BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BOB D. CLARK, Claimant, v. AGRICULTURAL PRODUCTS CORP, Employer, and ONEBEACON INSURANCE COMPANY, successor to AMERICAN EMPLOYERS INSURANCE COMPANY, Surety, Defendants.	**IC 1974-094714** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed November 25, 2019**

INTRODUCTION

This matter came before the Industrial Commission for hearing on August 1 and 2, 2018. Claimant is represented by Brad Bearnson and Aaron Bergman. Defendants are represented by David Gardner. At hearing, the testimony of Sherry Clark, Lene O'Dell, Sindra Morgan, Kelly Lance, and Lisa Christensen was taken. This matter came under advisement on May 24, 2019 and is now ready for decision.

ISSUES

The following issues are before the Commission per Defendants' July 12, 2017 request for calendaring and Claimant's July 26, 2017 response thereto:

> (a) Whether pursuant to the Stipulation and Agreement of Partial Lump Sum Discharge and Order of Approval dated October 18, 1984, the claimant is responsible to pay for all non-professional care and only seek reimbursement

from surety, if, and to the extent such reasonable non-professional care exceeds the amount of the annuity referenced in the agreement.

(b) Whether claimant has violated the Stipulation and Agreement of Partial Lump Sum Discharge dated October 18, 1984 as it relates to the requirement to partially pay for "medical benefits" as defined by the Stipulation and Agreement in accordance with Idaho Code Section 72-432.

(c) Whether Defendants are entitled to attorney's fees pursuant to Rule 16 of the Judicial Rules of Practice and Procedure when claimant violated the Stipulation and Agreement approved by the Industrial Commission

…

a. Whether Defendants improperly denied Claimant medical care that was causally related to Claimant's industrial accident and that Claimant was entitled to receive.

b. Whether Defendants continue to improperly deny Claimant medical care that is causally related to Claimant's industrial accident and that Claimant is entitled to receive.

c. Whether certain care should be characterized as "in-home professional care" or instead as medical care payable by Defendants under Idaho Code § 72-432.

d. Whether Claimant paid for medical care that Defendants were required to pay for but did not.

e. Whether Claimant is entitled to attorney fees. See Idaho Code § 72-804.

f. Whether Defendants are entitled to reimbursement of Claimant's in-home nonprofessional care annuity monies that are in excess of in-home nonprofessional care services.

g. Whether Claimant has on one or more occasions unreasonably received reimbursement from Defendants in excess of the non-professional care annuity.

h. Whether the Commission, on the basis of manifest injustice or otherwise, should reopen the *Stipulation and Agreement of Partial Lump Sum Discharge and Order of Approval* (October 18, 1984) and order Defendants to reimburse Claimant's wife and children for services rendered in Defendant's absence.

EVIDENCE CONSIDERED

At hearing, Claimant offered Joint Exhibits 1 through 92, consisting of 7,493 pages. Defendants offered Exhibits 1 through 8, consisting of 81 pages. A number of objections to the

Joint Exhibits were raised and dealt with at hearing, as explained more fully at pages 208 through 218, Tr. Vol. II. Documents contained at Joint Exhibit 88 are admitted to the extent they were the subject of testimony at hearing. Defendants submitted the post-hearing deposition of Robert Friedman, M.D., and the pre-hearing deposition of Sherry Clark. Claimant submitted the pre-hearing depositions of Cathleen Robinson, RN, and Jeffrey Rosenbluth, M.D.

CONTENTIONS OF THE PARTIES

As noted above, the parties have raised numerous issues in connection with Defendants' payment of benefits since approximately 2008. Generally, the issues derive from the construction to be given to the "Stipulation and Agreement of Partial Lump Sum Discharge and Order of Approval," (hereinafter the "1984 Agreement") executed by the parties and approved by the Industrial Commission on October 18, 1984. As developed in more detail, *infra*, that document purports to partially resolve Claimant's claim by the purchase of two annuities, the first resolving his claim for indemnity benefits, and the second resolving his claim to certain medical benefits, specifically to "all in-home nonprofessional care and aid." Finally, with respect to other medical care, Defendants agreed to continue to accept responsibility for the payment of certain specified classes of medical expenses that Claimant might incur in the future.

Two main issues arise from the 1984 Agreement: (1) what type of services constitute "in-home nonprofessional care and aid," such that they should first be paid from the annuity versus by Defendants as a medical expense; and (2) which of certain past professional medical expenses are compensable pursuant to the 1984 Agreement. Claimant contends that Defendants have inappropriately designated certain care to be "nonprofessional," seeking to first hold Claimant responsible for payment of the same. Claimant further argues that professional care necessitated by the subject accident has been wrongly denied by Defendants, and that such

denials, even if since rectified, warrant an award of attorney fees pursuant to Idaho Code § 72-804.

Defendants contend "nonprofessional" care and aid denotes care which does not require any particular skill or training to deliver, and that Claimant is first responsible for the payment of such care. Defendants contend that they had an appropriate medical predicate supporting their previous denials, such that the denials were not unreasonable. Regardless, all disputed professional care has been accepted as of the date of hearing.

FINDINGS OF FACT

1. Claimant suffered a catastrophic anoxic brain injury as the result of an industrial accident occurring on October 1, 1974. Claimant is totally and permanently disabled. His injuries are of the type which render him "so helpless as to require constant attendance" as anticipated by the provisions of Idaho Code § 72-432(3). Between 1974 and 1984, Defendants paid indemnity and medical benefits to Claimant, or on his behalf, pursuant to the statutory scheme. In 1984, the parties entered into the aforementioned stipulation and agreement. It was approved by the Commission by order dated October 18, 1984. A true and correct copy of the document is attached as Appendix 1 to this decision. The 1984 Agreement, styled as a "partial" lump sum settlement, establishes how Claimant's entitlement to all worker's compensation benefits will be addressed in the future. The settlement resolved Claimant's entitlement to indemnity benefits by Defendants' agreement to purchase an annuity paying Claimant $800 per month, beginning August 1, 1984, for the rest of Claimant's life, with payments increasing at a compounded rate of 7% per annum. The payments were guaranteed for thirty (30) years. Next, in "partial settlement" of Claimant's entitlement to medical benefits, another annuity was purchased by Defendants, paying Claimant $1,500 per month for life, with monthly payments increasing at a compounded

rate of 5% per annum. The purpose of this annuity is described as follows in the body of the agreement:

> Claimant agrees that from said monthly benefit, Claimant will pay all in-home nonprofessional care and aid, and that Claimant's wife, Sherry Clark, shall not be entitled to reimbursement for the care she personally provides Claimant, regardless of the nature of said care. Defendants agree that in the event the monthly cost of in-home nonprofessional care and aid exceeds that particular month's annuity payment, Surety will be responsible for and will pay said excess amount. Defendants further agree that in the event the actual cost of in-home nonprofessional care and aid is less than the annuity payment in a particular month, Claimant shall be entitled to the excess up to the amount of the annuity payment to be used for whatever purpose Claimant sees fit.

(emphasis supplied). Concerning medical expenses incurred to the date of the agreement, the parties stipulated:

> There are no outstanding medical expenses necessitated by reason of Claimant's accident which have not been paid by Surety.

(emphasis supplied). The agreement then makes provision for the payment of future medical expenses not encompassed by the annuity as follows:

> Defendants shall continue to be responsible for and to pay all in-patient hospital treatment, all doctors' expenses, all medication expenses, physical therapy expenses, speech therapy expenses, and any other professional medical expenses for treatment, whether rendered on an in-patient basis or on an out-patient basis which may be incurred by Claimant, and shall continue to be responsible for providing, repairing, and/or replacement of any specialized equipment which Claimant needs.

(emphasis supplied). The parties conclude by acknowledging that the settlement discharges Defendants from "only such liability as is specifically set forth hereinbefore." The Commission's order of approval of October 18, 1984 also acknowledges that the agreement is a "partial discharge" of Defendants' obligations.

2. Following the approval of the 1984 Agreement in October of 1984, annuity payments commenced and Defendants continued to pay Claimant's medical expenses. These

expenses evidently included the services of "home health aides" whose duties included, *inter alia*, assistance with range of motion, strengthening, and gait training therapy. The extent to which these home health aides provided other services, such as toileting, feeding, moving, and simply being a companion to Claimant is unclear. It is clear that Sherry Clark, Claimant's wife, provided a good deal of this type of care following the 1984 Agreement. The agreement specifies that Mrs. Clark would receive no payment for any of the services she provided to Claimant. However, the agreement clearly anticipates that the Clarks would obtain some benefit by virtue of the day-to-day care and aid provided by Mrs. Clark to Claimant; annuity money not spent by the Clarks on "in-home nonprofessional care and aid" was retained by the Clarks to do with as they pleased. Therefore, even though Mrs. Clark was not directly compensated for her services, the marital community recognized some benefit from Mrs. Clark's provision of day-to-day care.

3. In approximately 2002, OneBeacon Insurance (the successor-in-interest to American Employers Insurance Company)[1] assigned adjusting responsibilities to Idaho Intermountain Claims. In September of 2003, OneBeacon ordered a life care plan consultation and medical costs projection from Corvel. At several places in the September 4, 2003 report, it is noted that home health aides were providing Claimant with range of motion and other exercises approximately three (3) times per week. As noted, the services were paid by Defendants as part of the medical expenses for which they retained responsibility. The report cautioned that caregiver expenses might increase if Claimant's condition deteriorated, or if Mrs. Clark was no longer able to provide such services herself.

[1] The coverage for Agricultural Products Corporation was initially provided by American Employers' Insurance Company (AEIC). On June 30, 2005, AEIC's claims were assumed by Pennsylvania General Insurance Company (PGIC) to facilitate the sale of AEIC. On October 1, 2012, OneBeacon Insurance Company (OBIC) assumed the claims from PGIC. On February 9, 2015, OneBeacon Insurance Company changed its name to Bedivere Insurance Company. This decision will refer to Surety as OneBeacon.

4. There was evidently some internal discussion among Defendants about whether, or to what extent, Defendants should continue to pay for home health aides as one of the medical expenses for which they retained responsibility pursuant to the terms of the 1984 Agreement. This determination evidently turned on whether the home health aides were "professionals." See DE 3:39. Based on his conclusion that home health aides provided nonprofessional care, by letter dated June 23, 2008, Frank Domenick, the adjustor assigned to the claim by Intermountain, advised Claimant that the Corvel audit revealed that Defendants had been paying for nonprofessional medical care, and that in the future, Defendants would no longer pay for medical care deemed "nonprofessional."

5. Joint Exhibit 2 contains excerpts of emails between OneBeacon, Intermountain Claims, and Jack Barrett, the defense attorney retained by OneBeacon in 2008 to provide counsel on this matter. In an email of May 28, 2008 from Debbie Schoen-Cruse, of OneBeacon, to Mr. Barrett, Ms. Schoen-Cruse observed:

> OneBeacon has paid for home health care for at least the past several years going back thru available records to 2002. When I took over this file last December, I discovered a copy of the draft agreement and was immediately in contact with our Idaho TPA adjuster at Intermountain Claims. We stopped paying for home care services billed by Intermountain Health Care, and currently have accrued bills for 9/07 to present for $7,000
>
> In reviewing the terms of the agreement, I would interpret the home care services as Nonprofessional care, and therefore covered under the annuity and payable by the claimant. While my adjuster has been attempting to sort this out with the claimant's wife, I have been in contact with claimant's defense counsel Mark Nye at Racine, Olson, Nye, Budge. Mr. Nye recalled the case clearly, and did not dispute my interpretation of the home care issue.

JE 2:23. However, by email to Frank Domenick of March 6, 2009, Ms. Schoen-Cruse also cautioned against denying physical therapy, speculating that Defendants would be hard pressed to defend a position that physical therapy services are nonprofessional. Ms. Schoen-Cruse

inquired whether the basis for the denial was that the care itself was "nonprofessional," or because it was "palliative," and therefore not expected to produce functional improvement. JE 2:13. This inquiry may have been prompted by certain opinions rendered at Defendants' instance by Robert Friedman, M.D. For example, in his letter of October 22, 2008, Dr. Friedman proposed that the physical therapy provided to Claimant in July and August of 2008 was "palliative in nature, and not considered professional in the sense of treating the patient's industrial injury, or changing his functional status." JE 28:1396. Therefore, Defendants treated "professional" care as that care intended to improve Claimant's functional status. Palliative care, i.e., care which is not expected to change Claimant's functional status was deemed "nonprofessional."

6. The period 2008-2009 marks the point at which the current dispute arose, eventually leading to the 2018 hearing. Dr. Friedman found that many other of the services requested by Claimant were "nonprofessional" and therefore not compensable. See DE 4. Defendants continued to assert that care provided by nurses' aides, home health aides, CNAs, or other "nonprofessionals" was not compensable because it was the type of care that should be paid from the in-home nonprofessional care and aid annuity. On the other hand, Claimant contends that the only care which must be paid from the in-home nonprofessional care and aid annuity is care rendered by persons (mainly friends and neighbors) whose main vocation is other than providing in-home care and aid. Such persons, and such persons only, are "nonprofessionals," and Defendants are obligated to pay for all care and aid rendered by individuals whose vocation it is to provide in-home care (whether it be feeding, moving, toileting, cleaning, or simply providing companionship) to Claimant.

7. Further, Claimant takes the position that the medical care denied by Defendants on the basis that it is either palliative, or not related to the injuries suffered by Claimant in connection with the 1974 accident, is wholly unjustified. The facts demonstrate that the care in question is related to injuries sustained in the subject accident, and that the care may be palliative in nature is no defense to its compensability. Claimant acknowledges that while Defendants may have relented and paid most or all of the bills in question, the fact that care was withheld for so long, and without any basis in law or fact, warrants an award of attorney's fees under the provisions of Idaho Code § 72-804.

DISCUSSION AND FURTHER FINDINGS

8. As noted, the October 1984 Agreement purports to be a "partial" settlement of Defendants' obligation to Claimant. In reality, however, the settlement is similar to many others that the Commission generally regards as fully and finally settling the rights of the parties in a particular matter. It is not uncommon for an Idaho Code § 72-404 agreement to resolve the indemnity portions of a case while leaving medical care "open." Such a settlement does not guarantee that further disputes will not arise concerning Claimant's entitlement to future medical care. For example, consider the case of a claimant with a severe work-related knee injury, who required a meniscectomy and chondroplasty. The parties reach an agreement to settle the indemnity portion of the case, but because claimant has been advised that the accident may cause the need for a total knee replacement in 15-20 years, the parties agree to leave medicals "open" such that surety agrees to pay such future medical benefits as claimant may be entitled to pursuant to the provisions of Idaho Code § 72-432. That section anticipates that claimant is entitled to medical care which is referable to the subject accident, which is reasonable, and which is required by claimant's treating physician. Many years after the hypothetical settlement is

approved by the Industrial Commission, claimant suffers another industrial accident involving the same knee, and shortly thereafter it is recommended that he undergo a total knee replacement. A dispute arises as to whether the need for the surgery is causally related to the original, versus the new, accident. Because the settlement obligated surety to only pay for such future medical care as would be payable pursuant to Idaho Code § 72-432, the Industrial Commission obviously has jurisdiction over the question of whether the need for medical treatment is, in fact, causally related to the original injury.

