BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRADFORD WALKER, Claimant, v. ALBENI FALLS BUILDING SUPPLY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2008-006200** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Issued 2/28/18**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Coeur d'Alene, Idaho, on December 15, 2016. Starr Kelso of Coeur d'Alene represented Claimant. Kent Day of Boise represented Defendants Employer and Surety[1]. Thomas Callery of Lewiston represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). The parties submitted

[1] Mr. Day retired prior to this matter's submission. Matthew Vook of Boise assumed the defense thereafter.

oral and documentary evidence at hearing and prepared post-hearing briefs. Post-hearing depositions were taken. The matter came under advisement on October 30, 2017.

ISSUES

The issues agreed upon at hearing by the parties were:

1. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical Care;
    b. Temporary partial and/or temporary total disability (TPD/TTD);
    c. Permanent Partial Disability (PPD) in excess of impairment, up to and including Total Permanent Disability (TPD) pursuant to the 100 percent method or odd-lot doctrine;
    d. Attorney Fees;

2. Whether ISIF is liable under Idaho Code § 72-332;

3. Apportionment under the *Carey* formula;

4. In the event of PPD less than total, whether apportionment under Idaho Code § 72-406 is appropriate; and

5. Whether the Commission should retain jurisdiction beyond the statute of limitations.[2]

CONTENTIONS OF THE PARTIES

Claimant asserts that he is not at MMI from his 2008 industrial accident. Thus he is entitled to a host of additional medical care in the form of pain management, including a spinal cord stimulator and medication, psychological counseling, increased diabetic medication and treatment for his pre-existing but accident-aggravated diabetes, and ongoing TTD benefits retroactive to April 5, 2011. In the alternative, if Claimant is at MMI,

[2] None of the parties listed issue number 4 in their briefing, perhaps because it was added by oral request at hearing. No party presented any argument in favor of or against the application of IC § 72-406 in briefing. While Employer/Surety listed issue 5, no party put forth any argument in favor of or opposing retention of jurisdiction. Because no arguments were presented on these two issues, they are deemed waived, and will not be analyzed herein.

he is entitled to the same benefits listed above (other than TTD), as "palliative" treatment. He is also entitled to TPD benefits retroactive to April 5, 2011 if he is found to be at MMI. Claimant is entitled to attorney fees.

Employer and Surety assert that Claimant is at MMI. A spinal cord stimulator is contraindicated. Claimant is not totally and permanently disabled. If the Commission determines that Claimant is totally and permanently disabled, ISIF is liable for a share of Claimant's permanent disability payments under the *Carey* formula.

Defendant ISIF argues that although Claimant had many physical conditions which could constitute pre-existing impairments, several of those conditions were never rated. More importantly, there is scant evidence indicating any such pre-existing condition was a hindrance or obstacle to employment. Claimant did not suffer from pre-existing impairments which combined with his 2008 industrial accident to cause total permanent disability. Claimant's disability is solely the product of his CRPS, which was brought on by his industrial accident and upper extremity injuries. ISIF is not liable under Idaho Code § 72-332.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony taken at hearing;
2. Claimant's exhibits (CE) A through PP, admitted at hearing[3] ;
3. Employer/Surety's exhibits (DE) B, E, F, and H, admitted at hearing;
4. ISIF's (IE) exhibits 1through 4, admitted at hearing;

[3] Claimant listed the Industrial Commission's legal file as proposed exhibit QQ. The file was not admitted as an exhibit, although it was acknowledged that if some document within the Commission file was referenced by a party in briefing, such document could be considered and the Commission would take judicial notice of the same. Claimant referenced various filings in his briefing, none of which are in dispute.

5. The post-hearing deposition transcripts of J. Soren Ispirescu, M.D., and Hilding Ohrstrom, Jr., both taken on April 19, 2017;

6. The post-hearing deposition transcript of Douglas Crum, taken on June 8, 2017.

All objections preserved through the depositions are overruled.

FINDINGS OF FACT

1. Claimant suffered an industrial accident on February 9, 2008, when he slipped and fell on Employer's premises while shoveling snow as part of his employment duties. Claimant struck his left hand on the ground and his right elbow on lumber during the incident. Claimant was 55 years old at the time of his accident.

INDUSTRIAL MEDICAL TREATMENT OVERVIEW

2. Since his 2008 accident Claimant has had extensive medical treatment, and the records are quite voluminous. It serves no purpose to detail herein every physician visit. Records considered in reaching legal conclusions are discussed.[4]

3. After his accident Claimant was first seen by a physician at Family Health Center in Newport, WA, who diagnosed left wrist and right elbow sprains. Claimant was taken off work and prescribed physical therapy. When Claimant was released for light duty work, Employer could not accommodate him long term.

4. Claimant was seen on May 5, 2008 by Michael DiBenedetto, M.D., a north Idaho orthopedist. Dr. DiBenedetto's notes document consistent hypersensitivity in Claimant's upper extremities. The doctor felt Claimant's pain responses were "bizarre,"

[4] The Commission is not required to make a specific finding with regard to every fact presented to it; a finding is necessary only for those facts which support the award and which enable meaningful appellate review. *See, e.g., Davaz v. Priest River Glass Co.*, 125 Idaho 333, 338, 870 P.2d 1292, 1297 (1994).

and "nerve injury versus psychiatric originated pain needs to be considered." CE M, p. 624. Of interest, Dr. DiBenedetto noted skin color, texture, and temperature changes between Claimant's two hands, but still did not feel Claimant's symptoms were "consistent enough" for a diagnosis of complex regional pain syndrome (CRPS). *Id.* Dr. DiBenedetto's first visit impression was lateral epicondylitis, right elbow, and left wrist pain with no true diagnosis. He ordered MRIs (wrist and elbow), and EMG for Claimant's left wrist.

