BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT E. MEAD, Claimant, v. SWIFT TRANSPORTATION, Employer, and ACE AMERICAN INSURANCE CO., Surety, Defendants.	**IC 2008-027385** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed August 24, 2017

INTRODUCTION AND BACKGROUND

Referee LaDawn Marsters conducted a hearing on November 3, 2014 in the above-entitled matter. Claimant was present and represented by Starr Kelso. Employer (Swift) and Surety (collectively Defendants) were represented by Emma R. Wilson. The matter came under advisement on July 9, 2015, and Referee Marsters subsequently submitted her proposed findings, conclusions, and recommendation and left the Commission for other employment. On September 11, 2015, the Commissioners issued their own findings of fact, conclusions of law and order determining that Claimant continued to suffer symptoms related to his June 2008 industrial back injury and was entitled to additional diagnostic and palliative treatment. The Commission further determined that the statute of limitations was tolled, but that Claimant had not proven entitlement to a third low back surgery or additional temporary disability benefits.

Claimant subsequently filed another request for hearing. Pursuant to Idaho Code § 72-506, the Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on December 21, 2016. Claimant, Robert E. Mead, was present

and represented by Starr Kelso, of Coeur d'Alene. Defendants Swift Transportation and Ace American Insurance Co., were represented by Emma R. Wilson, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on June 8, 2017.

ISSUES

The issues to be decided are:

1. Whether the Commission's September 11, 2015 decision is final pursuant to Idaho Code § 72-718;

2. Whether Claimant's requests for medical care and temporary disability benefits are barred by the doctrines of res judicata, collateral estoppel, or quasi-estoppel;

3. Claimant's entitlement to medical care including surgery;

4. Claimant's entitlement to temporary disability benefits; and

5. The extent of Claimant's permanent partial impairment and date of medical stability.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant suffered a low back injury at Swift on June 9, 2008, for which he received medical benefits including an October 10, 2008 surgery by Dr. Dirks and an April 12, 2012 surgery by Dr. Larson. Claimant asserts entitlement to additional treatment by Dr. Dirks, specifically, a third low back surgery performed by Dr. Dirks on December 8, 2014. Claimant also requests temporary disability benefits related to his 2008 industrial low back injury due to his inability to work from July 2, 2014 until December 17, 2015. He asserts that Dr. NcNulty's permanent impairment rating is appropriate.

Defendants assert that Claimant's claims for a third low back surgery and for temporary disability benefits were adjudicated and denied in the Commission's September 11, 2015 decision. They assert Claimant has been medically stable since July 11, 2012 and that Dr. Larson's 6% impairment rating is appropriate, or at most, Dr. Frizzell's 12% impairment rating with 2% assigned to Claimant's preexisting condition.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. All evidence admitted and considered pursuant to the Commission's Findings of Fact, Conclusions of Law, and Order dated September 11, 2015;
3. Claimant's Exhibits X-JJ and Defendants' Exhibits 1-13, admitted at the December 21, 2016 hearing;
4. The post-hearing deposition of John McNulty, M.D., taken by Claimant on January 30, 2017;
5. The post-hearing deposition of Bret A. Dirks, M.D., taken by Claimant on February 23, 2017;
6. The post-hearing deposition of Tyler Frizzell, M.D., taken by Defendants on March 6, 2017.

All pending objections are overruled, except Claimant's objection at page 57 of Dr. Frizzell's post-hearing deposition which is considered moot inasmuch as Dr. Frizzell offered no changes to his deposition testimony.

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

FINDINGS OF FACT

1. The Commission's findings of fact from its September 11, 2015 decision are incorporated herein by this reference as if set forth in full.

2. Prior to the initial November 3, 2014 hearing in this case, Claimant received several lumbar epidural steroid injections. On November 10, 2014, Claimant attended a follow-up appointment with Dr. Dirks who noted that Claimant was miserable due to ongoing back pain but was fearful of further surgery. After a careful review of diagnostic test results and lengthy discussion, Dr. Dirks concluded surgery was Claimant's best option and so advised him. Claimant deliberated extensively before deciding to proceed. On December 8, 2014, Dr. Dirks performed posterior lumbar surgery including removal of old hardware at L5-S1, complete lumbar laminectomies at L4 and L5, partial lumbar laminectomy at S1, bilateral facetectomies at L4-5 and L5-S1, allograft/autograft modeling, pedicle screw placement at L4, L5 and S1 bilaterally with DePuy instrumentation including two rods and one crosslink, bony arthrodesis posterior and lateral bilaterally at L4, L5 and S1, and left L5-S1 diskectomy. By January 8, 2015, Dr. Dirks noted Claimant was doing nicely although his back was still bothering him; however, he reported decreased leg symptoms. Before surgery Claimant had regular groin pain, nearly constant left leg and buttock pain, and intermittent right leg pain. After surgery Claimant had no groin pain and noted intermittent rather than constant left leg pain.

3. By January 27, 2015, Kurt Bailey, DC, NP-C, noted that Claimant had decreased numbness and tingling in his right leg. Claimant continued to regain feeling in his left foot until he regained approximately 40% of the feeling in his left foot. On February 10, 2015, Dr. Dirks recorded that Claimant was making progress, hurting less than before surgery with decreased pain down his legs. Claimant reported numbness down his left leg.

4. On April 28, 2015, p. 441 Dr. Dirks recorded that Claimant continued slowly making progress. Dr. Bailey noted that Claimant's left leg and foot were less numb than before surgery, his left leg pain was now intermittent instead of constant, and his right leg was improved and now not painful. By July 28, 2015, Dr. Bailey noted Claimant's life style was improving although he was still unable to perform many activities.

5. On December 17, 2015, Dr. Dirks charted that Claimant has done fairly well post-surgery. He noted that Claimant still had some persisting nerve pain but had improved markedly from before surgery and that at least some of his nerve damage was not permanent because he had benefited from surgery. Dr. Dirks found Claimant medically stable on that date.