9. As discussed *infra*, the language of the 1984 Agreement likewise contemplates that disputes might arise in the future concerning the compensability of this or that type of medical care, as well as the somewhat unique need to make a determination as to whether a particular type of care is professional (to be paid by Defendants) or "nonprofessional" to be paid first from the annuity, if delivered "in-home." It is clear that the Industrial Commission has ongoing and continuing jurisdiction to resolve these types of disputes. Idaho Code § 72-707 provides:

> 72-707. COMMISSION HAS JURISDICTION OF DISPUTES. All questions arising under this law, if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission.

Obviously, while the agreement establishes the framework by which medical benefits will or will not be paid, questions concerning whether a particular type of care is professional or nonprofessional, or related to the subject accident, are questions over which the Commission has ongoing jurisdiction.

10. At the same time, however, it must be recognized that the 1984 Agreement is one that is final and conclusive as to all matters adjudicated pursuant to Idaho Code § 72-718. The time to reconsider the Commission's October 18, 1984 order approving the settlement is long

past, as is the time within which to appeal that order to the Supreme Court. Further, the October 18, 1984 order approving the 1984 Agreement is exempted from application of the provisions of Idaho Code § 72-719; because the order is a commutation of payments pursuant to the provisions of Idaho Code § 72-404 it is not subject to reopening on the basis of a change in condition, fraud, or manifest injustice. Idaho Code § 72-719(4). Even were the 1984 Agreement subject to Commission review under Idaho Code § 72-719(3) on the grounds of a change in condition, fraud, or to correct a manifest injustice, such review is only allowed within five years of the date of the accident. Claimant's argument that this limitation is waived by virtue of the fact that the 1984 Agreement was approved nearly ten years following the accident finds support in neither the statute, nor case law. Idaho Code § 72-719 offers no opportunity to revisit the 1984 Agreement.

11. One of the secondary issues involved in this case is whether the parties' current rights and responsibilities should be governed by an agreement ostensibly made by the parties sometime in 2011, which modifies the terms of the 1984 Agreement. Purportedly, because of difficulties associated with tracking the work hours and compensation of so-called "nonprofessional" caregivers, Claimant agreed to allow Defendants to become wholly responsible for the payment of all medical care, whether professional or nonprofessional, in exchange for turning over his monthly annuity payments for in-home nonprofessional care and aid to Defendants. The record does not contain a document memorializing this agreement. Nor was the Commission ever invited to approve an amendment to the 1984 Agreement. What we know of the 2011 modification is gleaned from contemporaneous emails and correspondence. From these documents it further appears that while the parties followed this arrangement for a time, at some point, likely in early 2017, the understanding broke down, and Claimant declined

to submit the monthly annuity, or any portion of it, to Defendants in exchange for Defendants' payment of the entirety of Claimant's medical expenses. In his March 22, 2017 letter, Mr. Bergman explained Claimant's position as follows:

> In response to your email and pursuant to the *1984 Stipulation and Agreement of Partial Lump Sum Discharge and Order of Approval*, Mrs. Clark is not required to return any portion of the annuity payment. While she has done so previously, it is clear under the agreement that the insurer is required to pay for these services in full. Please contact our office if you have any questions or concerns.

DE 8:81.

12. While the Commission has determined that it does have jurisdiction over issues which arise by virtue of the 1984 Agreement, the Commission concludes that the statutory scheme does not admit Commission review of any subsequent modification of that agreement that may have been reached by the parties in 2010 or 2011. As noted, the Idaho Code § 72-404 settlement is final and conclusive as to the rights of the parties pursuant to Idaho Code § 72-718. Nor does Idaho Code § 72-719 admit any other opportunity to modify or revisit the terms of the 1984 Agreement. The time for reconsideration and/or appeal of that order is long passed, and it remains the final order of the Commission. We find no statutory basis upon which it could be revisited or modified at this late date.

13. While the accident giving rise to this claim occurred in 1974, the settlement which commuted and compromised the liability of Defendants was approved in 1984. The settlement compromised any and all future claims which might arise on account of Claimant's injuries. The operative law in effect at the time of settlement, and the law which governs the rights which were compromised, was the law in effect in 1984. Even though the accident occurred in 1974, the application of the worker's compensation law as it existed in 1984 does not amount to a

retroactive application of a law. As stated in *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969):

> A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; rather, a law is retroactive only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage.

14. At the time of the 1984 settlement, the provisions of Idaho Code § 72-432 had last been amended in 1978. It is this version of the statute which governed the rights and responsibilities of the parties vis-à-vis prospective medical care at the time the settlement was made. It also seems clear that to the extent the settlement defers to the statutory scheme to treat issues not covered by the agreement, the law that was in effect at the time of the settlement is the applicable law, notwithstanding that since 1984 the worker's compensation law has been subject to many other amendments.

15. Pursuant to Idaho Code § 72-432, Claimant is entitled only to medical treatment causally related to the subject accident. *Waters v. All Phase Const.*, 156 Idaho 259, 322 P.3d 992 (2014). In 1978, Idaho Code § 72-432(1) read:

> 72-432(1) MEDICAL SERVICES, APPLIANCES AND SUPPLIES - - REPORTS. The 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. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

Session Laws, 1978, Ch. 264, § 12, p. 583. The obligations of Employer to provide medical care pursuant to this subsection are stated in the disjunctive. First, Defendants are obligated to provide such "reasonable" care as may be "required" by the employee's physician. It is for physician to determine whether treatment is required; it is for the Commission to determine whether the care required by the physician is reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho

720, 779 P.2d 395 (1989). The reasonableness of the care must be judged by the totality of the circumstances. *Chavez v. Stokes,* 158 Idaho 793, 353 P.3d 414 (2015). Further, the statutory scheme draws no distinction between Claimant's entitlement to care that is "palliative" versus "curative." *Hamilton v. Boise Cascade Corp.*, 84 Idaho 209, 370 P.2d 191 (1962); *Poss v. Meeker Machine Shop,* 109 Idaho 920, 712 P.2d 621 (1985); *Rish v. Home Depot, Inc.*, 161 Idaho 702, 390 P.3d 428 (2017).

16. The second part of Idaho Code § 72-432(1) specifies that notwithstanding that certain medical treatment may not have been "required" by a treating physician, such care may nevertheless be payable because it is "needed immediately after an injury… and for a reasonable time thereafter." Therefore, pursuant to the provisions of Idaho Code § 72-432(1), an injured worker may be entitled to such other attendance or treatment as his physician may require or as may be needed following the occurrence of an accident. Certainly, this would seem to contemplate such assistive care as might be required as a consequence of a work accident even if not conventionally "medical" in nature. *Barrios v. Zing*, 162 Idaho 556, 401 P.3d 144 (2017).

17. The 1984 version of Idaho Code § 72-432(2) provided that employer shall also furnish necessary repairs or replacements of appliances and prosthesis. The 1978 amendments to Idaho Code § 72-432(2) removed the limitation that the employer's obligation concerning repair and replacement of prosthesis need only happen once every five (5) years.

18. The 1978 version of Idaho Code § 72-432(3) authorized additional benefits for workers with profound injuries, such as those suffered by Claimant:

> 72-432 MEDICAL SERVICES, APPLIANCES AND SUPPLIES – REPORTS.
> (3) In addition to the income benefits otherwise payable, the employee who is entitled to income benefits shall be paid an additional sum in an amount as may be determined by the commission as by it deemed necessary, as a medical service, when the constant service of an attendant is necessary by reason of total blindness of the employee or the loss of both hands or both feet or the loss of use thereof, or

> by reason of being paralyzed and unable to walk, or by reason or other disability resulting from the injury or disease actually rendering him so helpless as to require constant attendance. The commission shall have authority to determine the necessity, character and sufficiency of any medical services furnished or to be furnished and shall have authority to determine the necessity, character and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of physician, hospital or rehabilitation facility when in its judgment such change is desirable or necessary.

Session Laws, 1978, Ch. 264, § 12, p. 583-584.

19. From the foregoing, it is clear that had Claimant's entitlement to medical care continued to be governed by the provisions of the-then applicable version of Idaho Code § 72-432, he would have been entitled to "the constant service of an attendant if deemed necessary by the Commission." See Idaho Code § 72-432(3). The term "attendant" is not defined in statute, but it is generally defined as one who attends to another to perform a service. *Marion-webster.com/dictionary/attendant* (accessed August 22, 2019). Therefore, it would have been within the power of the Commission to order that Employer be required to provide and pay for a person, any person, to attend to the day-to-day needs of Claimant. Setting aside the specific provisions of Idaho Code § 72-432(3), it is equally clear that Defendants would be obligated to provide the injured worker such "attendance or treatment" as required by the employee's physician or otherwise needed after an injury and for a reasonable time thereafter. Construing the similar language of the current version of Idaho Code § 72-432, the Idaho Supreme Court has ruled that the "attendance" referenced in Idaho Code § 72-432(1) does not necessarily refer to services that are only medical in nature. *Barrios v. Zing*, 162 Idaho 556, 401 P.3d 144 (2017). Therefore, under either the former Idaho Code § 72-432(1) or Idaho Code § 72-432(3), Defendants could have been required to provide such attendance to Claimant as he might need, without reference to whether such services are medical versus non-medical, professional versus nonprofessional.

20. While the then-applicable statute would seem to require of Defendants that they provide the attendant services that are at the heart of this dispute, the fact is that since 1984, Claimant's right to worker's compensation benefits is largely unconnected to the statutory scheme. Rather, his rights are governed by the provisions of the 1984 Agreement. Importantly, and contrary to Defendants' assertion, even though that agreement did leave certain of Claimant's medical benefits "open," and to be paid in perpetuity by Defendants, it did not couch that obligation in terms of the care and services listed at Idaho Code § 72-432. See Defendant's Brief, p. 24. Rather, the Agreement created a unique rule for determining what expenses are payable by Claimant from the proceeds of the annuity, and what expenses are payable by Defendants, as they are incurred.

21. Therefore, the Commission need not concern itself with whether Claimant is entitled to the benefits established by Idaho Code § 72-432(3). We need not delve into whether the care that Claimant seeks is compensable as medical or attendant care pursuant to Idaho Code § 72-432(1). We need not determine whether the care required by the Claimant's physician is reasonable. Rather, our task is to understand the rights and obligations created by the 1984 Agreement.

"NONPROFESSIONAL" AS USED IN THE 1984 AGREEMENT

22. We turn, then, to the provisions of the October 18, 1984 Agreement, and Order approving the same. Before doing so, however, we must consider the rules of construction that apply to such a document: "[t]he rules of construction of contracts and written documents in general apply to the interpretation of court orders." *Suchan v. Suchan*, 113 Idaho 102, 106, 741 P.2d 1289, 1293 (1986). Moreover, a settlement agreement "stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts

generally." *Vanderford Co. v. Knudson*, 150 Idaho 664, 672, 249 P.3d 857, 865 (2011). The same rule applies to lump sum settlements approved by the Industrial Commission. *Harmon v. Lutes Const. Inc.*, 112 Idaho 291, 723 P.2d 260 (1986).

23. First, the Commission must determine whether the lump sum is ambiguous. If a contract is clear and unambiguous, the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words. *Hammer v. City of Sun Valley*, 163 Idaho 439, 414 P.3d 1178 (2016); *Harmon*, *supra*.

24. In determining the "plain meaning" of an unambiguous contract, the Idaho Supreme Court looks at dictionary definitions and the agreement as a whole. For example, in *Swanson v. Beco Const. Co., Inc.*, 145 Idaho 59, 175 P.3d 748 (2007), the Court wrote:

> The term "working day" has an established definition. It means "a day when work is normally done as distinguished from Sundays and legal holidays." Webster's Third New Int'l Dictionary of the English Language, 2635 (Philip Babcock Gove et al. eds., G. & C. Merriam Co.1971). There is nothing on the face of the parties' agreement indicating that they intended some other meaning. Giving the words "working day" their normal meaning would not conflict with any other provisions of the written lease or create any uncertainty as to its meaning. There is nothing in the context of the lease that would indicate that the term should be given a different meaning.

The Court has also looked at its own definitions of prior terms in interpreting a contract.[2]

25. Importantly, if the contract is unambiguous, the (subjective) intent of the parties is not considered:

> If the language used by the parties is plain, complete, and unambiguous, the intention of the parties must be gathered from that language, and from that language alone, **no matter what the actual** or secret **intentions of the parties may have been.** Presumptively, the intent of the parties to a contract is expressed by the natural and ordinary meaning of their language referable to it, and such meaning cannot be perverted or destroyed by the courts through construction, for

[2] *Knipe Land Co. v. Robertson* 151 Idaho 449, 259 P.3d 595 (2011) cited a prior Supreme Court case for the definition of forfeit: ""The word forfeit is in common usage and its popular and accepted meaning is to lose or to lose the right to." *Nagel v. Hammond*, 90 Idaho 96, 100, 408 P.2d 468, 470 (1965)."

> the parties are presumed to have intended what the terms clearly state. **Only when the language of the contract is ambiguous may a court turn to extrinsic evidence of the contracting parties' intent.**

Id. quoting 17A *Am. Jur. 2d, Contracts* § 348 (2004), emphasis supplied. In other words, a party's intent regarding the meaning of the contract, standing alone, cannot render the contract ambiguous.

26. For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 139 P.3d 737 (2006), or it must be nonsensical, *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184 (2003). Ambiguity can be established from just the words of the contract, otherwise known as patent ambiguity, or established from external/parol evidence, otherwise known as a latent ambiguity:

> There are two types of ambiguity, patent and latent... A patent ambiguity is an ambiguity clear from the face of the instrument in question… A latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist.

Knipe Land Co. v. Robertson 151 Idaho 449, 259 P.3d 595 (2011).

27. To determine whether a contract is patently ambiguous, a court looks at the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003). In *Cannon v. Perry*, 144 Idaho 728, 170 P.3d 393 (2007) the Idaho Supreme Court explicitly found a patent ambiguity. The parties had originally contracted for a closing date of December 30, but then signed an addendum that "extended" closing to December 16. The Court held that the use of the word "extended" in that context created an ambiguity about what the parties actually intended in drafting the addendum and that the district court was permitted to consider extrinsic evidence as to the parties' intent. *Id.* at 730.

