to the job sites or managing his business. His symptoms included peripheral neuropathy in his right foot, shocks and nerve damage in his calf from his prior injury; right-sided pain from his spine surgery; "dead" feeling left leg with pins and needles (new with the 2006 accident); and grinding noises and pain in his neck and low back.

68. Claimant never returned to manual logging work.

69. **Lumbar fusion surgery, L3 to L5 (February 21, 2007).** Following Dr. Dirks' surgical recommendation, Claimant underwent testing with Bruce Woodall, M.D., a family practitioner, to obtain medical clearance. On January 31, 2007, noting Claimant was a heavy smoker, Dr. Woodall diagnosed chronic obstructive pulmonary disease (COPD) with acute bronchitis, which he treated with Rocephin. No PPI has been assessed to Claimant's COPD. In response to Claimant's request for pain medication, Dr. Woodall prescribed 120 Lortab pills. However, he declined to undertake long-term management of Claimant's pain.

70. On February 21, 2007, Claimant underwent a bi-level lumbar fusion with decompression surgery, from L3 to L5, with Dr. Dirks. Claimant's recovery was complicated by

a staph infection at the surgical site, which Dr. Dirks successfully treated with ciprofloxacin. On April 17, 2007, Dr. Dirks referred Claimant for physical therapy. On May 17, Dr. Dirks reported Claimant was doing fine in regard to his back, but he still had “complaints of leg pain from before and he has low back pain.” JE-103. On exam, Claimant had good leg strength and was walking. Also, “He has right-sided neck pain that goes into the right arm and makes it feel like jelly,” with right deltoid, triceps, and biceps weakness on exam. *Id.*

71. **Cervical fusion surgery at C5-6 (July 16, 2007).** Dr. Dirks ordered a new cervical spine MRI, performed on May 23, 2007. The images demonstrated motion; however, the radiologist reported they revealed bony changes at C3-4, C4-5, and C5-6, as well as “moderate narrowing of the bilateral C3-C4 neuroforamen and moderate narrowing of the C5-C6 right neural foramen.” JE-104. On June 7, 2007, Claimant continued to have pain in his neck and down his right arm “since his accident.” JE-106. Claimant explained that previously, when he had neck pain, he could alleviate it by lying on a rolled-up towel. After his 2006 industrial injury, however, this procedure provided no relief. “If I lay on that towel now with stenosis, or whatever is going on in there now, I can’t - - everything goes numb.” 2007 Cl. Dep., pp. 26-27.

72. Upon review of the latest MRI, Dr. Dirks opined Claimant’s neck and right arm complaints were the result of a “right, greater than left, radicular component correlating with a C5-6 disk bulge on the right.” JE-110. Dr. Dirks recommended an anterior cervical discectomy and fusion at C5-6 with plating and cadaver bone. He attributed the need for surgery to the 2006 industrial injury.

73. On June 14, 2007, Claimant sought pain medications from Dr. Woodall. Dr. Woodall complied, cautiously, by prescribing 60 Lortab pills and 10 Duragesic patches,

along with Baclofen and Lyrica. “My impression is that patient is probably reliable with his medications, he is not coming in repeatedly with conflicting demands.” JE-134. Dr. Woodall also strongly encouraged Claimant to quit smoking in order to prevent progression of his COPD and reduce his chronic pain. Dr. Woodall again provided pain medication to Claimant on June 28, 2007 (100 Norco 7.5 mg., 1-2 every six hours as needed, or 100 per month, with two refills). “Patient understands that I am only providing analgesics until Dr. Dirks gives him definitive treatment.” JE-135.

74. On July 16, 2007, Claimant underwent cervical fusion surgery, at C5-6, with Dr. Dirks. A week later, Claimant sought stronger pain medication from Dr. Dirks for continued right arm pain and mostly posterior bilateral shoulder pain. Claimant was also experiencing numbness into his hands. Dr. Dirks prescribed Norco 10. On August 7, 2007, Claimant sought pain medication from Dr. Woodall, who prescribed MS Contin and Duragesic patches. “He has an appointment with Dr. Dirks for follow-up on 08/30....Patient anticipates that he will ask Dr. Dirks to make a referral to a pain management center. If Dr. Dirks declines, we will make the referral as my continuing to provide him with large quantities of synthetic opiates for a permanent condition is not an option.” JE-135. Dr. Woodall also noted, “In February he had L3-L5 fusion which he states was fabulously successful and alleviated his lower body pain.” *Id.*

75. On August 14, 2007, Dr. Dirks observed that Claimant was doing better pain-wise, having procured MS Contin, a long-acting pain reliever, from Dr. Woodall. However, he still had pain across his shoulders. Dr. Dirks prescribed physical therapy, twice weekly for four weeks. Claimant did not follow up.

76. On August 29, 2007, Claimant again approached Dr. Woodall for narcotic pain medication.

As with every encounter for the past year, patient is in seeking pain medications....Taking him at his word that he sees Dr. Dirks on 09/13, I provided MS Contin...Since chronic pain management with opiates such as MS Contin is not part of my practice scope, I will not be providing any opiate narcotics for patient beyond today. If this issue is not addressed with Dr. Dirks, patient will need to see a pain management consultant or perhaps seek a different primary care provider.

JE-137.

77. Surveillance video (September 11 and 12, 2007). Surveillance video taken September 11, 2007 shows Claimant, alone, backing his boat and trailer into the water, getting in and out of his truck multiple times, jumping from his truck cab a few feet over to the dock to avoid getting into the water, tugging on the boat to get it off the trailer, lowering himself to his stomach on the dock to retrieve a hubcap from the water, and other activities. It is not apparent that Claimant ever bent at the spine below approximately shoulder-level. He maintained a straight low and mid spine throughout his activities. Claimant thinks he was wearing a back brace. In addition, he recalls wearing a Fentanyl patch and having taken morphine, an anti-inflammatory, Gabapentin, and Neurontin that day.

78. Video footage taken September 12 shows Claimant carrying a gallon of milk in his right hand and a small sack in the other. When he got to his pickup, he smoothly lifted the milk jug to chest-height and tossed it into the passenger seat. Claimant described his symptoms on the 12<sup>th</sup>:

Well, I was ruined. My shoulder would get - - it was the weirdest thing. It would get so bad that I couldn't move. All my body wanted to do was lay there with heat on it. And after a couple days of that, I could go out and do some - - you know. I was trying -- the more I - - if I used it, it would get better. That's what I

thought. Not heavy use, but if I used it. But it didn't work that way with it. It made it worse.

TR1, pp. 119-120.

79. In 2012, Dr. Dirks opined that Claimant's functionality as depicted in the surveillance videos was consistent with his recollection of Claimant's presentation, on pain medication, on August 14, 2007. As discussed below, Drs. Zoltani and Barnard disagreed. They opined these videos evidenced what they had already concluded based upon their evaluation of Claimant: that he was faking his symptoms.

80. **MRIs of cervical and lumbar spine (September 12, 2007).** On September 12, 2007, Claimant underwent MRIs of his cervical and lumbar spine. The cervical studies revealed slight anterior subluxation of C4 relative to C5 with flexion. The lumbar studies revealed a well-seated L3-5 laminectomy and posterior fusion with no definite subluxation on flexion or extension, as well as an unchanged T12-L1 right-sided bone graft with metallic plates and screws.

81. **Pain management.** On September 13, 2007, Claimant returned to Dr. Dirks, who provided him with a prescription for 20 Norco tablets with instructions to make them last for at least a couple of weeks. He also referred Claimant to Dr. Magnuson for pain management. "He is hurting quite a bit in his neck and along the top of his shoulders....He is difficult to assess because he hurts so much." JE-123.

82. **MRI of cervical spine (September 19, 2007) and EMG study (October 2007).** Due to ongoing neck pain complaints, Dr. Dirks ordered another cervical MRI, which was performed on September 19, 2007. It demonstrated mild narrowing of the bilateral C3-4 neural foramina, with no significant impinging lesions. Dr. Dirks summarized, "...good decompression



without evidence of any structural lesions.” JE-128. On exam on September 27, 2007, Dr. Dirks noted no atrophy in Claimant’s arms and a satisfactory gait. Claimant reported that his lower back was doing quite nicely. At Claimant’s attorney’s prompting, Dr. Dirks ordered an EMG study to further evaluate Claimant’s nerve condition. On October 30, following the EMG study, Dr. Dirks wrote, “As far as his arms are concerned, the EMG studies were unremarkable and do not show any sort of radiculopathy.” JE-129. He ordered a thoracic MRI to rule out problems at that level, “although I doubt this will be the case.” *Id.*

83. **Pain management.** On October 1, 2007, Claimant was evaluated by Scott Magnuson, M.D., a pain specialist. According to the chart note, the purpose of the visit was (contrary to Dr. Woodall’s repeated instructions) “simply to have a recommendation back to Dr. Woodall to prescribe.” JE-142. Following an examination, Dr. Magnuson recommended to Dr. Woodall that he continue prescribing pain medications for 3 to 6 months in tandem with physical therapy. Dr. Magnuson opined that Claimant had obtained good relief of his cervical radicular symptoms following surgery, but was now experiencing severe chronic myofascial pain in his shoulders and thoracic back area.

84. On October 8, 2007, Claimant again sought pain medication from Dr. Woodall. This time, Claimant specifically requested oxycodone. Dr. Woodall complied, but reluctantly. “Chronic pain and opiate seeking behavior. I shared with him Dr. Magnuson’s written communication of the non-advisability of long-term opiate use...Also at his request I am making a referral to a pain management consultant in Moscow who may be more willing to accept his management than Dr. Magnuson was.” JE-136. He also noted that, as far back as 2003, Claimant had been receiving large amounts of narcotic pain medications. The record does not

support the conclusion that Claimant received such medications consistently between 2003 and July 3, 2006.

85. On October 18, 2007, Claimant was reporting bilateral shoulder pain, neck pain, and bilateral arm weakness, worse on the right. An EMG nerve conduction test by R. Clinton Horan, M.D., revealed mild nerve conduction abnormalities that he opined did not meet criteria for an entrapment neuropathy, and are of questionable clinical significance. An underlying peripheral neuropathy could not be ruled out, but would be unlikely to explain arm weakness. No electrodiagnostic evidence of cervical radiculopathy or brachial plexopathy existed.

86. On December 18, 2007, Dr. Woodall again declined to continue prescribing pain medications and advised Claimant to return to Dr. Magnuson or Dr. Dirks. Claimant also requested an MRI of his thoracic spine, as Dr. Dirks' request had been denied by Surety. (Dr. Woodall made the MRI recommendation; however, Surety denied this request, as well.) Ten days later, Claimant returned. He had been unable to get in to see Dr. Magnuson. Dr. Woodall prescribed ten days worth of MS Contin to tide him over.

87. On January 3, 2008, Dr. Dirks' nurse practitioner contacted Dr. Woodall's office to advise she had prescribed 40 Norco 7.5 mg. and concurrently advised Claimant that she would not prescribe any more pain medications and that he should not be going around to other physicians and "double dipping." JE-138.

88. **Continued right arm/shoulder and neck pain.** Also on January 3, 2008, Dr. Dirks evaluated Claimant for right arm and shoulder pain, as well as neck pain. Dr. Dirks found "severe atrophy of his arm and in the deltoid and biceps area. He also has strength loss in

the right deltoid muscle.” JE-131. Dr. Dirks referred Claimant to Dr. McNulty for a shoulder evaluation and recommended a CT myelogram to investigate C5-6 and C4-5.

89. On January 10, 2008, Dr. McNulty evaluated Claimant’s right shoulder. “[Claimant] states during the original injury he did not hurt his shoulder. He is having pain mostly in the trapezial area, radiating to his neck.” JE-515. Dr. McNulty diagnosed tendonitis and injected Depo-Medrol and Lidocaine. He denied Claimant’s request for narcotic pain medication.

90. On January 16, 2008, Dr. Woodall declined to make an appointment for Claimant to discuss refilling his pain medication. Instead, he referred Claimant to Don Williams, D.O., for pain management.

91. **January 31, 2008 initial evaluation by Dr. Williams for pain management.** Dr. Williams undertook Claimant’s pain management treatment on January 31, 2008. At this visit, Claimant reported almost complete loss of use of his right shoulder.

92. **Thoracic MRI (February 5, 2008).** On February 5, 2008, Claimant underwent a thoracic MRI, which revealed normal findings except for a small left posterior disc protrusion at the T10-11 level that mildly contoured the ventral aspect of the thecal sac on the left, resulting in mild encroachment of the inferior recess of the left neuroforamen.

93. **February 13, 2008 panel evaluation (Drs. Barnard and Zoltani).** On February 13, 2008, Claimant underwent a panel evaluation arranged through Inland Medical Evaluations by Surety. The panelists were J. Greg Zoltani, M.D., a neurologist, and Michael Barnard, M.D., an orthopedist. The panelists reviewed Claimant’s industrial injury-related medical records through December 18, 2007, when Dr. Woodall diagnosed chronic pain and

drug seeking behavior and ceased prescribing morphine. They also reviewed Dr. Stevens' September 2006 IME report and Claimant's prior medical records evidencing diagnoses of, among other things: low back symptoms, neck pain and headaches, left hand and right arm numbness, chronic pain disorder in the absence of any objective organic cause, generalized axonal motor neuropathy (as suggested by EMG findings), thoracolumbar disc fusion followed by physician restrictions of no regular heavy lifting or bending at the waist plus a recommendation to obtain retraining assistance, residual right S1 radiculopathy (as demonstrated by November 1, 2004 EMG study), and multilevel degenerative changes (as demonstrated by lumbar spine MRIs dated January 8, 2003 and November 10, 2004). Claimant brought in his February 2007 lumbar MRI films, but no cervical spine films. The panel also had a report of the February 2008 thoracic MRI identifying a small disc protrusion at T10-11. In addition, the panelists reviewed Dr. Dirks' December 23, 2004 deposition and interviewed and examined Claimant.

94. According to the report, Claimant told the panel physicians that he was still having pain in his neck, mid back and low back, with crunching and snapping in his neck, and that his symptoms had worsened since his neck surgery. Also, "He notes that he had symptoms previous to this incident in both legs prior to his fusion at T12-L1, and following that surgery he had improvement in his left leg, but had no improvement in the right leg. He notes that following the incident, his left leg was then worse than the right." JE-166.

95. Functionally, Claimant told the panel physicians that he was unable to do any neck or back exercises, clean fish, carry or lift items ("Even lifting a carton of milk would be impossible for him with the right arm," *Id.*), do bookwork (because he cannot look down), or

bend over to pick anything up (because he would fall over). He had trouble riding in his pickup because of the bouncing, and looking in an upward direction. Activities Claimant could do included fishing, cooking (some), and walking out and getting the mail.

96. On entering the exam room, the panel physicians noted Claimant was lying on the exam table. Claimant's sensory exam revealed, among other things, "subjectively decreased" feeling in the right arm that "does not follow any specific dermatomal pattern," and was negative for Tinel's sign. Claimant had heavily callused hands.

It is noted that the claimant's hands are not only callused but they are extremely heavily callused and extremely dirty. There is ground in dirt, there is subungual dirt, and there are heavy calluses which are discolored. The claimant states that all of the calluses on his hands, which are several millimeters thick, and all of the dirt is from a recent snowfall where he had to move snow. This is not possible. The Claimant is, in my opinion, purposefully misrepresenting his history. There is no way he would develop multiple thick calluses on his hands and fingers in the period of the last week.

JE-169.

