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

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| JORGE M. AVALOS,<br>Claimant,<br>v.<br>LAVAL WHITEHEAD,<br>Employer,<br>and<br>IDAHO STATE INSURANCE FUND,<br>Surety,<br>Defendants. | **IC 2010-021068**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>January 12, 2018 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing in Idaho Falls on June 24, 2016. Jonathan W. Harris of Blackfoot represented Claimant, Jorge M. Avalos, who was present in person. Scott R. Hall of Idaho Falls represented Employer, Laval Whitehead, and Surety, Idaho State Insurance Fund (collectively, "Defendants"). The parties presented oral and documentary evidence at the hearing, took post-hearing depositions and submitted briefs. The matter came under advisement on January 27, 2017.

## PROCEDURAL BACKGROUND AND PREVIOUS DECISION

Referee LaDawn Marsters held a previous hearing in this case on June 14, 2013. That hearing resulted in a decision on May 6, 2014 in which the Commission ordered as follows:

1. Claimant proved that he was entitled to additional reasonable medical care related to his August 23, 2010 industrial lower right extremity injury, including but not limited to a spinal cord stimulator trial and pain management counseling, as recommended by Dr. Poulter.

2. Claimant was not presently medically stable.

3. Claimant was entitled to TTD payments from August 23, 2010 until such time that he became medically stable and Whitehead Farms offered him suitable employment or, in the alternative, employment in the general labor market was available to Claimant, with credit to Defendants for TTD benefits already paid.

4. Claimant's average weekly wage was calculated based upon an hourly wage of $10 and a workweek of 35 hours.

5. Claimant waived the issue of attorney fees pursuant to Idaho Code § 72-804.

6. All other issues were reserved.

## PRESENT ISSUES

The issues to be decided by the Commission as the result of the hearing held on June 24, 2016 are as follows:

1. Whether and to what extent Claimant is entitled to additional medical care;

2. Whether and to what extent Claimant is entitled to disability in excess of impairment; and

3. Whether Claimant is entitled to permanent and total disability pursuant to the Odd-Lot Doctrine or otherwise.

## CONTENTIONS OF THE PARTIES

Following the Commission's decision of May 6, 2014, Claimant received further medical treatment, including two spinal cord stimulator trials, and underwent physical therapy/work

hardening, and pain management counseling at the LifeFit Program in Boise. Further treatment failed to resolve Claimant's pain complaints. The parties agree that he reached maximum medical improvement (MMI) on November 15, 2015, after his release from LifeFit.

Claimant contends that he is totally and permanently disabled pursuant to the Odd-Lot Doctrine. He further contends that he is entitled to lifetime palliative care for pain associated with his right leg injury, including reimbursement for palliative treatment expenses incurred after he reached MMI. Defendants contend that Claimant's continuing pain complaints are due to malingering, that his testimony is not credible, and that he is not entitled to any further benefits, including medical care and any disability in excess of impairment.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Testimony of Claimant taken at the June 24, 2016 hearing;
2. Joint Exhibits (JE) 1 through 45,[1] admitted at the hearing; and
3. Transcripts of the following post-hearing depositions:
    a. Kathy Gammon, CRC, MSPT, taken August 17, 2016;
    b. Sharik Peck, CRC, PT, taken August 29, 2016;
    c. A. Jake Poulter, M.D., taken September 9, 2016;
    d. Delyn Porter, M.A., CRC, CIWCS, taken September 27, 2016; and
    e. Robert Friedman, M.D., taken October 7, 2016.[2]

[1] The joint exhibits include the entire evidentiary record from the first hearing held on June 14, 2013. Ex. 1 - 32 are identical to the 32 exhibits admitted at that hearing. Ex. 36 is the hearing transcript of the first hearing. Ex. 37 – 43 are the seven post-hearing depositions taken after the first hearing. The second depositions of Dr. Poulter, and Mr. Porter, referenced above, are distinguished and referenced herein as Poulter Dep. and Porter Dep. respectively. Their previous depositions are referenced by exhibit numbers (Ex. 37 for Poulter and Ex. 42 for Porter). Similarly, the first hearing transcript is referenced by Ex. 36 while the second hearing transcript is referenced by "Tr."

[2] It appears some text may be missing from Dr. Friedman's post-hearing deposition as evidenced by the abrupt transition at page 98, l. 20 thereof.

## OBJECTIONS

All objections preserved in the post-hearing depositions are overruled.

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. **Summary of facts from 2013 hearing**. The Commission's findings of fact from its May 6, 2014 decision are incorporated herein by this reference as if set forth in full. For context and readability of the present decision, a summary of salient facts adduced from the 2013 hearing follows.

2. Claimant was 43 years old at the time of the 2013 hearing. He was born and attended primary and secondary schools in Mexico. Claimant came to the United States in the mid-1980s as a teenager. After arriving in the U.S., he worked in farming, construction, and potato production. At the time of his industrial accident, Claimant had worked for Whitehead Farms for approximately 20 years.

3. On August 23, 2010, Claimant sustained an industrial accident while working from the bucket of a front-end loader when the bucket accidentally released, dropping him ten or more feet to the ground. A board landed on his right leg and a coworker landed on the board, crushing and fracturing Claimant's right lower leg.

4. At the hospital Timothy Woods, M.D., diagnosed fractures of the right tibia and fibula and a crush injury. Shortly thereafter Claimant developed acute compartment syndrome of his lower right extremity—the most severe case Dr. Woods had seen in 15 years of medical practice. JE-1459. Claimant demonstrated "a large, rather extensile medial fracture blister. …. The underlying skin was showing signs of a degloving-type mechanism from the inside-out, with

partial thickness skin damage." JE-39. Dr. Woods performed a four-compartment fasciotomy before setting Claimant's broken bones utilizing an intramedullary rod. For several days after surgery, a wound vac was needed to reduce swelling from the leg. On September 1, 2010, Dr. Woods performed a split-thickness skin graft measuring approximately eight inches by two inches to close Claimant's open right leg wound.[3] Ultimately he underwent six surgeries on his right lower leg and remained hospitalized for 16 days. Within a few weeks Claimant developed symptoms suggestive of chronic regional pain syndrome (CRPS). Dr. Woods referred Claimant to Jake Poulter, M.D., for pain management.

5. Dr. Poulter treated Claimant's chronic right lower leg pain from September 23, 2010 onward. Dr. Poulter initially noted Claimant's report of sharp, burning, and stabbing pain; color changes, swelling, and allodynia—symptoms consistent with CRPS. Dr. Poulter observed Claimant's right leg and documented temperature changes, allodynia changes (from sensitivity to light touch, to sensitivity to pressure); and color changes (from pale to almost purple with some redness when compared to the non-affected leg). JE-1381-2.

6. On October 16, 2010, internist Margarita Llinas, M.D., confirmed Claimant's right calf was swollen and shiny compared to the left side. She suspected CRPS. On March 11, 2011, Dr. Poulter noted Claimant continued to report sympathetically mediated changes including swelling, temperature changes, and color changes in his lower extremity. JE-824.

7. On March 24, 2011, vascular and interventional radiologist David Shelley, M.D., observed edema in Claimant's lower right leg; however, arterial and venous duplex studies were normal. Charles Garrison, M.D., at The Wound Center in Pocatello, observed and measured right leg edema and suspected venous insufficiency and/or lymphedema. He ordered a

[3] The graft size was later estimated to be eight inches by three and one-half to four inches. JE-1019 and 1034.

lymphoscintigraphy which produced normal results. Dr. Garrison opined the injury to Claimant's right leg vasculature was "most likely that of the microsystem" not evident on these studies. JE-556. He prescribed compression wraps and a compression boot.

8. On April 27, 2011, Dr. Poulter observed Claimant's right leg was darker than his left and he had allodynia to light touch. JE-832.

9. On May 25, 2011, orthopedic surgeon Brigham Redd, M.D., examined Claimant and observed significant right leg swelling and discoloration from the middle of the shin downward ("kind of a brawny purplish hue") and significant tenderness around the right knee. JE-862. Claimant's right thigh showed mild atrophy compared to the left. He limped and was unable to bear full weight on his right side. Dr. Redd recommended aggressive physical therapy and continued pain management by Dr. Poulter. However, additional physical therapy was not helpful and was ultimately discontinued.

10. On May 26, 2011, an MRI demonstrated significant persisting edema in Claimant's right lower leg, which Dr. Woods opined was likely permanent.

11. On July 18, 2011, orthopedic surgeon Hugh Selznick, M.D., examined Claimant and observed right leg swelling now almost one year after his fracture and compartment syndrome. He recommended a new ultrasound, x-rays, and a CT scan. Dr. Selznick did not believe Claimant was suffering from CRPS. After reviewing the imaging results, Dr. Selznick opined Claimant likely had a low-grade infection near the fracture, and recommended hardware removal. On August 23, 2011, Dr. Woods surgically removed the hardware from Claimant's lower leg, and in October 2011, again opined that Claimant's right leg swelling and pain were likely permanent.

12. On November 22, 2011, Dr. Poulter observed Claimant had lower right leg swelling, redness and color changes, and remarkable allodynia to gentle pressure. JE-836. Dr. Poulter identified Claimant's pain as both nociceptive, a painful message from a normal-functioning nerve, and neuropathic, a painful message from a nerve that is not functioning properly. Dr. Poulter later noted: "the most difficult pain [to treat] is the multifactorial pain that's due to nerve issues and ongoing postsurgical issues, swelling." JE-1403. Dr. Poulter recommended a spinal cord stimulator trial.

13. On December 16, 2011, orthopedic surgeon Brian Tallerico, D.O., examined Claimant at Defendants' request. He noted Claimant had received exemplary medical care but identified no evidence of edema or CRPS. However, Dr. Tallerico recorded Claimant's right ankle girth measured two centimeters larger than his left. Dr. Tallerico reported Claimant demonstrated nonphysiologic give-way weakness of all major motor groups in the right lower extremity. JE-895-96. He concluded Claimant showed functional overlay and his subjective complaints of right lower extremity dysfunction outweighed his objective findings. JE-897. He found Claimant's functional loss unexplainable because Claimant's fracture was healed, he had no right leg infection, and electrodiagnostic studies detected no permanent nerve injury. Dr. Tallerico found Claimant medically stable and rated his permanent impairment at 11% of the right lower extremity. JE-898. He opined that there was no objective reason Claimant could not return to his pre-injury job. Surety denied further treatment.

14. On April 10, 2012, Dr. Poulter found Claimant's condition unchanged. He tolerated wearing a sock and walking boot, but had increased pain with gentle pressure. JE-843. Dr. Poulter again observed obvious right lower leg swelling, color and temperature changes, and allodynia to gentle pressure between Claimant's knee and ankle. Dr. Poulter opined as follows:

> [Claimant's] persistent right lower extremity pain fits nicely with the diagnosis of CRPS type II. He meets the diagnostic criteria by having had an [*sic*] severe traumatic injury to his right leg, including compartment syndrome, which led to his ongoing nerve injury. He has persistent neuropathic pain and hyperalgesia to light pressure in a nondermatomal distribution. He also has persistent lower extremity swelling, color changes, temperature changes, and an abnormal pattern of sweating in his right lower extremity. This is supported both by the patient's history and by physical exam.

JE-844.