5. Claimant's EMG study did not show evidence of left radial or median neuropathy, but did reveal a polyneuropathy consistent with Claimant's longstanding (since age 10) Type I diabetes. The wrist MRI showed multiple bone cysts "suggestive of sequelae of previous injury" (although the record is not clear what previous injury, if any, Dr. DiBenedetto was referencing), and some slight fluid in the extensor pollicus brevis and abductor pollicus longus tendon sheath compatible with tenosynovitis (DeQuervain's syndrome). CE M, p. 626; CE W, p. 938. Claimant's right elbow MRI showed a partial tear of the extensor origin with slight retraction, no edema seen.

6. Dr. DiBenedetto strongly felt there was nothing surgical which could be done for Claimant, and that his prolonged symptomatology was a result of Claimant's chronic diabetes and pre-existing pain issue, more than a specific industrial injury. On May 30, 2008, Dr. DiBenedetto opined that Claimant had reached MMI relative to his right elbow and left wrist pain. He recommended an injection of Claimant's left first dorsal compartment, but Claimant refused. Dr. DiBenedetto released Claimant to "limited duty job with activities that do not cause pain" but there were no specific restrictions identified based upon objective findings. *Id.*

7. On that same date Dr. DiBenedetto responded to the Industrial Commission that Claimant could return to a modified/light duty job that Employer had available, as per

an attached job site evaluation. Claimant testified at hearing that the light duty job in question lasted less than one day before Employer sent him home.

8. Claimant disagreed with Dr. DiBenedetto's return-to-work opinion, so Claimant sought out Dr. Wayne Venters, M.D., of Rockwood Orthopedics and Sports Medicine in Spokane on June 5, 2008. Claimant had treated with Dr. Venters since 2004 for multiple trigger finger releases, knee and right shoulder surgeries.[5]

9. On this initial visit Dr. Venters found Claimant's left first dorsal compartment to be very swollen, elongated, and exquisitely tender into the forearm from the thumb base. Claimant's right elbow was not tender and Claimant had excellent range of motion in the joint. Dr. Venters diagnosed left-sided DeQuervain's tenosynovitis. Based upon Claimant's right elbow MRI results, Dr. Venters also diagnosed right elbow traumatic tendinitis. Claimant desired a left wrist extensor compartment release, which Dr. Venters felt would be related to Claimant's industrial accident. Dr. Venters sought authorization for the procedure, which was not granted at that time.

10. On September 25, 2008, Claimant attended a Surety-arranged IME with Brian Tallerico, DO. Claimant was hypersensitive in his upper extremities, but his skin had normal warmth, appearance, hair growth, and turgor bilaterally. Dr. Tallerico diagnosed pre-existing right shoulder issues, right elbow contusion and partial tear of the common extensor origin, and traumatic DeQuervain's tenosynovitis. Dr. Tallerico found Claimant's right elbow and the DeQuervain's were causally related to Claimant's industrial accident in question. He agreed that Claimant should have surgical release of his first dorsal compartment. He also

[5] Also in 2004 Claimant complained of right "tennis elbow" which by that time had been bothering him for the past two years.

felt Claimant should pursue injection therapy for his right elbow, followed by physical therapy, activity modification and a tennis elbow strap. Claimant had resisted such treatment to date. Dr. Tallerico felt Claimant could not return to his time-of-injury job at that time, but with proper treatment could progress in that direction. Claimant was not at MMI.

11. Left wrist surgery was finally authorized, and performed on February 3, 2009.[6] Dr. Venters, who did the surgery, found extensive damage, but was able to free the fully-locked tendons in question. Post surgery, Dr. Venters opined that Claimant would not ever be able to return to his time-of-injury job.

12. Notes from Dr. Venters dated March 25, 2009 indicate Claimant was unable to start occupational therapy post surgery without signing a personal guarantee for payment, which he refused to do. Claimant complained of lack of movement in his left thumb and intermittent pain and swelling of the dorsum. Claimant was again complaining of right tennis elbow (Dr. Venters' term) pain from the lateral forearm to the long fingertip. Dr. Venters felt Claimant was showing signs of possible chronic regional pain syndrome (left hand) based on Claimant's cool skin on the dorsum and extensor surface, but sweating on the palm side. None of these conditions were present on the right.

13. By his April 17 visit with Dr. Venters, Claimant had just started occupational therapy. Claimant's left hand was cool and pale compared to the right hand, with discomfort and paresthesia upon palpation. Claimant also complained of worsening right elbow area pain, which Dr. Venters felt could be attributed to overuse after Claimant's left wrist surgery. Occupational therapy had ordered a TENS unit for Claimant, and Dr. Venters concurred,

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[6] It was originally scheduled for January but had to be rescheduled to February due to inclement weather precluding Claimant from making the trip from his home.

hoping Claimant found it useful for either or both of his upper extremities. Dr. Venters felt Claimant would hopefully be able to return to light duty work in May.

14. At Claimant's July 15, 2009 examination, Dr. Venters determined Claimant was at MMI. He predicted Claimant's lateral epicondylitis (tennis elbow) would get worse as activity increased, since Claimant's left hand and forearm were still burning and painful due to what Dr. Venters labeled reflex sympathetic dystrophy or chronic regional pain syndrome of the left upper extremity. Dr. Venters suspected Claimant had early stage CRPS when he was under Dr. DiBenedetto's care. Dr. Venters felt Claimant's care and medication management should be transferred to Claimant's family physician, Angelita Krouse, M.D., at Newport Family Medicine.