97. During his orthopedic exam, Dr. Barnard noted, "The claimant moans, groans, grunts, and complains of pain throughout the entire examination, no matter what position he is in." JE-168. Claimant demonstrated positive Waddell's signs at the shoulders and in en bloc rotation, with complaints of severe pain. Claimant refused the lumbar range of motion test because he was unable to do it. Asked to demonstrate what he could do, Claimant rotated bilaterally approximately 30 degrees, but exhibited 0 degrees of flexion, extension, right tilt, and left tilt. "It is interesting to note that he would have to have far more motion in his lumbar spine to get on and off the table than demonstrated when he was asked to do so. These measurements are felt to be completely invalid, with no effort on the part of the claimant." JE-168. Likewise, Claimant's cervical range of motion testing was deemed invalid. Claimant complained of severe

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 37**

pain while demonstrating 20 degrees of flexion, extension, right tilt, and left tilt, 45 degrees of right rotation and left rotation, as measured by inclinometer. “When asked to do active shoulder range of motion, the claimant does not participate fully in the examination. He claims he cannot move his shoulders.” JE-169. However, with encouragement, Claimant demonstrated motion in all planes. “Again, it is felt that all of these measures are invalid, as the claimant does not appear to be participating fully and does appear to be manipulating the examiner.” *Id.* “The claimant has ‘total body jolting’ with his movements. He has cogwheel motions with his neck, back, shoulders, etc., which are nonanatomical.” *Id.*

Overall, the orthopedic examiner found no objective findings consistent with the claimant’s current complaints, and found multiple findings which I feel are manipulated by the patient and are false. I cannot give any valid rating for his neck, back, shoulders, etc., based upon my examination, as I do not feel the findings are correct. I am mystified by the claimant’s statement that he does no work whatsoever and has not worked for several years, although he claims that calluses on his hands, which are obviously months or years old, are recent in the last snow storm. This is blatantly false.

JE-170.

98. The panel concluded that Claimant was medically stable from his 2006 industrial accident. Drs. Barnard and Zoltani opined Claimant’s subjective complaints were far out of proportion to any objective findings, that he is more functional than he reports he is, and that he inaccurately reported his symptoms in relation to his prior injuries and pre-existing conditions, including chronic pain syndrome. Further, Claimant suffered only muscle strains that had resolved, with no permanent aggravation of any pre-existing conditions, and no permanent impairment as a result of his 2006 industrial injury.

99. The panel approved Claimant to return to his time-of-injury job as a full-time owner/operator of his salvage logging company, as described on a Job Site Evaluation (JSE)

prepared and provided by the ICRD, without restrictions. That JSE indicated Claimant needs to travel up to two hours per day to reach his job site; lift (at the heaviest) 35 to 50 pounds frequently and 51 to 75 pounds rarely; bend/stoop, twist, and reach at shoulder height or below continuously; climb, kneel, reach at shoulder height or above, and grasp/handle frequently; finely manipulate/finger occasionally; and crouch rarely.

100. Subsequently, Drs. Barnard and Zoltani reviewed the September 11, 2007 surveillance video depicting Claimant launching his boat. They appended individual notes to the end of the panel report in which each, in the strongest possible terms, opined that Claimant lied in his IME and that he is not disabled. According to Dr. Barnard:

There is no doubt in this examiner's...mind that the claimant is willfully and deliberately misrepresenting his claim for secondary gain. He has, in my opinion, absolutely nothing to justify his current claimed disability....It is impossible to believe that a person with his claimed disabilities could do any of these activities, which included jumping out of a pickup truck onto a stone wall, pulling on a leader for the boat, and launching the boat by himself. His activities, as demonstrated in the video, demonstrate in my opinion complete and total misrepresentation on his part.

JE-172 to 173. According to Dr. Zoltani:

The diagnosis he best fits at this time is a willful misrepresentation of his medical condition to his providers. It is our opinion that this further confirms our opinions that he is fully capable of continuous gainful work activity and is not in need of any formal treatment to his spine nor is it indicated that he should continue to receive narcotic medications.

JE-173.

101. **February 21, 2008: Claimant reached MMI as per Dr. Dirks.** Dr. Dirks opined that Claimant reached MMI following his July 3, 2006 industrial accident on February 21, 2008 (one year following his February 2007 lumbar spine surgery).

102. Dr. Dirks acknowledged that, with Claimant's history of cervical, thoracic and lumbar spine surgery, "you could certainly make an argument at that time not to send somebody back to work with a heavy labor, heavy lifting position." 2012 Dirks Dep., pp. 10-11. However, he speculated that Claimant could have probably returned to work in some capacity as of February 2008.

103. Dr. Dirks believes Claimant would be back at work, apparently in his time-of-injury position, if he had not injured his lumbar spine in 2006.

...If you talk to [Claimant] now I don't think he has a lot of complaints in the cervical region. I don't think - - let's put it this way. If you measure what I was saying about the success of the surgery or not, if he just had had the cervical surgery do I think he would be back to work today. [sic] Yes.

Dirks Dep., p. 23.

104. **Functional capacity evaluation by Dr. Williams.** On February 28, 2008, Dr. Williams prepared an estimate of Claimant's physical capabilities at Surety's request. He opined that, in an eight-hour workday, Claimant could sit a total of two hours, stand one hour out of each four-hour segment, and walk one hour out of each four-hour segment. He could carry up to five pounds continuously (67% to 100% of the day), up to 10 pounds occasionally (2% to 33% of the day), and up to 20 pounds seldom (0 to 1% of the day). (See JE-155.) In addition, Claimant could occasionally bend, squat, kneel, crawl, and crouch, but could not reach above shoulder level at all. Dr. Williams did not restrict Claimant's left hand use, but opined that he could not push, pull, or execute fine manipulations or simple grasping with his right hand. Dr. Williams opined Claimant could work at unprotected heights and around moving machinery, and in environments with marked changes in temperature and humidity. As well, Dr. Williams opined Claimant could drive automotive equipment.



105. On April 9, 2008, Dr. Williams opined that Claimant was unable to return to his time-of-injury job. He anticipated Claimant would need another year to reach medical stability and, in the meantime, would require ongoing care.

106. **CT myelogram of cervical and thoracic spine (April 10, 2008).** On March 25, 2008, Claimant sought treatment from Dr. Dirks for ongoing pain in his neck and down his right arm primarily, but also into the left arm. Dr. Dirks ordered a CT myelogram.

107. On April 10, 2008, Claimant underwent a CT myelogram of his cervical and thoracic spine. The cervical myelogram demonstrated small ventral impressions on the thecal sac at the C4, 5, 6, and 7 levels consistent with small disc protrusions, with normal filling of the nerve root sleeves. The thoracic myelogram returned results within normal limits. “There are no significant abnormal impressions on the thecal sac.” JE-293. The post myelogram CT of the thoracic spine revealed a moderate, focal, central disc protrusion at T10-11. “The protrusion, in combination with posterior osteophytic spurring results in ventral impression on the thecal sac with abutment and mild contouring of the ventral cord. The clinical significance of this lesion is uncertain.” JE-288. The post myelogram CT of the cervical spine revealed facet joint arthropathy at C3-4 on the right and at C7 and T1 on the left, as well as small focal central disc protrusions at C4-5 and C6-7. “These result in mild contouring of the ventral thecal sac but do not appear to significantly focally impinge on the neural structures.” JE-297.

108. On April 22, 2008, Dr. Dirks opined, “His CT scans of his cervical and thoracic spines do not show any evidence of neural element compression at this time. They show good decompression where the surgical sites are.” JE-298. Nevertheless, because Claimant continued

to complain of pain, “it seems reasonable to obtain cervical and thoracic spine MRIs and I will see him back following these studies.” *Id.*

109. **MRIs of cervical and thoracic spine (April 25, 2008).** On April 25, 2008, Claimant underwent MRIs of his cervical and thoracic spine. At the cervical level, there was broad-based bulging (a protruding disc), accentuated on the extension views at C4-5, abutting the ventral cord. In addition, foraminal stenosis was noted at this level and mild subluxation between the flexion and extension data suggested ligamentous laxity at C4-5. “Facet arthrosis may contribute to the listhesis.” JE-299. At the thoracic level, a broad-based leftward eccentric spondylotic disc protrusion at T10-11 effacing the ventral and leftward aspect of the thecal sac, along with mild foraminal encroachment, was identified. “Otherwise, spondylosis is of mild severity and includes shallow noncompressive spondylotic disc displacements at several levels without central or lateralizing soft disc herniation or soft disc extrusion.” JE-300.

110. On May 8, 2008, Dr. Dirks opined, “His cervical and thoracic spine MRIs shows [*sic*] multilevel minimal disk degeneration. He shows good postoperative decompression.” JE-301. Dr. Dirks recommended no treatment, but instructed Claimant to follow up in three months. He also encouraged Claimant to file for SSDI “as he hurts and is not able to do any heavy labor activity at this time. He has had multiple surgeries on his cervical, thoracic, and lumbar spines and I believe he is disabled and unable to return back to work at this time.” JE-301. Dr. Dirks was apparently unaware that Claimant had been pursuing an SSDI award since July 2006.

111. Dr. Williams continued to treat Claimant periodically with narcotic pain medications and osteopathic manipulations for his lumbar, thoracic, and cervical pain, as well as for his right shoulder pain and rotator cuff-like symptoms.

112. On July 19, 2008, Dr. Dirks authored a letter to Claimant's counsel, apparently responding to questions previously posed. He wrote that, following review of Claimant's records and films, he did not believe that the current MRI findings were contributing to Claimant's current symptoms or that further surgical intervention was warranted. He opined that physical therapy, injection therapy, and anti-inflammatory medication were reasonable options to treat Claimant's neck pain.

113. On July 21, 2008, Dr. Williams took Claimant off logging work for six months.

114. On August 7, 2008, Dr. Dirks wrote an open letter confirming that he does not believe Claimant can return to his time-of-injury job and that he suggested Claimant file for SSDI. The corresponding chart note indicates that, on exam that day, Claimant had good strength and his incision was well-healed. Claimant was seeing a chiropractor, "which seems to help him as far as keeping his head in alignment." JE-304.

115. On October 1, 2008, Dr. Ganz evaluated Claimant, at Claimant's request. Following review of Claimant's imaging and an examination, Dr. Ganz opined that Claimant's persistent neck pain is due to musculoskeletal factors, not neurogenic causes. To be certain, he recommended an EMG study "to confirm that there is no radicular component to his pain." JE-309. He recommended that Claimant get back into physical therapy. "After his neck surgery he only had two sessions...and then he quit because it hurt. I have explained to him that the muscle spasm is the main cause of his pain and that he needs to give therapy another try and I think his symptoms will significantly improve." JE-309. He wrote Claimant a prescription for physical therapy two to three times per week for six to eight weeks. Dr. Ganz also opined that Claimant should not return to logging work or heavy labor because of his prior back surgeries. "The only

motion segment that remains in his back is at L1-2 and L2-3, and with heavy work, those will certainly begin to fail and most likely will require surgery in the future.” JE-309.

116. On November 11, 2008, counsel for Defendants enclosed the February 2008 IME report in a letter to Dr. Dirks seeking information regarding an impairment rating. Dr. Dirks did not respond because he does not do impairment ratings. At his 2012 deposition, he could not recall anything about the IME report.

117. Also in November 2008, Claimant underwent an appendectomy. He does not allege that this procedure was related to an industrial injury. No related PPI was assessed, and no permanent medical restrictions were issued.

118. **Functional capacity evaluation by Mark Bengston, MPT (March 31, 2009 and April 2, 2009).** On March 31, 2009 and April 2, 2009, Claimant underwent a functional capacity evaluation (FCE) by Mark Bengston, MPT, at the request of Claimant’s attorney, to determine his physical abilities and limitations. Mr. Bengston opined that Claimant gave 100% maximal effort on all test items, that his performance was consistent among FCE items, as well as from the first to the second day of testing (indicating Claimant should be able to perform at the tested levels sustainably day-to-day), and that his functional abilities as measured by the Spinal Function Sort were consistent with his perceived abilities, among other things. Mr. Bengston administered Waddell’s tests, opining that five of five were negative.

119. Mr. Bengston opined that Claimant had high hand function and coordination, “occasional” sitting tolerance, “frequent” walking tolerance, and “prolonged tolerance to activity was noted with a myriad of position and activity changes instead of maintaining sustained postures and repetitive lifting and Right [*sic*] hand use.” JE-679. Claimant could sit/stand/walk

with frequent position changes, at a pace set by Claimant, for up to eight hours per day, five days per week. In addition, Claimant could carry 30 pounds rarely (ten pounds occasionally or frequently), and could bend and stoop occasionally. However, Mr. Bengston also opined that Claimant was significantly limited in activities requiring him to shift from a neutral spine position (i.e., bending, twisting), as well as in repetitive grasping and handling with his right hand, due to right cervical pain and numbness in the C7 distribution.

120. Given Claimant's limitations, Mr. Bengston did not entirely rule out the possibility of Claimant someday returning to logging, but given "the large discrepancy between [Claimant's] abilities and job demands," he may be better off to look for alternate employment, rather than to attempt to rehabilitate himself to his prior level of function.

121. On May 7, 2009, Dr. Dirks had an informal conversation with Claimant about his right shoulder. Claimant asked for a right shoulder MRI, and Dr. Dirks complied by making the recommendation. "I have suggested that he get this looked at in the past." JE-314. Also, Dr. Dirks commented, "He is actually happy with his neck and his back at this stage." JE-314.

122. On September 8, 2009, Claimant underwent an IME by John McNulty, M.D., an orthopedic surgeon. Following a medical records review and examination of Claimant, Dr. McNulty opined that the injuries requiring surgeries in 2007 were due to the 2006 industrial accident. "The mechanism of injury of being hit on the head with a tree in parts [*sic*] axial load throughout his spine. The injuries he sustained to his cervical and lumbar spine that resulted in surgical treatment are on a more probable than not basis the result of being struck on the head by a tree." JE-331.

123. Dr. McNulty opined Claimant was medically stable and assessed 25% whole person impairment to the cervical spine condition and 20% whole person impairment to the lumbar spine condition. He did not apportion any impairment to pre-existing degeneration because he believed this was asymptomatic prior to the industrial injury. In the event Claimant is found to have lumbar impairment due to his prior accident, Dr. McNulty opined this should be subtracted from his lumbar impairment rating for apportionment purposes.

124. Regarding the right shoulder, Dr. McNulty found evidence of muscle atrophy, weakness and limited movement on exam. He also noted that Claimant had an injection in January 2008 that did not relieve his symptoms. Given Claimant's report that he fell on his shoulder in the accident (which is notably inconsistent with earlier notes stating Claimant did not injure his shoulder in the 2006 accident), Dr. McNulty recommended a right shoulder MRI to evaluate Claimant's rotator cuff.

125. Dr. McNulty agreed with Mr. Bengston's FCE findings, opining that Claimant should not engage in heavy physical activities such as logging due to his thoracic and lumbar fusions. "He should not engage in heavy physical activities such as logging. He is more suited to work in a light job duty category as outlined in the FCE." JE-332.

126. Although Dr. McNulty summarized medical records in which other physicians doubted his credibility, including the panel IME report, he did not comment on them or, apparently, administer any validity testing on exam.

127. On September 10, 2009, Dr. Dirks opined that Claimant could not return to his time-of-injury job, as defined in the ICRD JSE previously approved by the IME panel physicians. He also disapproved, without comment, JSEs provided by Mr. Brownell for

machine/equipment operator, boat/marine mechanic, and small engine mechanic. On September 16, 2009, Dr. Dirks returned a check-box letter to Claimant's counsel in which he indicated he agreed with Mr. Bengston's FCE of March 31-April 2, 2009 and recommended a right shoulder MRI.

128. On November 18, 2009, Claimant underwent an MRI of his right shoulder. The radiologist opined there was no evidence of discrete rotator cuff tear; however, the imaging did reveal tendinopathy of the supraspinatus and infraspinatus tendons, as well as mild acromioclavicular arthropathy. On January 14, 2010, Dr. McNulty opined that Claimant had chronic tendinitis in his right shoulder and offered an injection, which Claimant declined. "It appears he did not have a significant injury to the shoulder as a result of the 7/3/2006 injury. He does not require any further treatment related to that accident." JE-515.