15. On June 13, 2012, psychiatrist Eric Holt, M.D, examined Claimant at Surety's request. Dr. Holt tested and interviewed Claimant. Dr. Holt's secretary read most of the MMPI-2 to Claimant because of his difficulty reading English. "Right after she starts him out—and she noticed that he was slow. And some people who—you know, they may not have gone through very much schooling, and in his case, he was slow in trying to figure out the wording in the tests." JE-1591. Dr. Holt noted that Claimant demonstrated no pain behaviors during the two hour interview and exam. Claimant described difficulties sleeping and that he arose several times each night to stretch to relieve his right leg aches. He expressed interest in returning to work for Whitehead Farms or in looking for another job. During the interview, Claimant reported he could walk down approximately two store aisles when shopping before needing to rest. Dr. Holt watched Claimant leave the interview and walk back to his hotel—a distance of more than a block—wearing his walking boot and using crutches. Dr. Holt opined Claimant "is grossly exaggerating his pain symptoms to the point that it borders on malingering which he is doing purposefully for secondary gain." JE-636.

16. On June 14, 2012, Claimant was examined at Surety's request by neurologist Richard W. Wilson, M.D., and by Dr. Holt. Claimant reported burning, stabbing, constant pain, worse in his right calf region underlying his skin graft; incapacitating pain while weight-bearing without the boot; need to use crutches or a cane to ambulate; and swelling in his right leg that

increased through the day and resolved during sleep. He reported 60%-70% improvement in his right leg pain with prescription Methadone and Percocet. Claimant reported he was unable to drive a car due to right leg pain, which presented an obstacle to employment.

17. Dr. Wilson opined that Claimant "is exaggerating his current pain complaints and right leg weakness for secondary gain." JE-663. He considered Claimant's muscle testing results inconsistent with his gait pattern and use of a walking boot and crutches. Dr. Wilson concluded Claimant's symptoms did not support a CRPS diagnosis. Drs. Wilson and Holt concurred in Dr. Tallerico's PPI rating of 11% of the right lower extremity, opined Claimant could return to sedentary and light duty work, and recommended cessation of opioid medications and further treatment, and reassessment of work restrictions in one year. JE-663.

18. On July 19, 2012, Dr. Poulter observed Claimant had developed some exquisitely tender nodules in the subcutaneous tissues of his right lower leg. JE-845. Claimant reported these nodules to Dr. Woods who concluded the nodules were tender superficial thrombosed veins, typical of poor circulatory outflow from the leg. JE-1470.

19. On August 29, 2012, Dr. Poulter assessed Claimant's functional abilities concluding that he could stand 5-10 minutes before requiring a 30 minute rest, stand for a total of one hour with frequent breaks in an eight hour day, walk for five to seven minutes with his boot and/or crutches and resume walking after a five minute break for up to one hour, lift up to 30 pounds with careful positioning for less than one-half hour in an eight-hour day. Dr. Poulter concluded Claimant cannot carry one-handed, maintain a full-time 40 hour per week work schedule, tolerate sedentary work, perform light work requiring standing and walking for up to five-and-a-half hours per day, tolerate medium work lifting up to 50 pounds for up to two-and-a-half hours a day and standing/walking for up to five-and-a-half hours per day, or perform heavy

work lifting up to 100 pounds for up to two-and-a-half hours per day and standing/walking up to five-and-a-half hours per day. Dr. Poulter noted extreme functional limitations due to persistent severe right leg pain. JE-847-8.

20. On November 5, 2012, after reviewing an August 23, 2012 request by Chris Horton that Surety authorize hand controls for Claimant's vehicle per Dr. Woods' recommendation, Dr. Wilson opined that hand controls were not medically necessary. JE-666. Surety denied Dr. Woods' recommendation for hand controls.

21. On December 14 and 18, 2012, Briggs Horman, PT, performed a functional capacity evaluation and opined Claimant did not give maximal effort on testing and could work in light-medium duty jobs. Mr. Horman measured Claimant's right calf girth at 6 cm larger than his left.

22. On January 29 and 30, 2013, Nathan Hunsaker, PT, MSPT, performed a functional capacity evaluation and opined Claimant is limited to sedentary work. Mr. Hunsaker measured Claimant's right calf girth at 6 cm larger than his left.

23. Claimant owned a vehicle but could not operate it with his right leg condition and had to sell it two months before the 2013 hearing.

24. Dr. Woods in his chart notes near the time of the 2013 hearing affirmed his belief that Claimant was credible. He opined that Claimant's ongoing symptoms after December 2012 were likely the consequence of his severe compartment syndrome. He noted that Claimant had worn out half a dozen walker boots while continuing to use crutches. JE-993.

25. Referee Marsters and the Commission found Drs. Poulter and Woods both treated Claimant for more than three years and given Claimant's notable but somewhat limited English skills were in a better position than any other physician to evaluate Claimant's reports, intent,

credibility, and pain. The Commission found the opinions of Drs. Poulter and Woods regarding Claimant's credibility persuasive and concluded that Claimant was a credible witness, both observationally and substantively.

26. **Facts adduced from 2016 hearing.** Claimant was 46 years old at the time of the 2016 hearing. He is a permanent U.S. resident. At all relevant times he resided near Blackfoot. Claimant testified at both the 2013 and 2016 hearings without the assistance of an interpreter. However, he has no formal training in English and at times, has trouble fully communicating in English. Claimant's pauses, slowed responses, and sentence structure at hearing were not that of a native English speaker.

27. Spinal cord stimulator trials. Pursuant to the Commission's decision from the first hearing, Dr. Poulter performed a spinal cord stimulator trial in October 2014. However the stimulator leads migrated—likely due to Claimant's ambulation with crutches—thus necessitating a second trial. The second trial in January 2015 resulted in insufficient pain reduction to justify permanent implantation.

28. LifeFit. From September 21, 2015 to October 15, 2015, at Defendants' request, Claimant attended a four-week LifeFit rehabilitation program in Boise supervised by Robert Friedman, M.D., where Claimant also received pain management counseling. Claimant was discharged the day before the four week program was to conclude for "noncompliance" when he failed in his attempt to walk with only a cane, rather than with one crutch and a walking boot.

29. During the LifeFit program, Claimant was expected to progress his functional performance 10% per week.[4] Claimant progressed from a baseline of 25 minutes of walking when he started LifeFit to 35 minutes of walking with his crutch and walking boot by the end of

[4] Dr. Friedman later testified that in 20 years as the director of the LifeFit program, he had never seen anyone who could not progress 10% per week if they gave full effort. Friedman Dep. pp. 78-79.

Week 4. Claimant was also weaned off his narcotic pain medications within approximately the first 10 days of the program.

30. Dr. Friedman met with Claimant approximately weekly during the LifeFit program and confirmed that during the first three and a half weeks Claimant was progressing and compliant:

> Q. So were you seeing what the goals of the program are, which is this 10 percent increase per week, were you seeing him actually progress in a standard measure which you would have anticipated?
>
> A. Yes.
>
> Q. With that, was he being weaned off his narcotic pain medications?
>
> A. Yes.
>
> Q. Why is that important?
>
> A. Well, it's important because, medically speaking, we wouldn't prescribe drugs to patients that did not improve their physical performance. So it turns out as we weaned his medications, his physical performance goes up.

Friedman Dep. p. 27, ll. 1-17.

31. After weaning off narcotic pain medications, Claimant testified his pain increased and his "blood pressure was through the roof." Tr., p. 78, l. 11. His sleep worsened as the LifeFit program progressed. Given his increasing pain level, he was sleeping each night "four hours, most." Tr., p. 78, l. 17.

32. Claimant's right leg swelling also worsened as the LifeFit program progressed. Claimant repeatedly asked the LifeFit staff to measure the swelling in his right leg but they did not. Tr., pp. 118-119. He ultimately obtained a tape measure from a LifeFit staff member at the gym and recorded his own leg measurements during the last week or 10 days of the program. His right leg regularly swelled from morning to evening 2.5 to 3 cm in girth at a point three inches

above his right ankle and as much as 4 cm in girth at a point Claimant described as two fingers' width beneath the upper edge of his right lower leg skin graft scar. Tr., pp. 87-89; JE-1691-4. He did not record left leg measurements but recalled that there was no swelling problem with his left leg.

33. Claimant testified as follows about the pressure he received at LifeFit to stop using the walking boot:

> A. There was a few times that they practically made me. Well, they didn't force me, but—so, I don't get discharged out of the program, I was almost forced.
>
> Q. [by Mr. Hall] But they didn't force you to do anything, did they?
>
> A. No, no, no, no. But I didn't want to be discharged. I wanted to put an effort to their program. I wanted to really try to see if I can really leave that place walking. So, I gave it a shot without the brace, but it just—it was very difficult. It's really hard. It's way more painful.

Tr., p. 113, ll. 2-12.

34. Claimant reported he was unable to walk on the treadmill at LifeFit so he walked in the pool starting in five feet of water and progressing to three and one half feet of water. For several days Claimant was then directed to use only one crutch and his walking boot and push a cart down the hallway. In the fourth week Claimant was directed to walk on the treadmill; he tried but was unable and was almost discharged for his failure. He was then returned to walking in the hallway with one crutch. On the final day he was directed to walk with a cane without any crutch or walking boot.

35. Kathy Gammon, CRC, MSPT, later accurately summarized Claimant's weight bearing progression based on LifeFit program documents beginning with his first week:

> He just stayed walking with his boot and his two crutches for that entire week. And then Week 2, he basically started ambulating in the pool …chest height depth water because the water has buoyancy and eliminates gravity so weight-bearing is decreased. …. And he did that three days …. And then they decreased the depth

> of the water down to about his waist which increases the weight bearing because he has less buoyancy effect. And he did two days of pool ambulation there. So that's Week 2 ….
> Week 3, out of five days, he did two days of pool ambulation in the three-and-a-half-foot water. …. Midweek 3, it's well, we need to get him out on dry ground and start progressing his weight-bearing, so they put him on dry ground and took one crutch away so he had one crutch and one boot.

Gammon Dep. p. 33, l. 2-25.

> Mr. Hirai, who was the physical therapist noted in the Life Fit [sic] staffing that the progression, the weight-bearing progression was way behind schedule and they needed to speed it up. He actually noted that in the staffing … at Week 3.
>
> So Week 4, they, after—he had only had really three days of ambulation in the hallway with one crutch and one boot.

Gammon Dep. p. 34, ll. 15-22

> And then we're to the end of Week 4 and he's still ambulating with the assistance of a crutch. And he was told that the crutch would be taken away and he would be given a cane. And he was apprehensive about that because his pain levels had increased. In fact, when he saw Dr. Stevenson, the [LifeFit program] psychologist, he reported that Mr. Avalos limped badly and appeared to be in significant pain but he was still trying to do it.
>
> We come down to the day before the last day of the final week of rehab and Mr. Barnett says you now need to take away your crutch and I'm going to give you the cane. Mr. Avalos was apprehensive, but he said he would try it. He tried it in the morning, was able to take a few steps, three to four to five steps, and then was unable to continue because of his reported pain increase.
>
> He tried it again in the afternoon with just the cane and was unable to do it. At that point, Mr. Barnett said you are now discharged from the program one day before the end because you've been noncompliant with the weight-bearing progression.

Gammon Dep. p. 35, ll. 2-22.[5]

[5] Ms. Gammon contrasted Claimant's documented weight–bearing progression at LifeFit with her experience as a physical therapist as follows:

> In my experience as a physical therapist, they were very slow to start the weight-bearing progression and then speeded it up so much and in so few days that Mr. Avalos had no ability to adjust to this increased weight-bearing. The reason it's gradual is because you're trying to help the nervous system desensitize those sensory signals. As you increase the weight, the pain increases

36. Upon Claimant's return to his home after his discharge from LifeFit, he presented to Dr. Poulter who renewed Claimant's narcotic prescriptions. Defendants criticize Dr. Poulter for putting Claimant back on narcotic pain medications after his return from the LifeFit program where he tapered off of them. Dr. Poulter explained as follows:

> But the process for Jorge of tapering him down off of his medications and weaning him off of his crutches and walking boot, and then hoping that he would succeed, failed miserably. He came home much—in much worse of a condition than he was when he went over there.
>
> So because of the failure of the program, because we were managing Jorge's pain and trying to help him out through this process, Dr. Friedman didn't call and ask me if he could taper him off his medications, I didn't feel like I needed to ask him permission to go back on his pain medications.