15. Claimant was sent to another OMAC IME on August 14, 2009, conducted by Joseph Lynch, M.D., an orthopedic surgeon from Boise. Dr. Lynch related Claimant's right elbow contusion and common extensor tear, and left DeQuervain's tenosynovitis to the industrial accident. He also felt Claimant's disproportionate pain symptoms possibly represented a bilateral chronic regional pain syndrome, related to Claimant's work accident. Claimant's right shoulder condition was unrelated to the industrial accident. Dr. Lynch felt that none of Claimant's symptoms were related to his diabetes.

16. Dr. Lynch felt Claimant needed additional treatment, including referral to a pain management specialist for his pain syndrome. He opined that a sympathic block combined with occupational therapy, pharmacotherapy, and biofeedback could improve Claimant's "comfort and function" regarding his pain symptoms. Dr. Lynch had a "guarded" prognosis for Claimant's recovery. CE Q, p. 722. Finally, Dr. Lynch felt Claimant was not at MMI, and could not return to manual labor given his pain condition involving both upper extremities.

17. After considerable delay Claimant was finally seen by a pain specialist, Jamie Lewis, M.D., in Spokane on May 14, 2010 for pain management.[7] Dr. Lewis noted diffuse widespread upper extremity pain symptoms with Claimant displaying "flagrant" pain behavior whenever he was asked to perform range of motion activities. Dr. Lewis acknowledged previous CRPS proposals, and found subjective evidence such as allodynia with light touch, and poorly localized symptoms. However, the doctor found no objective evidence of CRPS, such as trophic or sudomotor changes to confirm the diagnosis.

18. Dr. Lewis concluded it was unlikely any specific targeted treatment would benefit Claimant given his diffuse pain pattern. Instead, he felt Claimant should enter a functional restoration program involving physical and occupational therapy, pain psychology, and biofeedback, with the goal of improving Claimant's activity tolerance with coping techniques and non-pharmacological pain management. As a prerequisite to the program Dr. Lewis suggested elbow and wrist MRIs to rule out musculoskeletal pathology for Claimant's symptoms.

19. Claimant's left wrist MRI showed abnormalities which Dr. Lewis had orthopedist Anthony Sestero, M.D., address. Dr. Sestero found no surgical findings, but felt Claimant might have a component of CRPS despite lack of physical exam findings. Dr. Sestero suggested a stellate ganglion block as a diagnostic tool for a CRPS diagnosis.

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[7] Surety first attempted to have Dr. Ludwig treat Claimant; he refused. Next, Surety sought out Dr. Magnuson, who also declined to treat Claimant. Claimant sought to have a Dr. Williams in Spokane treat his pain symptoms, but Surety refused to authorize that doctor. Apparently, Surety also unsuccessfully attempted to have Drs. Soto, Lamb, and Stanek treat Claimant. Finally, Dr. Lewis saw Claimant as discussed herein.

20. After reviewing Dr. Sestero's report, Dr. Lewis reaffirmed his opinion that Claimant should enroll in a functional restoration program with stellate ganglion blocks as adjuvant treatment. He felt Claimant would be at MMI upon completion of such program.

21. Surety then unilaterally decided that Claimant would attend a four week St. Lukes-Elks Rehabilitation program in Boise beginning on September 20, 2010, and so informed Claimant. Claimant declined to attend the program, citing the availability of comparable programs in the Spokane-Coeur d'Alene area.[8] Claimant and Surety locked horns on this issue; Surety claiming there was no place in the Spokane area where stellate ganglion block injections could be coordinated with the functional restoration program, and Claimant contesting such claim.

22. Ultimately, Claimant did not attend any rehabilitation program, with or without injections. Instead, on December 31, 2010, Surety sent Claimant to another IME, this one with Kevin Krafft, M.D., a Boise physiatrist. Dr. Krafft performed an examination, reviewed medical records, and took a history from Claimant. He then answered specific questions posed by Surety.

23. Dr. Krafft felt Claimant had "likely" achieved MMI, but recommended further evaluation and treatment, including a neuropsychology evaluation, a bone scan, and stellate ganglion block, before opining definitively on MMI, impairment, and work capacity. Dr. Krafft felt Claimant had "significant psychological barriers to recovery," including depression stemming from Surety's treatment of his case. CE T, p. 747. Dr. Krafft felt that without a functional restoration program Claimant's work ability was "indeterminate."

[8] At hearing, Claimant testified he could not leave his home for four weeks, because he lives "off the grid" and heats the home entirely by wood stove. Furthermore, his wife is an airline flight attendant and is often gone for months at a time. As such he had to be home during the cold weather seasons.

The doctor believed that Claimant was probably not capable of completing a valid functional capacity evaluation, nor would he be a good candidate for a functional restoration program with his then-current psychological barriers.

24. If Claimant underwent none of the recommended course of action, Dr. Krafft opined that Claimant's "multifactorial" impairments should be apportioned as 7% whole person (WP) impairment from his industrial injury, and 8% WP impairment pre-existing and related to significant degenerative changes noted on his radiographic studies. Specifically, Dr. Krafft diagnosed pre-existing multiple finger tenosynovitis, including Claimant's left thumb. Claimant's left thumb condition was aggravated by the industrial accident. Claimant's right tennis elbow also pre-existed the industrial accident but was aggravated by it. The CRPS diagnosis was questionable due to lack of objective findings. Claimant's DeQuervain's was probably not traumatically caused by the accident, but rather likely pre-existed it. Claimant's depression was more a function of dealing with the Surety and the process, and not directly from the accident in and of itself. (Claimant had suggested as much to Dr. Krafft.) Dr. Krafft felt Claimant should be seen by a psychologist skilled with chronic pain and industrial injuries to see if Claimant would be a good candidate for a functional restoration program.