6. Claimant credibly testified that before surgery he was very limited and his condition was continually getting worse. He almost did not leave his house and essentially moved from his bed to his couch. After surgery Claimant's groin pain completely resolved, his right leg pain improved, and his left leg pain decreased. Post-surgery Claimant was able to go to the park with his granddaughter for half an hour and wash dishes for fifteen minutes before needing to sit or lie down. Post-surgery, he was able to mow half of his back yard although thereafter he was "down" for a couple of days.

7. At the time of hearing, Claimant continued to have difficulty putting on his shoes and needed another's help to tie or untie them. However, he was able to walk around a grocery store for more than 15 minutes, but less than 45 minutes. He was unable to go to movies because he cannot sit upright for extended periods.

8. **Credibility.** Having observed Claimant at hearing, and compared his testimony with other evidence in the record, the Referee finds, as did Referee Marsters and the Commissioners previously, that Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

9. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

10. **Finality of the Commission's 2015 decision.** The first issue concerns the finality of the Commission's September 11, 2015 decision. Defendants assert Claimant's present claims are barred by collateral estoppel, quasi-estoppel and/or res judicata.

11. *Collateral estoppel.* In Vawter v. United Parcel Service, Inc., 155 Idaho 903, 912, 318 P.3d 893, 902–03 (2014), the Court noted:

> [C]ollateral estoppel does not apply to this case, which involved multiple hearings but one cause of action. Collateral estoppel "precludes relitigation of the same issue in a separate cause of action." …A cause of action is a "group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person...." Black's Law Dictionary 251 (9th ed. 2009).
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> Here, all of the orders deal with the same operative facts related to Vawter's employment with UPS, so the orders do not deal with separate factual situations. Therefore, all the hearings and orders address only one cause of action. See Sanije Berisha, Claimant, IC 2002–003038, 2012 WL 2118142 (Idaho Ind.Com. May 30, 2012) ("Collateral estoppel is inapplicable in cases like this one where the litigation, albeit including several different hearings, is nevertheless all part of the same case.").

Vawter v. United Parcel Service, Inc., 155 Idaho 903, 912–13, 318 P.3d 893, 902–03 (2014).

12. Claimant's assertions herein of entitlement to medical care including surgery and temporary disability benefits do not represent a separate cause of action but rather are all part of the same case. His present claims are not barred by collateral estoppel.

13. *Quasi-estoppel.* The doctrine of quasi-estoppel "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." Atwood v. Smith, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006), quoting C & G, Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 144, 75 P.3d 194, 198 (2003).

> This doctrine applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Vawter v. United Parcel Service, Inc., 155 Idaho 903, 910–911, 318 P.3d 893, 900–901 (2014), quoting Allen v. Reynolds, 145 Idaho 807, 812, 186 P.3d 663, 668 (2008).

14. In the present case Claimant's assertions of entitlement to medical care including surgery and temporary disability benefits have been consistent and do not represent a change of Claimant's position. His claims are not barred by quasi-estoppel.

15. *Res judicata*. Defendants allege: "the issue of whether [Claimant] was entitled to a third low back surgery as proposed by Dr. Dirks, as well as the issue of his entitlement to temporary disability benefits were litigated issues at [the] 2014 hearing." Defendants' Responsive Brief, p. 7. The 2014 hearing culminated in the Commission's September 11, 2015 decision which states in part:

> 1. Claimant has proven that he continues to suffer pain and lower extremity radiculopathy symptoms related to his June 2008 industrial low back injury.
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> 2. Claimant has proven that he is entitled to additional reasonable diagnostic and palliative treatment, as prescribed by Dr. Dirks, and pain management treatment with Dr. Stoutin.
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> 3. Claimant has failed to prove that a third low back surgery constitutes reasonable treatment for his industrially-related symptoms.

> 4. Defendants failed to submit a NOCS when there was a legal responsibility to do so. Pursuant to Idaho Code § 72-604, the statute of limitations is tolled.
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> 5. Claimant has failed to prove that he had reentered a period of recovery by the time of the hearing; therefore, he failed to establish that he is entitled to additional temporary disability benefits.
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> 6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

Mead v. Swift Transportation, 2015 WL 6125455, at 20 (Idaho Ind. Com. 2015). Defendants assert the Commission's September 11, 2015 decision has become final pursuant to Idaho Code § 72-718.

16. Idaho Code § 72-718 provides:

> A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

17. In Vawter v. United Parcel Service, Inc., 155 Idaho 903, 913, 318 P.3d 893, 903 (2014), the Court addressed the supposed finality of a Commission determination awarding medical benefits stating: "the Commission's 2010 order awarding medical benefits was not a final order but, rather, an interlocutory order that was subject to modification until such time as a final, appealable order was entered. Thus, the Commission's decision to apply collateral estoppel was in error."

18. In Green v. Green, 160 Idaho 275, 371 P.3d 329 (2016), the Court had occasion to further describe its view of what constitutes a final decision. The surety in Green asserted ISIF did not timely appeal from a prior Commission decision establishing ISIF's liability arising from

Green's thoracic fusion. The surety contended ISIF's appeal was only timely as to the Commission's decision determining Green's impairment from the thoracic fusion. Thus, the surety argued ISIF's appeal as to the amount of impairment was timely, but its appeal of liability arising from the thoracic fusion was not. The Supreme Court disagreed, stating:

> "[W]henever the Commission explicitly retains jurisdiction over a matter, that act by its very nature infers that there is neither a final determination of the case nor a final permanent award to the employee." Reynolds v. Browning Ferris Indus., 113 Idaho 965, 969, 751 P.2d 113, 117 (1988). Here, the Commission explicitly retained jurisdiction, demonstrating that a final determination had not been made. The final decision determining the parties' rights was not entered until November 26, 2014. ISIF's notice of appeal was filed on December 23, 2014. We hold that ISIF timely appealed.[2]