28. Identification of a latent ambiguity involves a multi-step process, and is counter-intuitive to the parol evidence rule. The parol evidence rule provides:

> if the written agreement is a complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of **prior or contemporaneous** negotiations or conversations is not admissible to contradict, vary, alter, add to or detract from the terms of the contract.

Belk v. Martin 136 Idaho 652, 39 P.3d 692 (2001) (emphasis supplied).[3] However, a party can introduce evidence to establish a latent ambiguity, therefore allowing a court to consider more extrinsic evidence on the intent of the parties. In *Rangen, Inc. v. Idaho Dept. of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016) the Court explained: "Idaho law permits first, the introduction of extrinsic evidence to show that the latent ambiguity actually existed; and, second, the introduction of extrinsic evidence to explain what was intended by the ambiguous statement." *Matter of Estate of Kirk*, 127 Idaho 817, 907 P.2d 794 (1995), illustrates this process.

29. In *Kirk*, Mrs. Kirk died after having attached a "Script" to an amendment of her trust. The Script began "If anything happens to me on the trip to La Jolla…" and listed various items and to whom they should be dispersed if she did die. However, she returned unscathed and died a few months later of unrelated causes. The magistrate court found ambiguity in the fact that Mrs. Kirk had attached the Script to her other permanent trust documents but had included the conditional "if" in the Script; the magistrate court allowed testimony from Mrs. Kirk's friends as to whether her intent with regard to the gifts had been conditional or absolute. Affirming the magistrate, the Supreme Court stated:

> In the present case, the document containing the conditional language, the Script, had been physically attached to the Second Amendment, the amendment which explained the method by which Mrs. Kirk's intent could be expressed. Mrs. Kirk

[3] "Parol evidence, however, is admissible to establish "any fact that does not vary, alter, or contradict the terms of the instrument or the legal effect of the terms used." 29A Am.Jur.2d Evidence § 1106 (1994); accord Restatement (Second) of Contracts § 218 (1979)." *Perry*, 144 Idaho 728, 730, 170 P.3d 393, 395 (2007).

> placed these documents in a three ring notebook with her other estate planning documents. This action signifies a degree of permanence, inconsistent with the expressed condition. This extrinsic evidence introduced a latent ambiguity.

Therefore, the Court affirmed the magistrate court reliance on extrinsic evidence to show an ambiguity, followed by its consideration of parol evidence (her conversations with her friends about her intent at the time she attached the script) to discern Ms. Kirk's true intent.

30. In *Mountainview Landowners Cooperative Assn., Inc., v. Cool*, 139 Idaho 770, 86 P.3d 484 (2004), an agreement for the use of a beach by a homeowner's association was at issue. The use agreement provided an easement for "use of the beach area located north of the existing boat moorage facility for swimming and boating only…" It was argued by the owner of the beach subject to the easement that the term "swimming" was capable of a clear, concise, and unambiguous definition, i.e., to propel one's self through the water. The Court did not accept that "swimming" is capable of only one definition, but noted that even if it is, the term as used in the agreement nevertheless created a latent ambiguity due to the absurd results that would obtain if the landowner's preferred definition was adopted. The definition urged by the landowner would make it impossible for anyone to stand on the beach to act as lifeguard, or to sunbathe. It would even prohibit access to the beach for those who used the beach to access the water, but for some purpose other than swimming, e.g., standing in waist-deep water for the purpose of cooling off on a hot summer day. Therefore, as applied to the facts of the case, the term "swimming" was found to constitute a latent ambiguity, thus allowing the consideration of parol evidence to divine the intent of the parties.

31. Once the conclusion is reached that a contract term is ambiguous, either on its face, or as applied, the Commission may consider extrinsic evidence to determine the intent of the parties. The most repeated and important contract interpretation principle is to determine

what the parties' intent was at the time they entered into the contract. *Iron Eagle Development LLC v. Quality Design Systems, Inc.*, 136 Idaho 487, 65 P.3d 509 (2003).

32. To determine the parties' intent, a court should look to:

> the contract as a whole, the language used in the document, the circumstances under which it was made, the objective and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct or dealings. A party's subjective, undisclosed intent is immaterial to the interpretation of a contract.

Kunz v. Nield, Inc., 162 Idaho 432, 439, 398 P.3d 165, 172 (2017)(internal citations omitted). Therefore, when analyzing an ambiguous contract to discern the intent of the parties the Commission should look at: (1) the contract as a whole; (2) the language used; (3) the circumstances of the contract's formation; (4) the purpose of a particular provision; and (5) the conduct of the parties.

33. The first factor, interpreting the contract as a whole, is almost always used as a logical defense against one party basing their argument on only a portion of the contract. For example, in the recent case of *Dickinson Frozen Foods v. J.R. Simplot Company*, 164 Idaho 669, 434 P.3d 1275 (2019), Dickinson Frozen Foods (DFF) asserted a breach of contract claim against Simplot for violating a non-disclosure agreement (NDA). The NDA's purpose was to keep DFF's information confidential while Simplot and DFF explored a "proposed business relationship" and all the terms in the agreement were couched in terms of a 'proposed' or 'possible' business relationship. The NDA also contained a provision that any information obtained 'hereunder' (meaning under the NDA) had to be kept confidential for three years after receiving the information. DFF and Simplot did enter into a business relationship that then soured and turned to litigation regarding a host of issues. Regarding the breach of the NDA, DFF

tried to argue that the three year provision covered all information DFF relayed to Simplot, an argument the district court rejected. In affirming the district court, the Court wrote:

> As noted above, the express purpose of the NDA indicates it protects information related to a proposed business relationship or a possible vendor relationship. The agreement does not state it will apply to anything other than a proposed or possible relationship. And, the three year provision contains the word "hereunder" indicating the information to be kept confidential for three years is that information Simplot received pursuant to a proposed or possible business relationship. DFF's interpretation reads the three-year provision in isolation of the other terms of the NDA. As this Court has said, "[i]n determining the intent of the parties, this Court must view the contract as a whole."

Id. at 685, 1291. Analyzing the contract "as a whole" is required both when the contract is unambiguous and ambiguous, see *supra*.

34. The "language used" is also always a part of any contract analysis, unambiguous and ambiguous. It is the specific language used by the parties, but it is also that they used language to address an issue at all; the Court will not assume language used is "surplusage" and will try to give each provision effect. See *Opportunity v. Ossewarde*, 136 Idaho 602, 38 P.3d 1258 (2002).

35. The circumstance of a contract's formation is relevant evidence to determine the intent of the parties. In *Rudeen v. Howell*, 76 Idaho 365, 283 P.2d 587 (1955), the Court explicitly considered the circumstances in construing a surrender clause in an ambiguous farming lease agreement:

> The pertinent surrounding circumstances herein are that it was proper and customary to farm only one-half of this dry land each year and that one-half of the land was ordinarily prepared and planted in August or September of one year for the purpose of raising a crop the next year. It seems obvious that the object and purpose of the surrender clause was to permit the new lessee to prepare and plant the stubble land in the fall of the last season of the term of the old leases in order that such land would not lie idle for two years instead of one year…

The Court considered the land and farming practices to ascertain the intent of the parties in drafting the surrender clause.

36. The purpose of the particular provision is also considered in discerning intent in an ambiguous contract. The best example of this comes from Justice Jones' dissent in *Potlatch Educ. Ass'n. v. Potlatch School Dist. No. 285*, 148 Idaho 630, 226 P.3d 1277 (2010). *Potlatch* involved a dispute between a union and school district regarding a principal's decision to classify a teacher's absence to defend their Master's thesis as "personal" leave instead of "professional" leave. The contract allowed the principal the discretion to grant professional leave "to attend a professional meeting, to visit schools, or otherwise pursue professional development." Both parties asserted that the contract was unambiguous and the Court ultimately affirmed the grant of summary judgment in favor of the school district, reasoning that the contract in no way required the principal to grant leave. J. Jones dissented, saying first, the Court is not required to accept the parties' characterization of the language as unambiguous; he argued the interpretation of the ambiguous term "professional development" could be resolved through extrinsic evidence, namely the purpose for which it was adopted and negotiated for, which was for the benefit of teachers. J. Jones argued that because the purpose of provision was to benefit teachers, it should be construed in that light, and the grant of summary judgment for the school district reversed.

37. Lastly, the conduct "of the parties to a contract and their practical interpretation of it is an important factor when there is a dispute over its meaning." *Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*, 142 Idaho 861, 865, 136 P.3d 332, 336 (2006). In *Mountain View II*, the Court affirmed the district court's utilization of conduct evidence. The dispute arose over the meaning of "swimming and bathing" in an agreement made by the Association and the Cool's predecessors in interest. In defining "swimming" on remand, the district court included

"sunbathing" as a part of "swimming." The Cools appealed this issue, but the Court affirmed both the district court's ruling on sunbathing and its consideration of conduct evidence:

> The Cools take issue with the evidence of sunbathing, but we note that there was testimony from two witnesses that it has been customary for Association members to sunbathe in the beach area, and that this testimony was buttressed by photographic evidence. The testimony and other evidence offered at trial in this case provided ample support for the district court's finding that sunbathing was a swimming-related activity the parties to the Use Agreement intended to come within the scope of "swimming."

Id.

38. If, after applying the ordinary processes of interpretation and considering the relevant extrinsic evidence, there remains doubt as to the actual, mutual intent of the parties, then the ambiguity should be resolved against the party who used the ambiguity in drafting the contract. *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994). Such an approach is only employed when the intent of the parties cannot be ascertained by any other evidence. *Kunz v. Nield, Inc.*, 162 Idaho 432, 442, 398 P.3d 165, 175 (2017)

39. Lastly, "[C]ourts do not possess the roving power to rewrite contracts in order to make them more equitable." *Kantor v. Kantor,* 160 Idaho 810, 820, 379 P.3d 1080, 1090 (2016) (quoting *Losee v. Idaho Co*., 148 Idaho 219, 223, 220 P.3d 575, 579 (2009)). Furthermore, while "[e]quity may intervene to change the terms of a contract if the court finds unconscionable conduct serious enough to justify its interference," the harsh enforcement of unwise provisions is not proper justification. *Id.*

40. Having described the rules pertaining to the construction of the October 18, 1984 Agreement, the Commission first addresses the question of whether the term "in-home nonprofessional care and aid" is ambiguous. The parties seem to be in agreement that the term

"in-home" is well understood, and refers to care and aid rendered at Claimant's place of residence. Similarly, the terms "care" and "aid" are easily understood. Care is defined as the provision of what is necessary for health, welfare, maintenance, and protection of someone or something. Oxford English Dictionary, www.lexico.com/ian/definition/care, accessed August 18, 2019. Thus, the term includes medical assistance, but is not limited to medical assistance. "Aid" is defined as help, typically of a practical nature. Oxford English Dictionary, www.lexico.com/ian/definition/aid, accessed August 18, 2019. Therefore, in-home care and aid refers to all of the assistance or help Claimant may need at his place of residence, inclusive of medical and non-medical services. With this understanding, "care and aid" refers not only to what Claimant may require at his place of residence to manage or treat his injuries, but also to that assistance he may need to keep up his yard, clean his house, cook his meals, or provide companionship when his family members are absent. Giving the words their plain and unambiguous meeting "care and aid" admits a very broad spectrum of assistance. Therefore, the difficulty in this case arises not because of the terms "in-home" or "care and aid." Rather, the difficulty arises primarily because of the parties' dispute concerning the definition of "nonprofessional," in the context of its placement between "in-home" and "care and aid."

41. Some words have the ability to shift from one grammatical function to another. A noun may act as an adjective, an adjective as a noun, a noun as a verb, and so on. This "functional shift" is a well-known property of the English language. Garner, *Garners Modern English Usage*, Oxford University Press 4th Ed., (2016). The term "nonprofessional" is defined as follows:

> (*adjective*) 1. relating to or engaged in a paid occupation that does not require advanced education or training
>
> 'nonprofessional grades of staff'

1.1 relating to or engaged in an activity (especially an interest or hobby) which is not one's main paid occupation

'nonprofessional actors.'

(*noun*) a nonprofessional person.

Oxford English Dictionary, https://www.lexico.com/en/definition/nonprofessional, accessed August 18, 2019. Here, Defendants argue that "nonprofessional" is used as an adjective to modify "care and aid," to limit the care and aid to be paid by the annuity to care and aid that does not require advanced education or training.

42. Following this argument, nonprofessional care and aid must be care and aid that is not required to be rendered by someone in a "profession." If a "profession" is simply one's vocation, then a CNA is a "professional," as is the care and aid he or she may provide. However, the more considered view is that not <u>every</u> job is a profession.[4] Therefore, Defendants argue that nonprofessional care and aid most appropriately describes care and aid capable of being rendered without prolonged specialized training in a body of abstract knowledge.

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[4]Profession. This word has been much debased in recent years, primarily at the hands of egalitarians who call any occupation a profession. In many American cities today, a person seeking a job as a barber, manicurist, or convenience-store manager turns in the classified ads to the section titled "Professions." A physician looking for a change in jobs turns to "Advanced Degree Required," a section of its own rather than a subsection of "Professions."

Traditionally there have been but three professions: theology, law, and medicine. These were known either as the three professions or as the learned professions. The term was ultimately extended to mean "one's principal vocation," which embraces prostitution as well as medicine. (The oldest profession originally had an irony much stronger than it has today.)

The restricted sense of profession no doubt strikes many people as snobbish and anachronistic. What about university professors, atomic physicists, and engineers? Perhaps three professions are not enough, but we ought to use at least some discrimination, with emphasis on "prolonged specialized training in a body of abstract knowledge." William J. Goode, "Encroachment, Charlatanism, and the Emerging Profession," 25 Am. Soc. Rev. 902, 903 (1960). Professional training "must lead to some order of mastery of a generalized cultural tradition, and do so in a manner giving prominence to an intellectual component." Talcott Parsons, "Professions," 12 Int'l Encycl. Soc. Sci. 536, 536 (1968).

Garner, *Garner's Modern English Usage*, 732-733 "profession," Oxford University Press 4th Ed., (2016).

43. On the other hand, Claimant argues that "nonprofessional" is used to describe the attributes of the person or persons who provide "care and aid" to Claimant. Per Claimant, within the context of the 1984 Agreement, a "nonprofessional" is one whose main vocation is something other than the provision of care and aid to an invalid. This argument necessarily rejects the notion that "nonprofessional" modifies "care and aid." Claimant's argument is that if the "care and aid" which Claimant requires (regardless of whether it is medical or nonmedical in nature) is provided by someone whose main vocation is something else entirely, then charges for such services must be paid from the annuity.[5]

44. From the foregoing, the Commission concludes that a patent ambiguity exists vis-à-vis the term "nonprofessional." From the four corners of the document it is unclear whether the word is used as an adjective or a noun. Further, at least two definitions seem plausible. More so than in *Mountainview*, *supra*, where the possibility that "swimming" might be susceptible to two or more definitions was entertained by the Court, it seems clear that the same can be said about "nonprofessional."