25. Interestingly, on the same date as the above-discussed report, (but in a different document), Dr. Krafft, in answering Surety's question regarding impairment without the benefit of further restoration, opined that Claimant, as he presented at the IME, would have 2% UE impairment for left, and 2% UE impairment for right, for a combined 4% UE PPI, which converted to a 2% WP PPI. The doctor then apportioned 50% of Claimant's PPI rating to his industrial accident, and 50% to pre-existing conditions, for a net 1% WP PPI attributable to

Claimant's February 9, 2008 accident. There was no explanation as to the inconsistent ratings given by the doctor in two documents produced contemporaneously.

26. In February 2011 Surety had Claimant seen by Allen Bostwick, Ph.D, a Spokane neuropsychologist, for a neuropsychological evaluation. Dr. Bostwick took a history, reviewed voluminous medical records, and administered various neuropsychological tests to Claimant. Testing results were all deemed to be valid. Testing took approximately eight hours.

27. At the time of examination Claimant was complaining of constant pain in his left wrist up to his left elbow, and right elbow into right hand. Claimant reported multiple trigger fingers on his right hand, and inability to sleep regularly. He was also angry at Surety.

28. Physically, Claimant had trouble using hand tools, holding items with either hand, and dressing himself if buttons or zippers were involved. Psychologically, Claimant was sad, depressed, anxious, but not suicidal, and entertained homicidal thoughts but without considering plans or intent to carry through with them. Claimant was having trouble with anger management since the litigation began. Claimant also claimed to have lost interest in things.

29. Following a detailed analysis of testing results, Dr. Bostwick summarized Claimant's neuropsychological screening evaluation as being entirely within normal limits except for severely impaired grip strength bilaterally. Claimant presented with no neurocognitive deficits or limitations which would impede his ability to maintain employment.

30. Claimant's psychological testing revealed a relatively poor prognosis for recovering from his chronic pain syndrome. Relevant psychological factors included "hypochondriasis, conversion disorder processes, self-defeating personality traits, and a strong disability conviction with secondary gain motivation." DE E, p. 68. Dr. Bostwick felt Claimant had no motivation to start a new career at his age (58), and presented with "a mixed personality

disorder with narcissistic, histrionic, and passive-aggressive traits." *Id.* Dr. Bostwick felt Claimant was not at that time clinically depressed or clinically anxious. The doctor felt Claimant's anger and irritability was within expectations, given Claimant's chronic pain coupled with his personality disorder. Dr. Bostwick opined that it was highly unlikely Claimant would agree to enter a formal intensive multidisciplinary pain treatment program, or if he did his motivation would be very limited. Dr. Bostwick felt Claimant's chance for success in reducing his chronic pain condition "would appear to be very low." *Id.*

31. In response to a question posed by Surety, Dr. Bostwick opined that Claimant's condition was fixed and stable, and that "on a more-probable-than-not basis psychological therapy would not be beneficial in either a curative or palliative manner, and thus it is not recommended." DE E, p. 69.

32. In March 2011 Surety sent a copy of Dr. Bostwick's report to Dr. Lewis with a check-the-box question regarding Claimant's medical stability. Dr. Lewis agreed that Claimant was medically stable from his February 2008 industrial accident.

33. Later that same month, Dr. Krafft also agreed that Claimant was medically stable.[9]

[9] Dr. Krafft hand wrote a condition on his agreement which stated "in the absence of his recommended bone scan, understanding [Claimant] has not elected to pursue it." Claimant argues this is a false statement, as Claimant did not "elect" not to pursue the bone scan. The record shows that when Surety authorized a bone scan and stellate ganglion blocks based on Dr. Krafft's "suggestions" Claimant balked. His attorney wrote Surety, noting that the attorney was "not aware of any statute that requires [Claimant] to undergo treatment that is "suggested" but not "recommended" by any physician other than his … treating physician. Since Dr. Krafft "suggested" certain treatment [Claimant] will make an appointment with his treating physician, Dr. Lewis, to discuss the "suggestions" made by Dr. Krafft." CE MM, pp. 1800, 1801. Only after meeting with Dr. Lewis would Claimant decide on whether or not to submit to a bone scan and/or blocks. CE MM, p. 1804. Surety did not authorize an appointment with Dr. Lewis, and therefore the bone scan and ganglion blocks did not take place.

34. On April 5, 2011, Surety stopped time loss benefits since Claimant was deemed medically stable by Dr. Bostwick, and affirmed by Drs. Lewis and Krafft. Surety paid Claimant benefits based upon a 1% PPI rating given by Dr. Krafft.

35. In or around September 2011 Claimant attempted to obtain authorization for rehabilitation therapy with stellate ganglion blocks in the Spokane area. Surety denied his demand, noting that Claimant was deemed medically stable as of April 5.

36. In late 2012 Claimant's family physician noted that Claimant was still having right elbow pain and should see Dr. Venters, who had treated Claimant as recently as November 2011 for diabetes-related trigger finger releases. Surety would not pre-authorize the examination, but suggested if Claimant saw Dr. Venters, Surety might reconsider its decision after receiving his report. It does not appear Claimant treated at that time with Dr. Venters.