129. On January 28, 2010, Dr. Williams diagnosed Claimant with depression, prescribed Effexor and discussed coping strategies. Claimant had lost his ambition, was stressed about finances and the prospect of losing his house to foreclosure, and felt like a burden to his family. He had initiated bankruptcy paperwork. After a couple of months, Claimant no longer took Effexor because he did not believe it helped.

130. **Psychological evaluation (April 13, 2010).** On April 13, 2010, Claimant was evaluated by Tim Rehnberg, Ph.D., a licensed psychologist, at Claimant's SSDI attorney's request. Dr. Rehnberg administered psychometric testing and interviewed Claimant. Test results revealed no clinically significant match with malingering criteria. However, Claimant did produce scores clinically significant for identifying somatization, depression, acute stress, affective and psychological symptoms of depression, somatoform disorder, Cluster 8 (often seen

in persons reporting marked concerns about physical functioning, most commonly associated with diagnoses of somatoform disorder, adjustment disorder and dysthymia), and adjustment reaction.

131. Although Dr. Rehnberg was informed that a prior IME had resulted in an opinion that Claimant was exaggerating his symptoms and that he had previously been accused of manipulating his prescriptions, the actual IME report was not provided for review. Likewise, neither Dr. Lea's records, nor the panel IME report were provided. These omissions undercut his ultimate opinion that "[t]here was nothing in the clinical interview, medical record or current testing that would indicate that he is malingering or exaggerating his current physical and psychological symptoms." JE-376.

132. Dr. Rehnberg diagnosed Claimant with a pain disorder associated with both psychological factors and a general medical condition (chronic), adjustment disorder with depressed mood (chronic, in response to his chronic physical health issues), sleep disorder due to chronic pain (insomnia sub-type), and nicotine dependence. In addition, he opined that Claimant has psychosocial stressors from occupational, financial and health care access problems, as well as Global Assessment of Functioning (GAF) scores of 50 (current) and 50 (highest). Dr. Rehnberg did not explain his diagnoses. Specifically, he did not discuss how Claimant's pain disorder affects his perception or reporting of pain to his physicians, if at all.

133. On April 23, 2010, Dr. Williams completed a fill-in-the-blank worksheet provided by Claimant's Social Security benefits attorney. Among other things, Dr. Williams opined that Claimant could only do seated work for four hours out of every eight-hour day.



134. **Subsequent injury – chair fall (October 22, 2010).** In October 2010, Claimant fell off a chair while eating at a casino, reigniting his back and neck pain, as well as radiculopathy into his left leg. Cervical and lumbar spine MRIs taken that day raised the question of a C-4 fracture versus an imaging artifact. They also identified mild grade 1 cervical anterolisthesis, and no evidence of lumbar fracture or static evidence of lumbar instability. A CT of Claimant’s cervical spine the next day revealed no evidence of cervical fracture, C3-4 facet arthrosis, mild dextroscoliosis, or cervical spondylosis, and he had “adequately patent neural foramina at all levels.” JE-393.

135. Thereafter, Dr. Williams prescribed either Lortab or Norco in addition to MS Contin for Claimant’s pain. In March 2011, he referred Claimant to Dr. Dirks for a surgical consultation and increased Claimant’s restrictions to no lifting over ten pounds, with bending, lifting, and twisting only seldom.

136. **EMG nerve conduction study (May 9, 2011).** On May 9, 2011, Claimant underwent an EMG nerve conduction study by Ken Young, D.O., to help sort out the etiology of his new complaints of left lower extremity symptoms. Dr. Young opined the results demonstrated “left sided lumbar radiculopathy mainly involving the lower lumbar and sacral region on that side. Right lower extremity reveals residual chronic neuropathy without any active lumbar involvement currently.” JE-396.

137. **Spinal fusion surgery at L3-S1 by Dr. Dirks (April 2012).** Claimant underwent another fusion surgery with Dr. Dirks in April 2012. The procedure required removal of his prior lumbar fusion hardware at L3-L5 to integrate L5-S1.

138. **June 29, 2011 pain management by Dr. Williams.** On June 29, 2011, Dr. Williams administered a questionnaire, the results of which he interpreted to mean Claimant is a low-risk for opioid abuse or addiction.

139. On August 13, 2011, Dr. Williams wrote an open “Justification Letter” stating that Claimant is “unable to participate in any form of gainful employment for the next two years” due to his post-surgical status. JE-273. The corresponding chart note indicates the purpose of this letter was “to support getting government aid for housing.” JE-274.

140. Dr. Williams’ chart notes following Claimant’s 2012 lumbar spine surgery indicate he continued to have left foot numbness and lower extremity weakness, along with cervical, thoracic and lumbar pain. Around the end of 2012, Claimant’s left foot and lower extremity symptoms apparently resolved.

#### ***POST-INDUSTRIAL INJURY VOCATIONAL AND INCOME HISTORY***

141. Claimant was approved for SSDI benefits in 2012.

142. Claimant remained in business until October 2008. He explained that he ceased operations because Jerry Pokriots, his most trusted employee, was off work with an injury, his Cat was broken down, he had been operating at a loss for several months, and he could not afford to pay a \$12,000 workers’ compensation bill coming due. So, he saw no other viable options. Claimant could not explain why his tax forms demonstrated he had substantial earnings during the two years following his industrial accident, even though Claimant was not doing any heavy logging work.

143. To support himself after he closed his business, Claimant sold his equipment and whatever belongings he could. In October or November 2008, Claimant mortgaged his house

and property (5.78 acres about a mile from St. Maries). Claimant could not recount how the funds were spent, but he only made one mortgage payment. Eventually, foreclosure proceedings were initiated. He later filed for bankruptcy.

144. Claimant did not look for work until the first part of 2009 because he did not believe there were any jobs he could do in the St. Maries area. His daughter brought him an application from a casino and he filled it out, but did not keep it current. He initially thought he could do security work there, or flagging work elsewhere, but changed his mind when he learned these jobs required constant standing. Claimant thought he could do millwork, but upon inquiry at a mill, he was told his condition presented too big of a liability. He applied for a job as a lead forester with the Coeur d'Alene Tribe in Plummer. "This one I went over there as soon as I seen it." TR2, p. 179. The application process included a two-hour exam testing Claimant's knowledge of topics like tree species and fire procedures. Claimant believed he aced the exam, but then he was required to demonstrate that he could walk a mile carrying a 45-pound fire fighting pack. This, Claimant could not do. He was disappointed:

...another requirement was to know their land, where it is and whatnot, and from all the time I worked for Potlatch, man, designing the logging operations, it was right up my alley. It was perfect. And I was very disappointed about that.

TR2, p. 181.

145. Claimant was also listed with Job Service for a period, and he regularly perused the Nickel's Worth and the St. Maries Gazette for job listings. Claimant never found any listed openings for which he felt qualified, and no employer he approached ever offered him an interview or a job.

146. Claimant did not have an active file with ICRD because the 2008 panel evaluation concluded he could return to work without restrictions. He did not have an active file with Idaho Division of Vocational Rehabilitation (IDVR), apparently because he was unaware of how to go about initiating this. After the first part of 2009, he worked with Dan Brownell, vocational consultant, to find work. With Mr. Brownell, Claimant has approached a number of employers about jobs. Those efforts were unsuccessful.

147. In July 2012, Claimant lost his house. He was living in a camp trailer on mortgaged land at the time of the hearing, receiving \$1,700 per month in Social Security Disability benefits along with assistance from his children. Claimant's three children help him financially. Two of them, Shelby and Wesley, sincerely testified that Claimant can no longer do the things he did before his 2006 industrial accident, that he was devastated that he could no longer work and support his family, and that he was ashamed of having to accept assistance from his children. Wesley explained the hardships occasioned by Claimant's inability to work, including the loss of their house to bankruptcy and Claimant's resulting depression. He believes that Claimant stopped socializing because his source of pride – his work – was gone.

#### ***TESTIMONY FROM POTENTIAL EMPLOYERS***

148. Mike Roland, owner of a logging salvage operation and Claimant's former boss, confirmed that Claimant is an excellent worker and has a reputation as such in the St. Maries community. He heard through the grapevine about Claimant's 2006 back injury. Mr. Roland would not hire anybody with a back condition, including Claimant. "It's just business, you know, work. You gotta be able to, you know, work, pull winch line, run chainsaws. And you can't do that with a bad back. You can't do it." TR2, p. 22.

149. Robby Macklin, owner of St. Maries Saw & Cycle, a Yamaha dealership and repair shop catering to all brands, confirmed that Claimant had approached him about a job several times over the four years preceding the hearing. Mr. Macklin has known Claimant all his life and knows his mechanical experience and abilities. Although he would like to help Claimant out with a job, he never had a position that fits Claimants functional capabilities (specifically, his lifting limitations that he presumed from observing Claimant). Also, Mr. Macklin gets many inquiries from presumably able-bodied job-seekers. Mr. Macklin said he thought he could hire Claimant to be a “broom pusher” four years ago, but he never had an opening when Claimant inquired. TR1, p. 133.

150. Randy Reynolds, owner of a marine and automotive repair shop/U-Haul rental store in St. Maries, confirmed that he has declined to offer work to Claimant, who he knows incurred a spine injury in a logging accident. “He’s asked me for work, and I just - - to be honest, I gotta have somebody that has a strong back and is not going to be a liability to our business.” TR1, p. 143. Also, Mr. Reynolds must hire mechanics who, unlike Claimant, are certified to do warranty work. He sometimes hires high school kids to clean out the U-Hauls, but he has not done so since 2010. Mr. Reynolds owns the shop along with his brother. They have only employed one other mechanic since they went into business in 1983, and that individual only worked two days per week.

151. Dewey “Duke” Shawver, a long-time salvage logger in the St. Maries area who has worked with Claimant and respects his work ethic and logging abilities, testified that Claimant was not employable as a logger following his 2003 surgery.

152. Carrie Nordin, administrative assistant, handles all of the workers' compensation reporting at Stimson Lumber, where she had worked for nearly 16 years at the time of the hearing. She testified that she is familiar with the job of a forklift driver at the mill. Usually, this job is filled from the pool of available general laborers already working for Stimpson. Also, an individual with limitations on bending and twisting one-third of the time, limited grasping and handling with his right hand, sitting limited to one-third of the time, lifting limited to ten pounds on a frequent basis, and moving his head from side to side would likely not be able to drive a forklift on a full-time basis. She estimated that forklift drivers must sit 85% to 90% of the day, which is sometimes ten hours long. She also explained that sometimes boards fall off the forklift, and the driver needs to pick them up, requiring an ability to bend and lift more than ten pounds. In addition, Ms. Nordin estimated that a forklift driver spends 75% of his day driving backwards, requiring him to twist and move his head from side to side. Further, forklift-driving entails a great deal of bouncing.

#### ***VOCATIONAL REHABILITATION OPINIONS***

153. **Dan Brownell**. Mr. Brownell, a vocational rehabilitation consultant, was retained by Claimant in early 2009 both to assist him in job placement in the St. Maries local labor market, and to provide an expert forensic opinion as to Claimant's employability. He continued to work with Claimant and/or look into job possibilities for the next three years. He "was kind of excited" to work with Claimant "because he was famous down here. Logger of the year for Potlatch for two years, that's a big deal. So I thought it was going to be a piece of cake in job placement." TR2, p. 41. However, Mr. Brownell ultimately opined that Claimant is totally and permanently disabled.

154. Mr. Brownell prepared two reports in evidence: one dated August 15, 2009, and one dated August 7, 2012. He noted in 2012 that Claimant appeared to have regressed since 2009. He reviewed Claimant's medical and vocational records and spent a great deal of time assisting Claimant with his job search.

155. In determining what jobs Claimant could physically do, Mr. Brownell adopted Mr. Bengston's 2009 FCE limitation recommendations for limitations on:

- Any activities requiring him to lose his neutral spine position (bending, twisting)
- Repetitive right (dominant) hand grasping and handling
- Sitting: occasional
- Sit/stand/walk: up to 8 hours per day
- Lifting/carrying: 10 pounds frequently/occasionally, 30 pounds rarely
- Bending/stooping: occasionally

156. Mr. Brownell defined Claimant's local labor market to include all of Benewah County (St. Maries, Plummer, Worley, the Coeur d'Alene Casino, Fernwood, Santa, Harrison and Princeton).

157. It is undisputed that Claimant is a bright fellow. In 2012, a TABE test administered by Mr. Brownell revealed that Claimant has college-level applied math skills.

158. Although Mr. Brownell did not detail Claimant's transferrable skills specifically, he identified Claimant's main occupations with transferrable skills as logger, owner/operator, lumber mill laborer, mechanic and operator of logging truck and skidder.

159. Mr. Brownell opined that Claimant's physical limitations following his 2006 industrial accident place him in the light/sedentary work category, taking him out of any of his

prior occupations, including mechanic jobs. Previously, as a result of his 2003 thoracic spine surgery, he opined Claimant was able to do medium/heavy work, but he was unemployable in the logging industry because employers were aware of his limitations and prior accidents. However, Mr. Brownell opined that Claimant remained employable as a mechanic at that time.

160. In Claimant's job search, Mr. Brownell started with potential employers in Claimant's "sphere of influence." TR2, pp. 49-50. "...I really talked to Roy about who his sphere of influence was, and his sphere of influence is massive. I mean, he knows - - it's a rarity for some of the old timers or most of the people in town to not know Roy or Roy to not know them. He has relatives that own businesses here in town....So I utilized a lot of that, and he and I came up with a list of a lot of people to contact that way." *Id.* He also picked Claimant up at his house and, on some occasions, helped him get ready to go meet employers.

161. Mr. Brownell opined that Claimant's popularity in his community was detrimental to his job search in that "most, if not all, possible employers know of the injuries that Mr. Green suffered in the 7/3/06 accident and...as a result he was unable to keep his salvage logging business operating." JE-699.

162. Together, Mr. Brownell and Claimant approached Claimant's relatives, who own a local sporting goods store. They declined to offer employment because they could not afford to hire anyone outside the immediate family. Also, Claimant was unable to do any stocking.

163. Either together with Claimant or on his own, Mr. Brownell approached other employers, too. A local hardware store had no positions and was laying people off. The sawmill and other employers were afraid of the liability risk Claimant posed. Pete Manufacturing, a



larger employer, only hires women for the production line and some of the work requires lifting up to 20 pounds. (Mr. Brownell did not elaborate on how often such lifting would be required.)

164. Mr. Brownell also apparently ruled out some positions without contacting the employers due to Claimant's appearance, personality, physical abilities, and other factors. For example, he believed Claimant could work in retail clothing sales, but for the "yuck factor" – essentially Claimant's poor appearance – which he opined would preclude Claimant from being hired. He similarly ruled out convenience store and smoke shop work. Mr. Brownell opined Claimant had a speech impediment on the telephone that precluded him from call center work. He ruled out the Subway sandwich maker position because the employer has a lot of turnover and a lot of biases, and he did not see Claimant fitting in there. He thought Claimant's hobbling around, his personality, and his overall appearance would be off-putting. He also thought there would be too much computer work and tallying, and he vaguely opined that there would be too much physical work. "They expect them to work in other areas." TR2, p. 56. Mr. Brownell ruled out any security guard position at a casino because there is a hiring preference for tribe members and, too, Claimant would be physically unable to apprehend uncooperative rowdies. He ruled out Potlatch and, apparently Jack Buell Trucking, because he did not believe Claimant, physically, could do any job at either place.