45. Even were we to conclude that there is but one plausible definition of "nonprofessional," we believe, as explained below, that the underlying facts and circumstances of this case create a latent ambiguity warranting consideration of extrinsic evidence to discern the intent of the parties.

46. The construction urged upon the term "nonprofessional" by Claimant creates a variety of awkward, and probably unintended, outcomes. Following Claimant's argument, "nonprofessional," as used, refers to an individual whose main vocation involves something

[5] Further, Claimant's preferred definition of "nonprofessional" strongly suggests that a nonprofessional is one who performs a task or engages in an activity without the promise of recompense. The facts before the Commission do not suggest that "nonprofessional" services were ever rendered without the expectation of payment.

other than the care and aid he is asked to provide Claimant. Therefore, a blood draw performed by a registered nurse would be the responsibility of Defendants. A blood draw performed by a friend whose main vocation happens to be farming, but who had been trained to draw blood, would be compensated by Claimant through the annuity. Similarly, hands on care provided by a CNA would be the responsibility of Defendants (since that is the principle work of a CNA), while the same service provided by a neighbor would be payable by Claimant, so long as the neighbor's main vocation was not providing hands on care.

47. The 1984 Agreement was drafted by Claimant's then-counsel, Lou Racine. Per Defendants, the proposed settlement was not even reviewed by defense counsel before being signed by a representative of Surety. Tr. Vol. 1, 20:12-16. The document was, however, prepared with input from Sherry Clark. Referring to the section of the 1984 Agreement dealing with in-home nonprofessional care and aid, Mrs. Clark testified:

> A: Exactly. Mr. Racine and I spent a great deal of time writing this paragraph and conferring with Surety to get this paragraph done.
>
> Q: Okay.
>
> A: That was probably the most time we spent on the whole stipulation.

Tr. Vol. 2, 36:9-14. Mrs. Clark is peculiarly in a position to comment on the parties' intentions at the time of the 1984 Agreement. She had already had a long course of dealing with her husband's care needs by the time the document was drafted. In her 2010 deposition, she testified to the circumstances and prior course of conduct which informed the drafting of the provisions relating to in-home nonprofessional care and aid:

> Q: [By Mr. Barrett] Okay. Now, what is your basic understanding of the annuity for nonprofessional in-home care?
>
> A: Well, that was the part that I was fighting for when we settled this.

Q: Okay.

A: I was very pregnant with my second child, and I had - - we had had aides come into our home for at least three or four years, but at that time I would send a check - - I would send hours to the insurance company and they would pay them direct. Well, when people come to your home, sometimes they weren't willing to wait a month for their paycheck to come, and we, you know, had to either pay them out of our own pocket and then the checks would come and then we'd have to send them back and they'd have to reimburse me, or - - it just got very hard to take care of the paperwork.

Q: Sure.

A: And so we went up - - when we went up there, we decided that, you know, we were going to have help and we were going to have it set aside in that clause of how much help I could have, and I would be responsible for - - my understanding was, I was going to be responsible for hiring the help, actually doing all the paperwork as far as paying them, and they were just going to give me a monthly sum.

Q: Okay.

A: And that was the way we were going to do it.

Q: And this was your input into it at the time that that agreement was entered into?

A: Yes.

Q: And that's you understanding?

A: Yes.

Q: All right.

A: And - -

Q: Go ahead.

A: And as far as the nonprofessional part, they wanted to word it as CNA or registered nursing care, and we lived in a very rural area. There were - - they didn't have the agencies that they do now.

Q: Sure.

> A: And there was - - there were no CNAs around, and so I said, "I don't want it to be liable to just hire CNAs or I wouldn't have help." So that's why we put that nonprofessional services.

Clark Depo., 9:19-11:15. Therefore, prior to the 1984 Agreement, Claimant had required the assistance of aides for three or four years. Mrs. Clark evidently retained their services, but depended on Defendants to actually issue payment to the aides. This resulted in delayed payment, or required the Clarks to make direct payment to the aides, and then seek reimbursement from Defendants. To avoid these inconveniences, the 1984 Agreement provided Claimant a fund from which to make payment for the services of aides. Nothing in this testimony suggests that in creating the in-home nonprofessional care and aid annuity, Claimant only anticipated hiring persons whose work for Claimant was incidental to their principal vocation. To the contrary, Mrs. Clark volunteered that the reason the 1984 agreement speaks to "nonprofessionals" as opposed to "CNAs" is not because she considered CNAs to be professionals and therefore the responsibility of Defendants, but rather because if the only persons she could hire were CNAs, she would not be able to find the help she needed.

48. At hearing, Mrs. Clark also touched on her understanding of the type of care which constituted nonprofessional care and aid. Mrs. Clark provided most of the hands-on care for her husband, but she still required help around the house to perform other household tasks. In rural Bloomington, Idaho, she found what help she needed from friends and neighbors. Tr. Vol. 1, 32:3-33. Even early on, however, she required help in caring for Claimant during the periods she was absent from the residence to work at her part-time job, or for some other reason. Tr. Vol. 1, 32:19-20; 34:8-17; Tr. Vol. 2, 69:13-77:11.

49. Mrs. Clark testified that she envisioned the nonprofessional services to encompass individuals who helped provide "care" for her husband, and "aid," which was for any other type

of help needed to run the household. Tr. Vol. 2, 29:17-30:5; Tr. Vol. 2, 38:16-39:10. None of these individuals were "skilled" in the sense that they possessed a degree or licensure of some type; they were simply friends, neighbors, and in some instances, Claimant's children. See also Tr. Vol. 2, 88:3-18. Mrs. Clark testified that she equated nonprofessional care with "unskilled" care and acknowledged that this encompassed not only housework, but also assistance that these individuals provided in the day-to-day care of Claimant. Tr. Vol. 2, 123:7-126:6. At another point in her testimony, Mrs. Clark explained that one of the principle reasons for crafting the nonprofessional care and aid portion of the agreement the way it came to be was because she did not want the people who were coming into the household in 1984 for the purpose of providing Claimant physical therapy and speech therapy to be classified as "nonprofessionals," such that she would be obligated to provide for such services out of the proceeds of the annuity. Tr. Vol. 2, 26:2-19. Indeed, the agreement does specify that physical therapy and speech therapy services shall be paid by Defendants. However, this provision does not denigrate the proposition that in other instances nonprofessional care contemplates care delivered by the unskilled.

50. On balance, Mrs. Clark's testimony supports the proposition that while she expected to provide the bulk of Claimant's day-to-day care at the couple's residence, the annuity paid for whatever assistance Mrs. Clark might require in providing hands on care to Claimant that could be given by unskilled aides, whether they be friends, neighbors, or some other unskilled person. Mrs. Clark's testimony does not lend any particular support to the proposition that Claimant intended "nonprofessional" to mean someone whose main vocation was something other than the provision of home health care to an invalid such as Mr. Clark. As noted above, the definition favored by Claimant admits certain logical absurdities which do not appear to have been within the contemplation of Mrs. Clark. Nothing in Mrs. Clark's testimony suggests that

she would be in agreement with the proposition that whether or not a particular service is paid for by Defendants, or out of the annuity, turns entirely on the identity of the individual who performs the service. Again, if the service in question is a blood draw, per Claimant's argument, it would be payable from the annuity if performed by a local farmer, but payable by Defendants if performed by a registered nurse. Mrs. Clark's testimony is more consistent with the notion that "nonprofessional" is used to modify "care and aid" and describes a type of care and aid that does not require advanced education or training.

51. The Commission acknowledges that Claimant may require in-home skilled nursing care, to be provided by registered or licensed practical nurses. As of the date of hearing, it appears that this level of care may now be necessary. Care provided by such individuals is clearly "professional" within the meaning of the agreement since it requires advanced education/training. However, it is equally clear that certain aspects of Claimant's day-to-day care are appropriately provided by individuals with no advanced skill, training, or state licensure. The Commission acknowledges that this unskilled care may be provided under the direction of a skilled nurse. However, for purposes of the agreement such unskilled care is nevertheless "nonprofessional care and aid" which must first be paid from the proceeds of the annuity. It seems easy to understand that nonprofessional care and aid may encompass assisting Claimant with moving, feeding, toileting, grooming, and other activities of daily living, whether done under the supervision of a skilled nurse or not. It is less clear to the Commission that an individual without advanced education or training may legally dispense Claimant's medications, take his vital signs, check him for skin breakdown, or otherwise assess his physical needs. This may well veer into the realm of professional care of a type which the agreement envisions to be the responsibility of an individual with advanced education or training. The Commission does

not believe it necessary to make a service-by-service or task-by-task determination as to whether such service or task is one which falls into the professional versus nonprofessional category. Rather, we rely on state licensure statutes and regulations to define what services may only be provided by someone with advanced education/training.

52. The facts of this case raise specific questions as to whether certified nursing assistants (CNA) constitute "nonprofessional" caregivers. Even today, CNAs are not licensed in the state of Idaho; there are no rules governing the scope of practice for CNAs, and they are referred to as unlicensed assistant personnel in the Board of Nursing Administrative Rules. They may work under the direction of a nurse, and the Board of Nursing does have rules regarding the functions that may be delegated to a CNA. IDAPA 23.01.01.490.

53. The provisions of Idaho Code § 72-102 further support the conclusion that certified nursing assistants are not medical professionals under the workers' compensation laws of the state. The version of the statute that was in effect in 1984 provides:

> (20) "Physician" means medical physicians and surgeons, ophthalmologists, otorhinolaryngologists, dentists, osteopaths, osteopathic physicians and surgeons, optometrists, podiatrists, chiropractic physicians, and members of any other healing profession licensed or authorized by the statues of this state to practice such profession within the scope of their practice as defined by the statutes of this state and as authorized by their licenses.

Sessions Laws, 1982, Ch. 231, § 1, p. 610 (emphasis supplied). Therefore, "physician" is a broad term encompassing individuals licensed or authorized by the statutes of the state of Idaho to practice their profession. No such recognition is given in Idaho to certified nursing assistants, possibly, because such work is not regarded as a profession.

54. Finally, on the question of what does qualify as professional services, attention is called to the Idaho Supreme Court case of *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 93 P.3d 680 (2004). There, the question was whether real estate agents should be deemed as

rendering "professional services" such that the provisions of Idaho Code § 5-219(4) govern when a claim for damages against such an agent may be pursued. While Idaho Code § 5-219(4) does not define what constitutes professional services, other provisions of Idaho law were thought to provide significant, but not controlling, insights on the meaning of the term. The former Idaho Code § 30-1303(1)[6], governing professional service corporations provided:

> The term "professional service" shall mean any type of service to the public that can be rendered by a member of any profession within the purview of his profession. For the purposes of this chapter, the professions shall be held to include the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed public accountancy, social work, surveying, and veterinary medicine, and no others.

The Court ruled that Idaho Code § 30-1303(1), and the similar Idaho Code § 53-615(8)(a), suggested a legislative intention that "professional services" contemplated some type of specialized training or educational foundation beyond high school, and frequently, some sort of residency or internship training. While Idaho law does require licensure for real estate agents, that fact, standing alone, was not sufficient to qualify real estate agents as "professionals." Idaho law at the time only required that a real estate agent have a high school equivalency degree and pass a 90-hour classroom or correspondence course. The Court ruled that to include real estate agents in the list of professional services set forth in Idaho Code § 30-1303(1) would be inconsistent with the education and training for every other occupation identified in the statute. While the Court held that Idaho Code § 30-1303(1) does not define the universe of professional services, it did hold that in order to be deemed "professional" a vocation must involve training

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[6] This provision was recodified at Idaho Code § 30-21-901, effective July 1, 2015, and now reads in pertinent part: "For the purpose of this act, the professions shall include the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed public accountancy, social work, surveying and veterinary medicine, and no others."

and education comparable to the listed professions. The former Idaho Code § 30-1303(1) quoted above was adopted in 1989. The version of the statute in effect at the time of the 1984 Agreement reads as follows:

> The term "professional service" shall mean any type of service to the public which can be rendered by a member of any profession within the purview of his profession. For the purpose of this chapter, the professions shall be held to include the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, optometry, physical therapy, podiatry, professional geology, psychology, certified or licensed public accountancy, social work, surveying, and veterinary medicine. This chapter shall not be held to preclude incorporation as provided by section 54-1235, Idaho Code.

Session Laws, 1982, Ch. 233, § 5, pp. 616-617. Therefore, though similar, the 1982 version of the statute did not include occupational therapists among the list of enumerated professional services, and further, did not contain the language making the list the exclusive enumeration of such services. Based on the reasoning of the Court, the Commission cannot conclude that the earlier version of the statute would have produced a different result on the question of what constitutes professional service.

55. We conclude that CNAs, nurses' aides, or similar caregivers, whether acting independently, or under the direction and control of a licensed nurse, are "nonprofessionals" pursuant to the terms of the 1984 Agreement. While those engaged in this work are assuredly pursuing a vocation, theirs is not a profession requiring advanced education or training. The Commission concludes that the parties originally intended that those providing care and aid not requiring advanced education or training, such as lay persons, nurses' aides, and CNAs are "nonprofessionals" within the meaning of the 1984 Agreement, and that costs incurred in connection with the hiring of such individuals must first be paid from the annuity. Where doubt exists as to whether a particular component of the care and aid required by Claimant is

"nonprofessional," the determination should be made on the basis of whether the service may be legally rendered by an individual without advanced education or training.

56. We deem it important to emphasize that whether advanced education or training is required to provide a particular type of care must be judged by the standards generally accepted in 1984. In other words, if at some point since 1984, a type of care previously provided by lay persons has been recognized as requiring advanced education or training, then the determination of whether such care constitutes nonprofessional care and aid will be made based on the facts extant in 1984. The parties could have made the definition of "nonprofessional" a moving target. They chose not to.

57. It is important to remember that the 1984 agreement gives special treatment to physical therapy and speech therapy. Notwithstanding that such therapy may be provided by nonprofessionals, the cost of such services shall be paid by Defendants.