37. Surety sent Claimant to Dr. Krafft for another IME on August 8, 2014 (apparently in preparation for a hearing which was then set for November 2014). Claimant did not complete the questionnaire and pain inventories, but had no difficulties during the examination other than hypersensitivity to light touch in his bilateral upper extremities. Dr. Krafft reviewed various medical records and diagnostic films, and Claimant's two deposition transcripts. He also conducted an examination focused on Claimant's bilateral upper extremities.

38. Dr. Krafft summarized Claimant's history and then-current condition:

> [Claimant] is a 62-year-old who injured his left wrist and right elbow and is now status post left DeQuervain's first compartmental release. He had partial tearing of the extensor tendon of the right elbow on MRI, but was not recommended for surgery. He has been recommended for stellate ganglion block but continues to state he would have a hard time having "someone stick a needle in his neck." His neuropsychology evaluation indicated that he would not be a good candidate for work hardening, a functional restoration program, or other physical therapeutic treatment. He has not undergone a bone scan as previously recommended. He continues to complain that his diabetes is out of

> control as a result of his pain, and he notes that his pain is not well controlled with his current oxycodone. His pre-existing status is notable for use of oxycodone prior to his injury for upper extremity symptoms. He used less oxycodone than currently. He would like to be fixed. No further intervention has been recommended from a surgical standpoint or from a neuropsychological perspective, noting that he would not likely respond well. He was found to have significant illness conviction. Dr. Cathcart indicates on April 9, 2014, that his diabetes has not worsened his upper extremity pain syndrome, but the pain syndrome does worsen his diabetes secondary to stress. The use of pain medications interferes with his use of the continuous subcutaneous glucose sensor, noting that the acetaminophen makes it unreliable. He needs the sensor due to his hypoglycemic episodes.

CE T, p. 765.

39. When asked by Surety if both the industrial accident and Claimant's diabetes contributed to Claimant's disability, Dr. Krafft opined that on a more-probable-than-not basis, Claimant's diabetes did not contribute to his upper extremity disability. Dr. Krafft did note that Claimant had UE symptoms prior to his industrial accident, so that Claimant's disability was a combination of the industrial accident, pre-existing pain syndrome and surgery, and psychological factors, all contributing to Claimant's current disability.

40. Dr. Krafft also felt that the work injury and Claimant's psychological status aggravated his diabetes by causing pain and stress response. Dr. Krafft recommended Claimant consider further pain management, including a long-acting pain medication in addition to oxycodone. He believed a pain management consultation was a reasonable option, and if successful could dampen the effects of Claimant's pain on his diabetes. Dr. Krafft calculated Claimant's whole person PPI at 11% for his pre-existing diabetes.

41. When Claimant received a copy of Dr. Krafft's IME report, he demanded a consultation with J. Sorin Ispirescu, M.D., a pain specialist with Idaho Pain Clinic in Sandpoint. The examination was scheduled for December 1, 2014. The November hearing

was vacated.

42. On October 28, 2014, Claimant obtained a functional capacity evaluation (FCE) through Virginia Taft. She found his bilateral grip strength to be less than 10 pounds with severe pain. He also had limited ROM, shooting pain and nausea with UE movements. Several tests were not attempted or completed. Claimant had a ten pound lift and carry limit. Every detail of the FCE involving Claimant's UE was negatively impacted. Ms. Taft felt Claimant fully cooperated, although there was no validity testing incorporated into the procedure, allowing for significant subjectivity in the results. Ms. Taft conducted re-evaluation testing in September 2016 which showed substantially similar results.

43. Claimant also sought a "second opinion" from Hilding Ohrstrom, a licensed clinical professional counselor (LCPC) from Priest River, prior to seeing Dr. Ispirescu. Claimant disagreed with Dr. Bostwick's previous conclusion that Claimant had psychological barriers which would preclude him from successfully completing a work hardening program. Claimant felt the evaluation with Dr. Bostwick was not accurate. He felt Dr. Bostwick's evaluation negatively affected his medical care, and wanted a "fair" evaluation.

44. After testing and interviewing Claimant and reviewing various medical records, Mr. Ohrstrom opined that Claimant's personality, functioning, and mood were negatively affected by chronic pain, stress, and sleep disturbance due to pain. Mr. Ohrstrom felt there was no reason why Claimant could not have "made gains" and "had successes" in a work hardening or retraining program. While Mr. Ohrstrom conceded that Claimant presented with psychological factors, including pre-existing passive-aggressive traits, he reasoned that many individuals with chronic pain often present with psychological factors due to the impact

of pain on their lives. Also, people on opioids often show impaired personality functioning. Mr. Ohrstrom posited that a combination of effective pain management, occupational therapy, and culturally-informed psychotherapy services, in conjunction with work hardening and improved communication with Surety, "would have resolved much of [Claimant's] emotional difficulties." CE Z, p. 1299.

45. Mr. Ohrstrom diagnosed, using DSM V criteria, depressive disorder due to chronic pain, not pre-existing; somatic symptom disorder with predominant pain, persistent, moderate, not pre-existing; insomnia disorder with non-sleep disorder co-morbidity, 25% pre-existing; personality change due to chronic pain, mixed, not pre-existing; and passive-aggressive traits, pre-existing.

46. Mr. Ohrstrom recommended pain management treatment with psychotherapy and medical case management, including a medication review to rule out any negative drug interactions between the numerous medications Claimant was then taking. Claimant could also benefit from a sleep disorder specialist consultation, enrollment in a work hardening program near his home (as opposed to in Boise), and a psychiatric medication evaluation. Mr. Ohrstrom also felt it would be helpful if Claimant could reduce conflict with Surety through better communication. Finally, if Claimant would be willing, stellate ganglion blocks could be considered. However, Claimant expressed reservations about the procedure, given the elapsed time since his injury. His preference when asked by Mr. Ohrstrom was to not have the procedure without learning much more about how it would affect him after such a long wait.