Poulter Dep. p. 30, ll. 7-19.

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> and you're trying to desensitize that system in that leg so he can progress. And you can't desensitize in a matter of days. My experience, it's weeks.

Gammon Dep. p. 35, l. 23 through p. 36, l. 8.

Ms. Gammon also compared the similarity of Claimant's difficulty at LifeFit in 2015 to his challenges at gait training progression while in physical therapy at Bingham Memorial Hospital from November 2010 through March 2011, which she accurately summarized thus:

> Weight bearing on the right leg progressed until on December 21, 2010, Mr. Avalos was able to bear 100% of his weight on the right foot …. However, he was only able to do this briefly. Reduced support gait, without crutches but with hand support and the walking boot on, was first attempted on December 28, 2010. Mr. Avalos was able to walk 10 feet for 3 repetitions with decreased support in this manner. Gait was very painful for him but he performed as was requested by his therapist. At the next scheduled treatment on January 4, 2011, Mr. Avalos presented with his right foot and lower leg "doubled in size" with significantly increased pain.

JE-434.

Dr. Woods prescribed continued physical therapy with special precautions for chronic edema. Gait training continued with bilateral crutches but no walking boot. This produced significantly increased right lower leg swelling and pain which became constant by the end of January 2011. Claimant also attempted walking with a single crutch which produced increased right leg swelling. Dr. Woods halted physical therapy because it was counterproductive to improving Claimant's function and "swelling [was] an issue, lymphedema [was] an issue and that's when it was discontinued." Gammon Dep. p. 37, ll. 14-19. Ms. Gammon noted that during the five months of physical therapy, Claimant progressed to ambulating with his boot and one crutch. Nevertheless, the therapy consistently increased his right leg swelling that worsened his leg pain. Claimant testified that during his months of physical therapy at Bingham Memorial Hospital he ultimately attempted to walk without his crutches and using only a cane; nevertheless he "couldn't do it. It was terribly bad pain-wise." Tr., p. 48, ll. 20-21. Claimant was ultimately discharged from physical therapy in 2011 with the note: "Range of motion has improved however due to his injury swelling has increased. Multiple methods have been tried to alleviate swelling but continues to be consistent." JE-406.

37. Claimant testified he cannot drive a vehicle; he tried with and without his walking boot and was not able due to pain and lack of mobility in his right leg. He sold his vehicle before the first hearing when he could not physically drive it with his painful right leg and he was short of money after receiving no workers' compensation income benefits for at least six months.

38. Claimant has not worked or looked for work since his industrial accident. Industrial Commission vocational rehabilitation consultant, Dan Wolford, helped Claimant with some preliminary work search efforts, but ultimately ceased because Claimant was not able to drive to follow-up on job leads, attend interviews, or get to work. Tr., p. 117. Claimant testified he cannot operate farm equipment because he cannot sit for prolonged periods, operate right foot controls, walk over uneven ground, or hook up equipment to a tractor. Claimant testified there are no jobs in his community that he could do, no jobs within walking distance of his home that he could do, and no public transportation in his community of Blackfoot.

39. **Condition at the time of 2016 hearing.** At the time of the 2016 hearing Claimant continued to report persistent right lower extremity pain, low back pain, and the more recent development of left lower extremity symptoms. Claimant testified his right leg symptoms have not changed since the 2013 hearing. He continues to have painful nodules in his right lower leg, with increased right leg swelling and pain if he is up on his feet during the day. He testified his leg swells during the day when he is up grocery shopping, going to medical appointments, or just doing household chores. He believes his right leg would swell and become more painful if he were to attempt to work. Claimant described the right lower extremity pain as commencing at his mid-foot, continuing through his right ankle, and extending above his skin graft scar to just below his right knee. As observed at hearing, the most painful area corresponded in part to a splotchy brown discolored area of skin. Tr., pp. 136-137. He testified that: "without the

medications, I do really have a bad time. My blood pressure just goes bad. I can't sleep. The pain is just really bad. Worse and worse." Tr., p. 112, ll. 10-13. Claimant indicated he can stand comfortably for only approximately 10 minutes and sit comfortably for approximately 25 minutes. He has a chair or bench in his kitchen so he can rest periodically while cooking his meals.

40. Claimant continued to use crutches and wear a walking boot on his right foot because it was painful. He was only able to bear approximately 25% of his weight on his right foot. Claimant testified that no doctor has told him to continue wearing the walking boot. Most doctors have encouraged him to get out of the boot. Dr. Poulter has asked him if the boot helps and he has responded yes. Claimant wears the walking boot because it gives him support and stability. Tr., p. 115. Claimant testified that he cannot walk with just the boot and no crutches. Claimant has worn out multiple walking boots and crutches since his industrial accident. After a period, he stopped doing his home exercises because he perceived no benefit; rather, the exercises increased his right leg pain.

41. Claimant testified that the significant change in his condition since the first hearing is that he now has persistent low back pain and right knee pain which he attributes to his awkward gait resulting from his right leg pain when ambulating.

42. Claimant gets help from a friend bringing his groceries in and putting them away, and taking out his trash. At the time of the second hearing, Claimant was six months behind in rent, fearful of being evicted from his apartment, living on food stamps, and relying on relatives and a friend to lend him money to buy his prescription medications. Tr., p. 67.

43. Dr. Poulter affirmed Claimant's right leg condition is essentially unchanged and he is no better off than he was at the time of the 2013 hearing. Poulter Dep. pp. 16-17.

44. **Credibility.** Claimant's credibility is pivotal to the instant decision. Defendants attack Claimant's observational and substantive credibility on a number of grounds, each of which is addressed below.

45. Reliable as an employee. Defendants allege that Claimant's attendance at more than 100 medical appointments and participation in the four-week LifeFit program belies his assertion that his chronic pain would prevent him from being a reliable employee. The Commission rejected a similar allegation in its prior decision. 2014 Decision, pp. 47-48.

46. It should be remembered that Claimant was ultimately deemed unsuccessful and discharged from the LifeFit program when he failed to ambulate with only a cane. Moreover, the Commission's prior decision rejected a similar argument noting that Claimant persuasively testified that he pays a neighbor gas money to take him to his medical appointments; otherwise, he has no transportation since he cannot drive because of his right leg condition and there is no affordable public transportation in the Blackfoot area.[6] Dr. Poulter interpreted Claimant's diligent attendance at his medical appointments as an attempt to do everything the doctors asked of him because he wanted to get better. JE-1416. Dr. Wilson suggested Claimant's pain would likely not prevent him from going to the doctor because he had hopes of getting relief. JE-1569. Even assuming reliable affordable transportation, Claimant's diligent attendance at sporadic medical appointments is far different than the day after day attendance required to maintain gainful employment.

47. Overstatements. Defendants allege Claimant has overstated a number of items thus impugning his credibility and indicating he overstates his right lower extremity pain and limitations. This assertion and a number of Defendants' other concerns regarding Claimant's

[6] Claimant actually missed the second day of his FCE with Briggs Horman because Claimant had no money to pay his neighbor to take him to the FCE. Ex. 36 pp. 198-9.

credibility arise from Claimant's communication limitations, both expressive and receptive, in English.

48. The Commission's prior decision elaborated extensively on Claimant's limitations when communicating in English. 2014 Decision, pp. 5-9. Although Claimant testified at both hearings without the assistance of an interpreter, he has no formal training in English and at times, has trouble speaking and understanding English. His sentence structure and command of English is noticeably less than that of a native speaker.

49. The Commission's prior decision specifically noted that Kathy Gammon, CRC, MSPT, documented via WRAT-4 testing on November 8, 2012, that Claimant comprehends English sentences at the 3.6 grade level. "Although Mr. Avalos is able to sound out words correctly in English and appears to speak the language well, he has very poor comprehension of what English words mean when put in sentence form, particularly as the sentences become longer and more complex." JE-427. Claimant also has some difficulty with verbal comprehension. Ms. Gammon concluded the Personnel Tests for Industry-Oral Directions Test – Form S: "demonstrates that Mr. Avalos is at a distinct disadvantage when compared to similar job applicants in the work place in regards to his ability to follow directions given in the English language. Even when compared to similar vocational rehabilitation clients in the western part of the United States, 50 percent of whom are minorities, he scored lower than 85% of that normative population." JE-428. Ms. Gammon also observed first-hand Claimant's challenge clearly communicating in English, noting: "when I did the physical therapy evaluation, I had to demonstrate what I wanted him to do because he didn't seem to understand my verbal request." Gammon Dep., p. 74, ll. 18-20.

50. Claimant readily acknowledged his limitations in communicating in English as follows:

> Q. [by Mr. Harris] Okay. Do you, at times, have difficulty communicating with doctors who don't speak Spanish?
>
> A. Yes, yes. Obviously I do sometimes. A lot of times.

Tr., p. 100, ll. 22-25. As noted above, Dr. Holt's secretary had to read Claimant most of the MMPI-2 questions and help him understand them at his June 2012 IME with Dr. Holt.

51. The overstatements so concerning to Defendants make evaluating Claimant's credibility more challenging; however they more consistently demonstrate Claimant's imperfect English skills, rather than an intent to mislead or deceive.

52. Walking boot and crutches/body position. Defendants allege that Claimant's use of a walking boot and crutches evidences he is fabricating his pain complaints. They assert that Dr. Tallerico, Dr. Holt, Dr. Wilson, and Dr. Friedman all indicate the walking boot serves no legitimate purpose and may be counterproductive. In a similar vein, Defendants also assert Claimant's conduct disproves his reported walking, standing, sitting, and lifting limitations and show he is capable of gainful employment.

53. Concerning functional capacities in lifting and sitting, Kathy Gammon testified:

> Q. [by Mr. Harris] So if somebody like Jorge is at a functional capacity evaluation and some professional, a physical therapist, asks them to do something, do they sometime exceed what they could do, because a professional asked them to do it?
>
> A. And is urging—and that is the case, and that's where safety becomes so very important in an FCE so the individual does not harm themselves. It is very important.
>
> Q. Likewise, in an exam setting, if somebody sits or stands longer than what is comfortable for them, that doesn't necessarily mean that they can do that on a daily basis?

> A. That's the one experience, and like right now, I've sat too long. I need to get up. We all experience that.
> ….
>
> Q. [by Mr. Hall] …. [I]f a functional capacity evaluator has two boxes or two bags, and the bigger bag is lighter than the smaller bag, one of the things they can do is have you lift—see if you can lift either bag, and you may be lifting the smaller bag that is heavier, but that tells us you can do that, isn't that true? So you can't really fake good in a functional capacity setting.
>
> A. You can in the sense that you lift more than you are physically able to lift and can cause injury, and you lift on one repetition more than you could repeatedly, so a functional capacity is not just that one time lift. It's what you can repetitively.

Ex. 36, p. 155, ll. 6-21, p. 157, ll. 10-22.

54. Claimant indicated his right leg pain is nearly always present. His right leg pain and swelling worsen throughout the day and are more pronounced in cold weather. He testified he could stand for approximately 15 minutes and that standing increases his right leg swelling and pain. He uses his crutches even when moving around in his own home.