Green, 160 Idaho at 280–81, 371 P.3d at 334–35. The Court then proceeded by footnote to expressly differentiate between an interlocutory order and a final decision:

> We wish to note the apparent divergence between this Court and the Commission's understanding of the operation of Idaho Code section 72–718. The Commission expressed concern about a perceived discrepancy between a sentence in a recent decision from this Court and the statute. In Vawter v. United Parcel Service, Inc., 155 Idaho 903, 913, 318 P.3d 893, 903 (2014), this Court characterized a Commission order as "an interlocutory order that was *subject to modification until such time as a final, appealable order was entered.*" The Commission appears to believe this statement is at odds with Idaho Code section 72–718, which provides that a "decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated," subject to the parties' right to seek reconsideration within twenty days. The Commission stated: "It is difficult to square Vawter with the unambiguous provisions of Idaho Code § 72–718."
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> The Commission appears to have adopted the position that parties may not seek reconsideration of interlocutory rulings more than twenty days after they are made. The view we expressed in Vawter is based upon the final sentence of Idaho Code section 72–718, which provides that "[f]inal decisions may be appealed to the Supreme Court as provided by section 72–724, Idaho Code." Our view is that a decision is not final, and thus appealable, until all issues are resolved between all parties. Thus, in order to permit appeals of certain interlocutory decisions of the Commission, we have adopted I.A.R. 11(d)(2), authorizing expedited appeals from compensability determinations. The statement in Vawter to which the Commission has appeared to take exception is simply corollary to our view of what constitutes a final decision.

Green, 160 Idaho at 280 fn 2, 371 P.3d at 334 fn 2 (emphasis in above paragraph supplied).

19. The Commission's September 11, 2015 decision herein did not resolve all issues between the parties and pursuant to Green is not a final order. Furthermore, the following language of the Commission's decision itself suggests it is not intended to be a final order as to Claimant's entitlement to a third back surgery or additional temporary disability benefits:

> 58. The next question is whether Dr. Dirks' opinion is sufficient to support a determination that Claimant is entitled to a third surgery. Dr. Dirks has opined that Claimant will likely benefit from a third surgery. However, he was very cautious in his recommendation, calling for additional workup first:
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> > .... I would want to correlate again Mr. Mead, his exam, his history, talk to him again, review the C.T. scan, review the MRI and make certain that we have a reasonable chance of helping him. If it's a flip of the coin, 50/50, I would not do surgery. If it's at least 60, 70, 80 percent chance you are going to provide some benefit to him, you could at least offer that to him as a potential option.
> > ....
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> > And at this time I think Mr. Mead's only hope — let's say it this way, best hope of recovering function and getting rid of some of the back pain, would be to go in and do a decompression, particularly at the L5, S1 area, but possibly at the L4, 5 area. Again I would have to review those films in conjunction with what Mr. Mead is telling me to give him a chance of recovering function. Because right now the EMGs are indicative of nerve damage. It may be permanent and it may not recover. I don't know. So it's obviously a very complicated case because you have two different surgeons involved. You have lots of different testing that has been done. I think if you take out the two surgeons and you just look at the patient, he clearly has issues in his lower back. ... So I think if you are going to give Mr. Mead a chance, you have to contemplate redoing the surgery Dr. Larson did. But is it a guarantee he is going to get better, absolutely not. So that's kind of where we are at.
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> Dirks dep., pp. 26-27; 25-26/59.
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> Dr. Dirks is forthright in admitting the difficulties involved in determining whether another surgery is reasonable. If Claimant's nerve damage is permanent, then the proposed surgery will not relieve his symptoms. However, if Claimant's nerve damage is not permanent, then decompressing the nerves should improve

> some of Claimant's symptoms. Dr. Dirks recommended further evaluation to make this determination.
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> 59. Unless further evaluation supports a conclusion that Claimant's chances of improving are substantially above 50/50, the proposed surgery is not reasonable. However, Dr. Dirks was not prepared at the hearing to testify as to Claimant's actual chances of improving with surgery or, consequently, whether he presently recommends it. This is because he is not yet convinced that Claimant's symptoms are not the result of permanent nerve damage.
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> 60. Under these circumstances, the Commission finds that Claimant has failed to prove by a preponderance of the evidence that another low back surgery is reasonable. Although it is quite possible Dr. Dirks will endorse future treatment options, including a third surgery, the Commission does not advocate for a particular outcome. Simply, at this point, Claimant has not met his burden of showing that a third surgery is reasonable care.

Mead v. Swift Transportation, 2015 WL 6125455, at 16-17 (Idaho Ind. Com. 2015) (emphasis supplied). As to temporary disability benefits, the decision further concluded:

> As addressed, above, the evidence of record establishes the authenticity of Claimant's symptoms over time - he has lived and worked with low back pain and radiculopathy - to some degree, since 2008. However, it is insufficient to establish whether Claimant's condition is permanent and, if it is, when it became so. If Claimant's nerve damage is permanent, then no treatment is likely to permanently improve his condition, so his condition is medically stable. If, instead, his symptoms are the result of current nerve compression, then Claimant may not have been medically stable at the time of the hearing. Because the exact nature of Claimant's symptomatology has not been established, it cannot be determined whether Claimant reentered a period of recovery or, if he did, when he did so.

Mead v. Swift Transportation, 2015 WL 6125455, at 20 (Idaho Ind. Com. 2015) (emphasis supplied).

20. The Commission's 2015 decision determined that Claimant's ongoing low back symptoms are caused by his 2008 industrial accident at Swift and that Claimant was entitled to diagnostic medical care to evaluate what additional treatment may be reasonable and necessary. It would be inconsistent to conclude that the Commission intended to approve Claimant's diagnostic medical care and simultaneously deny him whatever substantive care the approved

diagnostic testing may show is necessary. A fair reading of the Commission's 2015 decision indicates that it is interlocutory and not a final order particularly as to Claimant's entitlement to a third back surgery and temporary disability benefits.