58. Finally, it must not be forgotten that expenses other than those directly related to care of Claimant are also payable from the nonprofessional annuity. Expenses associated with housekeeping, cooking, laundry, yard work, and other household manpower needs are payable from the annuity because they, too, represent in-home nonprofessional care and aid. These expenses are payable either because Claimant can no longer perform such work himself, or because other household members who would otherwise perform such work are unable to do so because caring for Claimant is their first priority. Claimant need only show that such expenses would not have been incurred absent the 1974 accident in order to implicate the payment of such expenses from the annuity.[7]

[7] As Paragraph six, part two, of the 1984 Agreement makes clear, the in-home nonprofessional care and aid annuity was conceived as a "partial settlement of Claimant's medical benefit claim." While Paragraph six, part two, of the Agreement specifies that "all" expenses of in-home nonprofessional care and aid shall first be paid from the annuity,

59. Having determined that the term "nonprofessional" as used in the agreement refers to care and aid not requiring advanced education or training, and having further determined that CNAs are nonprofessionals, it follows that expenses for such care must first be paid from the annuity. Should it be the case that the annuity is insufficient to satisfy the costs of in-home nonprofessional care and aid, then Defendants are obligated to provide the same. Defendants suggest that if the cost of in-home nonprofessional care and aid exceeds the monthly annuity payment, Claimant must nevertheless incur the costs, and later seek reimbursement from Defendants. See Def's Brief, p. 20. The 1984 Agreement specifies:

> Defendants agree that in the event the monthly cost of in-home nonprofessional care and aid exceeds that particular month's annuity payment, Surety will be responsible for and will pay said excess amount.

The agreement does <u>not</u> require Claimant to first incur such expense, then seek reimbursement. Rather, it contemplates that on exhaustion of the monthly annuity, Defendants shall assume responsibility for additional costs. It is not unreasonable to ask of Claimant that he account for the expenses paid from the monthly annuity in order that Defendants may be satisfied that the annuity has been appropriately exhausted before they assume responsibility for payment of expenses which exceed the monthly annuity.

MEDICAL BENEFITS PAYABLE BY DEFENDANTS UNDER THE 1984 AGREEMENT

60. We next turn to the second principle issue, i.e., whether Defendants are responsible for certain care which, though medical and professional in nature, was denied by Defendants as being unrelated to the subject accident, or palliative, and therefore noncompensable. A related issue is whether Claimant is entitled to an award of attorney's fees

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without explicitly requiring that such expenses be causally related to the subject accident, we conclude, as we explain in ¶ 67, that as a "medical benefit," the parties intended that only in-home nonprofessional care and aid expenses causally related to the subject accident are payable from the annuity.

under Idaho Code § 72-804 for Defendants' unreasonable denial of certain medical benefits between approximately 2007 and 2012. The parties appear to be in agreement that the medical care that was disputed during this timeframe has now been largely accepted and paid by Defendants. The real question at this juncture is whether the denials, denials that were later reversed, were unreasonable, such that Claimant is entitled to an award of attorney's fees for the period that the unreasonable denial obtained.

61. As noted above, after being assigned the claim, Frank Domenick undertook a review of the file to better understand Defendants' obligations vis-à-vis the payment of medical bills. In performing his evaluation, he consulted with Cynthia Pilant, a registered nurse evidently employed by Intermountain Claims. In 2008, nursing aides were visiting Claimant's household on a three-times-per-week basis for the purpose of providing physical therapy and range of motion services to Claimant. Concerning the characterization of this care and aid, Ms. Pilant offered the following opinions in June of 2008:

> To the best of my opinion this is how I would sort out the medical services. In the state of Idaho and Utah, RN's are considered professionals and CNA's are considered unlicensed assisted personnel. After reviewing the home health notes it appears that many of the visits were only to provide range of motion, transfers and companionship to Mr. Clark. Those are services that the daily caregivers or the wife would be competent and trained to provide. Partly, we could consider this palliative care versus curative care and possibly not be responsible.

DE 3:39. Ms. Pilant's opinion seems to have informed Mr. Domenick's decision to author his June 23, 2008 letter to Claimant and his wife in which he advised Claimant as follows:

> A recent audit revealed the fact that we may have paid for nonprofessional medical care. I am writing to advise you that effective July 1, 2008 we will no longer be paying for any medical care deemed nonprofessional.

JE 3:24. Previously, Defendants had paid for nurses' aides who came to Claimant's home to provide physical therapy. Based on the assertion that this care was provided by nonprofessionals,

Defendants denied further responsibility for physical therapy services. Dr. Friedman also proposed that the care was not compensable by Defendants because it was "palliative" instead of curative. This threshold denial provides a useful frame of reference when reviewing those provisions of the 1984 Agreement that relate to the Defendants' responsibility to provide for future medical care.

62. As explained above, the statutory scheme in place in 1984 established Claimant's entitlement to a broad range of medical services and attendant care. The attendance to which Claimant was entitled under the statutory scheme admitted Defendants' responsibility for things only tangentially medical in nature. However, the statutory scheme holds Defendants responsible only for those things causally related to the subject accident and only for care that is reasonable. No distinction is drawn in the statutory scheme between care that is curative versus palliative in nature.

63. However, the parties chose not to rely on the statutory scheme to define Defendants' future responsibility for medical care. Rather, they compromised and commuted that obligation by way of an Idaho Code § 72-404 agreement, an agreement that was approved by the Industrial Commission in October of 1984. It is worth reiterating that document's treatment of Defendants' responsibility for future medical care:

> Defendants shall continue to be responsible for and to pay all in-patient hospital treatment, all doctors' expenses, all medication expenses, physical therapy expenses, speech therapy expenses, and any other professional medical expenses for treatment, whether rendered on an in-patient basis or on an out-patient basis which may be incurred by Claimant, and shall continue to be responsible for providing, repairing, and/or replacement of any specialized equipment which Claimant needs.

Therefore, Defendants have continuing responsibility for the payment of the following expenses as incurred: (1) All in-patient hospital treatment; (2) All doctors' expenses; (3) All medication

expenses; (4) Physical therapy expenses; (5) Speech therapy expenses; (6) Providing, repairing and/or replacement of any specialized equipment which Claimant needs; and (7) Any other professional medical expenses for treatment, whether rendered on an in-patient basis or an out-patient basis.

64. There are several odd things about this language. Why, for example, specify that Defendants are responsible for the payment of "all" in-patient hospital treatment, "all" doctors' expenses, "all" medication expenses, but fail to specify that Defendants are responsible for all physical therapy or all speech therapy? After specifying that Defendants are responsible for the payment of all in-patient hospital treatment, what is the purpose of reiterating that obligation in what might be described as the catch-all provision?

65. The parties seem to be in agreement that the 1984 Agreement only requires Defendants to assume responsibility for the payment of medical care which is shown to be causally related to the subject accident. At least, a number of the disputes described by the parties turn on whether or not the care is or is not related to the 1974 accident. However, nothing in the provisions of Paragraph six, part two, of the agreement specify that Defendants' responsibility for medical care is limited only to care necessitated as the result of the accident. The specific language of Paragraph 6 seemingly requires Defendants to pay for <u>all</u> of Claimant's future medical needs regardless of whether the need for care is related to the subject accident or not. Had the parties wished to specify that Claimant is only entitled to such care as he could otherwise prove under the provisions of Idaho Code § 72-432, it would have been simple to couch Defendants' responsibility for future care in this fashion. Indeed, this is the usual practice in Idaho Code § 72-404 agreements where the parties agree to leave medicals "open"; the medicals are open, but only to the extent that Claimant can prove that the need for such future

care would otherwise be compensable under the provisions of Idaho Code § 72-432, i.e., that the care in question is related to the subject accident, that it was required by a treating physician, that it was reasonable, etc. Here, the parties chose a different path, and at first blush, the agreement does not seem to limit Claimant's rights to future medical care only to such care as can be causally related to the subject accident.

66. However, the language quoted above also contains a word which might initially appear to be surplusage, or of no particular significance, until read in the context of the complete document. The provisions of Paragraph six, part two, relating to Defendants' future obligations to provide medical treatment begins as follows: "Defendants shall *continue* to be responsible…" Compare this language to the following language found in Paragraph five of the agreement:

> Defendants have to date fully paid Claimant permanent total disability benefits and have compensated Claimant for all medical and related expenses. There are no outstanding medical expenses necessitated by reason of Claimant's accident which have not been paid by Surety.

With this language in mind, the language of Paragraph six, part two, of the agreement takes on new significance. To "continue" to be responsible to pay for something necessarily implicates consideration of past conduct. What is it that Defendants "continue" to agree to be responsible for? The answer that seems to make sense is all "medical expenses necessitated by reason of Claimant's accident."

67. From the foregoing, we conclude that even though Paragraph six, part two, of the Agreement seems to anticipate that Defendants shall have ongoing responsibility for all medical care, regardless of whether or not such care is necessitated as a result of the subject accident, the provisions of Paragraph five suggest that something else was intended, i.e., that Defendants are only obligated to continue to provide ongoing care necessitated as the result of the subject accident. This seems to be consistent with the positions taken by the parties at hearing. However,

the parties' current concurrence is not particularly relevant to ascertaining the intent of the parties in 1984. Similarly, when OneBeacon retained the services of Intermountain Claims to adjust this matter, Sarah Cormier's October 3, 2002 Letter of Assignment included a "claim critique" in which the following statement is made:

> This file has physician and pharmacy paid at 100%, so there is no fee schedule. OneBeacon is responsible for all medicals whether for physicians, drugs or dental. No denials allowed.

DE 1:6. However, without further information, Ms. Cormier's assessment of what was resolved in 1984 is neither more nor less compelling than the parties' apparent acquiescence to the proposition that the 1984 settlement only contemplates the obligation to provide future medical care related to the subject accident. Again, we are constrained to divine the intent of the parties at the time the 1984 Agreement was executed. The Commission concludes that the 1984 Agreement, read as a whole, does not create an ambiguity concerning the type of medical care Defendants are bound to provide prospectively. The Agreement requires Defendants to "continue" to provide the specified care, i.e., as "necessitated" by reason of the accident. The "reasonableness" of the care is not identified as a consideration.

68. As to the other potential problems referenced above, while it may be true that the document admits the possibility that the Defendants are responsible for something less than "all" physical therapy and "all" speech therapy, there is no language which provides any rule as to what type of speech or physical therapy might be the responsibility of Defendants, and what part is either non-compensable, or the responsibility of Claimant to pay via the annuity. We therefore think it appropriate to conclude that Defendants are responsible for the payment of all physical therapy and all speech therapy.

ATTORNEY FEES

69. The Commission turns next to Claimant's claim for attorney's fees pursuant to Idaho Code § 72-804. That section 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[8] 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.

(emphasis supplied). Therefore, an award of attorney's fees is payable to Claimant in three instances: (1) the claim was contested by Employer/Surety without reasonable grounds; (2) Employer/Surety neglected or refused to pay compensation provided by law within a reasonable time following receipt of a written claim; or (3) Employer/Surety discontinued the payment of compensation justly due and owing. *Salinas v. Bridgeview Estates*, 162 Idaho 91, 394 P.3d 793 (2017). A decision that grounds exist to award attorney fees in a workers' compensation case is a factual determination, resting with the Industrial Commission. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

70. The first question the Commission must consider is whether the provisions of Idaho Code § 72-804 apply to Claimant's rights under the 1984 Agreement. As discussed, the 1984 Agreement resolves indemnity and certain medical expenses by the payment of two annuities, but leaves other medicals open as described by the terms of the Agreement. The 1984 Agreement contains no provision for penalties for failure to comply with its terms. Moreover, it

[8] A "written claim" includes the submission of medical bills to Surety, in addition to a written claim or written application for hearing. *Lorca-Merono* v. *Yokes Washington Foods, Inc*, 137 Idaho 446, 50 P.3d 461 (2002).

does not purport to define all of Claimant's rights. Rather, as specifically set forth at part six of the Agreement, the obligations of the parties are only "partially settled, partially satisfied, and partially discharged by way of the Agreement…" Finally, the Order of Approval executed by the Commission also reflects that the Agreement only partially discharges the obligations of the parties.

71. From these provisions, the Commission concludes that while the Agreement does govern the rights of the parties on the specific issues settled, i.e., Claimant's entitlement to indemnity benefits, Claimant's entitlement to "in home-nonprofessional care and aid," and Claimant's entitlement to future medical benefits, it anticipates that the Commission will continue to have jurisdiction over whether certain medical care is causally related to the subject accident, or professional versus nonprofessional.

72. Nothing in the Agreement prohibits the application of Idaho Code § 72-804 in the event Defendants unreasonably contest a claim for medical benefits, neglect, or refuse to pay a claim for medical benefits, or discontinue the payment of medical benefits. Therefore, should it be determined that Defendants have failed in their obligation to pay any of the medical benefits encompassed by the terms of the 1984 Agreement, then an award of attorney's fees under Idaho Code § 72-804 is warranted.

73. We believe it is also important to emphasize that certain other obligations imposed by Idaho law are not expressly commuted by the terms of the 1984 Agreement. For example, Idaho Code § 72-304, and the rules implementing that section, require sureties to promptly pay workers' compensation benefits to which an injured worker may be entitled. Further, Idaho Code § 72-305 requires sureties to provide prompt and continuous medical supervision of cases. This last requirement resonates with particular significance in this case.

Claimant suffered an all-together debilitating injury. He lives in a rural area. His wife and family members have no medical training and are presumably unsophisticated in how his needs might be best addressed, and what medical technologies might be available to make his life and care a little easier. And yet, evaluation by medical professionals skilled in assessing the ongoing needs of Claimant has been intermittent at best. When such medical evaluation has been performed many of the recommendations for certain treatments or appliances have not been adopted on a timely basis by Defendants. Idaho Code § 72-304 and Idaho Code § 72-305 require sureties to act proactively in the provision of medical treatment. Nothing in the provisions of the 1984 Agreement suggests that this obligation may be ignored.

74. With these statutory provisions in mind, the Commission next addresses specific instances in which it is claimed that Defendants' actions, or inactions, warrant an award of attorney's fees pursuant to the provisions of Idaho Code § 72-804.

75. Turning first to Mr. Domenick's decision to decline to pay for physical therapy provided by nurses' aides on the basis that the service was provided by "nonprofessionals," and therefore the responsibility of Claimant, it seems that his thought process is similar to the conclusion that the Commission has reached concerning what is meant by the term, "nonprofessional;" nurses' aides are not "professionals" and therefore responsibility for the payment of their services would ordinarily be the responsibility of Claimant. However, the aides in question were providing physical therapy to Claimant, and physical therapy is specified to be the responsibility of Defendants. The specific language of the agreement requiring Defendants to pay for expenses associated with physical therapy controls over the general pronouncement that Defendants shall not be responsible for care and aid provided by nonprofessionals. The requirement to provide physical therapy is succinctly identified as one of the responsibilities of

Defendants, yet was apparently ignored by Mr. Domenick. Mr. Domenick's decision was called into question by at least one person associated with Defendants. See JE 2:13.