55. On April 25, 2011, Dr. Woods recorded: "The patient has chronic lymphedema secondary to a crush injury to his leg, subsequent compartment syndrome, and subsequent need for fasciotomies, which is [sic] no doubt left him with poor venous and lymphatic drainage in the leg despite no obvious obstruction or large treatable obstruction." He noted Claimant needed crutches and a CAM walker boot to get around and "Whenever, he does not use the crutches, he states that the swelling becomes pretty intense in that leg. …. Skin graft area to the lateral aspect is stretched tight that represents considerable calf swelling from when we were treating in the hospital." JE-975. Further weight bearing physical therapy was attempted in May 2011 but discontinued by Dr. Woods when it resulted in increased swelling and pain.

56. Dr. Woods opined Claimant required crutches and a walking boot because "Jorge came back to me on multiple occasions with worn out boots and worn out rubber stoppers on the bottom of his crutches and seemed to be using them, literally wearing them out." JE-1473.

57. The Commission's prior decision expressly concluded that Claimant's use of a walking boot and crutches does not establish he is exaggerating his pain, noting that Dr. Woods recommended Claimant cease wearing his boot and Claimant tried; however, his pain increased without the boot, so he resumed wearing it.[7] 2014 Decision, p. 48. Dr. Woods opined that Claimant's use of the walking boot is helpful because it "limits the motion of his foot and ankle. In other words, the boot immobilizes his ankle motion. And ankle motion in a sense is either done by calf muscle action or causes some calf muscle action." JE-1497. Dr. Woods drew no negative conclusions from Claimant's continued wearing of the boot; rather, he prescribed new boots as the old ones wore out. Dr. Poulter observed that chronic pain patients, including those with lower extremity CRPS, regularly wear devices to protect the affected limb and Claimant's use of a protective boot is not necessarily inconsistent with allodynia. JE-1432-1433.

58. Dr. Tallerico opined Claimant has no need of the walking boot; however he also assessed work restrictions, thereby recognizing that Claimant's safe functional capacity is limited.

59. Dr. Friedman opined Claimant has no limitations and no need of the walking boot or crutches. Dr. Friedman also testified that when Claimant was limited to using only one crutch at LifeFit, he chose to use the right crutch. This, Dr. Friedman asserts, is the wrong side for a right lower extremity injury. Friedman Dep. p. 30. However, Dr. Friedman opined that since he

[7] Similarly, Claimant's experience in 2015 at LifeFit without a walking boot resulted in increasing right leg pain.

believed Claimant did not need crutches at all, it did not matter which crutch he weaned off first as there was no "correct" crutch.

60. Kathy Gammon testified that during her interview with Claimant:

> I had him convert to one crutch, and he wanted to put it on his right side instead of his left, and he knew that was wrong, because he had been taught properly, but it was more comfortable for him. But with one crutch, his stability really decreased and his balance deficits really increased. I would say he would be not safe on one crutch.

JE-1290 (Ex. 36, p. 66, ll. 16-22). On cross-examination Ms. Gammon explained:

> Well, that's according to PT training. You always use the crutch on the opposite … side, so when you put the right leg out, you can put the hand weight on the opposite side, so it is helping disperse the weight from the involved leg.
>
> Q. [by Mr. Hall] When you do it otherwise, you are actually putting more pressure onto the bad leg?
>
> A. No. What he is doing is he is putting more pressure with his dominant hand.

JE-1309 (Ex. 36, p. 145, ll. 4-13). Ms. Gammon noted that from the time of Claimant's five months of therapy in 2011, shortly after his accident, to his participation in four weeks of intensive therapy at LifeFit, Claimant was consistently able to tolerate only minimal weight bearing on his right foot.

61. Defendants maintain Claimant's experience at LifeFit disproves his reported limitations. An accurate appraisal of Claimant's performance at LifeFit is significant to the decision in this case.

62. Sharik Peck, CRC, PT, who performed a functional capacity assessment of Claimant on April 12 and 28, 2016 and extensive surface EMG testing, reported his testing documented "nearly complete dysfunction within the right lower extremity muscles below the knee." Peck Dep. p. 40, ll. 5-7. Mr. Peck testified that Claimant's initial right lower extremity evaluation at LifeFit was inadequate because it did not show the strength of his right ankle and

knee joints and did not record any actual range of motion of these joints. Mr. Peck testified that "if you're just eyeballing the range of motions, for example, the American Medical Association states that that's the most improper way to look at range of motion. And it should have had a measurement with it so you can compare right side to left side." Peck Dep. p. 51, ll. 3-7. Mr. Peck opined the inadequate initial evaluation was critical because: "if he was, indeed, inadequately assessed during his initial evaluations, that all providers after that would be expecting him to be able to accomplish more than he was able to accomplish there." Peck Dep. p. 52, ll. 20-24. Mr. Peck's report summarized:

> The right ankle and its motions and strength were likewise inadequately assessed. …. Based on my assessment, I would disagree completely with the physical therapist range of motion and strength testing of Jorge's right lower extremity. This error appears to influence the therapy approach by other PT's and PTA's working with Jorge when they make comments such as: "He continues to self-limit, when using one crutch he reaches for handholds along the wall and equipment."

JE-1250. Mr. Peck noted that there appeared to have been: "quite a bit of bias among a number of the medical providers involved in the LifeFit experience for Mr. Avalos. And … they questioned his abilities, questioned whether he was giving full effort, had him perform, repeatedly, activities that may have been considered unsafe for Mr. Avalos to perform." Peck Dep. p. 105, ll. 10-18.[8]

63. Dr. Friedman opined Claimant needed no walking boot or crutches. JE-1118. As the LifeFit program director, Dr. Friedman's expectations and opinion of Claimant's LifeFit effort are evident in his post-hearing deposition testimony. Dr. Friedman was questioned about

[8] LifeFit notes from Karmeron Barnett, OT, repeatedly refer to Claimant's industrial injury as: "Unspecified fracture of lower end of right tibia, subsequent encounter for closed fracture with routine healing. …. Other fracture of shaft of right fibula, subsequent encounter for close fracture with routine healing." JE-1156, 1157, 1159, 1161, 1162, 1163. LifeFit notes from Benjamin Douglass, DPT, contain repeated identical references, JE-1181, 1183, 1185, 1187, as do LifeFit notes from Chad Bainbridge, PTA. JE-1189, 1191, 1193, 1195. LifeFit providers thus failed to acknowledge Claimant's un-routine severe compartment syndrome requiring urgent fasciotomies, six right lower leg surgeries, and skin grafting.

the notes of LifeFit program psychologist Mack Stephenson, Ph.D., regarding Claimant's increasing pain, but refused to acknowledge that Claimant suffered limiting pain as he reported:

> Q. [by Mr. Harris] Looking at page 1214 under the "Assessment." I'm going to read this. It says, "Jorge was using one crutch today. He was limping badly. It appeared that there was a good deal of pain associated with using one crutch."
>
> So, apparently, Dr. Stephenson is of the opinion that Jorge Avalos is having a lot more pain because he's only using one crutch?
>
> A. I would not interpret it that way. That could be your interpretation.
>
> Q. How would you interpret it?
>
> A. He used the word "appears." Again, we have no painometer. We can't measure pain.

Friedman Dep. p. 91, l1. 1-13. Dr. Stephenson himself apparently accepted at least some of Claimant's pain reports as valid. His September 23, 2015 notes report: "Jorge is feeling a little more pain lately. That is probably due to him engaging in increased activity." JE-1198. Dr. Stephenson's September 30, 2015 notes report: "We 1st talked about Jorge's pain. He is experiencing increased pain, though that may not be atypical given the demands of this program. …. So from my observations it appears that the pain is quite a bit increased."[9] JE-1205.

64. Claimant's counsel questioned Dr. Friedman about Claimant's reports of increasing pain as he continued in the LifeFit program:

> Q. [by Mr. Harris] If you'll go to page 1213. On that page, Dr. Stephenson—I'm looking near the bottom where it says 'current pain scale'—apparently, Jorge Avalos reported to Dr. Stephenson that the pain is 'excruciating, incapacitating and unbearable'; do you see that?

[9] Claimant's blood pressure increased during his participation in LifeFit. Blood pressure readings for each of the four weeks were: Week 1 - 146/91, Week 2 - 177/94, Week 3 - 154/90, and Week 4 - 162/92. JE-1240. This is consistent with increasing pain. The most dramatic increase occurred on Week 2, which corresponds with the time when he wore tennis shoes one morning to LifeFit but then changed back to his CAM walking boot that afternoon. Defendants assert this shows Claimant is not credible. Nevertheless, wearing tennis shoes for morning exercises and then switching to a walking boot for the afternoon is at least as consistent with a legitimate failed attempt to transition out of the walking boot due to increasing pain, as it is with the malingering Defendants allege.

A. I do.

Q. Isn't it true that towards the end of the program Jorge Avalos is reporting much, much more severe pain than he had earlier in the program?

A. I don't look at it that closely. I would accept your statement that he is reporting more pain.

Q. And this is as he is getting tapered off his pain medication and is doing more physical activity, correct?

A. Correct.

Q. And isn't it fair to say that you could correlate his increased pain with increased activity and not having the pain medication or getting tapered off the pain medication?

A. You could do that.

Q. Isn't that a reasonable thing to do?

A. It's possible. It doesn't match his performance, but that's okay.

Friedman Dep. p. 89, l. 10 - p. 90, l. 8.

65. Dr. Friedman refused to accept that Claimant may have progressed at LifeFit until he was unable to comply with directives on the final day of Week 4 because his pain had increased to the point it was intolerable:

A. He reported increased pain throughout the entire program …. I have testified multiple times he had multiple complaints that did not match his physical performance, which did improve while we tapered the opiates despite his complaints of increase in pain.

Q. [by Mr. Harris] Well, isn't it possible that he just pushed himself to perform in the program notwithstanding the pain that he was feeling; isn't that what he was doing?

A. I would not make that interpretation as a physician, nor do I think a reasonable person would make that determination.

> Jorge had already been in pain for five years, and Jorge had been experiencing decrease in function based on his reports of pain. So it just doesn't make sense, to say that his performance, as I measure it, goes up as I decrease his opiates, and his pain reports increase. It means there's a disconnect.
>
> So I can't say that he was pushing despite his pain. He certainly had not done that, based on my review of the records, ever before.
>
> Q. He hadn't pushed himself hard in therapy before?
>
> A. He had, and he had discontinued because of pain, so he had not been successful in making progress because he had pain. But now we have improvement, progress, functional increase as measured by every measure we use, tapering of his opiates, and so the complaints of increasing pain don't match what he's doing.

Friedman Dep. p. 84, l. 2 - p. 85, l. 9. Dr. Stephenson's October 12, 2015 notes recorded: "Jorge came in with one crutch and was limping badly. …. There were significant pain behaviors. In addition, he appeared to be in significant pain throughout the session. …. It is a little confusing, because he says there is excruciating pain, while others are saying that there is really no medical reason for disability." JE-1217.

66. Dr. Friedman also refused to consider the influence of increasing pain on Claimant's performance on the key test administered during LifeFit which was deemed invalid:

> Q. [by Mr. Harris] …. Isn't it possible that [the key test] was determined to be invalid because Jorge Avalos underperformed because at that point in time he's in a lot of pain?
>
> A. The answer is it was determined to be invalid because his objective measures of effort did not meet the standard norms, including heart rate increases we would expect for a full effort, blood pressure for a full effort, or grip strength as a measure of a full effort and a normal curve. They're just measure of effort. He did not meet the standard, therefore, it was not thought to be a full effort. I also know that based on the numbers he performed compared to what he was actually doing in therapy up to the day before do not match.
>
> Q. And couldn't that be because by that point in the program, I believe it was October 13, 2015, he was in a lot of pain because of increased activity and not

being on pain meds; isn't that a possible explanation for why you say he underperformed?