21. Finally, pursuant to Idaho Code § 72-432, claims for medical care are potentially viable for a claimant's lifetime provided causation is established. Regarding this section, the Commission has declared:

> It is well established within the workers' compensation arena that Idaho Code § 72-432 imposes an obligation upon employers to provide reasonably necessary medical treatment to employees injured on the job. Medical benefits are such a fundamental part of the workers' compensation system that they are excluded from the statutory time limitations contained in Idaho Code § 72-706. See, Walters v. Blincoe's Magic Valley Packing Co., 117 Idaho 239, 787 P.2d 225 (1989). An injured worker's right to receive medical treatment for a work-related condition extends throughout the worker's lifetime, subject only to the worker's obligation to demonstrate that the need for the medical treatment is causally related to the industrial accident.

Hardy v. Salmon River Lumber Company, 2005 WL 1902585, at 4 (Idaho Ind. Com. 2005).

22. The fact that Claimant herein did not prove entitlement to a third back surgery as of the date of the November 3, 2014 hearing does not forever foreclose his entitlement to a third back surgery.

23. Defendants assert: "Although a claimant may not be foreclosed from pursuing additional medical benefits after a prior adjudication of non-entitlement, this is different than re-litigating the precise issues previously adjudicated where there has been no change in the claimant's condition." Defendants' Responsive Brief, p. 7 (emphasis supplied). However, in the present case, there has indeed been a change in Claimant's condition between the November 3, 2014 hearing upon which the Commission's September 11, 2015 decision was predicated and the December 21, 2016 hearing upon which this present decision is predicated; namely, Dr. Dirks performed surgery on December 8, 2014, and Claimant's condition improved

thereby. Dr. Dirks' notes of January 8, April 28, and December 17, 2015, all document this improvement resulting from surgery. Chiropractor Bailey's notes of January 27 and July 28, 2015, also document Claimant's improved condition. At hearing, Claimant credibly testified and gave multiple illustrations of his improved condition and greater function post-surgery.

24. The Commission's September 11, 2015 decision was not a final order as to Claimant's entitlement to medical benefits and temporary disability benefits related to Dr. Dirks' December 8, 2014 surgery. Claimant's present claim is not barred by res judicata.

25. **Medical care.** The next issue is Claimant's entitlement to medical care, specifically reimbursement for surgery performed by Dr. Dirks on December 8, 2014.

26. Idaho Code § 72-432 provides in pertinent part:

> the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of 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.

Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

27. Claimant herein asserts that his third surgery, performed by Dr. Dirks on December 8, 2014, constituted reasonable treatment necessitated by his industrial accident. During the surgery Dr. Dirks removed bony growth impinging on the L5- S1 nerve roots. Thereafter Claimant regained more feeling and noted less pain in his lower extremities. By December 17, 2015, Dr. Dirks noted that Claimant had done fairly well post-surgery. Claimant benefited from surgery. Defendants challenge both whether Claimant's industrial accident

caused his need for surgery by Dr. Dirks on December 8, 2014, and whether his surgery was reasonable.

28. *Causation.* A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

29. Claimant alleges that his 2008 accident at Swift caused his need for 2014 lumbar surgery. The Commission's 2015 decision found that Claimant's 2008 industrial accident caused his continuing lumbar symptoms: "Claimant has established that, more likely than not, his persistent low back pain and his lower extremity radiculopathy symptoms are related to his 2008 industrial injury" and further concluded:

> Given Claimant's credible testimony that he continues to have symptoms of low back pain and radiculopathy and Dr. Dirks' persuasive testimony that these symptoms are industrially related, the Commission finds Dr. Stoutin's and Dr. Dirks' treatment to be reasonable under the totality of the circumstances. Claimant has shown he is entitled to further reasonable diagnostic and palliative care as recommended by Dr. Dirks and Dr. Stoutin, because Claimant has proven that following his 2012 fusion surgery, he continued to experience low back pain and lower extremity radiculopathy, with objective evidence of nerve compression and nerve damage at the time of the hearing. Claimant is entitled to reimbursement for the diagnostic and palliative care he received from Dr. Dirks, Dr. Stoutin, and others following July 2012, when Dr. Larson deemed him medically stable from his fusion surgery, through the date of the hearing.

Mead v. Swift Transportation Co., 2015 WL 6125455, at 15-16 (Idaho Ind. Com. 2015).

30. Dr. Dirk's opinions regarding the cause of Claimant's ongoing low back and leg symptoms continue to be persuasive evidence that Claimant's need for lumbar surgery on December 8, 2014 was causally related to his 2008 industrial accident.

31. *Reasonableness.* Idaho Code § 72-432(1) obligates an employer to provide treatment if the employee's physician requires the treatment and the treatment is reasonable. The physician decides whether the treatment is required. The only review the Commission is entitled

to make of the physician's decision is whether the treatment was reasonable. Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015). Defendants herein zealously assert that Claimant's third back surgery was not reasonable as of the November 3, 2014 hearing or the December 8, 2014 surgery itself. However, the present case no longer admits to only a prospective analysis of reasonableness based largely on conflicting medical opinions. Rather, the instant case now allows evaluation of the reasonableness of Claimant's third surgery with the further circumstance that Claimant has received the surgery in question and improved thereby.

32. In Sprague v. Caldwell Transp., Inc., 116 Idaho 720, 722–23, 779 P.2d 395, 397–98 (1989), overruled by Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Court declared:

> Under the circumstances of this case, there is no dispute that: a) the claimant made gradual improvement from the treatment received; b) the treatment was required by the claimant's physician; and c) the treatment received was within the physician's standard of practice the charges for which were fair, reasonable and similar to charges in the same profession. We hold that in light of these facts a legal conclusion that the treatment was unreasonable under I.C. § 72–432(1) cannot stand.