47. Dr. Ispirescu examined Claimant on three occasions between December 1, 2014 and March 30, 2015. On the first visit, Dr. Ispirescu diagnosed bilateral UE reflex sympathetic

dystrophy, which he used interchangeably with the term CRPS for complex (or chronic) regional pain syndrome, based on hypersensitivity to touch, allodynia, temperature and skin color changes between right and left side, decreased ROM and diminished UE strength. Dr. Ispirescu noted the likelihood of successful treatment for CRPS seven years post accident was significantly decreased. The doctor felt a trial stellate ganglion block injection was reasonable, and if that afforded even temporary pain relief, Dr. Ispirescu could begin a series of such injections. If the trial injection was unsuccessful, then a spinal cord stimulator (SCS) might be appropriate. Claimant would also potentially benefit from psychological counseling to help him cope with his chronic pain and anger issues. Claimant requested time to ponder these suggestions.

48. On Claimant's next visit with Dr. Ispirescu, Claimant expressed reservations with stellate ganglion injections. His research led him to believe there was a low percentage chance for success and Claimant was concerned over the risk of paralysis with the procedure. Claimant also showed "high anxiety" toward a spinal cord stimulator, again fearing possible paralysis. He also questioned whether Surety would pay for either procedure. Claimant left without deciding on how to proceed.

49. Claimant next met with Dr. Ispirescu on March 30, 2015. Dr. Ispirescu told Claimant that the chance of stellate ganglion blocks improving his symptoms this far after the injury was *at most* 20%. Dr. Ispirescu felt that Claimant's best chance for improvement was an SCS. The office notes indicate that Claimant was "very reluctant to try any invasive procedure that does not have a high likelihood of success." CE AA, p. 1437.

50. Another option discussed that visit was for Claimant to try cognitive behavioral therapy to learn to cope with his chronic pain. The office notes of that date indicate Claimant

agreed to the above-stated plan, but it is not clear if that included Claimant's use of the invasive SCS which he had previously been reluctant to try, or the cognitive therapy, or both. In any event, Surety never authorized either modality, even though Claimant demanded both.

51. After the demand for an SCS was made, Surety sought to have Claimant examined again by Dr. Bostwick. Claimant's counsel responded by noting that if Claimant wasnot allowed to have a witness with him at this examination, Claimant would not attend the IME. Ultimately Dr. Bostwick declined to see Claimant, as did a second psychologist selected by Surety. Finally, Surety was able to arrange for Claimant (with a witness in tow) to be seen by psychologist Duane Green, Ph.D., in late July 2015.

52. When Claimant and his witness arrived at the appointment with Dr. Green, Claimant refused to sign release forms without first modifying them to limit the scope of the release to information pertaining to the industrial accident. Dr. Green refused to proceed with examination under those restrictions. After giving Claimant an explanation as to why such restrictions were unworkable, Claimant proposed that he would decide what information could be released after the examination. Ultimately, Dr. Green terminated the examination.[10]

53. Surety next sought to have Claimant examined by Ronald Klein, Ph.D., on September 10, 2015, but Claimant refused and filed a Motion for Protective Order. Surety cancelled the IME.

54. Perhaps in light of the upcoming December 15, 2016 hearing, Surety posed

[10] While Claimant tries to argue the aborted examination was Dr. Green's fault, the conversation was recorded, produced as CE FF, and reviewed several times by this Referee. The recording speaks for itself, and implicates Claimant's behavior as the reason the examination did not take place. Even Claimant's own witness, Mr. Ohrstrom, stated Dr. Green would not have been allowed to submit a standard psychological evaluation to Surety with the restrictions Claimant sought to impose on the release of information.

several questions to Dr. Krafft in a letter dated July 22, 2016. Claimant had by that time undergone the second FCE with Ms. Taft, and Dr. Krafft commented on the results by noting there was a question regarding the lack of validity criteria used in the FCE. However, Dr. Krafft noted Claimant would not be able to perform his time-of-injury duties in his current condition. Dr. Krafft declined to assign specific work restrictions on the information provided.

55. Next, Dr. Krafft was asked to provide an impairment rating for Claimant's pre-existing pain syndrome. Dr. Krafft acknowledged he lacked the records to give a comprehensive rating, but he rated Claimant's pre-existing trigger fingers at 6% left UE impairment. He had no information to rate Claimant's right hand impairment.

56. Lastly, Dr. Krafft was asked if he was of the opinion that the industrial accident in question worsened or aggravated Claimant's diabetes. Dr. Krafft was unsure if the accident played any role in Claimant's current diabetic condition. He instead reiterated that Claimant undergo a neuropsychology evaluation, and perhaps stellate ganglion blocks to sort out this issue. Dr. Krafft felt that if Claimant had CRPS, then the industrial injuries are likely contributing to his worsening diabetes. However, the doctor noted Claimant's worsening diabetes was due to multiple factors, including pre-existing psychological elements.

57. On October 11, 2016, Dr. Krafft answered more questions from Surety. He opined that Claimant may benefit from a work hardening program, although he should begin on a trial basis; the program should include psychological, medical management, and therapy treatments, together with vocational rehab input. Dr. Krafft felt that before deciding on whether an SCS would be appropriate Claimant should undergo a full neuropsychological battery of testing. A month later, Dr. Krafft again indicated that "a significant portion" of Claimant's current presentation was related to pre-existing factors, but those needed to be "sorted out

in conjunction with a neuropsychologist skilled in chronic pain syndromes, their etiology and treatment from a psychological perspective." CE T, p. 770-A.