A. It is one of a number of possibilities.

Friedman Dep. p. 101, l. 25 - p. 102, l. 19.[10]

67. Dr. Friedman addressed his perspective and use of patients' pain reports:

Q. [by Mr. Harris] But you use it for the purpose of if they say that their pain level is staying the same or increasing but their performance is going up, you find that to be an inconsistency?

A. Correct. Most people will not increase their performance when they're hurting a lot more. ….

Q. The concern with Mr. Avalos was that he was stating that his pain was increasing, was hurting more, but yet his performance was increasing, and you found that to be inconsistent?

A. Well, his performance is going up, he's complaining a lot more. We take away his pain meds and yet he's doing more and more.

Friedman Dep. p. 109, l. 21 - p. 110, l. 20.

68. Claimant testified he was concerned that if his performance did not improve as directed he would be discharged from the LifeFit program, thus he pushed himself in spite of increasing pain to comply with all LifeFit directives. The LifeFit records show Claimant was compliant and willing to attempt whatever was requested of him. Dr. Friedman reiterated that he believed Claimant's improved performance was inconsistent with his complaints of increasing pain. Ironically, Claimant's improved performance was then apparently deemed evidence by Dr. Friedman that his pain reports were exaggerated, and Claimant was discharged as noncompliant on the last day of the four week program when he could not tolerate the increased pain resulting from attempting to walk with only a cane.

[10] Mr. Peck noted that one of the performance measures relied upon at LifeFit to assess whether Claimant was giving full effort on his functional testing was rise in heart rate during exertion and Claimant was on a beta-blocker heart medication that "will decrease the heart rate during activity." Peck Dep. p. 59, ll. 9-10.

69. Dr. Friedman ultimately acknowledged there is a difference between being unwilling and being unable. He testified:

> Q. [by Mr. Harris] And because pain is subjective, you can't say what pain Jorge Avalos does or does not perceive; you can't say whether he was unwilling or unable to use a cane in the way that was required of him as a condition of staying in the program, can you?
>
> A. I can.
>
> Q. How is it possible for you to do that? You've already testified that you can't say whether or not he is or is not in pain.
>
> A. Correct. But I know, because we saw it, that he doesn't need the crutch. So if he chooses to do that, in my opinion, that's because he's unwilling, not because he's not able.

Friedman Dep. p. 116, ll. 8-20.

70. While Dr. Friedman testified that he could determine Claimant did not need the crutch because "I know, because we saw it," he did not identify what was seen, when it was seen, or who saw it. The LifeFit records do not contain any documentation of Claimant successfully ambulating—other than in pool therapy—for more than a few steps without at least one crutch. Dr. Friedman apparently refused to accept Claimant's verbal pain reports, his increasing blood pressure readings through the LifeFit program, his increased limping, and his reluctance to attempt to walk without a crutch as valid evidence of increasing pain. Dr. Friedman testified that if the activity of walking with only a cane had been too painful to perform, adjustments would have been made to the weight bearing progression. However, it is unclear how Dr. Friedman expected Claimant to communicate that he had reached the point where increased pain prevented further progression in the time allowed. Dr. Friedman's assertion that Claimant was unwilling rather than unable due to pain to ambulate without at least one crutch is not persuasive. Dr. Friedman's opinion of Claimant's credibility and physical capacity is similarly unpersuasive.

71. Dr. Woods in his chart notes near the 2013 hearing clearly conveyed his belief that Claimant is credible and had not fully recovered from his work injury. JE-1502-3. Dr. Poulter clearly conveyed his belief throughout his deposition that Claimant is credible and he has genuine walking and standing limitations due to right leg pain.

72. The Commission drew no unfavorable inferences in its prior decision regarding Claimant's credibility from the fact that he continued to wear a walking boot or use crutches, and does not do so now. 2014 Decision, p. 48.

73. Pain scale and narcotic abuse. Defendants assert Claimant's behavior is not consistent with the level of pain he reports, thus he must be exaggerating his pain. Dr. Poulter explained the limitations of the visual analog pain scale:

> But the tool that you're basing that assumption on is a visual analog scale which, honestly, I don't even look at. Patients come to see me, and I don't because that number means nothing to me.
>
> I'm looking for functional improvement, not the number. The number is meaningless. What I want to see is how are they doing. ….
>
> If we solely based our decisions on the visual analog scale number, it's a meaningless number that I—that I really pay very little attention to. One person's ten is another person's four, and it really doesn't –it doesn't really reflect what I'm trying to accomplish when someone comes around to see me.

Poulter Dep. p. 67, l. 6 - p. 68, l. 7. The Commission's prior decision addressed and rejected this argument and the undersigned referee finds it equally unpersuasive.

74. Defendants also allege Claimant's pain complaints are not credible because his drug screen demonstrated use of methamphetamines not prescribed, and failure to use Methadone and Oxycodone when prescribed.

75. Prashanth Manjunath, M.D., managed Claimant's pain medications for a time. On September 16, 2013, Claimant's drug screen tested positive for methamphetamine. In February

2014, Claimant's drug screen was negative for opiates that he was prescribed. Dr. Manjunath discharged Claimant from his care.

76. Claimant testified he did not use methamphetamine and did not know why he would have tested positive, although noting he takes over-the-counter hay fever allergy medication in August and September and that may have influenced his test results.

77. Dr. Friedman acknowledged that every test has an error rate and false positive tests for methamphetamine "certainly is possible." Friedman Dep. p. 43, ll. 23-24. He noted some drugs have a cross reactivity that may produce a positive test, but he was not aware that Claimant had been prescribed any such drug. He believed Claimant was taking methamphetamines. However, Dr. Friedman testified he would give a pain patient a second chance if a drug screen showed noncompliance with drug prescription therapy.

78. Dr. Poulter testified:

> Q. [by Mr. Harris] I believe there was one test that was positive for methamphetamine. You've looked at that, correct?
>
> A. I have looked at that. I discussed this with Jorge. He did not have an explanation for where that came from. He did not knowingly take any or have the intent to take any methamphetamine.
>
> There are reported false positives for methamphetamine in a drug screen that can come from some over-the-counter medications. It's—it's not clear where that positive came from.

Poulter Dep. p. 32, ll. 14-24.

79. Dr. Poulter also addressed the absence of prescribed medication in Claimant's drug screen:

> Q. [by Mr. Harris] Now, the other instance or allegation of noncompliance when he was with Dr. Manjunath is that he tested negative for pain medications that should have been in his system?
>
> A. That's correct.

> Q. Do you have any comment on that?
>
> A. So in the months leading up to the drug screen, which did not show Jorge's prescribed medications, Dr. Manjunath had been tapering his medications down as a trial. ….
> ….
>
> [M]ost of the time what we see is they take their medications at the same rate, they run out early, they show up for their next appointment, and they have a negative drug screen at their next appointment. I would anticipate that that's what had happened with Jorge.

Poulter Dep. p. 34, l. 21 - p. 36, l. 1. Dr. Poulter noted that he later discussed this with Claimant and regarding the circumstance when Claimant ran out of medication early: "He just continued taking them in the way that I had prescribed them before." Poulter Dep. p. 56, ll. 15-17.

80. Defendants criticize Dr. Poulter for sporadic drug testing of Claimant; however, while recognizing the significance of periodic drug testing, Dr. Poulter explained that drug screens are "only one tool we have to monitor compliance. The other tools we use are physical exam, questioning, Board of Pharmacy report. We look at patterns of behavior." Poulter Dep. p. 63, ll. 5-8.

81. Dr. Poulter treated Claimant from September 23, 2010 through August 12, 2013, then moved his practice and resumed treating Claimant from April 29, 2014 through the date of his post-hearing deposition in September 2016. Dr. Poulter testified of Claimant: "As long as he has been in our clinic, I have not seen any issues with noncompliance." Poulter Dep. p. 32, ll. 7-9. Jorge's been—since he reestablished with our practice, he has done great with pain medications. We have seen no other signs of abnormal behavior." Poulter Dep. p. 34, ll. 8-11.

82. Claimant's two questionable drug screens over his six years of extensive medical treatment since his industrial accident do not destroy the credibility of his reported right leg pain.

83. Swelling. Defendants allege that Claimant's assertions of right leg swelling are fabricated and impugn his credibility. They maintain that Claimant failed to measure his right leg as recommended by Dr. Woods: "Had Claimant complied with Dr. Woods' instructions, it may have given some credibility to the allegation of swelling, but Claimant failed to perform this relatively simple task. As such, there can be no finding that Claimant actually experiences swelling." Employer/Surety Defendants' Responsive Post-Hearing Brief, p. 13.

84. In its prior decision the Commission determined that Claimant's persistent right leg swelling and nodules demonstrate that he is experiencing sequelae from his industrial accident. 2014 Decision, p. 50. Notwithstanding IME opinions to the contrary, no later than July 19, 2012, Dr. Poulter observed Claimant had developed exquisitely tender nodules in his subcutaneous tissues of his right lower leg. JE-845. Claimant had earlier reported these nodules to Dr. Woods. Dr. Woods opined the nodules were tender superficial thrombosed veins, typical of poor outflow from the right leg. Drs. Poulter and Woods persuasively related them to Claimant's compartment syndrome following his industrial accident. These objective symptoms are consistent with tissue injuries including damage to microsystems not identifiable through objective testing.

85. In February 2011, Dr. Woods observed Claimant suffered persistent lymphedema and venous congestion. Dr. Shelley then examined Claimant and reported likely lymphedema even though studies were normal. Dr. Garrison examined Claimant on April 4, 2011, and although lymphatic and venous evaluations were negative, opined Claimant likely sustained underlying vascular injury of the microsystem which was not evident on the studies. He diagnosed edema, lymphedema, and venous insufficiency.

86. During a brief physical evaluation by Kathy Gammon on December 12, 2012, Claimant's right ankle measured 29 cm, his left ankle 26.5 cm; four inches above the malleolus his right leg measured 31.5 cm, his left leg 26.5 cm. During a December 2012, functional capacity evaluation, Briggs Horman, PT, measured Claimant's right ankle girth at 6 cm larger than his left ankle. During a January 29 and 30, 2013, function capacity evaluation, Nathan Hunsaker, PT, measured both of Claimant's legs 20 cm above the malleolus and found his right leg girth larger than his left by 4.5 cm on the first day of testing and 6 cm on the second day.

87. Dr. Friedman acknowledged Claimant's edema at least to the point of prescribing a high-compression stocking for edema control. Dr. Friedman testified that while participating in LifeFit Claimant was taking dilator medications for his blood pressure that could cause hand and feet swelling. He testified that sitting would cause pooling of blood in the feet and legs and result in swelling. Friedman Dep. p. 39. He offered no explanation for why the edema in Claimant's right lower leg was measurably greater than in his left. Dr. Friedman ultimately acknowledged that chronic edema might be a reason for Claimant's pain; however, Dr. Friedman had seen patients with edema who had no pain. Friedman Dep. p. 76.