165. In his 2012 report, Mr. Brownell asserted that he had contacted over 50 employers in Claimant's local labor market. Although it is unclear exactly which employers Mr. Brownell actually approached, or when, Mr. Brownell testified that he exhausted all possible options in Claimant's job search. "I can honestly say that I sincerely saturated the market on possibilities....I can sincerely say that I think he is a total perm. He's not employable in the labor

market. I challenge anybody else who thinks that they could place him." TR2, pp. 59-60. Mr. Brownell did not reveal his private database of employer information because it is proprietary.

166. In developing his opinions and trying to place Claimant in a job, Mr. Brownell also consulted Carol Jenks, ICRD consultant; Tony Frazier, IDVR consultant; Alivia Metts, Idaho Department of Labor (IDOL) labor analyst; Annie Frederick and Sue Shoemaker, IDOL workforce consultants; a testing counselor at ABE in St. Maries; and Jeff Truthman, president/owner of *SkillTRAN*.

167. As for his statistical analysis of the job market, Mr. Brownell included a list of resource materials and some raw job market data. However, he did not describe his methodology in either of his reports or at the hearing.

168. Mr. Brownell is not a certified rehabilitation consultant, and he does not agree that his involvement in a case should be limited to *either* forensic analysis *or* job placement assistance. He believes he can be a strong hands-on advocate in assisting an individual in job placement, and at the same time provide an objective opinion based upon statistical analysis of the relevant job market and an individual's established education, skills, and abilities. Mr. Brownell has extensive knowledge of the St. Maries labor market through his many years working as an ICRD consultant before he began his own vocational consulting business.

169. **Nancy Collins, Ph.D., CRC.** Dr. Collins was retained by ISIF to assess Claimant's employability. Surety also relies upon her opinions.

170. Dr. Collins authored a letter summarizing her preliminary opinions (based upon records provided by ISIF and Claimant's 2007 deposition transcript) on July 27, 2009. She

opined that Claimant's most restrictive limitations were from his 1988 FCE, which outlined limitations on lifting over 20 to 35 pounds, stooping, overhead work, and right-handed strength limitations, as well as physician recommendations that he leave logging. Also noting Claimant's 2003 condition prompting new recommendations that Claimant leave logging, Dr. Collins was unable to find any permanent restrictions related to either the 2002 or the 2006 injury. She did note Dr. Williams' 2008 temporary restrictions, as well as the 2008 panel IME opinion that Claimant could return to work as owner/operator of St. Joe Salvage. Dr. Collins concluded:

Mr. Green's deposition testimony is certainly different from the medical records the [sic] discuss past pain complaints and physical restriction. My preliminary opinion, based on the records reviewed, is that he has some pre-existing restriction (that was ignored), but there is no support for a total disability opinion as a result of a combination of industrial injury and pre-existing condition.

JE-741.

171. On August 20, 2009, Dr. Collins prepared a full written analysis and report in which she listed all of the records she reviewed, including medical records, Claimant's 2007 deposition and interrogatory responses, ICRD records, and Dan Brownell's report. She also identified vocational information databases and software she relied upon.<sup>3</sup> She requested an interview with Claimant, but he refused.

172. Dr. Collins defined functional limitation as “the hindrance or negative effect on the performance of tasks or activities, and other adverse and overt manifestations of a mental, emotional, or physical disability.” She cited authority (Wright, 1980) in identifying the following 14 functional limitation areas that result from disability: mobility, communication, sensory, invisible, mental, substance abuse, pain, consciousness limitation, debilitation, and

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<sup>3</sup> Dr. Collins utilized *SkillTRAN*, *Idaho Occupational Wage and Employment Survey*, *Occupational Outlook Handbook*, Department of Labor job listings, and O\*NET.

motivity, restricted environment, uncertain prognosis, functional behavior, and atypical appearance. She identified Claimant's limitations based upon his 1988 FCE (noted, above) and his 2009 FCE, which she interpreted to include: no lifting more than 20 pounds, 15 pounds occasionally and 10 pounds frequently<sup>4</sup>; significant limitation with elevated work, kneeling and forward bending while standing; some limitation with standing work and static standing and sitting; some limitation for crouching and kneeling, stairs, and ladder climbing; no limitation on walking; and no limitation for right or left hand grip. In summary, "His most recent FCE allows light work with additional restriction for elevated work, position changes, occasional bending, climbing and kneeling." JE-748.

173. Dr. Collins identified job categories for work Claimant has performed in the past in the logging and mechanic fields. She erroneously assumed Claimant had truck driving experience based upon ICRD records indicating Claimant wished to retrain as a truck driver.

174. Using the *SkillTRAN* program, Dr. Collins compared Claimant's pre-injury employability with his post-injury employability in order to estimate his loss of access to the local labor market. As to Claimant's pre-injury status, Dr. Collins opined that without any restrictions, Claimant had directly transferable skills for 71 job titles; with medium restrictions he had directly transferrable skills for 60 job titles and, assuming the restrictions from his 1988 FCE, he had directly transferable skills for 10 job titles, representing an 86% loss of access to the labor market as a result of his 1987 neck injury. Considering unskilled work, he had access to 58.8% of jobs in the Dictionary of Occupational Titles. Post-injury, Claimant had restrictions greater than imposed in 1988 due to additional restrictions on static sitting and standing.

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<sup>4</sup> These are not consistent with Mr. Bengston's recommendations of 10 pounds occasionally and frequently, and 30 pounds rarely.

Assuming Claimant was restricted to medium duty work prior to his 2006 injury, and light duty afterward, Dr. Collins opined Claimant's loss of access would be 83%. Considering unskilled work, his loss would be 53%. Dr. Collins posited that Claimant could, for example, still do some sawyer work. Also, he could inspect exhaust emissions, do some sorter operating and machine operating, hand soldering and knife setting, and some retail and driving jobs.

By considering the most restrictive limitations, he can do some light work that does not require constant sitting or standing. Light work makes up 60% of the jobs in the labor market. If he improves like he did after his 1988 FCE, his access will be greater.

JE-750.

175. Dr. Collins also opined Claimant lost significant earning capacity as a result of his 2006 industrial injury. She understood, incorrectly, that Claimant's net earnings for 2008 were \$70,000, and, based upon an ad for a logger in St. Maries, that his pre-injury hourly wage was approximately \$18. Post-injury, Dr. Collins opined that Claimant should be able to earn \$8 to \$10 an hour in light-duty jobs, such as driver, some production work, inspection, and retail jobs that are regularly available within 30 miles of his home.

Labor market research using the Department of Labor job listings for one day found retail jobs, customer service work, front desk work, driving jobs, lot attendant/driver, solderer, and a runner position. The Department of Labor posts less than 25% of jobs that are available in a community, so this is just a small percentage of jobs he might consider. The economy is poor right now, but should improve in the next two years and provide additional opportunities.

JE-750.

176. Dr. Collins understood that Claimant had not attempted any job search since closing his business, and that he did not know how to look for work. Too, he did not believe he could do any work because he could not bend or do heavy lifting. She recommended that he

work with a vocational rehabilitation counselor and take a short computer training course to improve his employment opportunities.

177. On September 11, 2009, after interviewing Claimant in the presence of Mr. Brownell, Dr. Collins updated her opinions. She observed that Claimant appeared somewhat disabled because he did not move his head much, and that he answered her questions in a straight-forward manner. Claimant reported that his neck and shoulder conditions were his primary problems, with constant aching and sharp pains in his neck and shoulder, and limited function in his right shoulder. He was concerned that he had a rotator cuff tear or some other unaddressed, repairable, condition. He said he did not have permanent problems with his arms or hands prior to his 2006 injury. Also, when he looks down he gets a shooting pain in his right hand and his hand is very weak. He cannot read for long (he testified 20 minutes every three to four hours), cannot shave well because he has to hold his arms and chin up, and has a hard time doing anything that requires repetitive use of his hands if he also has to move his head. He also described low back pain with limited motion including bending, twisting, stooping, and squatting. He reported being able to stand only 15 minutes at a time. He could walk fairly well, but slowly because he cannot look at the ground and fears falling. He could sit for an hour before changing positions, or drive for an hour before getting out and walking around. He spent most of the day on the sofa watching television and did not climb the stairs in his house very often.

178. Claimant reported that, prior to the 2006 accident, he could perform all aspects of his job as a logger, including operating a bull dozer, loader and processor; operate a chain saw all morning; walk on uneven ground, over logs and up hills, and other activities.

179. Claimant and Mr. Brownell also advised they had tried to find work for Claimant, to no avail. Dr. Collins still believed Claimant could do some retail work that would allow him to walk primarily during the day without much lifting. “There have been two retail clerk positions listed in the past week for cashier/clerk in St. Maries.” JE-753. She also noted Claimant's ideas for self-employment, including producing videos on safety for the logging industry, and on saw sharpening. He also had ideas about inventing underwater logging equipment and marketing some recipes.

180. If Claimant's testimony as to his pre- and post-injury capabilities is found as fact, Dr. Collins opined that all of his post-injury disability is due to the 2006 injury. She also acknowledged that Claimant's difficulty looking down and his right hand pain are significant. “This is not addressed by the physicians, but there is mention of right hand problems in the functional capacities evaluations. This will be problematic in most light and sedentary work.” JE-754. In addition, Dr. Collins acknowledged the job search difficulties accompanying the lackluster economy, but opined that it would improve in the next two years.

181. Dr. Collins again updated her opinions in a written report dated October 23, 2010 after reviewing Dr. McNulty's IME report and the Safety and Surveillance videos, and periodically considering the labor market within 30 to 40 miles of Claimant's home in St. Maries. She noted generally that Dr. McNulty, unlike most of Claimant's medical providers, felt Mr. Green's impairment was due to the 2006 injury and that he was asymptomatic previously. Also, Dr. McNulty agreed with Mr. Bengston's FCE recommendations and agreed that Claimant could do light duty work.

182. As for the Safety Video, Dr. Collins noted, “He showed no range of motion difficulties in his neck or low back.” JE-755. Concerning the September 2009 surveillance video of Claimant at his son's motorcycle competition, she opined, “This video depicted a gentleman that was very different from the gentleman I interviewed in his home in September of 2009. At the time I met with him, he displayed fairly severe pain behavior, had very limited range of motion in his neck, and he stayed in a reclined position during most of the interview.” *Id.*

183. Dr. Collins did not believe that Claimant had conducted a “realistic” job search. “Based on my review of his physical capacities as shown on the surveillance video, and a light work restriction, I do think Mr. Green could have returned to work in some capacity, had he conducted a reasonable job search.” JE-756. She listed a number of job openings<sup>5</sup> in the area listed in June, July, August, September, and October 2010 that she thought Claimant may be able to do.

184. Dr. Collins also criticized Mr. Brownell's methods. “It appeared Mr. Brownell was working in a dual capacity by providing vocational rehabilitation advice, while at the same time he appeared to be providing expert opinion regarding disability. I am unsure of his role, but under CRC guidelines, this is an ethics violation.” JE-756. At the hearing, Dr. Collins elaborated that, whereas Mr. Brownell accompanied Claimant to talk to prospective employers with no current job openings, she would have instead provided Claimant with the information

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<sup>5</sup> Job titles included log truck driver, truck driver (multiple), food service substitute, pit attendant, equipment operator (multiple), lead cook, delivery driver (multiple), fuel truck driver, truck driver to haul steel to Seattle, grocery store cashier, retirement home transportation driver, security officer, buffet cashier, transportation/cart attendant, gas station cashier, apartment manager, museum guide and gift shop sales person, semi-truck driver, security guard, construction truck driver, CDA resort driver, parkade night attendant, entry level loan processor, customer service representative (Kelly Services), part-time telephone operator, deli worker, retail sales associate, cashier (multiple), assembly worker, banquet cook, and buffet attendant.



and support to approach employers with current openings independently. She believed Mr. Brownell's approach only highlighted Claimant's disability. Mr. Brownell disagreed, testifying that he had been able to put together job training packages for others in the past, with assistance and funding from IDVR.

185. Dr. Collins opined that Claimant has good communication skills and “if he presents to an employer as he did on the surveillance video, he does not appear disabled. He is in his early 50's and appears to be fit.” JE-757.

### ***CLAIMANT'S CREDIBILITY***

186. This matter was heard by Referee Just, prior to her retirement. Only Referee Just was in a position to make a judgment concerning Claimant's “observational credibility”. Since the Commission did not have the opportunity to observe Claimant's demeanor at hearing, it is only empowered to make a judgment concerning Claimant's “substantive credibility”. This determination may be made based on the Commission's review of the record before it. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008). Here, the record is filled with conflicting facts and internal inconsistencies such that we are unable to conclude that Claimant is a credible witness.

187. Claimant, two of his children, and Dan Brownell all testified that Claimant is the hardest-working, strongest, and toughest person they have ever known. However, the record is replete with evidence that challenges Claimant's credibility.

188. With respect to the injuries Claimant claims are due to the 2006 industrial accident, Drs. Ludwig, Stevens, Zoltani, and Barnard all opined that Claimant magnified his symptoms during examinations, based in part upon Claimant's responses to Waddell's testing. It

is noted that Claimant disagreed with some of the methods employed by evaluators who were critical of him, as well as the conclusions they drew. For example, Claimant felt justified in refusing to bend at the waist in the 2008 panel evaluation because he felt unsafe:

There was a - - not bed - - but a whatever there, similar to a table, but it was padded. And I told them, "I'll bend over towards that in case I keep going, because I have no balance." And they're like, "No, we want you to do it here," right toward the concrete floor. And I'm like, "I'm not doing that." I mean, seriously. Especially if they wanted me to keep my legs straight.

TR1, p. 123. Similarly, Claimant minced no words in conveying his sentiments about the panel physicians' opinions that he could still work. "Well, they can go to hell. I worked with a broken foot before. I never stopped." TR1, p. 152. However sincere Claimant's protestations may be, they are insufficient to support a finding that the ultimate conclusions of any of his evaluators are based upon improper methodology or a preponderance of inaccurate medical findings. Importantly, no medical opinions in the record rebut these physicians' use or interpretation of Waddell's tests, their findings on exam, or the manner in which they considered Claimant's medical history in deriving their opinions. Key physicians who found Claimant credible, including Dr. Dirks, Dr. Williams, and Dr. McNulty, apparently administered no credibility testing at all. They were satisfied to take Claimant at his word, even though his credibility had been questioned by others, both before and after his 2006 accident and injury.

189. In addition, Claimant's testimony concerning his medical course was often inconsistent with information contemporaneously recorded in his medical records, and he has reported symptoms in excess of objective findings throughout his worklife, sometimes receiving monetary settlements as a result of his persistent but uncorroborated complaints. Furthermore, Claimant's testimony in these proceedings has been undeniably internally inconsistent on the key

points of his functionality both pre-injury and post-injury. For example, consider Claimant's testimony concerning the quality of his recovery following the 2003 T12-L1 surgery performed by Dr. Ganz. Both on questioning by his attorney and by the attorney for the ISIF, Claimant testified that the surgery left him unable to perform many of the physical tasks he had been able to perform before he injured his thoracic spine. TR1, pp. 95/6-99/23; 159/5-162/4. Therefore, Claimant testified that following the 2003 thoracic spine surgery, he was never able to return to sawing all day owing to the problems he had with bending and lifting. He limited his sawing to two hours per day, and there were some days when he did not saw at all. He spent more of his time operating the Cat and the log processor. However, Claimant gave an entirely different description of his recovery from thoracic spine surgery at the time of his 2009 deposition. At that time, Claimant described his recovery as follows:

Q. Do you think you made a full recovery from the thoracic, the T-12 L-1 surgery?

A. Oh, yeah.

Q. Yes?

A. Yes.

Q. Did you have any difficulty after you returned to work doing your logging?

A. No, sir.

Q. No part of the job?

A. No. It was fine.

Q. You could saw a tree, you could skid, you could operate machinery, everything?

A. Yes. I could run and jump. Everything. Ride motorcycles. I could do anything I wanted to.

C. Depo. 2009, p. 47, ll. 3 – 16.

190. Later in his deposition Claimant qualified this testimony by stating that Dr. Ganz had told him to avoid extremely hard to heavy lifting, but said that this restriction only impacted his ability to install a role of winch cable on his Cat, an activity which he was required to do once every three months or so. However, he was quite explicit that this was the only aspect in which his ability to perform his logging work or other physical activities was impacted by the thoracic spine surgery. (See Exhibit 24 at 345-346.) Claimant did not explain the discrepancy between his hearing testimony and his 2009 deposition testimony. TR1, pp. 162/17-164/3. Claimant was unable to reconcile these conflicting versions of how he fared following the 2003 thoracic spine surgery, but his testimony on this issue is important because it might have a bearing on whether or not the thoracic spine injury is a pre-existing condition which constituted a subjective hindrance to Claimant prior to the subject accident. It is easy to understand how an insincere claimant might be incentivized, under circumstances similar to those at bar, to argue that he is totally and permanently disabled by virtue of the last injury alone; if the Claimant loses on his total and permanent disability claim, he has not hurt his chances of still obtaining a sizable disability award related to the last accident. This might explain Claimant's deposition testimony, which is counter to the great weight of the medical and other evidence; evidence which clearly denigrates Claimant's assertion that he could do anything he wanted to at the time the 2006 Safety Video was prepared.