33. In Chavez v. Stokes, 158 Idaho 793, 353 P.3d 414 (2015), the Court noted that Sprague had been misconstrued as creating a three-factor test as the exclusive method to determine reasonableness of a claimant's medical treatment. The Court declared:

> [W]e conclude that any indication in our prior cases that the three factors from Sprague were the sole means to determine reasonableness was an unsound reading of that opinion. In fact, we overrule Sprague to the extent that it stands for the adoption of a specific test for the reasonableness of medical treatment under Idaho Code section 72–432(1). We also overrule Sprague's holding that the reasonableness of medical treatment is a question of law. This Court's review of the Commission's determination of the reasonableness of the claimant's medical treatment pursuant to Idaho Code section 72–432(1) is a question of fact to be supported by substantial and competent evidence.

Chavez v. Stokes, 158 Idaho 793, 797, 353 P.3d 414, 418 (2015). The Court observed that the three circumstances of Sprague constituted evidence in that case that medical treatment was reasonable, but was not an iron-clad test. The Court continued:

> Whether the claimant's condition gradually improved should not be determinative of whether treatment is reasonable.
> ….
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> [T]he central holding of Sprague, which remains valid, is simply: "It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable." 116 Idaho at 722, 779 P.2d at 397.
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> The Commission's review of the reasonableness of medical treatment should employ a totality of the circumstances approach. We are hesitant to provide specific factors for this fact-specific approach …. We note at a minimum, however, that the treatment must be required by the physician … as defined by worker's compensation law, unless it is treatment "needed immediately after an injury or manifestation of an occupational disease." I.C. § 72–432(1).

Chavez v. Stokes, 158 Idaho 793, 798, 353 P.3d 414, 419 (2015)

34. Both Sprague and Chavez evaluated the reasonableness of past medical care. As Chavez demonstrates, unfortunately not all reasonable medical treatment achieves its intended benefit, thus an injured worker's failure to improve should not be deemed fatal to compensability of past medical care. While the Chavez Court cautioned against "armchair doctoring," the required "totality of the circumstances" evaluation of medical treatment in the instant case would be materially incomplete without recognition that Claimant's condition improved with his third surgery. For Defendants to continue to dispute the reasonableness of medical treatment provided by Claimant's surgeon that has improved Claimant's condition is unpersuasive. Claimant has received surgery and his condition has improved. This positive change of condition further supports Dr. Dirks' opinions.

35. Claimant has proven that his 2008 industrial accident caused lumbar pathology resulting in his need for reasonable medical treatment therefore, including lumbar surgery by Dr. Dirks on December 8, 2014.

36. *Neel.* Claimant asserts he is entitled to payment of the full invoiced amounts of the medical expenses related to his December 8, 2014 surgery pursuant to Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009). Defendants assert the Commission's September 11, 2015 decision in this case renders Neel inapplicable.

37. In Neel v. Western Construction, Inc., 147 Idaho 146, 206 P.3d 852 (2009), the Idaho Supreme Court held a surety that initially denies an industrial accident claim which is later determined to be compensable is precluded from reviewing medical bills for reasonableness from the time such bills are incurred until the claim is deemed compensable. The surety may review medical bills incurred thereafter for reasonableness.

38. In Millard v. ABCO Construction, Inc., 161 Idaho 194, 384 P.3d 958 (2016), the Court repeated its holding in Neel and then restated the two prongs of the Neel test:

> [W]e hold that sureties, having denied a claim subsequently deemed compensable by the Commission, are only permitted to review a claimant's medical bills incurred after the claim is deemed compensable to determine whether such bills are reasonable in accordance with the worker's compensation regulatory scheme. Any medical bills incurred during the time from when the accident occurred to the time when the claim was deemed compensable fall outside the workers' compensation regulatory scheme and may not be reviewed for reasonableness and must be paid in full by the surety.
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> [Neel] at 149, 206 P.3d at 855.
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> Thus, under its plain language, Neel holds that a surety is liable for the full invoiced amounts of a worker's medical bills when (1) the surety denies a claim and (2) that claim is subsequently deemed compensable by the Commission.

Millard, 161 Idaho 194, 384 P.3d at 960.

39. In the present case, Claimant has proven that his lumbar surgery performed by Dr. Dirks on December 8, 2014, was reasonable and necessary treatment for his 2008 industrial accident. Although not then found reasonable by the Commission in its September 11, 2015 decision, that decision noted that: "it is quite possible Dr. Dirks will endorse future treatment options, including a third surgery" but that "at this point, Claimant has not met his burden of showing that a third surgery is reasonable care." Mead, 2015 WL 6125455, at 16-17. No later than May 18, 2016, Claimant's counsel notified Defendants of Claimant's December 8, 2014 surgery and resulting improvement and requested reimbursement from Defendants for the cost of the surgery. Defendants continued to deny Claimant's request through the date of the December 21, 2016 hearing and briefing herein. Both prongs of Neel are established. Pursuant to Neel and Millard, Claimant is entitled to reimbursement of the full invoiced amount of the medical bills related to his December 8, 2014 surgery up to the date of this decision.

40. **Temporary disability.** Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been

> medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

41. In the present case, Claimant has proven that his third lumbar surgery was causally related to his 2008 industrial accident and thus has proven his entitlement to benefits for temporary disability resulting therefrom. Dr. Dirks performed surgery on December 8, 2014 and found Claimant had reached maximum medical improvement on December 17, 2015. Claimant is entitled to temporary disability benefits from the time of his third surgery on December 8, 2014, until Dr. Dirks found his condition medically stable on December 17, 2015.