88. Kathy Gammon, reviewed Dr. Woods' medical records where he directed cessation of Claimant's physical therapy because it was causing increased edema and pain and was actually counterproductive to improving Claimant's function. She testified:

> And I noticed in his physical therapy treatment, which continued for four months, he—obviously, it was gait training, and he was really trying to weight bear, and they got him to weight bearing with his boot but without the crutches, but he could only go ten feet, three times, and then he had this extreme swelling. He came back the next day and his foot was double the size. So they kind of pulled back.
>
> And then they tried—the PT tried gait training where they—let me see. I've got to look. It's in my report on page 33, but—then he tried—he could have the crutches, but no boot, and he was only able to bear 50 percent of his weight, and

> he still had the swelling. They put on a Jobst—a Jobst sleeve. They use it for lymphedema. And that kind of helped him, but he could never really—according to the medical records, he could never really weight bear without this swelling.

Ex. 36, page 59, l. 16 - p. 60, l. 9.

89. Contrary to impugning Claimant's credibility, his reports of right lower leg swelling and nodules are repeatedly verified, objectively documented, strongly corroborate his chronic recurring right leg edema, and give substantial credibility to his reports of right leg pain.

90. Giveaway weakness. Defendants assert Claimant's giveaway weakness shows his pain complaints are not credible. In its prior decision, the Commission directly addressed this allegation and found the give-away weakness detected by Drs. Wilson and Tallerico did not establish Claimant was not credible. 2014 Decision, p. 51. Dr. Wilson and Dr. Tallerico assessed "give-away" weakness in which Claimant did not exert maximal effort on strength testing while failing to verbalize pain. Dr. Poulter and Dr. Woods reported no give-away weakness. The Commission previously concluded: "Claimant's demonstration of give-away weakness at IMEs is insufficient to raise a credibility concern not previously raised by Drs. Woods and Poulter." 2014 Decision and Order, p. 51.

91. Loss of sensation in his foot. Defendants allege that Claimant lacks credibility because his description of the sensation in the bottom of his right foot varies between the 2013 and 2016 hearings. Regarding the sensation in Claimant's right foot, the following exchange occurred at the 2013 hearing:

> Q. [by Mr. Hall] Okay. Do you have feeling in the bottom of your foot? In other words, is—if I were to touch the bottom of your right foot and the bottom of your left foot—
>
> A. I got sensibility, yes, not as much as in my good leg, my other foot. But, yeah, I do.
>
> Q. Is it the same as your left foot or less?

Q. No, it is not the same. It is less.

Ex. 36, p. 232, ll. 13-20.

92. The following exchange occurred at the 2016 hearing:

> Q. [by Mr. Hall] At the time of our last hearing, you indicated that you had normal sensation in the bottom of your foot. Has that changed? Or is that still the same?
>
> A. It hasn't changed.

Tr., p. 130, ll. 13-16.

93. Thus at the 2016 hearing, Defendants' counsel misstated Claimant's testimony from the 2013 hearing and then posed a compound question. As observed, Claimant is a non-native English speaker. To the extent there exists any difference in Claimant's descriptions of the sensation in his right foot between the two hearings, it is de minimus. The quoted exchange is more indicative of Defendants' determination to assail Claimant's credibility than any actual lack of credibility.

94. Sleep. Defendants allege Claimant's credibility is compromised by his testimony at hearing that during his four weeks at the LifeFit program he slept only four hours per night in contrast to his report while at LifeFit that he slept only two or three hours per week. Dr. Friedman testified Claimant reported sleeping only two and a half to three hours total during a week at LifeFit. However, Dr. Friedman acknowledged it was possible this may have been a miscommunication as Claimant's English was good but not perfect. This asserted discrepancy is similar to Defendants' allegations of overstatement and reflects more on Claimant's English communication difficulties than on his credibility.

95. Secondary gain. Defendants and the IME physicians assert Claimant is motivated by secondary gain rather than by genuine debilitating chronic right leg pain. Nevertheless, as

already noted, Claimant's treating physicians from the day of his accident, Drs. Woods and Poulter, find him credible. Dr. Poulter noted Claimant: "was very motivated at our appointment today to be able to improve his pain so he can return to work." JE-861.126. While the IME physicians opine Claimant is exaggerating or seeking secondary gain, the record suggests that Claimant in several instances did not fully understand their questions or directions. Drs. Poulter and Woods both understand Claimant's medical course because they largely directed treatment for his industrial injuries. Claimant consistently protects his right leg and limits weight-bearing on his right foot. He has worn out multiple walking boots and crutches since the accident.[11] Claimant: "does not wear his boot in the house, he is able to not wear his boot in the house only. Whenever he is out and about and outside of the home setting he does wear the boot." JE-861.148. There is no assertion Claimant has voluntarily placed full weight on his right foot since the accident. In its prior decision the Commission addressed this same allegation noting Claimant had to sell his vehicle, was not receiving benefits, was stressed about his inability to work and earn a living, and sought further treatment rather than a disability award. The Commission concluded that the totality of evidence indicated Claimant was more motivated to return to work than to remain disabled and would return to work immediately if he could. 2014 Decision, p. 50. The greater totality of the evidence now before the Commission continues to indicate the same motivation.

96. Having observed Claimant at the 2016 hearing and compared his testimony with other evidence in the record, the undersigned Referee concurs in Referee Marsters' findings adopted by the Commission in its May 6, 2014 decision that Claimant is a credible witness.

[11] In April 2016, Mr. Peck observed Claimant was "on his 4th CAM boot and 5th pair of crutches since the accident as he wears them out with use." JE-1249.

## DISCUSSION AND FURTHER FINDINGS

97. 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).

98. **Additional medical care.** The first issue is whether and to what extent Claimant is entitled to additional medical care. Claimant asserts entitlement to palliative medical care for management of his chronic right lower extremity pain. Defendants note that Claimant reached maximum medical improvement on November 15, 2015, following his release from LifeFit, and deny further responsibility for medical care, including palliative care.

99. The Commission's recent decision in *Cooke v. Bonner Foods*, 2017 WL 5558595 (Idaho Ind. Com.) is applicable. In *Cooke* the Commission addressed maximum medical improvement and an injured workers' entitlement to further palliative medical care. Referring to its May 6, 2014 decision in the present case the Commission declared:

> One of the issues before the Commission in *Avalos* was whether Claimant was entitled to the pain management treatment that had been offered by Claimant's physicians. The Commission also had before it the related question of whether Claimant was at the point of maximum medical improvement. Although not stated in the Opinion, it seems likely that the Commission conflated the two issues, reasoning that in order to afford Claimant the pain management he required, it necessarily followed that the Commission must find that Claimant had not yet reached medical stability. In other words, medical stability is inconsistent with the provision of palliative care which might provide Claimant with pain relief and restore function. This linkage was rejected in the recent Supreme Court case of *Rish v. Home Depot, Inc.,* 161 Idaho 702, 390 P.3rd 428 (2017). *Rish* makes it clear that employer's obligation to provide palliative care in no wise turns on whether or not the employee is still medically unstable. Care intended to reduce pain is a benefit to which an injured worker is entitled regardless of whether or

> not he is medically stable. Indeed, if an injured worker could not be pronounced medically stable if still suffering from pain related to his injury, then it is quite possible that such a worker might never reach medical stability if one of the permanent effects of the work injury is pain which requires palliative management. *Rish* makes it clear that an injured worker can be declared medically stable even though future treatment is contemplated for management of intractable pain. In order to receive TTD benefits, Claimant must establish that she is not medically stable, i.e. that the pain management treatment recommended by Claimant's treating physician, and approved by surety, is curative, rather than palliative.

*Cooke*, 2017 WL 5558595 (emphasis supplied).

100. As noted above, Claimant is credible and has established his persisting right lower extremity complaints are genuine and debilitating. Pursuant to *Rish* and *Cooke*, Claimant may be entitled to palliative medical care to manage his chronic pain both before and after reaching medical stability. Dr. Poulter affirmed he has provided periodic reasonable medical treatment to manage the chronic pain of Claimant's right lower extremity after November 15, 2015, when he reached medical stability.

101. Claimant has proven he is entitled to reasonable palliative medical care, including medications and treatment by Dr. Poulter, for management of his chronic right lower extremity pain both before and after reaching maximum medical improvement on November 15, 2015.

102. **Permanent disability.** The second principal issue presented is whether and to what extent Claimant is entitled to disability in excess of impairment, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

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

by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. "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. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

104. In the present case, Claimant asserts that his 2010 industrial accident renders him totally and permanently disabled. His permanent disability must be evaluated based upon his medical factors, including his permanent impairment, the physical restrictions arising from his permanent impairment, and his non-medical factors, including his capacity for gainful activity and potential employment opportunities.

105. Impairment. "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. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Claimant alleges permanent impairment due to his right lower extremity condition. Defendants argue he has no impairment.

106. Dr. Friedman examined Claimant on May 26, 2015, and opined he had fully healed lower leg fractures with good alignment and did not meet CRPS diagnostic criteria. Dr. Friedman rated Claimant's permanent impairment to his right leg at 0%. JE-1113.

107. Dr. Poulter did not rate Claimant's permanent impairment, nevertheless he testified that Claimant sustained a "significant injury and has persistent neuropathic pain syndrome in his right lower extremity as a result of his industrial injury and the sequelae from his compartment syndrome" that will likely continue for the rest of his life. Poulter Dep. p. 23, l. 23 - p. 24, l. l. He explained: "Jorge has a neuropathic pain syndrome in his leg, and has features of complex regional pain syndrome, but doesn't have all of the features to satisfy that diagnosis." Poulter Dep. p. 42, ll. 9-13. Dr. Poulter found Dr. Friedman's 0% impairment rating to be "very odd" and opined as follows:

> Dr. Friedman makes a statement that he hasn't received any permanent impairment as a result of his injury. To me that implies Jorge's fine. He's walking. He's back to work completely healed from his injury. That was a strange comment.
>
> I don't understand, unless there's some context to this that I don't understand, but Jorge is significantly disabled from this injury. He uses his crutches in his home to get up from the couch and go to the bathroom. He can't put any weight on his foot without severe pain.
>
> To me, that suggests that there's ongoing limitations and sequelae from his injury, so I don't know how anyone could say that he hasn't had any permanent impairment.

Poulter Dep. p. 24, ll. 4-18.

108. Sharik Peck, CRC, PT, performed a functional capacity assessment and sEMG testing of Claimant on April 12 and 28, 2016. Mr. Peck then reported:

> The sEMG Range of Motion testing of the Lumbar spine was performed as described in the AMA publication: The Practical Guide to Range of Motion Assessment. Abnormalities in muscle recruitment and functioning of the lumbar spine are present. Functional testing of bilateral calf muscles and their counterparts, the peroneal muscles, was performed during repeat toe rises and shows remarkably low muscle activity (a summation of depolarization during functional activity) in the right calf and peroneal muscles. There findings are consistent with Jorge's reported and demonstrated physical restrictions in both work-related and recreational activities.

Ex. 35, p. 1249. Mr. Peck testified his testing documented "nearly complete dysfunction within the right lower extremity muscles below the knee." Peck Dep. p., 40, ll. 5-7. He opined the sEMG testing was reliable and that a patient cannot fake a bad test.[12]

109. On December 16, 2011, Brian Tallerico, D.O., rated Claimant's permanent impairment of his right leg at 11% of the lower extremity. On June 14, 2012, Drs. Holt and Wilson agreed with Dr. Tallerico's 11% right lower extremity impairment rating. JE-663. Dr. Woods later agreed with this rating. Repeated lower leg girth measurements by multiple practitioners have documented the frequent recurrent swelling of Claimant's right lower leg. Defendants assert Dr. Tallerico's impairment rating excludes any restorative medical or rehabilitation treatment Claimant subsequently received. However, in spite of rehabilitation efforts, Dr. Poulter persuasively opined that Claimant's chronic right lower extremity condition was unchanged subsequent to that time. Poulter Dep. pp. 16-17. Thus Dr. Tallerico's impairment rating remains unaffected.