191. It is also possible that Claimant's pre-injury medical and other records should not be relied upon to accurately characterize how Claimant was actually getting along prior to the subject accident. Perhaps Claimant overstated his physical problems in order to maximize the settlements he obtained in past workers' compensation cases. If so, then the 2006 Safety Video,

and Claimant's explanation of his physical prowess at the time of his 2009 deposition might actually be a more accurate representation of his functional capacity immediately prior to the subject accident.

192. Another factor in assessing Claimant's credibility is his psychological condition. Claimant was diagnosed with a somatoform disorder in the 1980s and, in 2010, psychological testing led to a diagnosis of pain disorder. As well, the 2010 testing failed to confirm Claimant was malingering. The full meaning of these conclusions was not fleshed out in the record but, at a minimum, they tend to establish that at least some of Claimant's complaints in excess of objective findings are likely not due to an intent on his part to mislead his caregivers or this tribunal, but are instead the result of a psychological disorder that manifested prior to the accident precipitating the instant claims.

193. It is also relevant that Claimant has been invested in obtaining a disability settlement since (at the latest) July 30, 2006, when he first applied for SSDI. At this time – less than one month following his 2006 industrial accident – no physician had yet opined Claimant had incurred any permanent impairment, let alone permanent disability, from any condition related to his subject injuries.

194. The evidence of record establishes that Claimant is not a reliable historian with respect to his medical condition at any given time, that he has exaggerated details about his condition in sworn testimony offered in these proceedings, and that he has given inconsistent testimony over the years concerning the impact of his various injuries on his ability to work. There is also sufficient evidence to establish that Claimant's testimony is at least partially colored by secondary gain factors, as well as his pre-existing psychological pain disorder.

Claimant is not a credible witness. However, we are mindful that just because Claimant's self-reported complaints have not been consistent over the years, does not mean that he is not significantly disabled at the present time.<sup>6</sup>

### **DISCUSSION AND FURTHER FINDINGS**

195. 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).

### **CAUSATION**

196. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

197. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for

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<sup>6</sup> One of the Commissioners remembers very well a comment made at a long ago hearing by then-Commissioner Gerry Geddes. In the middle of cross-examination intended to expose that Claimant's past acts of dissimulation, all to discredit his current claim, Commissioner Geddes interrupted counsel to point out: "Just because he is a liar doesn't mean he didn't hurt himself at work."

compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*

198. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

199. Claimant asserts that he suffered injuries to his cervical, thoracic, and lumbar spine areas, and his right shoulder as a result of his July 3, 2006 industrial accident. He also argues that he has chronic pain syndrome caused by the accident and subsequent surgeries. Defendants and ISIF both argue that the conditions requiring Claimant's surgeries were pre-existing and not due, either in whole or in part, to an industrial accident.

200. **Accident.** The evidence is sufficient to establish that Claimant suffered an industrial accident on July 3, 2006. Claimant's description of being struck on his head/hardhat by a falling tree is consistent over time and it is unrebutted. Also, medical records indicate Claimant reported the accident immediately, and that he suffered injuries consistent with such an event.

201. **Lumbar spine herniation (L4-5).** Dr. Dirks and Dr. Ludwig opined that Claimant's lumbar spine herniation is consistent with being hit on the head by a falling tree. Further, no physician opined otherwise. Also, MRI imaging soon after the industrial accident

confirmed an increase in the size of Claimant's lumbar spine bulge at L4-5 since prior imaging taken in 2004. The pre-existing bulge had grown into a herniation that new imaging demonstrated was now compressing the left L4 nerve root. Also, some of Claimant's left-sided lower extremity symptoms were generally consistent with L4-5 neurological pathology. On the other hand, some of the symptoms Claimant reported were inconsistent; an epidural steroid injection failed to alleviate Claimant's symptoms (and, thus, failed to confirm that they arose from a neurological source) and an EMG study failed to confirm any left-sided acute neurological trauma. Also, some physicians were certain Claimant was not honest in his symptom presentation on their respective exams. Given this array of evidence regarding the new MRI finding, several physicians offered causation opinions.

202. Dr. Ludwig (in August 2006) initially ruled out an acute/industrial cause, even though Claimant's left-sided lower extremity symptoms were generally consistent with an L4-5 injury, based upon Claimant's normal EMG results and his Waddell's test failures, among other things. Also, Dr. Ludwig noted that Claimant did not have a clinically significant response to the epidural steroid injection he received shortly following his industrial accident. At his deposition in January 2007, Dr. Ludwig repeatedly testified that he could not opine either that the industrial accident was or was not related to his need for lumbar surgery. However, by the end of questioning, Dr. Ludwig opined that the lumbar herniation was likely related to the industrial accident, and that Dr. Dirks' proposed fusion surgery would be reasonable to treat Claimant's L4-5 condition. (He deferred to Dr. Dirks as to the relatedness of including L3-4 in the fusion surgery.) The reasons for Dr. Ludwig's change of heart are founded upon new information not



previously available to him in the forms of Dr. Dirks' opinion, evidence of prior left-sided lower extremity radiculopathy, and the Safety Video.

203. Dr. Stevens (in September 2006), and Drs. Barnard and Zoltani (in February 2008) all opined that the enlargement at L4-5 was more likely due to natural degeneration than to a new trauma. They found Claimant's presentation was not credible, in part, due to multiple failed Waddell's tests. Drs. Barnard and Zoltani, after viewing the September 2007 surveillance videos, were certain that Claimant was faking his symptoms on exam.

204. Dr. Dirks (in September 2006) opined that Claimant required surgery to decompress L3 through L5 due to his industrial injury. In 2012, he explained that the mechanism of injury was consistent with Claimant's complaints and his condition had worsened since 2004, so it is more likely than not that the industrial accident was a causal factor. He did not differentiate L3-4 from L4-5 when rendering an opinion, nor did he ever explain why a bi-level fusion was necessary.

205. Dr. McNulty (in September 2009) shared Dr. Dirks' ultimate opinion, employing a similar reliance upon the pre-existing imaging, the mechanism of injury, and the post-injury imaging.

206. It is somewhat troubling that neither Dr. Dirks nor Dr. McNulty explained how or whether the 2006 EMG testing figured into their respective opinions, given that it was pivotal to Dr. Ludwig's initial causation opinion. Dr. Ludwig did not fully explain why he changed his opinion, notwithstanding these results, but apparently Claimant's history of left-sided lower extremity neuropathy led him to place less reliance upon the EMG results.

207. Drs. Stevens, Barnard, Zoltani, McNulty, and Ludwig were all more familiar with Claimant's pre-existing medical history at the time they rendered their initial opinions than was Dr. Dirks. By the time of the hearing, it is not apparent from the record that Dr. Dirks ever knew that other physicians had opined Claimant was not credible in terms of accurately reporting his symptoms, or that he had a significant history of spine injuries and treatment prior to 2003. He took Claimant at his word regarding the symptoms he was experiencing. As Claimant's treating surgeon, however, Dr. Dirks was significantly more knowledgeable of Claimant's then-current conditions than any other physician.

208. Dr. Ludwig was aware of Claimant's credibility issue, having determined through his own examination that Claimant failed Waddell's tests, and also having looked into Claimant's prior medical records. Nevertheless, he appropriately altered his ultimate opinion regarding Claimant's lumbar spine condition after receiving new relevant information, establishing himself as an informed and objective witness more concerned with determining the "truth" than with advocacy. Also, as a former treating physician, Dr. Ludwig had more opportunities to evaluate Claimant than did any other opining physician except Dr. Dirks (and Dr. Williams, addressed below). On the other hand, Dr. Ludwig's reliance upon the Safety Video in changing his opinion is problematic. He took those images to mean that Claimant performed at that level all the time. However, Claimant's testimony concerning his actual condition when he made the Safety Video was internally conflicting. At one point, Claimant testified that the Safety Video only caught him on a good day, and that his condition was much worse than depicted. As a result, the Safety Video as interpreted by Dr. Ludwig is insufficient to support a change in his original assumptions regarding Claimant's pre-existing condition. Also,

Dr. Ludwig's reliance on Dr. Dirks' opinion is problematic because it was formed without full knowledge of Claimant's relevant pre-existing medical conditions and symptom reporting behavior. Dr. Ludwig's change of heart rests on shaky ground. It is not surprising that it came upon the heels of a confrontational cross-examination at his deposition.

209. At the end of the day, it is persuasive that all of Claimant's opining treating physicians agreed that there is a causal link between his worsened L4-5 condition and his industrial accident. Dr. Ludwig's struggles with this question brought the case complexities into better focus, inviting heightened scrutiny of the relatively cursory treatment the IME physicians provided. Although their opinions were well-grounded in Claimant's pre-existing history and findings from their respective one-time examinations, they lacked the depth and breadth of experience with Claimant's case possessed by Drs. Ludwig and Dirks, especially. Along these lines, none of the IME physicians testified under oath or defended their opinions under cross-examination in these proceedings; whereas, both Dr. Ludwig and Dr. Dirks did. Further, there is objective imaging evidence to corroborate Claimant's complaints, and Claimant's symptoms are consistent with the mechanism of injury.

210. Claimant has proven that his L4-5 disc herniation is the result of a permanent worsening of his pre-existing asymptomatic disc bulge at that level.

211. *Thoracic spine herniation (T10-11).* At his deposition in September 2012, Dr. Williams opined that Claimant has a symptomatic herniation at T10-11 due to the industrial accident. He relied upon a CT myelogram, presumably from April 2008, to support his opinion. That study revealed a protrusion at T10-11 that, in combination with degenerative spurring, mildly contoured the ventral cord. The results were of questionable clinical significance, so

Dr. Dirks ordered cervical and thoracic MRIs, also in April 2008, which he opined demonstrated multilevel minimal disc degeneration but, apparently, no neurologic pathology. There is apparently no imaging demonstrating a symptomatic herniation at T10-11.

212. Dr. Dirks also addressed a T10-11 herniation in his September 2012 deposition. He did not know whether Claimant, at the time, had a herniation at this level, but he opined that Claimant did not have a *symptomatic* herniation because Claimant had not reported any symptoms Dr. Dirks associated with that condition. Dr. Dirks had just taken Claimant to lumbar surgery in April 2012. Claimant's assertion in his briefing that Dr. Dirks "explained that the mechanism of the accident, getting struck on the head, was responsible for Green's current thoracic problems" is misleading. Dr. Dirks opined that being struck on the head could create or accelerate problems throughout the spine; however, he does not specifically address any thoracic problems, and he definitely does not opine that Claimant incurred a thoracic spine injury as a result of the July 2006 industrial accident.

213. Drs. Barnard and Zoltani acknowledged a 2008 thoracic MRI demonstrating a "small disc protrusion" at T10-11. JE-170.

214. No other physician has opined that Claimant suffered any thoracic spine injury in 2006.

215. Dr. Williams' opinion is unsupported by the weight of medical evidence in the record. Claimant has failed to prove that he sustained an industrial T10-11 herniation.

216. *Cervical spine strain and bulge (C5-6).* Radiologic imaging confirmed an acute cervical sprain in the ligaments and musculature at C5-6 shortly following Claimant's industrial accident. No physician disputes that this injury was likely caused by Claimant's industrial

accident. All opined that it would heal with conservative treatment. None have opined that Claimant's strain did not, eventually, heal. Claimant has failed to establish that he incurred any permanent damage to the ligaments or musculature at C5-6 due to his industrial accident.

217. Claimant's disc bulge at C5-6 was evident on post-accident imaging taken July 11, 2006. According to the reading radiologist, at C5-6 Claimant had a broad-based right paracentral disc bulge causing mild contouring of the cervical cord and minimal spinal stenosis. According to Dr. Dirks, "there was a diffuse disk bulge at C5, 6 but no frank impingement of the neural elements." 2012 Dirks Dep., p. 21. No physician opined, based upon the 2006 MRI, that the C5-6 bulge was either acute or caused by the industrial accident, or that it was causing any of Claimant's symptoms.

218. Following Claimant's L3-5 fusion in February 2007, Claimant began complaining of right-sided neck pain and numbness into his right arm. A cervical spine MRI conducted that month revealed, among other things, "moderate narrowing of the C5-6 right neural foramen" accompanied by bony changes. Dr. Dirks opined, without elaboration, that the MRI evidenced a C5-6 disc bulge correlating with Claimant's right radicular symptoms. In June 2007, Dr. Dirks performed C5-6 fusion surgery that he opined (in 2012) was related to the 2006 industrial accident. Dr. McNulty (in September 2009) also opined that Claimant's cervical surgery was necessitated by his industrial accident. On the other hand, Drs. Barnard and Zoltani (in February 2008) opined that Claimant's cervical spine disc pathology was entirely related to pre-existing degenerative processes, and that the industrial accident had no permanent effect.

219. According to the reporting radiologist, Claimant's November 24, 2004 cervical spine MRI showed pre-existing C5-6 pathology consisting of a mild to moderate broad posterior

and right posterolateral disc protrusion and end plate spurring causing a low-normal central canal volume, without deformity of the cord, and mild bilateral neural foraminal narrowing at C5-6, somewhat greater on the right. No physician provided any testimony establishing how, or whether, these findings were considered in developing their respective opinions regarding the nexus of Claimant's symptoms leading to his June 2007 C4-5 cervical fusion surgery. Dr. McNulty did not list this study among the records he reviewed prior to rendering his IME opinions. Dr. Dirks has never mentioned it. Drs. Barnard and Zoltani indicated in their IME report that they reviewed cervical imaging, but they did not identify any specific cervical studies.

220. Claimant reported neck pain on the day of his industrial accident and consistently thereafter, to Drs. Ludwig, Stevens, and Dirks. Also, it requires no stretch of the imagination to understand how Claimant's industrial accident could have an effect on his pre-existing cervical spine bulge, and all parties agree that Claimant suffered injuries to the ligaments and musculature at the C5-6 level as a result of his industrial accident. In addition, it is conceivable that Claimant's symptoms and medications related to his contemporaneous low back condition and related surgery masked the more significant neck pain Claimant may have otherwise experienced.

221. Amid conflicting expert testimony and in the absence of any testimony regarding the impact of Claimant's 2004 MRI results, the evidence establishes by a preponderance that Claimant incurred trauma to his C5-6 disc as a result of his industrial accident that necessitated his cervical spine fusion surgery.