42. Additionally, Claimant requests temporary disability benefits before his third surgery; specifically, from July 2, 2014, through the date of his December 8, 2014 surgery. In its prior decision, the Commission expressly noted that the evidence established the authenticity of Claimant's symptoms, including low back pain and radiculopathy to some degree, since his 2008 industrial accident. However, the evidence then was insufficient to establish whether Claimant's condition was permanent and, if so, when it became permanent. The prior decision noted that if Claimant's nerve damage was permanent, then his condition was medically stable. The Commission declared: "If, instead, his symptoms are the result of current nerve compression, then Claimant may not have been medically stable at the time of the [2014] hearing. Because the exact nature of Claimant's symptomatology has not been established, it cannot be determined whether Claimant reentered a period of recovery or, if he did, when he did so." Mead v. Swift Transportation, 2015 WL 6125455, at 20 (Idaho Ind. Com. 2015).

43. The exact nature of Claimant's symptomatology has now been established by additional testing and treatment—most notably Claimant's third lumbar surgery and his documented improvement thereafter. As established by Dr. Dirks' testimony, Claimant's symptoms prior to his December 8, 2014 surgery were due at least in part to then current nerve compression and Claimant's back condition was not medically stable prior to the third surgery.

44. Claimant worked for Swift and sustained an industrial neck injury in 2013. He received temporary disability benefits for his neck injury which were terminated effective July 2, 2014. Thereafter, as set forth above, Claimant continued in a period of recovery from his back injury. The record does not establish that Swift made a reasonable and legitimate offer of employment to Claimant which he was capable of performing and which employment was likely to continue throughout his period of recovery. The record does not establish that suitable employment was available to Claimant in the general labor market during his period of recovery. Pursuant to Idaho Code § 72-408 and Malueg, Claimant has proven he is entitled to total temporary disability benefits from July 3, 2014 through December 17, 2015, the date Dr. Dirks found him medically stable.

45. *Medical stability.* Defendants maintain Claimant's back condition has been medically stable since July 2012. However, this ignores the benefit derived from his December 2014 surgery by Dr. Dirks. Dr. Dirks found Claimant's condition medically stable on December 17, 2015.

46. **Impairment.** The final issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating)

of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

47. Defendants herein correctly assert that "a permanent impairment award is not payable as a separate benefit under Workers' Compensation Law, only permanent disability is payable, and the extent of Claimant's permanent disability is not an issue for determination in this proceeding …." Defendants' Responsive Brief, p. 5. Claimant acknowledges that although permanent impairment may not be payable as a separate benefit in this proceeding, it has been duly noticed for hearing and it is still appropriate for the Commission to determine the extent of Claimant's permanent impairment at this time.

48. In the present case, Dr. Larson rated Claimant's permanent partial impairment at 6% of the whole person after his first back surgery with no additional impairment after his second back surgery. Dr. Larson's rating is open to question because his opinions were noted to "appear to be predicated upon a position of advocacy, conscious or unconscious, for Defendants" in the Commission's September 11, 2015 decision and part of his testimony was expressly found to be not credible. Dr. Frizzell assigned Claimant a 12% whole person permanent impairment rating with 2% assigned to his preexisting condition. Dr. Frizzell's opinion and impairment rating is less persuasive because he did not physically examine Claimant. Dr. Frizzell readily acknowledged that without having examined Claimant, his was not a complete impairment

rating. Additionally, Dr. Frizzell concluded that Claimant's third surgery was not reasonable when, as determined above, it was reasonable medical treatment and Claimant improved thereby.

49. Dr. McNulty examined Claimant and reviewed his medical records. On November 23, 2016, he rated Claimant's permanent impairment due to the back injury from his 2008 industrial accident at 19% of the whole person. When advised that Claimant after his first low back surgery had been rated at 6%, Dr. McNulty opined that his 19% rating would be inclusive of the prior 6% rating and not additional thereto. Dr. McNulty's rating is persuasive because it is based on his actual examination of Claimant. Claimant has proven he suffers permanent impairment of 19% of the whole person due to his 2008 industrial accident.

CONCLUSIONS OF LAW

1. The Commission's September 11, 2015 decision is not final pursuant to Idaho Code § 72-718 as to Claimant's entitlement to a third lumbar surgery or temporary disability benefits.

2. Claimant's present request for medical benefits for surgery and for temporary disability benefits is not barred by the doctrines of collateral estoppel, quasi-estoppel, or res judicata.

3. Claimant has proven his entitlement to medical benefits for lumbar surgery by Dr. Dirks on December 8, 2014, and medical care related thereto.

4. Claimant is entitled to reimbursement of the full invoiced amount of the medical bills that he has incurred related to his December 8, 2014 back surgery by Dr. Dirks, up to the date of the decision in this case.

5. Claimant has proven he is entitled to total temporary disability benefits from July 3, 2014 until December 17, 2015, the date he became medically stable.

6. Claimant has proven he suffers permanent partial impairment of 19% of the whole person due to his back injury from his 2008 industrial accident.

RECOMMENDATION

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

DATED this 28th day of July, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Alan Reed Taylor, Referee

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

STARR KELSO
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EMMA R WILSON
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___/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT E. MEAD, Claimant, v. SWIFT TRANSPORTATION, Employer, and ACE AMERICAN INSURANCE CO., Surety, Defendants.	**IC 2008-027385** **ORDER** Filed August 24, 2017

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

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

1. The Commission's September 11, 2015 decision is not final pursuant to Idaho Code § 72-718 as to Claimant's entitlement to a third lumbar surgery or temporary disability benefits.
2. Claimant's present request for medical benefits for surgery and for temporary disability benefits is not barred by the doctrines of collateral estoppel, quasi-estoppel, or res judicata.