58. On November 23, 2016, Claimant sought an impairment rating from John McNulty, M.D., a north Idaho orthopedic surgeon. Dr. McNulty found several indicators for CRPS, including bilateral UE hypersensitivity, coolness in both hands, fingernail changes, non-elastic skin, soft tissue atrophy and joint stiffness. Dr. McNulty diagnosed bilateral UE CRPS, type I, and right elbow epicondylitis. He found Claimant was at MMI.

59. Dr. McNulty rated Claimant at 8% WP PPI for the left UE, and 8% WP PPI for the right UE. He deferred any comment on the appropriateness of a spinal cord stimulator to Dr. Ispirescu. The record is silent on whether Surety paid PPI benefits based on Dr. McNulty's rating.

DISCUSSION AND FURTHER FINDINGS

MEDICAL CARE

60. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. An employer is only obligated to provide medical treatment necessitated by the industrial accident, and is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). Palliative, pain-killing treatments can be compensable even though they will not necessarily cure

the employee's condition. *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 924, 712 P.2d 621, 625 (1985).

61. The first issue for resolution is Claimant's entitlement to continuing medical care, including ongoing pain medications, a proposed spinal cord stimulator and cognitive therapy, either as a "curative" or a "palliative" treatment. Claimant also claims Defendants should pay for the "increased cost of his diabetic medication and treatment due to the impact of Claimant's industrially caused pain on his diabetes." Reply brief, p. 7.

Spinal Cord Stimulator and Cognitive Therapy

62. Claimant argues that either he is not at MMI and needs a spinal cord stimulator coupled with cognitive therapy as a potentially curative treatment, or if he is at MMI, he needs a spinal cord stimulator coupled with cognitive therapy as palliative treatment to lessen his pain and improve his ability to function on a daily basis.

63. Claimant is at MMI. Several physicians have opined thusly. Most recently, Dr. McNulty found Claimant to be at MMI. Dr. Ispirescu testified at his deposition that the longer a patient has CRPS the less likely the expectations for a complete recovery, and aggressive treatment as soon as the CRPS is diagnosed is important. In his medical records from late 2014, Dr. Ispirescu noted that Claimant was seven years out from his injury and therefore "the likelihood of successful treatment decreases significantly". CE AA, p. 1417.

64. When considering the totality of the record, the opinion of Dr. McNulty is afforded the most weight. Claimant is at MMI and further treatment would be designed to lessen Claimant's chronic pain and improve his ability to perform his routine functions, including sleep and activities of daily living. In that regard, a spinal cord stimulator would be considered palliative treatment.

65. All physicians of record commenting on utilizing an SCS in this case agree that, as a prerequisite to the implantation of the device, Claimant must first undergo a psychological (or neuropsychological, depending on the physician opining) evaluation to determine if Claimant is a good candidate for the device.

66. Dr. Bostwick and Mr. Ohrstrom have both examined Claimant, although neither with the advance directive to determine if Claimant is a good candidate for an SCS. The record is silent on how, if at all, either examination would have differed if there had been a specific request to make such determination. However, both examiners have opined on the subject when asked.

67. Dr. Bostwick opined, based upon the results of his testing and examination of Claimant in 2011, that Claimant would not be a good candidate for an SCS. He based his opinion on the fact that Claimant's underlying personality disorder was inherent in his personality, developed by his early adulthood, and was "not mercurial, intermittent, situational, or controlled by any chronic pain condition." DE E, p. 75. Claimant's personality disorder, according to Dr. Bostwick, includes critical, belligerent, or passive-aggressive tendencies, emotional immaturity, egocentric traits, a tendency to be demanding of others but resentful of demands placed on Claimant, either real or perceived. DE E, p. 66. Dr. Bostwick reached these conclusions after interviewing Claimant, reviewing extensive medical records, and administering the following tests – Wechsler Adult Intelligence Scale III; Wide Range Achievement Test-3; Chedru and Geschwind Writing Test, Controlled Oral Word Association Test; Mental Control Tasks, Rey Auditory Verbal Learning Test, Rey Complex Figure Test, Portland and Babcock Story Recall Tests, Grip Strength Test, Trails A and B, Rey 15-Item

Memorization Test, Lateral Dominance Examination, Neuropsychological Symptom Checklist, and the MMPI-2.[11]

68. Counselor Ohrstrom, when discussing Claimant's ability to participate in medical treatment in 2016, inferred that Claimant would be a good candidate for an SCS, even though Claimant showed subjective signs of depression, which is often considered a contraindication for the device. Mr. Ohrstrom had previously interviewed Claimant, reviewed selected medical records supplied by Claimant, and administered the following tests – Zung Depression Scale, DSM 5 Self Rated Level 1 Cross-Cutting Symptom Measure-Adult, PROMIS Emotional Distress-Depression-Short Form, PROMIS Emotional Distress-Anger-Short Form, PROMIS Emotional Distress-Anxiety-Short Form; PROMIS Sleep Disturbance-Short Form, and LEVEL 2 Somatic Symptom-Adult.

69. In response to a letter from Claimant's attorney in July 2016, Mr. Ohrstrom, when asked if the effects of Claimant's "industrial injuries on his psychological condition and personality function affect his ability to participate in medical treatment," responded;

> This is a complicated question that requires a complicated answer. I remind you that I am not a physician and my responses are limited by my scope of practice. [Claimant] has had long term physician/patient relationships with primary care, endocrinology, and cardiac physicians. As such, he appears to have the ability to participate in medical treatment. With that said, I noticed that a stimulation implant has been suggested. According to *Sparks, Et al (2010)*, depression is a predictor of negative outcomes, but that two studies showed that depression was reduced after some time with stimulation. It is my opinion that if [Claimant] is provided with an appropriate pain management multidisciplinary team treatment approach that includes attention to the psychological, he will be much more successful in medical treatment.