76. Notwithstanding that the denial has been rectified, Claimant was forced to live with this denial for many months, such that an award of fees under Idaho Code § 72-804 is justified because we find that Mr. Domenick contested the claim for physical therapy without reasonable grounds. The Commission further notes that Mr. Domenick seemed not to be persuaded by the parties' course of conduct over the many years since the approval of the agreement in 1984. As Mrs. Clark explained, Defendants expressed no reluctance to pay the expenses associated with physical therapy until some point after OneBeacon assumed responsibility for the claim.

77. Aside from Ms. Pilant, Defendants relied on Dr. Friedman to opine on two points: (1) whether a particular type of care is professional versus nonprofessional; and (2) whether a particular type of care is causally related to the subject accident.

78. The record contains many examples of Dr. Friedman's assessment of whether this or that type of care is professional versus nonprofessional, or related versus unrelated to the subject accident. He was given many opportunities to respond, in check-the-box fashion, to inquiries made of him by Defendants concerning the compensability of care, or whether certain care should be the responsibility of Claimant or Defendants. In some instances, he described care as being "nonprofessional" because he was not afforded an opportunity to state that it was unrelated to the subject accident. Friedman Dep., 18:13-19:1. In some instances, he described care as being unrelated to the subject accident because he deemed it "palliative" in nature, as opposed to curative or needed to restore function. *Id.* at 14:7-15:15. Asked to review page three of the 1984 Agreement, Dr. Friedman testified that even though the agreement called for the

Defendants to pay "physical therapy expenses," he deemed such care non-compensable because it was "palliative" care, not intended to change Claimant's underlying condition. *Id.* at 21:14-22:14.

79. The term "professional" and "nonprofessional" were used by the parties to delineate responsibility for the payment of medical and attendant services. Why Defendants chose to rely on the opinion of a physician to advise them on the legal meaning of the terms "professional" and "nonprofessional," as used by the parties to the agreement in 1984, is unclear. However, in the early going it appears that it was Dr. Friedman's opinion, and his alone, that informed Defendants' assessment of what type of care and aid constituted "nonprofessional" care that was to first be paid from the annuity. We believe that Defendants' reliance on these opinions is untenable; Dr. Friedman is not qualified to interpret what the parties intended by drafting the 1984 Agreement the way they did.

80. Similarly, Dr. Friedman's insistence that certain types of care are not related to the subject accident because they are "palliative," i.e., not directed toward functional gain, amounts to the provision of a legal opinion that palliative care is not compensable. Again, the Commission is struck by the complete absence of any foundation for Dr. Friedman's opinion, other than his own interpretation of what is and is not compensable as a consequence of the subject accident under the Idaho Worker's Compensation Laws. Dr. Friedman's is not an opinion on the medical cause of Claimant's need for palliative care. To the contrary, his conclusion is based on his impression that palliative care, even if causally related to the subject accident, is somehow not compensable because it can be deemed non-related by a virtue of the fact that it is not expected to improve Claimant's ability to function. According to Dr. Friedman, if care is not curative, it is not related to the subject accident. As we have pointed out, this is not and never has

been the law of this state. Defendants' reliance on these opinions to deny palliative care is, again, untenable.

81. The Commission further notes while it has determined that the 1984 Agreement does contemplate the payment by Defendants only of those medical expenses causally related to the subject accident, the agreement does not draw a distinction between care that is related to the accident but "palliative" and care that is related to the accident but "curative." For this reason as well, there was no basis for Defendants to deny payment of so-called palliative medical treatment.

82. Claimant also argues Defendants unreasonably denied, delayed, or inadequately provided durable medical equipment (DME) and medical care, resulting in injuries and damaged credit. Claimant specifically argues attorneys fees should be awarded based on Defendant's actions regarding: the nurse case manager[9], the automatic turning mattress and hospital bed, the shower chair, splints, vehicle modification, power wheelchair, lift system, communication system, physical therapy (discussed *supra*), Dr. Nash's services, prescription medication, baclofen pump surgery, sleep study, skin care treatment, dental treatment, and eye treatment.

83. As noted *supra*, this claim was assigned to Intermountain Claims on October 3, 2002. See DE 1. OneBeacon ordered a "Life Care Planning Consultation [and] Medical Cost Projection" which is dated September 3, 2003 and was received by Intermountain Claims' Boise office on August 16, 2006. DE 2:16. The consultant reviewed medical records, largely from February 1993 to May 2003, documented Claimant's current status, and provided a list of potential future complications and their respective costs.

[9] Defendants correctly point out that the request for a nurse case manager came after the filing of the complaint and therefore cannot serve as a basis for an award of attorney's fees. Defendants hired a nurse case manager by at least March of 2011. JE 39:1647.

84. The consultant noted Claimant was "primarily wheelchair bound…non-verbal and communicates with eye movements… [and is a] total assist for ADLs." *Id.* She summarized dental records showing Claimant's "mouth was partially rehabilitated in 1994, which was necessitated by [the] industrial accident." *Id.* at 17. She wrote that Claimant had "a history of problems with aspiration related to his spastic quadriplegia" and a history of asthma prior to the injury. *Id.* at 18-19. She recorded that, at that time, Claimant was utilizing a wheelchair, shower chair, and a computer for communication; Claimant had recently acquired all three. Claimant's medications were noted to have changed very little since they were first ordered in 1996, including Allegra, Diazepam, Dioctyl/Ducosate, Baclofen, Braun Oral-B, Neutro T/gel, yearly Kenalog shot, and yearly flu vaccine. *Id.* at 22-23.

85. In terms of future complications, the consultant noted in pertinent part that Claimant's injuries (spasticity and inability to clean out his secretions) and pre-existing conditions (asthma and allergies) interacted in the past to require extensive respiratory treatment and predicted that would continue, and possibly worsen, in the future. She recorded that Claimant would need a wheelchair replacement every 5-10 years, a shower chair replacement every 3-5 years, and ongoing updates to his computer or a new computer system every 5 years, for communication. She wrote that as Claimant aged, his spasticity would increase and that it could interrupt his sleep and cause pain. To treat his spasticity, she predicted Claimant would need: a baclofen pump, splints, a lift mechanism, a motorized wheelchair, a special mattress and hospital bed, and a bowel program. *Id.* at 20-27. Finally, she noted that "[t]he severity of the spasticity" would determine the final costs for Claimant's future care and recommended another life care plan update if Claimant deteriorated. *Id.* at 28.

86. There are no records in evidence which indicate Defendants took any action these recommendations between the date they were prepared and the date they were forwarded to Intermountain Claims.

87. Frank Domenick contacted Cynthia Pilant to provide nurse case management and her first report is dated November 19, 2007. In that report, she observes "[Claimant's] main mode of transportation is a wheelchair that is in bad repair." DE 3:34. It does not appear she was aware Claimant formerly communicated through a computer or other assistive devices, because she explains how Claimant's "wife came up with the means of verbal communication by spelling in particular quadrants." *Id.* She notes that Claimant is having trouble sleeping, that Mrs. Clark is having problems finding steady and reliable caregivers, and that Mrs. Clark is "currently ordering her supplies and that is not working well." *Id.*

88. Thereafter, Frank Domenick, working with Dr. Friedman, issued a series of denials regarding Claimant's treatment. It does not appear Mr. Domenick ever forwarded the Corvel Life Care Plan to Dr. Friedman or the medical records listed in the assessment; he forwarded only the medical record in question to Dr. Friedman or in the case of prescription medications, merely a list unaccompanied by any medical record. See JE 28. Below we discuss the delays or denials resulting from this conduct that we find particularly egregious.

89. **Independently Turning Mattress and Hospital Bed.** The 2003 Corvel Life Care Plan put Defendants on notice that Claimant may need a special mattress and hospital bed. DE 2:20. In the 2009 Life Care Plan prepared by Kelly Lance referenced *supra,* Ms. Lance stated:

> Due to his inability to independent [sic] move himself, Mrs. Clark wakes every two hours during the evening to turn Mr. Clark to prevent skin breakdown. Mr. Clark is currently sleeping in a regular bed with no lifting device or mechanism to raise the head of the bed. Again, Mr. Clark must be pulled up to a sitting position and turned in order to sit with support on the edge of bed. Mr. Clark is rigid and does not have trunk control. He tends to fall to the side. Mr. Clark needs a lift

> system and a hospital bed. He also needs a mattress that would independently turn him during the night. Mrs. Clark has been performing this function for the past 34 years without assistance… A lift system should have been purchased years ago… The Clarks will either need 24 hour nursing care or the Invacare Zero Pressure Bed.

JE 28:1314. Dr. Friedman opined regarding the mattress:

> The MicroAIR Turn-Q Plus Mattress is not medically necessary. There are alternatives at much lower technology and cost available and this is for the convenience of the family as turning every two hours is health maintenance and not a medical requirement.

JE 28:1295. The argument appears to be two-fold: (1) the proposed mattress is too expensive and cheaper solutions exist; (2) regardless, turning Claimant in bed every two hours is just "health maintenance" and not a medical requirement. Dr. Friedman did not explain whether he deems an appliance needed only for "health maintenance" to be unrelated to the subject accident in the same way he deems palliative care to be unrelated because it does not advance functional improvement. At his deposition, Dr. Friedman explained that whatever the Clarks are doing now is working since Claimant does not have a history of bed sores. He suggested that if Mrs. Clark awakens every two hours to move Claimant, then the self-turning mattress "would be for her, not him." Friedman Dep., 101-102. The 1984 Agreement requires Defendants to provide appliances related to the accident. It does not mandate some particular showing that the appliances is "required" vs. merely needed for health management. Further, that a self-turning mattress may relieve certain manpower demands on Mrs. Clark, or some other paid caregiver, does not make the need for such an appliance any less related to the subject accident. Defendants unreasonably relied on Dr. Friedman's opinion to deny the recommended appliance and therefore contested this claim without reasonable ground.

90. **Shower Chair.** Defendants were again put on notice by the Corvel Life Care Plan that Claimant would need a shower chair replacement every 3-5 years and that he had most

recently purchased one in 2002. Instead of investigating whether Claimant did need a replacement chair when it began adjusting the claim in 2007, Defendants waited for Dr. Rosenbluth to re-prescribe a chair in July of 2009, and then forwarded this opinion to Dr. Friedman, who agreed. See JE 28. In the meantime, Mrs. Clark testified "so we tied him in that broken shower chair with a sheet. And that went on for a long time…He's fallen out of the [broken] shower chair three times - - two broken noses and a broken ankle." Tr. Vol. 1, 81:14-15; 22-24. Defendants, without reasonable grounds, discontinued the provision of an adequate shower chair.

91. **Power Wheelchair.** The Corvel Life Care Plan notes that a manual wheelchair was purchased for Claimant in 2002 and recognized a power wheelchair as a potential future need. DE2:23, 28. Ms. Lance recommended a power wheelchair, which Dr. Friedman, without examining Claimant, opined he could not use. JE 28:1296. In the records provided to Dr. Friedman, Dr. Rosenbluth notes Claimant has "significant voluntary strength in his left arm with elbow flexion and grasping." *Id.* at 1305. The Life Care Plan, to which Dr. Friedman is by and large responding to in his October 22, 2009 records review, notes Claimant "is able to move his left elbow slightly with his right hand to readjust position." *Id.* at 1313. Dr. Friedman apparently discounted or ignored medical records by Dr. Rosenbluth and Ms. Lance, both of whom had actually seen and/or examined Claimant and indicated Claimant had some type of function. Dr. Friedman could have deferred making a recommendation until he could physically examine Claimant and, indeed, when he did examine Claimant in June of 2010, Dr. Friedman noted Claimant had and was utilizing a power wheelchair. Friedman Dep., Exh 2:3. Defendants' reliance on Dr. Friedman's uninformed opinions constitutes an unreasonable denial and they contested this claim without reasonable grounds.

92. **Lift System.** Again, the 2003 Corvel Life Care Plan notes a "hover lift" may be needed by Claimant in the future if his spasticity increased. DE 2:27. Dr. Rosenbluth prescribed a lift system on July 6, 2009. JE 35:1628. Dr. Friedman, responding to both Kelly Lance's recommendation for a SureHands Lift System and Dr. Rosenbluth's prescription, opined that while a lift system was appropriate, the one recommended by Ms. Lance was "excessive." Dr. Friedman wrote: "[t]hey have been using a standard bedside lift, which can be moved around the household, and this has been functionally adequate and appropriate." JE 28:1295. It is unclear where Dr. Friedman got this impression. Dr. Rosenbluth's records state "we are working on a lift system for transfers." *Id.* at 1305. Ms. Lance's life care plan states Claimant "needs a lift system…[a] lift system should have been purchased years ago." *Id.* at 1314. Mrs. Clark testified she did not have a lift system at the time of the life care assessment. Tr. Vol. 1, 77:16-19. Further, when asked about former Defense counsel's letter dated December 14, 2010, which also recited that the Clarks already had a lift system, Mrs. Clark responded "[b]ut at that time, we didn't even have the bedside lift system. It came after this letter. I remember that, thinking "Why - - why would - - why did they say that we when we didn't have it?" JE 10:873; Tr. Vol. 1, 87:13-17. It was not until April 12, 2011 that an electric lift system was purchased. JE17:1045. Eventually, the SureHands Lift System was purchased on August 6, 2012 after Dr. Rosenbluth specifically prescribed it on July 6, 2012. JE 17:1062; Rosenbluth Dep., Ex 45:5828. Defendants were in a position to know whether they had previously provided a lift system to Claimant. Dr. Friedman's honest mistake notwithstanding, Defendants were put on notice by the Corvel Life Care Plan that Claimant may need a lift system; Defendants should have known they had not previously provided a lift system, and this mistake could have been cleared up with a simple phone call to Mrs. Clark. A delay of almost two years from the time of the prescription to the

time of the provision of an adequate lift system was unreasonable; Defendants neglected to provide this durable medical equipment within a reasonable time after receiving a written claim.

93. **Communication System.** In 1980 and 1992, Defendants provided Claimant with assistive communication devices. See JE 64. At the time of the 2003 Corvel Life Care Plan, Claimant was reportedly "communicat[ing] with eye motions and a computer with voice synthesizer. He recently purchased a new computer for this purpose." DE 2:25. However, when RN Pilant began her brief tenure as case manager in 2007, she wrote that Claimant and his wife communicated with eye movements. As noted *supra*, Defendants have always known Claimant is aphasic and had previously provided assistive speech devices; from 2003 to 2009, Claimant was entitled to "prompt and continuous service" under Idaho Code § 72-304, and Defendants failed to provide updates to Claimant's computer or a new communication system. It is difficult to imagine a more frustrating delay than one that impacts a claimant's ability to communicate. Defendants did purchase the Dynavox Eye Max System on December 3, 2009 and had provided a new communication device by the time of hearing. Tr. Vol. 1, 84:3-11. However, Defendants discontinued providing this medical equipment without reasonable grounds.