110. Dr. Friedman's conclusion that Claimant suffers no permanent impairment of his lower right extremity is founded upon Dr. Friedman's unpersuasive conclusion that Claimant can

[12] Dr. Friedman testified that surface EMGs are not reliable and he does not use them in his practice. JE-1130. While not dispositive, sEMG testing by Mr. Peck further indicates a persisting right lower leg abnormality.

walk without at least one crutch or assistive device and has no physical limitation. The weight of the credible record establishes Claimant suffers persistent neuropathic pain and recurrent swelling in his right lower extremity, including pain producing a functional loss. Claimant has proven that he suffers permanent physical impairment of 11% of his right lower extremity due to his industrial accident.

111. Physical restrictions. Dr. Friedman opined Claimant has no restrictions in that there is nothing Dr. Friedman "could find that would say [Claimant] shouldn't do any thing because he would be at increased risk for having another injury. That is the reason I give people restrictions." Friedman Dep. p. 41, ll. 18-21. Dr. Friedman opined on October 16, 2015, that Claimant could return to full time light duty work and progress 10% per week for 10 weeks until he returned to his time of injury job with no restrictions or limitations.[13] JE-1112. As noted, Dr. Friedman's opinion that Claimant can walk without at least one crutch is unpersuasive.

112. Kathy Gammon, CRC, MSPT, accurately observed that Dr. Friedman's conclusion that Claimant could stand and walk without limitation was inconsistent with his LifeFit experience:

> If you will review the weight-bearing progression program, which we previously discussed, there was no weight-bearing progression, none, the first week, only in the pool for another week and a half, only the last two days of the third week and three days of the fourth week was there any weight-bearing progression. And it was ultimately, although Mr. Avalos tried, according to the records, it's very apparent through the records, he was ultimately unable to progress to a walking status without any assistive device.
>
> Q. [by Mr. Hall] Weight-bearing progression happened during all of Week 2 when he was in the water without crutches, all of Week 3, and all of Week 4, correct?

[13] Mr. Peck acknowledged he was unable to realistically project the extent of Claimant's future progress and questioned Dr. Friedman's extrapolation that Claimant would continue to progress functionally 10% each week for 10 consecutive weeks following his discharge from LifeFit until he was capable of full-duty heavy work without restrictions. Peck Dep. p. 61.

> A. It's a progression, but the magnitude of the progression was very minimal. The first two and a half weeks, very minimal progression and then immediately progressed to massive amounts of weight-bearing, increased amounts of weight-bearing over a very short time period, which Mr. Avalos tried to comply with and then was unable to do ultimately, and so when I read Dr. Friedman's recommendation that he can do combined standing and walking for up to 10 hours when he saw this very abbreviated weight progression, it doesn't track with me.

Gammon Dep. p. 63, l. 11 - p. 64, l. 9.

113. Ms. Gammon correctly noted that Claimant progressed at LifeFit to the same level of weight-bearing he had achieved in his 2010-2011 physical therapy overseen by Dr. Woods, as discussed above. She observed that the medical records repeatedly show that Claimant could never weight-bear consistently on his right leg without increased swelling. JE-1288 (Ex. 36, pp. 59-60).

114. Dr. Friedman's opinion fails to address Claimant's inability to walk at LifeFit or elsewhere without an assistive device and the reduced walking and standing tolerances which he has consistently shown and which Dr. Poulter and Dr. Woods and others have documented.

115. Nathan Hunsaker, PT, MSPT, after a January 29-30, 2013 FCE concluded Claimant overall demonstrated functional abilities at a sedentary level. JE-535. Mr. Hunsaker noted "according to his sitting ability, he would need work accommodations to change positions and elevate his leg." JE-537. Mr. Hunsaker opined Claimant's walking ability would decrease over the course of an eight-hour day. He observed: "This opinion is gained from the observance of a decrease in weight-bearing tolerance as the test progressed over a single day and over the 2 days that he was tested. His resting heart rate and maximum heart rate during weight bearing activities was also significantly greater on the second day possibly due to the increase pain he had from day 1 to day 2 of testing." JE-538. Mr. Hunsaker found Claimant was "unable to safely carry anything in 2 hands due to the need of using his crutches for safe ambulation." JE-539. He

noted that without a walking boot and crutches, Claimant is unable to negotiate stairs. He recommended Claimant elevate his right leg for 30 minutes every hour to allow for proper fluid exchange. JE-540.

116. Mr. Peck noted consistency between his functional capacity assessment and that performed by Mr. Hunsaker finding Claimant limited to sedentary work and his functional limitations consistent with his physical impairments and diagnosis. Peck Dep. p. 104. The functional capacity evaluations performed by Mr. Hunsaker and Mr. Peck limited Claimant to walking or standing at most two to three hours per day.

117. Briggs Horman, PT, administered a functional capacity exam on December 14 and 18, 2012. He concluded Claimant could lift 34 pounds. Mr. Horman believed Claimant did not give full effort on the lifting test. He measured Claimant's right ankle girth at six centimeters larger than his left. Mr. Horman provided no walking or standing assessment; however, he reported: "As his foot is so non-functional to him, climbing should be avoided. I especially feel being on a ladder should be a restriction." JE-532.

118. Ms. Gammon observed that Mr. Horman "did not follow a standardized assessment procedure, a functional capacity procedure, which in and of itself is not necessarily bad, but it is out of the norm." Ex. 36, p. 89, ll. 6-9. She observed that Mr. Horman based his validity measure of the FCE on isometric muscle testing. She testified:

> Isotonic means dynamic. There is movement in it. When you look at work activities in general …. We pick up things. We walk. We carry. We move. It's dynamic motion.
>
> So to test functional ability by isometric means or static contraction, in the literature it's said to not be valid. Okay. So in Mr. Horman trying to utilize isometric muscle testing to determine validity is kind of fallacious. It doesn't really determine validity.

JE-1296 (Ex. 36, p. 90, ll. 12-22).

119. Dr. Tallerico largely agreed with Mr. Hunsaker's FCE findings leading to a sedentary work recommendation, but opined Claimant's functional limitations were purely subjective and, therefore, he would not restrict Claimant even to light duty. Similarly, he agreed that Mr. Horman's FCE and light-medium duty recommendation is "quite reasonable." JE-908. Nevertheless, on December 16, 2011, Dr. Tallerico opined Claimant would not be able to return to heavy work and was permanently restricted from: "walk[ing] any great distances or stand[ing] for any extended periods of time, but he certainly could return to the workforce in a sedentary-type position, or even light duty if it does not require much mobility." JE-898.

120. On June 14, 2012, Drs. Holt and Wilson concluded Claimant "could return to sedentary and light duty activities. These work restrictions should be reassessed in 12 months, as they may not be permanent." JE-663.

121. Dr. Holt reported he watched Claimant walk approximately a block after his appointment with Dr. Holt. Claimant readily acknowledged he did walk with the use of his crutches and walking boot. Drs. Woods and Poulter opined that Claimant could probably walk in his boot and with crutches for a block or more before having to stop and rest.

122. On November 22, 2011, Dr. Woods opined Claimant could not return to his pre-injury position and had permanent restrictions including "crutches, cane or some type of walking assistive device." JE-984. On November 22, 2011, Dr. Woods further concluded: "Unable to walk/stand for more than 1-2 hours/day—Will likely need walking assistive device/therefore unable to lift >20 lbs." JE-987. Dr. Woods also opined Claimant needed secondary controls to safely operate a vehicle.

123. Dr. Poulter believed Claimant was not malingering. On July 29, 2012, Dr. Poulter opined Claimant was limited in standing, walking, and lifting and that he could not walk without

a walking boot and crutches. Dr. Poulter restricted him to lifting from 20 to 30 pounds and indicated Claimant would be restricted to standing or walking for five to 10 minutes consecutively, standing no more than one hour per day, walking no more than one hour per day. Dr. Poulter specifically opined that Claimant could not maintain a full-time 40 hour per week work schedule, could not tolerate sedentary, light-duty, or medium duty jobs, and sustained "Extreme limitation with function due to persistent & severe right leg pain." JE-847-848.

124. Dr. Poulter and Dr. Woods are Claimant's treating physicians and have had years of contact with Claimant and his support group and extensive opportunity to evaluate his functional abilities. The Referee finds the restrictions imposed by these physicians and the FCE performed by Mr. Hunsaker most accurately reflect Claimant's actual abilities and limitations.

125. Competitiveness in the open labor market. The parties emphasize the opinions of three vocational experts regarding Claimant's employability. Each is addressed below.

126. *DeLyn Porter.* Defendants presented the expert testimony of DeLyn Porter, CRC, who interviewed Claimant on September 17, 2012, and examined his medical records and prior work history. He considered Dr. Friedman's opinion that Claimant has no work restrictions and concluded that Claimant has no permanent disability.

127. Mr. Porter acknowledged that Dr. Tallerico concluded that Claimant was capable of sedentary and light work. Mr. Porter opined that if Dr. Tallerico's opinion were adopted, Claimant would suffer permanent disability of approximately 30.5%, inclusive of his impairment.[14] Porter Dep. p. 27, ll. 3-5. Relying on Dr. Tallerico's restrictions, Mr. Porter opined Claimant could work as a farm mechanic, tractor operator, field hauler, piler operator, harvest truck driver, door greeter, potato sorter, or transport van driver, or interpreter. JE-764. However,

[14] Mr. Porter had previously opined that accepting Dr. Tallerico's restrictions, Claimant suffered 23.5% permanent disability inclusive of impairment. JE-762.

although Mr. Porter identified approximately 36 jobs in the above named categories, he did not discuss Claimant's specific situation with any potential employer to determine actual job compatibility. Porter Dep. pp. 73-74. He further admitted that several of the jobs identified were in Idaho Falls and Rexburg—some distance from Claimant's residence outside of Blackfoot.

128. Mr. Porter testified it would not be futile for Claimant to look for work. However, Mr. Porter acknowledged that sedentary and light jobs commonly require more computer skills and functional academic skills than medium and heavy jobs. He admitted that Claimant dropped out of high school in Mexico, has no GED, no academic credentials, and no keyboarding or computer skills. Mr. Porter also acknowledged that Claimant no longer has a vehicle and admitted that lack of transportation was a barrier to job searching. Mr. Porter conceded there is no bus service in Blackfoot, but testified he had seen a taxi in Blackfoot shortly before his post-hearing deposition but did not know the name of the taxi service, its availability, or cost.

129. *Kathy Gammon. C*laimant presented the expert testimony of Kathy Gammon, CRC, MSPT, who interviewed Claimant and reviewed his work history, medical records, and physical restrictions. Ms. Gammon produced a written report, testified at the 2013 hearing, and was deposed after the 2016 hearing. She noted that Claimant's work history was that of a farm laborer with experience in driving tractor, grain thresher, potato harvester, and large trucks on the farm. He also worked as a transformer substation tank technician or cleaner and as an agricultural produce sorter. She testified that farm laborer and transformer tank cleaner were heavy or medium duty positions. She further testified that agricultural produce sorter positions were light duty positions but most required extensive standing and none allowed opportunity to elevate a lower extremity regularly. She opined that Claimant's pre-accident work history

provided few light or sedentary transferable skills and noted that Claimant lacks a GED or high school diploma, has chronic right leg pain, and somewhat limited English communication skills.