222. **Right shoulder injury.** Shortly prior to his cervical fusion surgery in July 2007, Claimant reported right-sided neck and arm pain, and Dr. Dirks noted weakness in his right

deltoid, triceps, and biceps on exam. Just one week after his cervical fusion surgery, Claimant began complaining of mostly posterior bilateral shoulder pain along with right arm pain and he sought additional pain medication to deal with it. In August 2007, Claimant still claimed bilateral shoulder pain, even though he was now taking MS Contin. Follow-up imaging led Dr. Dirks to opine there was no neurological basis for Claimant's pain.

223. In September 2007, Claimant was filmed with no apparent shoulder difficulties in the surveillance video. In October 2007, Dr. Magnuson diagnosed chronic bilateral shoulder and thoracic spine area myofascial pain. Like others before him, Dr. Magnuson recommended physical therapy which, as before, Claimant did not follow up with due to his pain. On exam around this time, Dr. Dirks noted severe atrophy of the right arm in the deltoid and biceps areas, with loss of strength in the right deltoid muscle. Dr. Williams in early 2008 undertook management of Claimant's pain care and opined that his cervical and shoulder pain were his worst problems. Dr. McNulty reported in his September 2009 evaluation report that Claimant had reported right shoulder symptoms immediately following his industrial accident; however, Claimant's medical records through 2006 and early 2007 do not reference right shoulder pain or injury.

224. Claimant underwent a right shoulder MRI in November 2009. It failed to demonstrate any significant shoulder pathology, leading Dr. McNulty to opine that Claimant did not incur any permanent right shoulder injury as a result of his industrial accident. Dr. Williams, employing hopeful reasoning, opined that the clear MRI established not that Claimant had no injury, but that Dr. Williams' treatment must have healed the right rotator cuff tear he diagnosed

based upon Claimant's complaints and his examinations. No other physician has opined Claimant's right shoulder symptoms are related to his industrial accident.

225. Claimant's right shoulder and arm atrophy evidence a lack of use that could be related to pain. However, the record lacks sufficient evidence to connect the source of such pain to the industrial accident or either of his subsequent accident-related surgeries. Also, Claimant's medical records evidence a history of chronic right shoulder and arm symptoms unexplainable by objective evidence. In July 1987, following his skidder accident, Claimant had severe right shoulder pain with right arm and hand tingling without evidence of any neurological defect or acute injury. By May 1988, he was diagnosed with chronic pain in his neck, shoulders, right arm, and elsewhere. These pain reports continued through the end of 1988, when Claimant received a settlement related to the industrial injury he claimed caused it. Claimant did not return for treatment following receipt of his settlement payment and he soon returned to logging.

226. Claimant has failed to prove that he incurred a right shoulder injury as a result of the 2006 industrial accident.

227. **Chronic pain syndrome.** Claimant was diagnosed with somatoform disorder in 1988. In 2010, psychological testing confirmed he had a psychological pain disorder. Claimant has not established that he has a physical chronic pain syndrome, nor that he incurred any new psychological condition as a result of his industrial accident as set forth in Idaho Code § 72-451.

228. Claimant has failed to prove that he incurred chronic pain syndrome as a result of the 2006 industrial accident.



### ***MAXIMUM MEDICAL IMPROVEMENT (MMI)***

229. As a prerequisite to determining Claimant's PPI or PPD, the evidence must demonstrate that he is medically stable. To wit, "permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. The statute does not contemplate that a claimant must be returned to his original condition to be considered medically stable, but only that the condition is not likely to progress significantly within the foreseeable future. Another important consideration is that workers' compensation benefits are allocated based upon injuries stemming from specific workplace accidents and occupational diseases. In this case, that means that only the conditions related to Claimant's July 2006 industrial injuries are compensable. Therefore, the Commission should focus upon Claimant's current diagnoses related to his subject industrial injuries to determine whether he is medically stable.

230. Here, Claimant's permanent conditions resulting from his July 3, 2006 industrial accident include his L4-5 disc herniation requiring spinal fusion surgery in February 2007 and his cervical disc bulge at C5-6 requiring fusion surgery in July 2007.

231. Drs. Bernard and Zoltani opined that these conditions were medically stable as of the date of their panel evaluation on February 13, 2008, even though Claimant continued to report pain, crunching and snapping in his neck (worsening after surgery), as well as pain in his mid and low back. They found Claimant's complaints were unsupported by objectively verifiable causes and, further, they both opined that Claimant was faking his symptoms.

232. At his deposition, Dr. Dirks opined that Claimant reached MMI by February 21, 2008 (one year following his February 2007 lumbar spine surgery). He continued to recommend testing for Claimant's ongoing pain complaints after that time to confirm his industrial injuries were stable, including a cervical/thoracic spine CT myelogram on April 10, 2008, and MRIs on April 25, 2008, neither of which revealed pathology that would explain Claimant's continuing symptoms. Thereafter, Dr. Dirks agreed that conservative care to control Claimant's pain was warranted, but he did not believe Claimant had any condition as a result of his industrial injuries that could be improved with surgery.

233. Dr. Williams, on the other hand, opined on April 9, 2008, that Claimant would not reach MMI for at least a year and that he required additional pain medications and manipulative treatment for chronic pain in his neck and shoulders. The record establishes that the treatment Dr. Williams endorsed (and that Claimant received) was palliative in nature. As of September 2012, Dr. Williams still recommended ongoing treatment. He acknowledged that, as an osteopath, his concept of medical stability is different from a medical physician's. Dr. Williams' opinions regarding Claimant's medical stability status are less persuasive than the medical physicians' generally, and Dr. Dirks' in particular.

234. On October 1, 2008, Dr. Ganz evaluated Claimant's neck pain and opined that it was due to muscle spasm, with no radicular component. He recommended that Claimant return to physical therapy, noting that Claimant only went twice following his cervical fusion surgery, then quit because it hurt. Claimant had declined physical therapy before, due to pain, and there is no evidence in the record to establish that Claimant followed Dr. Ganz' recommendation.

235. On September 8, 2009, Dr. McNulty opined Claimant had reached MMI and assessed PPI to both his cervical and lumbar spine conditions.

236. Only Dr. Williams opined that Claimant was not medically stable in or around February 2008. Dr. Williams' opinion is based, in part, on Claimant's shoulder and right arm symptoms that were not proven to be related to his industrial injuries. Further, Dr. Williams apparently based his opinion (that Claimant had not reached MMI) on his concurrent opinion that Claimant needed treatment for pain relief, with which Dr. Dirks concurred. Claimant's need for pain relief as a result of his industrial injuries cannot be quantified, due to his credibility issues and his psychological pain disorder. Moreover, even if Claimant's residual pain could be attributed to his industrial injuries, the evidence in the record establishes that this condition was stable.

237. As Claimant's treating surgeon, Dr. Dirks had more opportunities to observe all of Claimant's relevant conditions than did the other opining physicians. He followed up with appropriate testing on all of Claimant's residual complaints, finding no physiological basis.

238. Claimant's residual pain complaints are likely due to a combination of his pre-existing somatoform disorder and incentives related to the pendency of the instant litigation.

239. Claimant reached MMI as of April 25, 2008, the date on which the last test ordered by Dr. Dirks to confirm the status of Claimant's industrial conditions returned benign results.

### ***MEDICAL CARE***

240. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital

service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. Claimant is also entitled to reasonable palliative care. *Hamilton v. Boise Cascade Corp.*, 84 Idaho 209, 370 P.2d 191 (1962).

241. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

242. In *Sprague v. Caldwell Transportation*, 116 Idaho 720, 722-723, 779 P.2d 395, 397-398 (1989), the Court held that medical treatment already received is reasonable when: 1) the claimant made gradual improvement from the treatment; 2) the treatment was required by the claimant's physician; and 3) the treatment was within the physician's standard of practice, the charges for which were fair, reasonable, and similar to charges in the same profession. The Court has announced no similar standard for prospective medical treatment; thus, *Sprague* provides some guidance but the instant case must be judged on the totality of the circumstances with respect to his request for additional medical care. *Ferguson v. CDA Computune*, 2011 IIC 0015 (February 25, 2011); *Richan v. Arlo G. Lott Trucking, Inc.*, 2001 IIC 0008 (February 7, 2011).

243. Claimant seeks benefits for ongoing treatment by Dr. Williams of, primarily, his neck, thoracic spine, and shoulder conditions. He asserts that the manipulations and narcotic pain medications Dr. Williams administers are helping his body heal itself. Dr. Williams, at the

time of the hearing, was prescribing 25% more pain medications than in January 2008, when he first began treating Claimant. Claimant was only treating with Dr. Williams once per month at the time of the hearing, as opposed to once per week at the beginning of his treatment.

244. Dr. Williams has been a strong advocate of Claimant, writing open-ended letters opining as to his long-term disability and testifying under oath in these proceedings. He came to Claimant's case nearly a year following his lumbar spine surgery and approximately six months following his cervical spine surgery. His opinions are sometimes inconsistent with Dr. Dirks', and he believes Claimant will require manipulations and medications indefinitely. He diagnosed a right shoulder rotator cuff tear without the aid of radiologic imaging then, after Dr. McNulty ordered an MRI that demonstrated no tear, he took credit for helping the "tear" to heal without entertaining the possibility that there never was a tear in the first place. Dr. Williams' opinions are generally not very persuasive because they appear more strongly grounded in advocacy than in reasonable interpretations of objective and clinical evidence.

245. As discussed elsewhere herein, Claimant's pain complaints are unreliable in terms of identifying the etiology of the pain. Dr. Dirks ruled out a treatable cervical spine pain source in April 2008. He agreed that Claimant was in pain, due to his ongoing complaints and his right shoulder atrophy, but he did not causally connect Claimant's industrial injuries to this pain. He did not opine that Claimant should receive treatments from Dr. Williams indefinitely, but he did acknowledge that they helped because they kept Claimant's head aligned.

246. Claimant's thoracic and shoulder injuries were determined, above, not related to his industrial accident.

247. Claimant incurred a new whiplash-type injury to his cervical spine as a result of his October 22, 2010 chair fall which reignited his cervical spine symptoms.

248. Claimant has proven that Dr. Williams' treatment of his lumbar spine through April 25, 2008, and his cervical spine through October 22, 2010 (including palliative care following April 25, 2008) was reasonable and related to his 2006 industrial injuries. He is entitled to reimbursement for qualifying treatment through those dates.

### ***INDUSTRIAL INJURY PPI AND MEDICAL RESTRICTIONS***

249. Following his 2006 lumbar spine fusion surgery, Claimant was limited as set forth in Mr. Bengston's 2009 FCE. Although this FCE was conducted more than a year following the date on which Claimant reached MMI, no party disputes that these results accurately reflected Claimant's post-industrial accident functional abilities. The Claimant's lumbar and cervical spine injuries, with their attendant PPI and medical restrictions, are determined to be causally linked to Claimant's 2006 industrial accident. Unfortunately, no physician specifically diagnosed the source of each of Claimant's functional deficits. Drs. Dirks and McNulty did, however, rule out an industrial source for Claimant's right shoulder and hand deficits indicated in the FCE.

250. **Lumbar spine.** In September 2009, Dr. McNulty assessed 20% whole person PPI to Claimant's lumbar spine condition. No other physician assessed lumbar PPI. Therefore, Claimant has 20% whole person PPI, with no apportionment to pre-existing conditions.

251. **Cervical spine.** In September 2009, Dr. McNulty assessed 25% whole person PPI to Claimant's cervical spine, without apportionment.

252. 2009 FCE restrictions related to Claimant's industrial injuries. Claimant could sit occasionally, walk frequently, and sit/stand/walk for eight hours per day, five days per week, so long as he could change positions frequently and at his own pace. Claimant could carry 30 pounds rarely and ten pounds occasionally or frequently and could bend or stoop occasionally. Claimant was significantly limited in any activity requiring him to shift from a neutral spine condition, like bending or twisting.

253. Dr. McNulty restricted Claimant from heavy (and very heavy) work due to the weakness in his spine created between his thoracic (non-industrial) and lumbar (partially industrial) fusions. He agreed with Mr. Bengston's light-duty FCE recommendations.

254. Mr. Brownell and Dr. Collins agree that Claimant was limited to sedentary and some light-duty work following his 2006 industrial injury.

#### ***PERMANENT DISABILITY***

255. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

256. 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 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). 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).

257. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot*, WL 718795 (March 7, 2012) reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. However, the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case.

258. ISIF argues that the time-of-hearing labor market statistics should be applied, as per *Brown*, but it would work an injustice to ISIF and Employer/Surety to assess Claimant's disability (particularly whether he is totally and permanently disabled) as of the time of the hearing because these defendants are not liable for any worsening in Claimant's condition attributable to non-industrial causes following the last accident. Consequently, ISIF argues that Claimant's disability should be determined as of the date of medical stability.

259. The Commission agrees that Claimant's disability should be assessed as of the date on which he became medically stable from his last industrial accident for the following reasons. Importantly, there is sufficient evidence in the record to establish that Claimant reached medical stability following his subject industrial accident, but before his subsequent injury.



Also, Claimant's condition attributable to the industrial accident and his pre-existing conditions can more precisely be assessed as of the date of MMI. This is because Claimant's subsequent injury required surgical intervention at a site he contends was permanently impaired by his subject industrial accident. The worsening in his functional abilities (if any) attributable to the subsequent condition cannot be separated from his industrial and prior conditions by objective testing. Yet, testing and opinions in the record confirm Claimant's functional capabilities prior to the non-industrial subsequent injury. Under these circumstances, it would be nothing more than an academic exercise to consider Claimant's time-of-hearing condition, then attempt to "subtract" his subsequent conditions to determine Defendants' liability. The addition, then subtraction of irrelevant information would unnecessarily complicate the determination of Claimant's disability, leading to a less accurate assessment of Claimant's loss of functional abilities attributable to his industrial accident and more effort and expense required of all parties. Therefore, Claimant's local labor market will be determined as of the hearing date; however, his functional capabilities will be determined as of April 25, 2008, the date on which he reached MMI.

260. **Nonmedical factors.** Claimant has a GED and scored at the college level in math skills on the TABE test administered by Mr. Brownell. He has some on-the-job training in mechanics, as well as extensive experience in all aspects of logging, including operating and maintaining machinery, hands-on management of logging salvage jobs, budgeting and record-keeping, paying bills, complying with laws related to employment and maintaining a business, and related activities. Claimant does not have experience hiring employees from outside his St. Maries "grapevine" area contacts. He does not possess office-ready computer skills, and he has

not worked in a job that requires him to accommodate walk-in customers since he was a service station attendant in high school.

261. Claimant is not disfigured, though he did walk with a limp, at times, on and around April 25, 2008. Claimant was, at that time, a fit man in his late 40s. Claimant is well-known in his local labor market as a logger who has suffered a significant back injury.

262. **Permanent disability – two methods.** As a threshold matter, Claimant must establish he was totally and permanently disabled as of April 25, 2008 to prove ISIF is liable for his benefits. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled.

263. **100% method.** A claimant may prove total and permanent disability if his or her medical impairment together with the nonmedical factors total one hundred percent. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement. If the claimant has met this burden, total and permanent disability has been established. If, however, the claimant has proved something less than one hundred percent

disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997).

264. Claimant does not argue that he is totally and permanently disabled by the 100% method. Moreover, the record establishes that Claimant is not so disabled that he can do no work at all. Therefore, Claimant is not totally and permanently disabled by the 100% method.

265. **Odd-lot doctrine.** Claimant argues that he is totally and permanently disabled as an odd-lot worker. An odd-lot worker is one “so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Claimant carries the burden of proof to establish total permanent disability under the odd-lot doctrine, which may be established in any one of three ways:

- a. By showing that the claimant has attempted other types of employment without success;
- b. By showing that the claimant or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
- c. By showing that any efforts to find suitable work would be futile.

*Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

266. **First Lethrud method.** The record establishes that Claimant has attempted other types of employment since the subject accident. Following the date of injury, he continued as the sole proprietor of St. Joe Salvage, although all logging work was performed by his employees. Claimant was forced to close his business in October of 2008. The question is whether the facts demonstrate that it was because of his injuries that Claimant was ultimately unsuccessful in his efforts to continue as the sole proprietor of St. Joe Salvage.

267. In 2007 and 2008, Claimant's participation in the sole proprietorship consisted of running safety meetings, finding out where Potlatch wanted Claimant to log, doing payroll, and paying the bills. TR1, p. 169/20-23. He did no to minimal work in the woods. Even so, Claimant's business had gross receipts of \$244,396.00 in 2007, and Claimant had an adjusted gross income of \$70,295.00 in that year. Claimant only ran his business through October of 2008. Even so, for 2008, Claimant's tax returns show gross receipts of \$187,673.00 with adjusted gross income of \$50,016.00. Claimant testified that he closed his business in October of 2008 because he had been operating at a financial deficit. He testified that he lost a top worker due to an injury, had to deal with the breakdown of his Cat, and faced a \$12,000.00 workers compensation insurance premium payment that he could not meet. It is difficult to square Claimant's testimony that he had been losing money in the business prior to its closure with his tax returns, which show an AGI in excess of \$50,000.00 for 2008. However, it is easier to understand how events such as the loss of key personnel or equipment can suddenly turn a business from profitable to unprofitable. The closure of Claimant's business led, in short order, to the loss of his home and property, effectively putting him on the street, or close enough thereto to make no difference. If Claimant's business was still profitable, we doubt very much

that he would close the business in order to advance his designs upon obtaining SSDI and total and permanent disability benefits. Although Claimant's return to logging following the subject accident ultimately proved unsuccessful, we are not persuaded that it proved unsuccessful because of Claimant's work injury. Ultimately, the evidence persuades us that Claimant was forced to close his business because of business-related misfortunes, not because he was physically incapable of continuing to run his business in a profitable fashion. Therefore, Claimant has not shown total and permanent disability by evidence that he attempted other types of employment without success.

268. **Second Lethrud Method.** Next, Claimant can satisfy his burden of showing that he is an odd-lot worker by demonstrating that he, or vocational rehabilitation experts on his behalf, have searched for other work to no avail. Claimant has engaged in some independent job search activities since the subject accident. He has filed one application for employment with the Tribe, and though he alluded to other applications for employment, he did not identify any other employers with whom he filed a formal application. Aside from Claimant's application with the Tribe, Dan Brownell could not remember any other employers with whom Claimant filed an application, but testified that he thought the filing of formal applications for employment a waste of time in Claimant's case. (Transcript 93/15-23.) Mr. Brownell assisted Claimant in searching for employment by contacting area employers both with, and without, Claimant. Mr. Brownell did not prepare a resume for Claimant outlining Claimant's background, skills, and other attributes, explaining that such a resume would not actually advance any of Claimant's goals towards finding a job. However, he acknowledged that Claimant actually does have a lot of

things to be proud of which could be beneficially exploited on a resume, such as his good reputation with Potlatch and his multi-year awards as logger of the year.

269. Although Mr. Brownell testified that he saturated Claimant's labor market with job contacts and inquiries on Claimant's behalf, Dr. Collins was critical of this approach, testifying that by accompanying Claimant on job contacts, or making the contacts without Claimant, Mr. Brownell may have unintentionally sabotaged Claimant's prospects for making a good impression on a potential employer; Mr. Brownell's presence robs Claimant of the opportunity to make his own impression on a potential employer and signals to that employer that Claimant may be damaged goods. Dr. Collins was also critical of Mr. Brownell's lackadaisical attitude towards the preparation of formal job applications and a suitable resume to accompany such applications. Dr. Collins was also critical of Mr. Brownell for not seeking employment where the job openings were. Per Dr. Collins, many of the job contacts and inquiries made by Mr. Brownell were made at places where no current job openings existed.

270. Further, Mr. Brownell acknowledged that he did not focus his efforts on placing Claimant in cashiering, retail, or other service industry jobs because of his perception that Claimant suffered from what he colloquially described as a "yuck factor", even though Claimant admittedly had math and other skills that could be exploited in such employment. According to Mr. Brownell, Claimant's physical presentation, bad dentition, and rustic demeanor made him a poor candidate for any job which required interaction with the public. However, Mr. Brownell was also the first to state that Claimant was well-known and well-liked in his small community, a legend in fact. Even if we give credence to Mr. Brownell's observations concerning Claimant's appearance and mannerisms, we believe that he inappropriately excluded from his job search

those service industry jobs in which openings frequently appear, and which claimant was physically capable of performing. On balance, we cannot say that Mr. Brownell's failure to identify suitable employment for Claimant is sufficient to demonstrate that Claimant is an odd-lot worker.

271. **Third Lethrud method.** Mr. Brownell opined that it would be futile for Claimant to attempt to find work in the St. Maries area. In addition to Claimant's medical and non-medical factors, Mr. Brownell cited the peculiarity of Claimant's local labor market in which employers are familiar with the logging industry and the potential liability associated with employing an ex-logger with a spine injury. Specifically, everyone knows Claimant. They also know that he is no longer logging due to a spinal injury, and are unwilling to risk financial liability, should he again injure himself. Testimony in the record from potential employers supports Mr. Brownell's opinion in this regard, as does his 30 plus years of experience placing individuals in jobs in the St. Maries area.

272. Dr. Collins opined that, at least until his 2010 chair injury, Claimant was employable in regularly occurring jobs like retail sales, cashier, security guard, and driver. Mr. Brownell testified that security guard and driver likely required physical abilities in excess of Claimant's limitations. He did not believe Claimant would be employable in other jobs for a variety of reasons, many of which are peculiar to the St. Maries area. Contrary to Mr. Brownell's testimony regarding a deli job, the evidence does not establish Claimant would have trouble tallying. However, even though Claimant is apparently well-liked in his hometown, such that his rustic presentation might not be an obstacle to employment, Claimant would be competing with able-bodied individuals, many with customer service or other directly-related

experience, which he lacks. He is an older worker and, thus, may be viewed as more reliable. However, he had not worked for someone else for more than 20 years, and had not worked outside the logging industry for more than 30 years, except for one short stint as a mechanic. In addition, Claimant's lack of computer skills and his sitting restriction would have precluded him from being competitive for back office and telephone work for which he may otherwise qualify based upon his established computational skills.

273. Based on the foregoing, we find that Claimant has proven his odd-lot status by demonstrating that efforts to find suitable work would be futile. In making this determination, we recognize that there is some potential conflict between this conclusion, and our determination that Claimant did, in fact, successfully continue to work as the sole proprietor of St. Joe Salvage through October of 2008, and that the business' failure has more to do with a number of coincidental business misfortunes than it does Claimant's physical injuries. However, that Claimant was able to find ways to operate his business in 2007 and 2008 as a nonworking sole proprietor is not necessarily fatal to a determination that Claimant is totally and permanently disabled. Claimant need not demonstrate that there is no work that he can do. He is merely required to demonstrate that he can perform no services other than those which are so limited in quality dependability or quantity that a reasonably stable labor market for them does not exist. *See Bybee v. State Industrial Special Indemnity Fund, supra.* Claimant's self-employment was just such a limited employment opportunity, one that is unlikely to arise again for Claimant.

274. Based on the foregoing, we conclude that Claimant has met his *prima facie* case of demonstrating that he is an odd-lot worker because it would be futile for him to look for work.



275. The burden now shifts to Defendants “to show that some kind of suitable work is regularly and continuously available to the claimant.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 1067 (1995). Defendants must prove there is:

An actual job within a reasonable distance from [claimant’s] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [employer] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

*Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 p.2d 1360 (1977).

276. Dr. Collins listed a number of advertised positions that she opined may be within Claimant’s restrictions within 30 to 40 miles of his home. Although she did not check on every opening, the evidence of record, including Mr. Brownell’s opinions, indicates that it is likely that Claimant could have done, at a minimum, some retail sales/cashiering work. There is no evidence, however, rebutting the testimony herein of the potential employers regarding the stigma associated with Claimant’s spine condition, or affirming that Claimant would be a serious contender for any specific job. As such, the evidence fails to establish that Claimant had a reasonable opportunity to achieve employment in any proposed position. Claimant’s lack of experience and appearance would preclude him from some of the jobs within his functional abilities. The fact of his back injury would likely preclude him from the rest. Requiring few skills, these jobs would place Claimant in competition with a broad hiring pool of many able-bodied individuals, who would likely be selected over Claimant due to the stigma of his significant spinal pathology and related liability fears.

277. Defendants have failed to prove that there is work in Claimant’s local labor market that he has a reasonable opportunity to obtain. Claimant has established that he was

totally and permanently disabled pursuant to the odd-lot doctrine as of April 25, 2008, the date on which he reached MMI following his July 2006 industrial injuries.

### ***ISIF LIABILITY***

278. Idaho Code § 72-332(2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a pre-existing permanent physical impairment to result in total and permanent disablement of the employee.

279. In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

- (1) Whether there was indeed a pre-existing impairment;
- (2) Whether that impairment was manifest;
- (3) Whether the alleged impairment was a subjective hindrance to employment; and
- (4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

*Dumaw*, 118 Idaho at 155, 795 P.2d at 317.

280. In evaluating the claim of Employer/Surety that responsibility for Claimant's total and permanent disability should be shared between Employer/Surety and the ISIF, it is first necessary to address Defendants' argument that notwithstanding his current proclamations, Claimant is bound by the provisions of the prior lump sum settlements which identify pre-existing impairments totalling ten percent of the whole person. The argument is that since Claimant acceded to these PPI ratings when settling the prior claims, he cannot now be heard to

assert that all of his total and permanent disability is referable to the subject accident. Essentially, Defendants argue that Claimant should be judicially estopped from arguing that responsibility for his total and permanent disability should not be shared between Employer/Surety and the ISIF. Notwithstanding any other objections which might be raised to the application of the doctrine of judicial estoppel, we find it inapplicable for the simple reason that in this proceeding Claimant takes no position that could be deemed inconsistent with the averments allegedly made in the earlier lump sum settlements. It is Defendants who have made claim against the ISIF, and it is Defendants who have assumed the burden of proving all the elements of ISIF liability. Claimant has asserted that he is totally and permanently disabled, but has taken no position on whether responsibility for his disability should be borne by Employer alone or by Employer and ISIF jointly. (*See* Claimant's Opening Brief at 28.) What Defendants are really attempting to do is bind the ISIF to the averments of the prior lump sum settlement. However, the ISIF did not make the averments in question and was not even a party to the prior settlements. The Commission concludes that the doctrine of judicial estoppel has no application to the facts of this case. Having determined that the doctrine of judicial estoppel does not apply, we must now determine whether or not the elements of ISIF liability are met by the evidence before us.

#### ***PRE-EXISTING PERMANENT PHYSICAL IMPAIRMENT***

281. Claimant has a number of pre-existing conditions which may qualify as pre-existing permanent physical impairments. Some of these can be disposed of fairly quickly. In 1993 Claimant underwent bilateral carpal tunnel surgery. In 1995 he suffered a right shoulder separation for which he underwent surgery. In 2000 Claimant was diagnosed with a hernia for

which he underwent two surgeries. In 2001 Claimant suffered a left shoulder separation for which he underwent surgery in 2002. For the conditions referenced above, the record fails to disclose that Claimant suffered any permanent physical impairment. Nor does it appear that any of the other elements of ISIF liability are satisfied for any of these conditions.

### **Lumbosacral Spine**

282. Claimant suffered an unspecified injury to his lumbar spine in 1984. The 2005 lump sum settlement agreement reflects that Claimant was given a five percent PPI rating for the effects of the 1984 injury. However, there are no medical records in evidence which support the assertion that Claimant was given a five percent PPI rating for a 1984 lumbar spine injury, much less the nature and extent of his lumbar spine injury. In 1987 Claimant suffered a work related accident while operating a skidder. Although his injuries were primarily to the neck, jaw, right shoulder and upper extremities, there are some references to lower back symptoms among the constellation of Claimant's other symptoms. The 1987 accident was eventually resolved via a lump sum settlement, which referenced Claimant's entitlement to a five percent PPI rating on account of the 1987 injury. However, the lump sum settlement does not reflect to what body part or parts the five percent PPI rating attached. Nor are there any contemporaneous medical records which support the award of a five percent PPI rating arising from the 1987 work accident.

283. The record does reflect that Claimant began reporting neuropathies in approximately 1988. In December of 2004, Dr. Dirks confirmed that an EMG evidenced residual radiculopathy in Claimant's S1 nerve distribution. In August of 2006, Dr. Ludwig assessed permanent restrictions of "no significant repetitive bending or heavy lifting due to his ongoing condition of chronic S1 radiculopathy on the right as well as his history of lumbar

fusion [*sic*], but not due to his date of injury of 7-3-06.” JE-30. In September of 2006, Dr. Stevens diagnosed chronic pre-existing left S1 radiculopathy.

284. On September 8, 2009, Dr. McNulty assessed Claimant’s permanent impairment related to the 2006 accident, assigning a 20% PPI rating to Claimant’s lumbar spine injury. He declined to apportion any part of this impairment to a pre-existing condition, reasoning as follows:

Though Mr. Green did have pre-existing degenerative changes, they were asymptomatic and he was functioning at a high level prior to his injury. For this reason, I did not feel that apportionment is indicated in this case. However, if he did have a prior lumbar spine workmen’s compensation settlement, that would be subtracted from the 20% whole-person impairment that is attributable to his lumbar spine condition.

....

I have reviewed the FCE and agree with the findings. Mr. Green has a fusion at T12-L1 and at L3-L5. Because of those fusions, he has increased stress between L1 and L3. He should not engage in heavy physical activities such as logging. He is more suited to work in a light job duty category as outlined in the FCE.

JE-23, p. 332.

At first blush, Dr. McNulty’s treatment of the issue of apportionment of PPI appears somewhat inconsistent with the records he reviewed in connection with his evaluation. Both Drs. Ludwig and Stevens noted Claimant’s pre-existing chronic S-1 radiculopathy, yet Dr. McNulty failed to consider these findings when addressing the issue of apportionment, concluding that Claimant’s lumbar spine was asymptomatic prior to the subject accident. Dr. McNulty’s treatment of the apportionment issue can be reconciled with the records of Drs. Ludwig and Stevens by recognizing that Claimant’s radiculopathy was at S-1, while Dr. McNulty’s rating addressed only L3-L5.

285. The evidence persuades us that Claimant may have a pre-existing permanent impairment due to his well-documented S-1 radiculopathy. However, although we conclude that this pre-existing condition may have been of sufficient severity to warrant an impairment rating, the record does not disclose that Claimant was ever rated for this condition.

### **Thoracic Spine**

286. In 2002, Claimant suffered an injury to his thoracic spine at T12-L1. He underwent a fusion surgery at this level in January of 2003, performed by Dr. Ganz. Dr. Ganz released Claimant without restrictions referable to the T12-L1 fusion in 2004. However, both Dr. Dirks and Dr. Ludwig testified that permanent medical restrictions against bending and lifting would be appropriate following Claimant's fusion, such that he should avoid heavy and very heavy work, like logging, following the surgery. In September of 2006, Dr. Stevens opined that Claimant's pre-existing conditions precluded him from heavy and very heavy work.

287. The Commission concludes that Claimant is likely entitled to an impairment rating referable to the T12-L1 fusion and residuals. However, the record altogether fails to establish what that impairment rating might be.

### **Cervical Spine**

288. Among Claimant's complaints following the 1987 skidder accident were complaints of neck, jaw, and bilateral upper extremity symptoms. Some of Claimant's medical providers felt he was chronically disabled due to pain following the 1987 accident, even though there was little to no objective evidence of injury. Although it was recommended that Claimant not return to logging, he did anyway, even though he was afforded the opportunity through the

1988 lump sum settlement to retrain as a truck driver. Claimant continued to work as a logger until 2004, evidently without any ongoing cervical spine complaints.