94. **Vehicle Modification.** Defendants last provided a modified vehicle for Claimant in 1976. JE 61:2247. Ms. Lance recommended a new modified vehicle in the 2009 life care plan, and Dr. Friedman agreed on October 22, 2009: "[v]ehicle modifications are appropriate to allow access and adjustments for his height in a manual wheelchair." JE 28:1296. Dr. Friedman also stated that Claimant "cannot drive." *Id.* Despite this opinion, in a letter dated December 14, 2010, Defendants' former attorney relayed that the Defendants were still investigating providing vehicle modifications because there was a question of whether Claimant could safely operate a vehicle. JE 10:873. Claimant is repeatedly identified in all his medical records as completely

dependent on others for his activities of daily living and as wheelchair bound; it should have been obvious that he needed a modified vehicle to travel anywhere outside his home, as recognized by Dr. Friedman and previously recognized by Defendants. Defendants were put on notice again when their second nurse case manager, Cathleen Robinson, confirmed that Claimant needed a modified vehicle in March of 2011. JE 39:1649. Defendants finally purchased a Toyota Sienna and ramp on October 2, 2012. JE 61:2243-2244. Defendants neglected to provide a modified vehicle within a reasonable time after receipt of a written claim and discontinued providing a modified vehicle without reasonable grounds.

95. **Prescription Medications.** Defendants unreasonably denied Claimant's prescription medications. Defendants knew from the Corvel Life Care Plan why Claimant needed various medications, how they related to the accident, and that they had been previously covered. Furthermore, Defendants only forwarded an Albertson's pharmacy list to Dr. Friedman for his review unaccompanied by any kind of medical record, and then relied on that opinion to deny medications to Claimant. See JE 25. Defendants discontinued provision of these medications without reasonable grounds.

96. **Baclofen Pump Surgery.** A baclofen pump is listed as a potential future medical need in the 2003 Corvel Life Care Plan. DE 2:27. In January 2007, the Claimant and Dr. Rosenbluth began to discuss the possibility of a baclofen pump trial. JE 34:1627. Claimant underwent a baclofen pump trial in July of 2009 and decided to proceed with implantation in August of 2009. JE 35:1628; Rosenbluth Depo., Ex 7. The surgery was scheduled for October 16, 2009, but by October 15, 2009 the surgery had not been approved by Defendants, and the Clarks did not want to proceed without assurances it would be approved. Rosenbluth Depo., Ex 10, 8, 9. Ms. O'Dell sent medical records and a request for opinion to Dr. Friedman on October

15, 2009, and Dr. Friedman opined that a baclofen pump was not medically indicated because Claimant had not maximized his oral dosage of baclofen. JE 28:1300, 1298. Dr. Friedman reiterated this opinion at his June 15, 2010 IME. Friedman Dep., Ex. 2. The surgery was again scheduled for May 18, 2011. JE 33:1624. On May 16, 2011, Dr. Rosenbluth responded to Dr. Friedman's opinion as follows: "[i]ncreasing the dose is not an option for Mr. Clark due to the side effects of drowsiness. I feel that an intrathecal baclofen pump is a much better option for him." JE 38:1632. On May 17, 2011, this opinion was forwarded to Dr. Friedman, who maintained his opinion that a baclofen pump was not indicated. JE 39:1660-1662. The surgery was cancelled, and then rescheduled for June 28, 2011. JE 33:1624. Defendants then approved the surgery the day after it took place. Rosenbluth Depo., Ex. 15. This was an unreasonable denial and delay. Dr. Rosenbluth was Claimant's treating physician for many years prior to the surgery, specifically managing his baclofen dosage, and was in the best position to opine regarding his needs; Dr. Friedman never even responded to Dr. Rosenbluth's specific concerns with increasing his oral dosage. Dr. Friedman repeatedly emphasized that the baclofen pump would not result in any functional gain (see JE 39:1662, JE 28:1299, Friedman Dep., Ex. 2) despite his observations at his IME that Claimant reported it was easier for him to stand, that his legs did not collapse during transfers, and that his right hand was looser. *Id.* Moreover, as discussed *supra*, functional gain is not the measure of whether care is compensable. Defendants contested this claim without reasonable grounds.

97. **2008 Skin Care Treatment.** Claimant developed a rash on his back and was treated by Dr. Hubbard, his dermatologist, on August 22, 2008. JE 23:1274. Based on an opinion by Dr. Friedman, Defendants denied payment for the office visit on November 18, 2008. JE 22:1268. Dr. Hubbard's office manager wrote a letter requesting reconsideration, specifically

relating the rash to Claimant's wheelchair bound state: "[t]he diagnosed follicle infection was in direct relation to the circumstances of the patient's injury. The Patient's reliance on his wheelchair resulted in this irritated rash on his back that seemed to be growing." JE 23:1273. Dr. Friedman again opined that the "[f]ungal rash …would not be related to his injury," and further explained at his deposition:

> But skin fungal infections are normal on your skin, and people get them, because fungus is normal on your skin. They tend to occur more often after you've had an antibiotic, which suppresses normal bacterial growth and allows the fungus to overgrow. Having said all of that, it's also called "ringworm," and people just get it. There's no association of skin fungus with any neurologic diagnosis that I'm aware of.
>
> Q: [By Mr. Gardner] Would that be associated with the fact that he's in a wheelchair and can't move, maybe there's not any air getting back there to that area?
>
> A: Well, if that were the case - - the answer is none, that I'm aware of. There are other places on his body where he doesn't have a rash that equally have limited air motion and sweat. And this is not a new issue. He was originally injured 30 years prior. Why only in 2008 does he have a skin rash, and how would you relate that to his immobility, because that hasn't changed in 30 years. My answer is no. This is normal. This is how you get it. We don't actually know why people get athlete's foot, and athlete's foot happens in people who are not athletes. It is a normal thing.

JE 28:1293; Friedman Dep., 17:7-18:6. However, Dr. Hubbard did not diagnose Claimant with ringworm; Dr. Hubbard opined Claimant had "folliculitis," an infected follicle. Dr. Friedman's entire opinion hinges on his incorrect assumption regarding Claimant's diagnosis. Defendant's reliance on Dr. Friedman's opinion was unreasonable; they contested this claim without reasonable grounds.

98. **Dental Work.** Claimant's dental work had previously been covered by Defendants as related to the accident, without issue. See JE 27. However, when Claimant treated with his regular dentist on February 23, 2009 for hyperplastic tissues and a teeth cleaning, and

again on March 16, 2009, for work on Claimant's porcelain crown at tooth number 31, his care was denied. JE 26:1282-1283; DE 4:53-54. After the denial, Claimant's attorney wrote and provided records advising that, in 1994, Defendants had accepted Claimant's need for crowns as related to the accident. See JE 26. This was information Defendants already had from the 2003 Corvel Life Care Plan. The 1994 records were forwarded to Dr. Friedman, and on May 21, 2009, he opined that the March 16, 2009 crown work was related, but the February 23, 2009 appointment was not. DE 4:56. Thereafter, Defendants paid both bills. JE 27:1290. Defendants unreasonably discontinued providing this care without reasonable grounds.

99. Suffice it to say, the Commission finds ample basis to conclude that at various times since 2007, Defendants have either contested a claim for medical benefits without reasonable grounds, neglected or refused to pay compensation after receipt of a written claim for same, or discontinued, without reasonable grounds, the payment of compensation justly due and owing. Even though the record appears to reflect that these failings have been rectified, and that the benefits in question have now been paid, we believe an award of attorney's fees is nevertheless appropriate under Idaho Code § 72-804. This case is dissimilar from *Salinas v. Bridgeview Estates, supra*. In *Salinas*, following a work accident surety commenced the payment of medical benefits. However, approximately six weeks after the accident, surety denied responsibility for the payment of further medical or indemnity benefits. The case eventually went to hearing on claimant's entitlement to those benefits and on her claim for attorney's fees under Idaho Code § 72-804. The Commission found that claimant was not entitled to the further compensation benefits she requested, and that the medical and other evidence supported surety's denial. Notwithstanding that the medical proof necessary to support surety's denial was not adduced until after benefits were denied, the Supreme Court ruled that because compensation

was not "justly due and owing" under the third tranche of Idaho Code § 72-804, attorney's fees were not payable. Unlike *Salinas*, we have concluded that Defendants' decision to discontinue certain payments was not reasonable. Defendants' actions have not been proven correct; they have merely rectified their past denials. Claimant has still suffered the economic hardship imposed during the period in which the compensation in question was denied.

100. Claimant argues that he is entitled to reimbursement for bills he paid that Defendants were obligated to pay, specifically, reimbursement for Dr. Hubbard's bill. Clt's Opening Brief, p. 25. Defendants are obligated to reimburse Claimant for Dr. Hubbard's bill totalling $382.79. Regarding Dr. Nash's bills, the Commission cannot reconcile exhibits 17, 20, and 54 to account for all of the denied, but related, bills of Dr. Nash. To the extent that Claimant paid Dr. Nash's bills, or that any of those bills are outstanding, Defendants must reimburse Claimant or pay Dr. Nash.

101. Claimant argues that Defendants have not provided recommended care, specifically 24-hour skilled nursing services and adaptive home controls. The Commission believes Defendants had been providing 24-hour skilled nursing services until a recent interruption that was resolved following a request for emergency hearing. Regarding the adaptive home controls, there is a prescription for "purchase of appliance modules for ECU use that will interface with [his] wheelchair and/or Dynavox to control environment independently," dated March 30, 2012 and signed by a Dr. Marc Musson. JE 52: 1824. In 2015, Dr. Rosenbluth testified:

> I also think this may have under-represented some of his technology needs, which go beyond just the Eye Gaze System.
>
> Q: [By Mr. Bergman] What kind of technology needs are you referring to?

> A: Computer - - the Eye Gaze system itself, which I think was put in to be replaced every five years, but technology typically moves a little bit faster than that, and I didn't see any items that were - - that interfaced with that type of computer system, like things that would help him open the door, control his environment, the temperature, the lights, things to automate some things in the home to be more independent in his house.

Rosenbluth Dep., 124:16-125:4. Mrs. Clark testified at hearing that Claimant is now using a different communication system, and both the prescription and deposition are more than seven and four years old, respectively. Tr. Vol. 1, 84:4-5. Claimant may need adaptive controls which Defendants are obligated to provide, but the Commission is unable to reach a conclusion regarding whether Dr. Rosenbluth would currently recommend and prescribe this equipment.

102. In line with the above conclusions, the Commission finds Claimant's prescription medications, dental care, one-time skin infection treatment, and baclofen pump surgery compensable and related to the accident. Defendants shall continue to provide durable medical equipment related to the accident. We decline to rule on the compensability of Claimant's sleep condition, eye condition, and other care that was paid for by Defendants, but which is not the basis for an award of attorney's fees. Defendants have administratively accepted these claims and any future care for these conditions is not presently before the Commission.

REIMBURSEMENT TO DEFENDANTS

103. Defendants argue that Claimant and Defendants reached an alternate agreement, or "modification," which obligates Claimant to turn over the proceeds of the nonprofessional annuity to Defendants, in return for Defendants payment for <u>all</u> care. This agreement is not memorialized in writing, but can be inferred from Defense and Claimant counsels' email correspondence, and the parties' conduct. See DE 6. Defendants and Claimant operated under this agreement from approximately 2011 to 2017. By letter dated March 22, 2017, Claimant declined to remit the annuity proceeds to Defendants: "Mrs. Clark is not required to return any

portion of the annuity payment. While she has done so previously, it is clear under the agreement that the insurer is required to pay for these services in full." DE 8:81. Since that date, Defendants have expended over $180,000 to pay for "in-home nonprofessional care and aid," and Defendants request reimbursement.

104. First, as discussed above, the Commission has no authority to entertain a 2011 agreement purportedly modifying the 1984 Agreement. The modification was not adopted as an order of the Commission, it was not in any way approved by the Commission, nor is there any statutory route by which the Commission could approve a modification to the 1984 Agreement, having already fully and finally resolved indemnity and a portion of Claimant's entitlement to medical benefits in a final order of the Commission. The only ongoing jurisdiction the Commission has is with regard to interpreting and administering the 1984 Agreement.

105. As the Commission has interpreted the 1984 Agreement, Claimant is initially responsible to pay for all in-home care and aid that is nonprofessional in nature, i.e., such care that does not require advanced education/training or professional licensure. If those costs exceed the monthly annuity, Defendants shall pay the additional cost of such care. Defendants assert that since Counsel's letter of March 22, 2017, they have paid for all Claimant's care, including all in-home nonprofessional care and aid, while Claimant has retained the annuity intended to contribute to the payment for such services.[10] This is inconsistent with the provisions of the 1984 Agreement. From March 22, 2017 forward, Defendants are entitled to reimbursement from Claimant for the cost of monthly in-home nonprofessional care and aid they provided, up to the amount of the monthly annuity. *Brooks v. Standard Fire Insurance Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990). Defendants' right to reimbursement exists only where it is shown, for any

[10] Ms. Clark testified that the retained monthly annuity payments have been segregated in a separate bank account. Tr. Vol. II, 93:9-18.

particular month, that Defendants paid for care and aid that should have first been paid by Claimant, but which Claimant failed to pay.

RULE 16 SANCTIONS

106. Defendants also argue they are entitled to attorney fees under JRP 16 for Claimant's violation of the alternate agreement. By its language, JRP 16 vests the Commission with the authority to impose sanctions for "violation or abuse of its rules or procedures." No such violation is shown by these facts.

IMPROPER USE OF NONPROFESSIONAL ANNUITY

107. Finally, Defendants argue that over the years, Claimant improperly used the nonprofessional annuity to pay legal and other expenses when it was well understood that the monthly annuity was to first be applied to the payment of in-home nonprofessional care and aid. For any month for which the annuity was insufficient to cover nonprofessional care, Defendants were responsible to make up the difference, and Claimant's diversion of a portion of the monthly annuity for unauthorized purposes meant that Defendants' burden to pay for nonprofessional care was proportionately increased.

108. We turn first to the treatment of miscellaneous expenses referenced by Defendants. These include payment of meals for aides, payment for tickets for the aides' attendance at athletic or other events, payments of bonuses for the aides, and the like. Notwithstanding his severe disability, the record reflects that Claimant does enjoy athletic and other events in his vicinity. Obviously, he requires assistance when traveling. It is entirely reasonable to use the annuity to pay for meals and other expenses of aides while so engaged. This would include the cost of their admission to whatever event Claimant is attending. Bonuses and travel expenses paid to aides out of the annuity are simply part of their remuneration. The

fact that Mrs. Clark used the annuity to purchase groceries to be used by aides to fix sandwiches for themselves during their shifts is also an element of their remuneration, and appropriately paid out of the annuity. Clark Depo., 35.