3. Claimant has proven his entitlement to medical benefits for lumbar surgery by Dr. Dirks on December 8, 2014, and medical care related thereto.
4. Claimant is entitled to reimbursement of the full invoiced amount of the medical bills that he has incurred related to his December 8, 2014 back surgery by Dr. Dirks, up to the date of the decision in this case.
5. Claimant has proven he is entitled to total temporary disability benefits from July 3, 2014 until December 17, 2015, the date he became medically stable.
6. Claimant has proven he suffers permanent partial impairment of 19% of the whole person due to his back injury from his 2008 industrial accident.
7. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 24th day of August, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
R. D. Maynard, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

Concurring Opinion of Commissioner Thomas P. Baskin

I agree with the Referee's proposed decision, except that portion treating the issue of *res judicata*, and specifically, the Referee's conclusion that the Commission's September 11, 2015

decision is but an "interlocutory order," and not a final decision pursuant to Idaho Code § 72-718. However, the Referee's conclusion necessarily follows from the Supreme Court's decisions in *Jensen v. Pillsbury Co.*, 121 Idaho 127, 823 P.2d 161 (1992) and *Green v. Green*, 160 Idaho 275, 371 P.3d 329 (2016). While the Referee correctly applied the rule of *Jensen* and *Green* to the facts of this case, I believe that those cases were incorrectly decided, and articulate an interpretation favored by the Court but at odds with the legislative intent expressed in Idaho Code § 72-718. That section provides:

> **Finality of commission's decision.** – A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

So, for purposes of the instant matter, "a decision" of the Commission is final upon the filing of a decision in the office of the Commission. Such a decision may be appealed to the Supreme Court as provided by Idaho Code § 72-724. That section provides:

> **Appeal to supreme court.** – An appeal may be made to the supreme court by such parties from such decisions and orders of the commission and within such times and in such manner as prescribed by rule of the supreme court.

Therefore, an appeal may be made from such a decision in the manner prescribed by rule of the Supreme Court. Prior to July 1, 2015, IAR 11 authorized appeals from decisions of the Industrial Commission as follows:

> An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders
>
> . . .

> (d) Administrative Proceedings – Industrial Commission. From any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency.

These provisions of IAR 11 were in effect between July 1, 1978 and July 1, 2015. It was within the framework of the aforementioned statutes and rule that the Idaho Supreme Court ruled that the only type of Industrial Commission decision that is appealable to the Supreme Court is one which disposes of all of the issues in a case. The rule has its genesis in *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 751 P.2d 113 (1988). In *Reynolds*, the Commission entered a decision in which it retained jurisdiction over the case pending the completion of claimant's retraining under Idaho Code § 72-450. Claimant took an appeal from the Commission decision, and the Court held that whenever the Industrial Commission expressly retains jurisdiction over a case, that act demonstrates that there has been no final determination of the case. The appeal was deemed premature. The same result obtained in *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 795 P.2d 309 (1990). That case, too, involved a Commission decision in which the Commission expressly retained jurisdiction over the claim. Citing to *Reynolds*, the Court ruled that the appeal was premature, stating:

> Consequently, a decision of the Commission which does not finally dispose of all the claimant's claims would not be a final decision subject to appeal pursuant to IAR 11(d), particularly, as in this case, where the Industrial Commission did not rule on the issue of income benefits and expressly retained jurisdiction.

Jensen v. Pillsbury Co., 121 Idaho 127, 823 P.2d 161 (1992) applied the rule in a case where the Commission had bifurcated proceedings on the claim. Before the Commission was the question of whether or not claimant's cervical spine condition was related to her industrial accident. The Commission found that claimant's cervical spine condition was not related to the industrial accident and that she was therefore not entitled to workers' compensation benefits for

that condition. The Commission further ruled that claimant's wrist injury was related to her employment, and that she was entitled to workers' compensation benefits for that condition. Claimant attempted to take an appeal of the Commission decision to the Supreme Court. Rejecting the appeal, the Court stated:

> Idaho Appellate Rule 11(d) provides: "An appeal as a matter of right my be taken to the Supreme Court from . . . any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency." IAR 11(d). This Court held recently that, "a decision of the Commission which does not finally dispose of all of the claimant's claims would not be a final decision subject to appeal pursuant to IAR 11(d) . . ." Kindred v. Amalgamated Sugar Co., 118 Idaho 147, 149, 795 P.2d 309, 311 (1990).
>
> Additionally, in Reynolds v. Browning Ferris Indus., 113 Idaho 965, 969, 751 P.2d 113, 117 (1988), we held that "whenever the Commission explicitly retains jurisdiction over a matter, that act by its very nature infers that there is neither a final determination of the case nor a final permanent award to claimant."
>
> A review of the record in this case before us discloses that the Commission failed to resolve all the issues arising from Ms. Jensen's 1987 industrial accident. It specifically declined to consider certain issues, stating, "(t)he Commission ***reserves jurisdiction*** on the issues of permanent physical impairment and permanent partial disability regarding claimant's wrist and arm." (Emphasis added). Commission's Findings of Fact, Conclusions of Law and Order at 17.
>
> The resolution of these issues is necessary for a "final order" within the meaning of IAR 11(d). Consequently, the controversy before us is not presently subject to appeal as a matter of right pursuant to IAR 11(d).
>
> We therefore decline to rule on the merits of the parties' arguments and conclude that the appeal should be dismissed.

Most recently, the Court summarized its position on this issue in *Green*, *supra*, stating:

> "Our view is that a decision [of the Commission] is not final, and thus not appealable, until all issues are resolved between all the parties."