130. Ms. Gammon accepted Dr. Tallerico's permanent restrictions from his December 16, 2011 IME that Claimant would not likely ever return to the heavy work he had done and was restricted to not walking any great distances or standing for any extended period. She noted Dr. Tallerico concluded Claimant could return to sedentary or light duty work not requiring much mobility. She further observed that "Light exertional work by its very definition requires the ability to stand or walk up to six hours in an eight-hour day. So basically, it was sedentary restrictions." JE-1293 (Ex. 36, p. 79, ll. 19-22).

131. In response to Mr. Porter's suggestion that Claimant could work as farm mechanic, Ms. Gammon noted that Claimant had no significant prior experience as a farm mechanic and would not likely be competitive for such positions even if he could meet the physical requirements. Ms. Gammon opined that Claimant could not be a field hauler, piler operator, harvest truck driver, or Teton Transport van driver because all of these jobs were medium duty or heavier positions, thus exceeding Claimant's restrictions. She noted that Claimant could not be a tractor operator because tractor operators regularly walk on uneven ground and attach machinery, which would be difficult given Claimant's need for assistive walking devices. Moreover, she noted the difficulty Claimant would experience attempting to climb into or out of a tractor or truck, which would be similar to ladder climbing in that he would have to "put all of your weight on one foot and transfer all of your weight to the other foot, repetitively over and over." JE-1311 (Ex. 36, p. 151, l. 24 - p. 152, l. 1), JE-1295 (Ex. 36, p. 88). She testified that door greeter positions at large stores were being phased out and that potato sorter positions generally required standing for five to 12 hours per shift.

132. Ms. Gammon noted Claimant's physical limitations would not prevent him from performing many sedentary jobs; however he lacked the skills necessary to compete for them. She concluded: "There are tons of [sedentary] jobs out there that [Claimant] could qualify for if—if he had remediation of his pain, his narcotic medications, had training, and had a way to get to work, he could qualify for sedentary work, but he needs these things." JE-1310 (Ex. 36, p. 148, ll. 1-5).

133. In her August 17, 2016, post-hearing deposition, Ms. Gammon reaffirmed her conclusion that relying upon the work restrictions of Dr. Woods and Dr. Poulter, or even Dr. Tallerico, Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. She noted that light duty work requires standing or walking "two-thirds of the work day or up to six hours, five point some hours in an eight-hour day." Gammon Dep. p. 11, ll. 16-17. She specifically researched light duty agricultural produce sorter positions identified by Mr. Porter by contacting 14 potato sorting houses in the area. Half of those responding required standing the full shift, a fourth required standing for six hours, some permitted alternating sitting and standing but none allowed elevating a lower extremity while working.

134. Ms. Gammon again testified that assuming Claimant could physically perform the exertional demands of sedentary level work; he lacks the skills necessary to be competitive for such work. He has minimal formal education, no keyboarding or computer skills, limited English skills, and requires a boot and crutches to ambulate. She further noted that the only sedentary job identified by Mr. Porter was that of a bilingual interpreter. In response to Mr. Porter's suggestion that Claimant could work as an English/Spanish interpreter, Ms. Gammon searched for but found no actual interpreter openings in Claimant's area. Furthermore, fluent English and Spanish reading and writing ability was required for such positions, which Claimant did not possess. JE-

1292 (Ex. 36, pp. 76-7). Even assuming Claimant adequately speaks English and Spanish, his English reading skills are minimal. Ms. Gammon testified that when she considered "the loss of access in this local area according to his skills and his previous work history, there were no sedentary jobs available to him." Gammon Dep. p. 18, ll. 23-25.

135. Ms. Gammon acknowledged that if Dr. Friedman's conclusion that Claimant had no work restrictions were adopted, Claimant would have no permanent disability. She opined that utilizing the restrictions of Dr. Poulter, Dr. Woods, or even Dr. Tallerico, there was not any employment within Claimant's restrictions that is regularly and continuously available in the local labor market for which he would be competitive. Ms. Gammon noted that his restrictions preclude him from heavier work and while he may have the physical capacity to perform lighter work, he lacks the skills to be competitive for such work. She opined that it would be futile for Claimant to look for work and he is an odd-lot worker, totally and permanently disabled. Gammon Dep. p. 95.

136. *Chris Horton.* Industrial Commission rehabilitation consultant Chris Horton worked with Claimant from January 2011 through November 2012 and tried to help him find a job without success. Mr. Horton testified that Claimant was definitely cooperative and did the best that he could with the resources available to him to find employment. Mr. Horton noted that lack of transportation and computer illiteracy were significant obstacles to Claimant obtaining employment. Mr. Horton wrote Surety recommending auxiliary controls for Claimant's vehicle so he would have transportation to seek employment and provided a wide variety of alternatives from "$5,500 … and then others that were as cheap as 300 bucks installed and consisted of—and not necessarily a hand control, but a left accelerator pedal that would go on the floor of the car—on the left side of the brake." JE-1314 (Ex. 36, p. 162, l. 24 - p. 163, l. 4). Mr. Horton "did get a

letter from Dr. Woods stating that he thought it would be good and necessary for the claimant to obtain the secondary driving controls, but to my understanding, the State Insurance Fund had another letter from a doctor stating the contrary." JE-1315 (Ex. 36, p. 169, ll. 17-21). Surety refused to provide any funding and Claimant was unable to drive his vehicle without secondary controls due to his right leg pain. Thereafter he sold his car to pay bills because he could not drive it. Mr. Horton testified there is no public transportation available to Claimant near his home outside of Blackfoot. He was unable to find employment for Claimant. Ultimately, Claimant's file was closed because Mr. Horton had nothing vocationally to offer until Claimant could at least drive.

137. *Weighing the expert vocational opinions.* Claimant has not looked for work in the Blackfoot, Pocatello, or Idaho Falls areas. He has no reliable transportation of his own. He cannot safely drive himself without secondary controls (which Defendants refused to provide), and he has no funds to obtain such. Affordable public transportation in the Blackfoot area is not available to Claimant. Nevertheless, transportation is by no means the greatest obstacle to his employment.

138. Even assuming reliable affordable transportation, nearly all of the potential jobs identified by Mr. Porter are beyond Claimant's restrictions or capabilities as identified by Drs. Woods and Poulter and as further documented by Mr. Hunsaker. On cross examination during the first hearing, Ms. Gammon summarized her opinion as follows:

> Q. [by Mr. Hall] So you think there are sedentary jobs out there that he could do?
>
> A. With—at his present skill level and education, they would be few and far between. I'm not saying anything is impossible. I'm just saying it's not probable.

JE-1311 (Ex. 36, p. 152, l. 23 - p. 153, l. 3).

139. The record supports Ms. Gammon's conclusion that the jobs Claimant could perform are few and far between in light of his physical limitations and lack of transferable job skills for light or sedentary work. Her opinion on Claimant's vocational prospects is persuasive.

140. Based on Claimant's permanent impairment of 11% of the right lower extremity, his permanent physical restrictions, and considering all of his medical and non-medical factors, including his chronic neuropathic right leg pain, inability to ambulate without assistive device, limited walking and standing capacity, age of 40 at the time of his industrial accident and 46 at the time of the second hearing, limited English fluency, limited formal education, lack of high school diploma or GED, complete computer illiteracy, inability to return to previous positions, minimal transferable skills, and lack of affordable transportation, Claimant's ability to engage in regular gainful activity after his 2010 industrial accident has been greatly reduced. Claimant has established a permanent disability of 85%, inclusive of his 11% right lower extremity impairment.

141. Odd-Lot. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his

burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. *Lethrud v. Industrial Special Indemnity Fund*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

142. In the present case, Defendants question Claimant's true functional capacity and assert that he is employable. Claimant has presented the credible expert testimony of Kathy Gammon that a work search would be futile because, even assuming Claimant could physically perform the physical demands of sedentary work, he has minimal formal education, no keyboarding or computer skills, limited English skills, and simply lacks the skills necessary to be competitive for such work. As noted above, Ms. Gammon's conclusion is persuasive. Claimant has established a prima facie case that he is an odd-lot worker, totally and permanently disabled, under the *Lethrud* test.

143. Once a claimant establishes a prima facie odd-lot case, the burden shifts to the defendants "to show that some kind of suitable work is regularly and continuously available to the claimant." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The defendants must prove there is:

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

*Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

144. Although Mr. Porter opined Claimant could work as a farm mechanic, tractor operator, field hauler, piler operator, harvest truck driver, door greeter, potato sorter, transport van driver, or interpreter, he acknowledged that he did not discuss Claimant's situation with any potential employer to determine actual job compatibility. In contrast, Ms. Gammon's thorough research, including contacts with potential employers, establishes that Claimant is not realistically competitive for any of these positions. Significantly, Ms. Gammon specifically researched light duty agricultural produce sorter positions by contacting 14 potato sorting houses. Half of those employers responding required standing the entire shift, a fourth required standing for six hours, some permitted alternating sitting and standing, but none allowed elevating a lower extremity while working. All such positions thus exceeded Claimant's restrictions.

145. Finally, Ms. Gammon addressed Mr. Porter's recommended sedentary job for Claimant:

> He recommended bilingual interpreter as a sedentary job. That was the one sedentary job that he recommended for Mr. Avalos. But when you drill down and look at that job, it requires fluent English writing and reading skills, as well as fluent Spanish writing and reading.
>
> It required at least a high school education and in some cases, it required an associate's degree or even college education. So the skill level for a court—or for a bilingual interpreter is higher than the skills Mr. Avalos actually has.

Gammon Dep. p. 18, ll. 4-14.

146. Defendants have not established that there is an actual job regularly and continuously available that Claimant can perform and at which he has a reasonable opportunity to be employed.

147. Claimant has proven that he is totally and permanently disabled pursuant to the odd-lot doctrine.

## CONCLUSIONS OF LAW

1. Claimant is entitled to reasonable palliative medical care, including medications and treatment by Dr. Poulter, for management of his chronic right lower extremity pain even after reaching maximum medical improvement on November 15, 2015.

2. Claimant suffers permanent disability of 85%, inclusive of his 11% right lower extremity impairment, and has proven in the aftermath of his 2010 industrial accident that he is an odd-lot worker, totally and permanently disabled under the *Lethrud* test.

## 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 __4th_ day of January, 2018.

INDUSTRIAL COMMISSION

_/s/_____
John C. Hummel, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __12th____ day of ___January_____, 2018, 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:

JONATHAN W HARRIS
BAKER & HARRIS
266 W BRIDGE
BLACKFOOT ID 83221

SCOTT R HALL
NELSON HALL PARRY TUCKER
PO BOX 51630
IDAHO FALLS ID 83405-1630

sjw

_/s/_____

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

| | |
|---|---|
| JORGE M. AVALOS,<br>Claimant,<br>v.<br>LAVAL WHITEHEAD,<br>Employer,<br>and<br>IDAHO STATE INSURANCE FUND,<br>Surety,<br>Defendants. | **IC 2010-021068**<br>**ORDER**<br>January 12, 2018 |

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

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

1. Claimant is entitled to reasonable palliative medical care, including medications and treatment by Dr. Poulter, for management of his chronic right lower extremity pain even after reaching maximum medical improvement on November 15, 2015.

2. Claimant suffers permanent disability of 85%, inclusive of his 11% right lower extremity impairment, and has proven in the aftermath of his 2010 industrial accident that he is an odd-lot worker, totally and permanently disabled under the *Lethrud* test.

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

DATED this _12th_____ day of ___January_____, 2018.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the _12th__ day of __January_____, 2018, 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/_____