109. More problematic is the payment of legal expenses from the nonprofessional annuity. Review of JE 68 and 77 reflects that between December 31, 2008 and June 27, 2011, Claimant paid legal expenses of approximately $18,504.00 from the nonprofessional annuity. The Commission assumes that the hourly fees and costs represented by these expenditures were incurred in connection with the dispute that gives rise to this proceeding. At least, there is no suggestion that legal expenses paid were associated with something foreign to the instant matter. Even so, payment of legal expenses from the annuity contravenes the 1984 Agreement; by no stretch could such expenditures be deemed to be for "in-home nonprofessional care and aid" as the Commission has construed the phrase. Such expenses should have been paid from other sources since, as the 1984 Agreement specifies, Claimant is only free to use the monthly annuity for other than its specified purpose if it exceeds the monthly expenses for in-home nonprofessional care and aid. Within the timeframe December 31, 2008 to June 27, 2011, for most of the months in which legal expenses were paid, the annuity was insufficient to pay all the expenses of in-home nonprofessional care and aid. Defendants, per the 1984 Agreement, paid the difference. Therefore, the annuity should not have been used to pay legal expenses. Consistent with the 1984 Agreement, Claimant should reimburse Defendants for the additional expenses Defendants incurred due to Claimant's unauthorized expenditures for legal fees.

110. However, we know little about Claimant's monthly expenses of living, and whether he had other income readily at his disposal to pay for legal representation. Moreover, it was Defendants' actions which forced Claimant to retain the services of counsel. Because of

Defendants' Idaho Code § 72-804 violations, Claimant was forced to expend monies payable for Claimant's in-home care in order to protect his entitlement to medical care at issue. To the extent that Claimant paid for such legal services from the in-home nonprofessional care and aid annuity, we believe it is appropriate to require Defendants to reimburse Claimant for such expenditures. Although we reach no decision on the dollar amount of attorney fees payable to Claimant under Idaho Code § 72-804, one component must be reimbursement to Claimant for amounts diverted from the in-home nonprofessional care and aid annuity to pay for the legal services required to assert his rights to the medical care we have found to have been wrongly delayed or denied.

111. The practical effect of this ruling is that Claimant's use of the annuity for an unauthorized purpose is excused, and probably, no money will change hands; for any month in which Defendants paid for nonprofessional care and aid, any reimbursement to Claimant would have to be returned to Defendants to reduce their obligation to pay for care in excess of the monthly annuity.

CONCLUSIONS OF LAW AND ORDER

The 1984 Agreement partially resolves Claimant's entitlement to worker's compensation benefits arising from the October 1, 1974 accident/injury as follows:

1. Claimant's entitlement to indemnity benefits was resolved by the purchase of the annuity described in Paragraph 6, Part 1;

2. Claimant's entitlement to medical benefits payable pursuant to the 1984 version of Idaho Code § 72-432 was, in part, commuted by Defendants' agreement to pay future medical expenses falling into the following classifications, upon demonstration that the need for such care is necessitated as a result of the subject accident:

a. all in-patient hospital treatment;

b. all doctors' expenses;

c. all medication expenses;

d. physical therapy expenses;

e. speech therapy expenses;

f. revision and repair/replacement of specialized equipment required by Claimant;

g. any other professional medical expenses for treatment whether rendered on an in-patient basis or an out-patient basis;

3. Claimant's entitlement to medical expenses payable pursuant to the 1984 version of Idaho Code § 72-432 was in part commuted by the purchase of an annuity payable to Claimant to be applied to the payment of all expenses for all in-home nonprofessional care and aid required by Claimant. Should the annuity prove insufficient to pay such monthly expenses, responsibility for payment shifts to Defendants. The agreement does not contemplate that Claimant must make such additional payment and then seek reimbursement. Rather, once Claimant has exhausted the monthly annuity, Defendants shall pay the additional expenses of in-home nonprofessional care and aid incurred for that month. Consistent with this opinion, "nonprofessional" care and aid refers to care and aid which does not require advanced education/training or professional licensure to provide. Specifically, nurses' aides, CNAs and similar caregivers constitute "nonprofessional" care and aid. Consistent with this opinion, in-home nonprofessional care and aid also includes services not directly associated with Claimant's hands-on care.

4. The 1984 Agreement is final and conclusive as to all matters adjudicated only, i.e., the resolution of indemnity benefits, the type of medical care Claimant is entitled to in the future, and how responsibility for the payment of recognized medical care shall be apportioned between Defendants and Claimant via the in-home nonprofessional care and aid annuity. In other respects, Idaho law extant in 1984 governs Defendants' responsibilities to act in timely and responsible manner vis-à-vis Claimant's need for care.

5. The purported modification to the 1984 Agreement made in 2011 and abandoned in 2017 is unenforceable. To the extent Defendants have paid for in-home nonprofessional care and aid subsequent to the abandonment of the arrangement, they shall have a right of reimbursement against Claimant for those benefits which should have first been paid from the in-home nonprofessional annuity.

6. In connection with their obligation to provide medical care delineated in the 1984 Agreement, Defendants violated the provisions of Idaho Code § 72-804 on multiple occasions, as detailed in the decision. Claimant is entitled to an award of attorney's fees for these violations. Unless the parties can come to on an amount representing an appropriate attorney fee, Claimant's counsel shall, within twenty-one (21) days of the date of the entry of this Order, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant in connection with the benefits at issue, plus an affidavit in support thereof. In particular, the parties must discuss the factors set forth by the Idaho Supreme Court in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney's fees in this matter. As noted in the decision, the attorney's fees payable to Claimant shall, at the very least, include those fees diverted by Claimant from the in-home nonprofessional

care and aid annuity to pay his attorneys for services rendered in connection with the medical services which are the subject of the Idaho Code § 72-804 award. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an Order on attorney's fees.

7. To the extent that the medical services forming the basis for the Commission's award of attorney's fees under Idaho Code § 72-804 remain unpaid, Defendants shall satisfy such bills, specifically Dr. Nash's bills. To the extent that such care was paid by Claimant, Defendants shall reimburse Claimant for the cost of such care, including Dr. Hubbard's care.

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

DATED this ___25th___ day of __November__, 2019.

INDUSTRIAL COMMISSION

____/s/_____
Thomas P. Baskin, Chairman

____/s/_____
Aaron White, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____25th____ day of ____November_____, 2019, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

Brad Bearnson
399 N Main St., Suite 270
Logan, UT 94321

David Gardner
877 W Main St., Suite 1000
Boise, ID 83702

el _____/s/_____

Appendix 1

84 SEP 15 P3:10

BEFORE THE INDUSTRIAL COMMISSION

OF THE STATE OF IDAHO

BOB D. CLARK,

Claimant,

-vs-

AGRICULTURAL PRODUCTS CORP.,

Employer,

and

AMERICAN EMPLOYERS' INSURANCE COMPANY (a Subsidiary of Commercial Union Assurance Companies),

Surety,

Defendants.

I.C. No. 74-09714

STIPULATION AND AGREEMENT OF PARTIAL LUMP SUM DISCHARGE AND ORDER OF APPROVAL

SALT LAKE CLAIM

SEP 05 1984

FULL FILE RUSH

IN CONSIDERATION of the premises and promises and covenants hereinafter set forth and subject to the above-entitled Commission Approval and Order pursuant thereto, the above-entitled parties do stipulate and agree as follows:

FIRST: As hereinafter referred to, the parties shall be designated as follows:

BOB D. CLARK, as Claimant, AGRICULTURAL PRODUCTS CORP., as Employer, AMERICAN EMPLOYERS' INSURANCE COMPANY (a Subsidiary of Commercial Union Assurance Companies), as Surety, and THE INDUSTRIAL COMMISSION of the State of Idaho, as the Commission.

SECOND: On or about October 1, 1974, Claimant was injured as the result of an accident occurring while he was in the course and scope of his employment, said accident having occurred while Claimant was loosening a dome lid on a sulphur tank car. Employer at said time had secured its workmen's compensation liability to its employees under the laws of Idaho with Surety, American Employers' Insurance Company.

Following said accident, Claimant instituted third party

1. In settlement of Claimant's income benefit claim, Surety, American Employers' Insurance Co. (a subsidiary of Commercial Union Assurance Companies), agrees to purchase an annuity from Life Insurance Company of North American which will pay Claimant, beginning August 1, 1984, $800.00 per month for the rest of his life, with 30 years guaranteed and with the said monthly payments increasing at a compounded rate of 7% per year, as is more specifically set forth in the schedule attached hereto as Exhibit "B". Claimant agrees that said annuity, upon order of the Industrial Commission, shall discharge Defendants from any obligation to make any other income benefit payments by reason of said industrial accident. Claimant's dependents agree that said annuity shall be in lieu of any dependency benefits that they might otherwise be entitled to in the event Claimant dies before the 30-year guarantee period expires.

2. In partial settlement of Claimant's medical benefit claim, Surety, American Employers' Insurance Co. (a subsidiary of Commercial Union Assurance Companies), agrees to purchase an annuity from Life Insurance Company of North America which will pay Claimant $1,500.00 per month for the rest of Claimant's life, with the monthly payments increasing at a compounded rate of 5% per year. Claimant agrees that from said monthly benefit Claimant will pay all in-home nonprofessional care and aid, and that Claimant's wife, Sherry Clark, shall not be entitled to reimbursement for the care she personally provides Claimant, regardless of the nature of said care. Defendants agree that in the event the monthly cost of in-home nonprofessional care and aid exceeds that particular month's annuity payment, Surety will be responsible for and will pay said excess amount. Defendants further agree that in the event the actual cost of in-home nonprofessional care and aid is less than the annuity payment in a particular month, Claimant shall be entitled to the excess up to the amount of the annuity payment to be used for whatever purpose Claimant sees fit. Defendants shall continue to be responsible for and pay all inpatient hospital treatment, all doctors' expenses, all medication expenses, physical therapy expenses, speech therapy expenses, and any other professional medical expenses for treatment, whether rendered on an inpatient basis or an outpatient basis which may be incurred by Claimant, and shall continue to be responsible for providing, repairing and/or replacement of any specialized equipment which Claimant needs.

SEVENTH: Claimant is represented herein and has been counseled by Louis F. Racine, Jr., of Pocatello, Idaho, whose fee for negotiations and preparation of this agreement shall be paid by Defendants.

EIGHTH: The terms of this agreement shall be binding upon all of the above parties, their heirs, representatives, successors and assigns. Upon Commission order approving this

ORDER OF APPROVAL AND ORDER OF PARTIAL

DISCHARGE BY WAY OF AGREEMENT

The foregoing Stipulation, Agreement and Petition having duly and regularly come before this Commission, and it appearing that the interests of justice and of the Claimant, Bob D. Clark, are and will be served by approving said Agreement and granting the order of partial discharge as prayed for;

NOW, THEREFORE, said foregoing Stipulation and Agreement shall be, and the same is hereby APPROVED; and further,

Said Petition shall be and hereby is GRANTED.

DATED this _____ day of _____, 1984.

OCT 18 1984 INDUSTRIAL COMMISSION

BY: _____ Chairman

_____ Member

_____ Member

ATTEST:

_____

Assistant Secretary

Corporation and/or American Employers' or any of their respective administrators, successors, representatives, insurers, agents, employees, servants and assigns and any organization or person acting for, by or through either of them, as to any and all claims, actions, causes of action, demands, damages, costs, loss of service and expense whatsoever for which said American Employers' and/or Beker Industries Corporation are or may be liable to said third parties, or any of them, pursuant to the provisions of the Workmen's Compensation Laws of the State of Idaho and specifically Section 72-223 and/or Section 72-209, Idaho Code.

It is expressly agreed between the parties that this agreement is intended to relieve American Employers', a corporation, and/or Beker Industries Corporation, from any liability, if any, to make contributions to or indemnify any tortfeasor, joint or otherwise, as is provided in Idaho Code Section 6-801 through 6-806, and/or the Workmen's Compensation Laws of the State of Idaho including, but not limited to, Sections 72-209 and 72-223, Idaho Code; and pursuant to said Sections 6-801 through 6-806 of the Idaho Code, Clarks agree and expressly acknowledge that this stipulation and indemnification agreement reduces the claim or claims they have or may have against any tortfeasor involved in said accident of October 1, 1974, including, but not limited to, the defendants in Case No. 2501 above described in the amount of the subrogated interest of said American Employers' and/or Beker Industries Corporation, or to the extent of the pro rata share of American Employers' and/or Beker Industries Corporation, if any, in Clarks' damages recoverable against all the other tortfeasors, if such pro rata share is greater than said subrogated interest.

It is expressly and specifically agreed by Clarks to provide a full defense for and to indemnify American Employers' and/or Beker Industries Corporation from any and all further claims against American Employers' and/or Beker Industries Corporation of any kind or nature arising or which are alleged to arise from any damages, injury or loss suffered by Clarks as a result of the accident hereinbefore described.

It is understood and agreed this settlement constitutes the complete waiver of said subrogated interest by and on behalf of American Employers' and/or Beker Industries Corporation and that said waiver of said subrogated interest is not to be construed as an admission of liability of any fault or negligence on the part of said American Employers' and/or Beker Industries Corporation, and that said releasees, and each of them, deny liability therefor and intend by this instrument to completely avoid litigation, cost of any defense as a result of said accident and to buy their respective peace herein.

EXHIBIT "B"

YR	MTHLY INCOME	CUMULATIVE INCOME
1	$800.00	$9,600.00
2	$848.00	$19,776.00
3	$898.88	$30,562.56
4	$952.81	$41,996.28
5	$1,009.98	$54,116.04
6	$1,070.58	$66,963.00
7	$1,134.82	$80,580.84
8	$1,202.90	$95,015.64
9	$1,275.08	$110,316.60
10	$1,351.58	$126,535.56
11	$1,432.68	$143,727.72
12	$1,518.64	$161,951.40
13	$1,609.76	$181,268.52
14	$1,706.34	$201,744.60
15	$1,808.72	$223,449.24
16	$1,917.25	$246,456.24
17	$2,032.28	$270,843.60
18	$2,154.22	$296,694.24
19	$2,283.47	$324,095.88
20	$2,420.48	$353,141.64
21	$2,565.71	$383,930.16
22	$2,719.65	$416,565.96
23	$2,882.83	$451,159.92
24	$3,055.80	$487,829.52
25	$3,239.15	$526,699.32
26	$3,433.50	$567,901.32
27	$3,639.51	$611,575.44
28	$3,857.88	$657,870.00
29	$4,089.35	$706,942.20
30	$4,334.71	$758,958.72

THE TOTAL PAYOUT DURING THE ASSUMED LIFE EXPECTANCY OF THE ANNUITANT IS:
39 $7,323.40 $1,392,561.24
VALUE ERROR
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