289. In 2004, Claimant sought treatment after he hit his head getting into his Cat. MRI imaging did not identify evidence of neurological injury, but did reveal some degeneration in Claimant's cervical spine. No physician ever assessed any PPI related to this injury, and he settled his workers compensation claim for the 2004 accident via a 2005 lump sum settlement, which failed to reference any PPI referable to the cervical spine.

290. The evidence fails to establish that Claimant had any pre-existing permanent physical impairment referable to his cervical spine.

291. **Manifest:** "Manifest" means that either the employer or employee was aware of the condition so that the condition can be established as existing prior to the injury. *See Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 294, 647 P.2d 746, 750 (1982). Here, Claimant was diagnosed with a thoracic spine injury in 2002 for which he underwent fusion surgery in 2003, and his residual S1 radiculopathy was diagnosed following an EMG nerve conduction study in November 2004. Claimant, who is also the Employer, knew of his pre-existing sacral and thoracic spine conditions prior to July 2006.

292. **Subjective hindrance:** ISIF disputes that Claimant had any pre-existing condition that constituted a subjective hindrance prior to his final industrial injuries. The "subjective hindrance" prong of the test for ISIF liability is defined by statute:

"Permanent physical impairment" is defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. **This shall be interpreted subjectively as to the particular employee involved, however, the mere fact**

**that a claimant is employed at the time of the subsequent injury shall not create a presumption that the preexisting permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.**

Idaho Code § 72-332(2) (emphasis added).

293. The Idaho Supreme Court set out the definitive explanation of the “subjective hindrance” language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d 557, 563 (1990):

Under this test, evidence of the claimant’s attitude toward the pre-existing condition, the claimant’s medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant’s employability will all be admissible. No longer will the result turn merely on the claimant’s attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant’s condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission’s weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

*Id.*

294. *Archer* makes it clear that an injured worker’s attitude towards a pre-existing condition is but one factor to be considered by the Commission in determining whether or not the pre-existing physical impairment constituted a subjective hindrance to Claimant. After *Archer*, the Commission is required to weigh a wide variety of medical and nonmedical factors, as well as expert and lay testimony, in making the determination as to whether or not a pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant.

295. With respect to his thoracic spine injury, Claimant has offered conflicting testimony from which one could conclude either that this condition was or was not a hindrance to



Claimant after he returned to work following the thoracic spine surgery. We are more persuaded by the medical testimony, particularly that of Drs. Dirks and Ludwig, which establishes that Claimant reasonably did have permanent medical restrictions on bending and lifting such that Claimant should avoid heavy and very heavy work following his thoracic fusion surgery.

296. Regarding Claimant's pre-existing S-1 radiculopathy, we note that the limitations/restrictions attached to this condition do not appear to be any different than those given to Claimant for his prior thoracic spine injury. As such, it is difficult to understand how the S-1 radiculopathy could be deemed to constitute a subjective hindrance to Claimant prior to the 2006 accident. If the condition did not materially decrease Claimant's functional ability, would Claimant or anyone else consider the condition to constitute a hindrance to his employability? Probably not, but as developed below, we need not come to a resolution of this question, because we find that Claimant's S-1 radiculopathy does not satisfy the "combining with" element of the *prima facie* case against the ISIF.

**Combining With:**

297. As part of its *prima facie* case, Employer/Surety bears the burden of establishing that both Claimant's pre-existing S-1 radiculopathy and his pre-existing thoracic spine condition combined with his accident produced impairments to cause total impairment and disability. Employer/Surety bears the burden of demonstrating that but for the pre-existing conditions, Claimant would not be totally and permanently disabled following the work accident. *See Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 1973 (1989); *Bybee v. State Industrial Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

298. ISIF argues that Claimant's 2006 industrial accident, standing alone, rendered him totally and permanently disabled. Therefore, the claim against the ISIF must be dismissed because the requisite "combining with" elements of the *prima facie* case is not met. In making this argument, the ISIF relies heavily on the 2006 Safety Video, and certain portions of Claimant's testimony, which tend to establish that Claimant was unhampered by any of his pre-existing conditions prior to the 2006 accident. Therefore, the 2006 accident, standing alone, left him totally and permanently disabled. As noted above, we assign little weight to Claimant's conflicting testimony concerning his pre-injury and post-injury abilities. More persuasive to us is the testimony of Mr. Brownell and Dr. Collins, both of whom opined that Claimant's pre-existing conditions, in particular, the thoracic spine injury, limited his ability to engage in gainful activity in his labor market.

299. We have also concluded that as of his date of medical stability following the 2006 industrial accident, Claimant is an odd-lot worker via the path of futility. The remaining question is whether this result obtains solely from the combined effects of the work accident and Claimant's pre-existing physical impairments. We find the records of Drs. Ganz and McNulty particularly instructive on this question. In his report of October 1, 2008, Dr. Ganz offered the following comments on the impact of the thoracic spine fusion on the injuries attributable to Claimant's work accident:

The patient specifically asked me whether I would recommend that he return to logging again, and my recommendation is that he should not return to logging or heavy labor again because of his prior lumbar fusion and then the fusion that I performed for the central disc herniation of T12-L1. The only motion segment that remains in his back is at L1-2 and L2-3, and with heavy work, those will certainly begin to fail and most likely will require surgery in the future.

JE-21, p. 309.

In his report of September 8, 2009, Dr. McNulty offered similar observations:

I have reviewed the FCE and agree with the findings. Mr. Green has a fusion at T12-L1 and at L3-L5. Because of those fusions, he has increased stress between L1 and L3. He should not engage in heavy physical activities such as logging. He is more suited to work in a light job duty category as outlined in the FCE.

JE-23, p. 332.

300. Therefore, per Drs. Ganz and McNulty, the fact that Claimant has a pre-existing T12-L1 fusion increases the risk that he will have further problems from the L3-5 fusion unless he observes certain prophylactic limitations/restrictions. We believe this demonstrates that Claimant's pre-existing thoracic spine condition does combine with the effects of the work accident to contribute to Claimant's total and permanent disability.

301. With respect to Claimant's pre-existing S-1 radiculopathy, we are unable to identify any persuasive evidence of record which would lead us to conclude that this condition is implicated in contributing to Claimant's total and permanent disability. As noted above, the limitations/restrictions referable to the S-1 radiculopathy do not appear to be any different than the limitations/restrictions relating to Claimant's earlier thoracic spine condition. Nor does there appear to be any evidence suggesting that Claimant suffered a worse outcome from the effects of the work accident as a consequence of the S-1 radiculopathy. In short, the evidence is insufficient to demonstrate that the S-1 radiculopathy combined with Claimant's thoracic spine condition and his accident produced conditions to cause total and permanent disability. Rather, the evidence establishes that Claimant's total and permanent disability is a result of the combined effects of Claimant's pre-existing thoracic spine condition and the injuries associated with the 2006 accident.

### ***CAREY FORMULA***

302. Determination of the amount of ISIF liability is a matter of calculation set forth by the Idaho Supreme Court. *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984). To establish the amount of ISIF liability, the extent – in percentage of the whole person – of qualifying permanent physical impairments is required.

303. The most persuasive evidence on the question of the extent and degree of Claimant's accident-caused impairment comes from Dr. McNulty. Dr. McNulty proposed that Claimant has a twenty percent PPI rating referable to his lumbar spine condition and a twenty-five percent PPI rating referable to his cervical spine condition, with no impairment to pre-existing conditions.

304. We have found that while Claimant has a long and complicated pre-injury and medical history, only one of these pre-existing conditions combined with the subject accident to cause total and permanent disability. Claimant's pre-existing thoracic spine condition combined with the accident-produced cervical and lumbar spine injuries to cause total and permanent disability. We have also found that the pre-existing thoracic spine condition satisfies all other elements of the *prima facie* case against the ISIF. The problem, of course, is that although we have found that the pre-existing thoracic spine condition was of such a severity to constitute a pre-existing permanent physical impairment, the extent and degree of Claimant's permanent physical impairment for that pre-existing condition has not been quantified by Employer/Surety, who bears the burden of proof in this regard. The Commission recognizes its authority, as discussed in *Hartman v. Double L Manufacturing*, 141 Idaho 456, 111 P.3d 141 (2005), to request evidence on the issue of Claimant's pre-existing thoracic spine impairment, yet we are reluctant to do so when the parties, represented by experienced counsel, had ample opportunity

to marshal such evidence prior to hearing. The issue was clearly noticed and the parties are well aware of the elements required to prove and calculate ISIF liability. However, we believe the facts of this case mandate an assessment of the extent and degree of Claimant's pre-existing thoracic impairment considering the overwhelming proof that Claimant suffered from a pre-existing impairment which would impact Employer/Surety and ISIF's liability. Justice demands that we request that the parties present additional evidence of Claimant's pre-existing thoracic spine condition. As in *Hartman* we deem it necessary to retain jurisdiction of this matter in order to allow the parties to adduce additional evidence on the following question:

- (1) What is the appropriate impairment rating for Claimant's pre-existing thoracic spine condition?

305. The parties are directed to conduct such additional discovery and/or investigations that may be needed to provide the Commission with the evidence necessary to address this issue. If necessary, an additional hearing will be scheduled to allow the parties to present evidence and arguments on the issue as they deem fit. The Commission will necessarily defer any assessment of how responsibility for Claimant's total and permanent disability should be apportioned between Employer/Surety and the ISIF under *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) pending additional evidence necessary to apply the *Carey* formula.

#### ***TEMPORARY AND TOTAL DISABILITY***

306. Pursuant to Idaho Code § 72-408 and § 72-409, during his period of recovery, an injured worker is entitled to temporary total or temporary partial disability benefits calculated, for the first 52 weeks following the subject accident, at sixty-seven percent of his average weekly

wage, and thereafter, at sixty-seven percent of the currently applicable average weekly state wage.

307. Idaho Code § 72-419 identifies the various ways to calculate the average weekly wage of injured workers, the method of calculation depending on whether the worker in question is paid by the hour, week, month or year or by his output. Claimant does not fall into any of the categories specified by the statute. As the sole proprietor of St. Joe Salvage, Claimant has never been paid a “wage”, whether it be hourly, weekly, monthly or yearly. The sections which come closest to describing Claimant’s situation are Idaho Code § 72-419(5) and Idaho Code § 72-419(10) which specify:

Idaho Code § 419(5). If at such time the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.

Idaho Code § 419(10). When circumstances are such that the actual rate of pay cannot be readily ascertained, the wage shall be deemed to be the contractual, customary or usual wage in the particular employment, industry or community for the same or similar service.

However, even these methods of calculating an injured worker’s average weekly wage provide little guidance under the facts of this case; Claimant is not an employee. Rather, he is a sole proprietor who has elected coverage under the workers’ compensation laws of this State.

308. However, that he is entitled to TTD benefits during a period of recovery following a compensable work accident should be beyond cavil. When he elected coverage for himself, Claimant was certainly entitled to expect that he would receive the same classes of benefits as any other injured worker. Certainly, the Surety did not tell Claimant that because he was a sole proprietor, he was not entitled to time loss benefits since he was not a “wage earner”. Anecdotally, the average weekly wage of sole proprietors such as Claimant has been calculated

in the past by referring to tax returns and associated schedules. However, we need not decide how Claimant's average weekly wage should be calculated for purposes of this case, since Claimant is entitled, at most, to the payment of temporary partial disability benefits. Under Idaho Code § 72-408, where Claimant has found employment at a lower paying job during his period of recovery, he is entitled to benefits for partial disability, calculated per Idaho Code § 72-408(2) as follows:

Partial disability. For partial disability during the period of recovery an amount equal to sixty-seven percent (67%) of his decrease in wage-earning capacity, but in no event to exceed the income benefits payable for total disability.

309. Here, during the entirety of his period of recovery from July 4, 2006 through April 25, 2008, Claimant continued to operate St. Joe Salvage. He reported no earnings to Employer/Surety, yet his tax returns reveal that he had adjusted gross income from business profits of \$42,321.00 for 2006, \$70,295.00 for 2007, and \$50,016.00 for 2008. For the period July 4, 2006 through March 13, 2008, Surety paid TTD benefits to Claimant of \$28,703.90, representing what Surety thought it was required to pay for Claimant's period of temporary total disability. However, since Claimant continued to operate St. Joe Salvage during the period in question, he was entitled, at most, to temporary partial disability benefits. A review of Claimant's tax returns reveals that in the years following the subject accident, Claimant earned more than he had in the years leading up to his industrial accident. In short, the evidence does not reflect that Claimant suffered a "decrease in his wage earning capacity" following the subject accident, and during the time that he continued to operate St. Joe Salvage. Quite apart from the question of how to calculate Claimant's average weekly wage, Claimant has simply failed to demonstrate that he earned less in his business after the subject accident than before. Claimant

has demonstrated no entitlement to temporary partial disability benefits under Idaho Code § 72-408(2). Employer/Surety has overpaid benefits in the amount of \$28,703.90, and is entitled to a credit of \$28,703.90 against its obligation to share in responsibility for Claimant's total and permanent disability.

### ***ATTORNEY FEES***

310. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. Attorney fees are not granted as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

311. The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

312. Claimant asserts that Surety unreasonably delayed payment of his temporary disability benefits. As addressed above, Claimant failed to establish entitlement to TTD benefits because he failed to prove he had any lost wages. Therefore, Claimant is not entitled to an award of attorney fees related to the manner in which Surety paid him TTD benefits. Claimant also sets



forth a laundry list of complaints about Surety's behaviors in adjusting the claim and communicating with the panel experts that he asserts constitute unreasonable practices. Too, Claimant asserts that Surety did not pay bills associated with claims it accepted, and did not pay mileage due. The record and briefing are insufficient to establish Claimant's claims with the specificity necessary to form the basis for an order for attorney fees.

313. Claimant has failed to establish he is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

### **CONCLUSIONS OF LAW AND ORDER**

1. Claimant has proven that he suffered injuries to his cervical and lumbar spine areas as a result of his industrial accident on July 3, 2006.

2. Claimant has proven entitlement to medical care for his cervical and lumbar spine injuries through April 25, 2008.

3. Claimant has failed to establish entitlement to temporary disability benefits. Surety is entitled to a credit of \$28,703.90 for its overpayment, such credit to be applied as anticipated by Idaho Code § 72-316.

4. Claimant has proven PPI related to his July 2006 industrial accident of 20% of the whole person related to his lumbar spine condition and 25% of the whole person related to his cervical spine condition.

5. Claimant has proven that he is totally and permanently disabled as of April 25, 2008.

6. Employer/Surety has proven that Claimant's thoracic spine injury warrants the assignment of a PPI rating, was manifest, constituted a subjective hindrance, and combined with the effects of the subject accident to cause permanent and total disability.

7. Employer is liable for its portion of disability as may be established by application of the *Carey* formula and it shall begin paying total and permanent disability benefits immediately, based upon the date of medical stability (April 25, 2008), with opportunity for adjustment with ISIF after relevant pre-existing PPI and *Carey* formula applications have been ascertained.

8. ISIF is liable for its portion of disability as may be established by application of the *Carey* formula.

9. Jurisdiction over this matter is retained for the purpose of requiring Employer/Surety to put on additional proof concerning the extent and degree of permanent physical impairment referable to Claimant's thoracic spine condition.

10. If necessary, the Commission will schedule another hearing for the purpose of taking evidence and argument on the extent of the thoracic spine impairment.

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

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

DATED this 29th day of January, 2014.

INDUSTRIAL COMMISSION

/s/  
Thomas P. Baskin, Chairman

/s/  
R.D. Maynard, Commissioner

/s/  
Thomas E. Limbaugh, Commissioner

ATTEST:

/s/  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of January, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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/s/ \_\_\_\_\_