The problem with this view is that it engrafts a prerequisite for appeal from a decision of the Industrial Commission that is in no wise supported by either the statute or the rule. Idaho Code §

72-718 does not specify that only decisions resolving all issues in a case are appealable. Rather, it defines when "a decision" of the Commission becomes final and appealable. The unambiguous language of the statute specifies that when "a decision" of the Commission is filed, it becomes final, and such decisions are appealable to the Supreme Court pursuant to Idaho Code § 72-724. Nothing in the provisions of Idaho Code § 72-718 draws a distinction between decisions which resolve all issues in a case and those which do not. Only by defining "decision" to mean an order of the Commission which resolves not less than all issues in a case, could the Court's view be supported. But such a tortured construction is altogether inconsistent with the "plain and ordinary" definition of the term, and it is the plain and ordinary definition which must first be honored. *Robinson* v. *Bateman-Hall Inc.*, 139 Idaho 207, 76 P.3d 951 (2003). Idaho Code § 72-724 specifies that a decision which is final under Idaho Code § 72-718 may be appealed to the Supreme Court in accordance with its rules. Therefore, this case is unlike *Hoffer v. Shappard*, 160 Idaho 868, 380 P.3d 681 (2016), in which the Court struck down the provisions of IRCP 54(e)(1) because that rule was inconsistent with the legislative intent expressed in Idaho Code § 12-121. Here, Idaho Code § 72-724 expressly states that an appeal from a decision made final pursuant to Idaho Code § 72-718, may be taken "in such manner as prescribed by rule of the Supreme Court." Therefore, unlike *Hoffer*, the legislature intended for rule of the Supreme Court to specify the manner in which appeal from a decision made final by Idaho Code § 72-718 may be pursued. However, the former IAR 11(d) adds no gloss to the statutory pronouncements. It merely specifies that a final decision, i.e., a decision made final pursuant to Idaho Code§ 72-718, may be appealed to the Supreme Court. The additional requirement imposed by *Jensen* that the decision from which appeal is taken must also be a decision which resolves all issues in the case, is found in neither the statute nor the rule.

Even if the Court had adopted an appellate rule codifying the holding of *Jensen*, such a rule would be subject to the same criticism recently leveled by the Court against IRCP 54(e)(1) in *Hoffer*. While Idaho Code § 72-724 does specify that appeals from decisions made final per Idaho Code § 72-718 shall be made in "such manner" as provided by rule of the Supreme Court, Idaho Code § 72-724 does not authorize the Court to craft an appellate rule that significantly contravenes the unambiguous direction of Idaho Code § 72-718.

Effective July 1, 2015, IAR 11(d) was amended to read as follows:

> **Administrative Proceedings – Industrial Commission.**
> (1) From any final decision or order of the Industrial Commission or from any final decision or order upon rehearing or reconsideration by the administrative agency.
> (2) From any order of the Industrial Commission deciding compensability that the Commission has determined should be immediately appealable pursuant to Rule 12.4. Any appeal from the order must be taken within fourteen (14) days from the date file stamped by the Industrial Commission on the written determination that the order should be immediately appealable. The appeal shall be expedited as set forth in Rule 12.4. The failure to appeal the order on compensability pursuant to this subsection shall not preclude consideration of the order in an appeal taken pursuant to subsection (1) of this rule.

IAR 11(d)(2) was adopted in recognition of certain problems created by application of the rule of *Jensen*. IAR 11(d)(2) allows appeal to be taken from certain decisions of the Commission which decide less than all of the issues in a case. However, the necessity for IAR 11 (d)(2) is dependant on the validity of the rule of *Jensen*, which, as developed above, is entirely inconsistent with the statutory scheme, and should be found to be as invalid as the provisions of IRCP 54(e)(1) in *Hoffer*. As stated in *Hoffer*:

> We can conceive of no principles of law that are more plain or obvious than these: (1) It is the province of the legislature to make and amend laws; and (2) This Court is without authority to amend laws enacted by the legislature because we think them unwise.

Certainly, I recognize that the Court has no desire to clog its docket with appeals from decisions of the Commission which it regards as interlocutory. However, the hard truth of the matter is that the solution arrived at by the Court in *Jensen* is wholly contrary to the statutory scheme. *Jensen* offers a convenient interpretation of Idaho Code § 72-718 that is of exactly the same type that the Court found so offensive in *Hoffer*.

The rule of *Jensen* also has unintended consequences which even IAR 11(d)(2) cannot cure, and which are of considerable consequence to the administration of a workers' compensation case. For example, let us assume that in a complicated case, one threshold issue is whether claimant is entitled to the multi level fusion surgery proposed by claimant's treating physician. A hearing is held on the issue, and the Commission rules that the surgery is compensable, and must be provided by surety. The surgery is expected to cost over $100,000.00. Surety could petition the Commission pursuant to IAR 11(d)(2) to authorize appeal of the decision to the Supreme Court. However, as IAR 11(d)(2) makes clear, claimant may also defer appeal until all issues of the case are decided. Suppose surety decides not to pursue immediate appeal of the Commission decision, or suppose that the Commission declines to recommend appeal of the decision to the Court. Surety then refuses to comply with the Commission order requiring surety to provide the recommended surgery. What can claimant, or the Commission, do to enforce the Commission order? Idaho Code § 72-735 provides a mechanism for the enforcement of an award of the Commission in the district courts of the state. However, that section only applies to awards "from which no appeal has been taken." Because surety is allowed to defer appeal of the decision treating the compensability of the low back surgery, Idaho Code § 72-735 cannot be employed to enforce the decision of the Commission, at least not until all of the issues in the case have been decided. The problem, of course, is that the end of

the case will never be gotten to where surety is allowed to thwart the Commission's designs upon providing claimant the treatment he needs to reach medical stability. All of this would be avoided by the Court's recognition of the plain language of Idaho Code § 72-718.

Therefore, while I agree with Referee Taylor that under both *Jensen* and *Green*, the Commission's September 11, 2015 decision is one which decided less than all of the issues of the case, and is therefore "interlocutory," I disagree with the reasoning of those cases; per Idaho Code § 72-718, the September 11, 2015 decision is final and conclusive as to all matters adjudicated. However, because I agree that the September 11, 2015 decision does not bar consideration of Claimant's entitlement to surgery based on new evidence, I concur with the outcome proposed by the Referee.

DATED this 24th day of August, 2017.

INDUSTRIAL COMMISSION

___/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

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___/s/_____