[11] It is doubtful that every test listed was directly used to reach the specific traits and tendencies listed, but the record is silent on the specific uses for each test, and the degree, if any, to which information gathered therefrom was utilized in reaching the "psychological barriers" listed herein.

CE Z, p. 1318, 1319.

70. Mr. Ohrstrom acknowledges that depression is often "a predictor of negative consequences." In fact, in materials he supplied, six studies found a correlation between depression and a lack of success with SCS, but two studies showed that depending on the type of depression (pre-morbid v. post-morbid), the successful use of an SCS can over time reduce depression as pain lessens. Interestingly, in the quote above, Mr. Ohrstrom does not directly opine that Claimant will be, on a more-probable-than-not basis, a good candidate for an SCS, or successful in his use of such device. Instead, Mr. Ohrstrom simply notes that Claimant will be much more successful in *medical treatment* if he has a multidisciplinary team approach to such treatment. While no magical words are necessary to convey a medical opinion to a reasonable medical probability, the statement must plainly and unequivocally conveys a doctor's conviction on the subject. *Accord, e.g. Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997). Here, it is not clear that Mr. Ohrstrom believes Claimant is a suitable candidate for SCS implantation. However, even if his statement is read to unequivocally enforce a belief that Claimant is a suitable candidate, such opinion would not carry the day when the totality of the evidence is examined, as discussed below.

71. Mr. Ohrstrom's tests administered to Claimant and listed above, are self-rating questionnaires, where Claimant rates his experience in various categories such as anger, anxiety, sleep disturbance, etc., over the past seven days and scores are formulated based upon his self-reported perception. While Mr. Ohrstom defends his testing in a response to Claimant's counsel, the fact remains that tests where one rates their personal experiences, while useful, are subject to manipulation, and reflect the past week's experiences. The record is silent on validity testing

to rule out manipulation. If such testing was done, it was not apparent from Mr. Ohrstrom's reports. *See* CE Z, pp. 1291 forward.

72. Dr. Bostwick's testing was comprehensive and when his reporting, including follow up reports are reviewed in light of the entire record, including all the medical records produced, Dr. Bostwick's opinion that Claimant's personality barriers, present by early adulthood, make him a poor candidate for SCS implantation and cognitive therapy is given more weight.[12]

73. Claimant has failed to prove he is entitled to a spinal cord stimulator and cognitive therapy.

Pain Medications

74. At the time of his industrial accident, and for years before, Claimant took pain medication including Oxycodone and Norco for chronic pain which pre-existed his work accident. Claimant has had through the years a number of painful medical issues including knee injuries (both before and after the subject accident), numerous trigger fingers with multiple surgeries, (both before and after the subject accident), shoulder complaints with right shoulder surgery, open heart surgery with follow up surgery to sternum, neck pain, and right elbow complaints (both before and after the subject accident). The preponderance of the record shows Claimant had consistently taken Oxycodone and/or Norco since well before, and after the industrial accident in question for his chronic pain syndrome unrelated to his work injuries in question. No arguments based on medical evidence were developed to establish that Claimant

[12] While it is not clear from Claimant's briefing if he is seeking psychological therapy regardless of and independent from an SCS, if such is the case, he failed to develop any arguments supporting such request. Idaho Code § 72-451 sets out requirements to obtain benefits for psychological injuries. Claimant did not address these requirements in any fashion in his briefing. Furthermore, the expert opinion of Dr. Bostwick that Claimant's psychological condition was not predominately caused by the work accident in question, as compared to all other causes combined carries the most weight of any opinion on the subject.

would have not been taking these pain medications after February 9, 2008 but for the industrial injuries he suffered on that day.

75. After the industrial accident in question, additional pain medications were prescribed – most notably morphine. While Claimant does not itemize or present argument for any particular pain medication for which Surety is responsible, the record is clear the morphine was prescribed for complaints directly related to injuries suffered by Claimant as the result of his February 9, 2008 industrial accident.

76. Claimant has failed to prove he is entitled to reimbursement of past prescriptions or future prescription benefits for Oxycodone (by that name or other trade names, such as Roxicodone) and/or Norco (or any trade or generic name for substantially the same drug).

77. Claimant has proven he is entitled to reimbursement for morphine pain medication prescribed since February 9, 2008, and continuing into the future as long as it is prescribed for his industrial upper extremities injures.

Diabetes Medications and Treatment

78. Claimant suggested in a footnote in his Opening Brief at page 28, and again in the "conclusion" paragraph of his Reply Brief that he is entitled to the "increased cost of the medication necessary to treat his preexisting diabetes." However, this argument was never developed in the briefing. Claimant has had diabetes Type I since he was ten years old. The record in this case shows it was often poorly controlled before the accident in question. Claimant was fitted with an insulin pump prior to 2008. His insulin numbers fluctuated significantly at times for years.

79. While multiple physicians have opined that the stress Claimant is experiencing as a function of this open claim and his dealings with Surety herein have aggravated his diabetes,

the record lacks sufficient medical evidence to establish in concrete terms the level of treatment and medication Claimant would be taking but for the accident in question, and his resultant stress from dealing with this claim. No argument was developed to establish the fact that but for the accident, Claimant would be taking X% less medications, or receiving X% less treatment today or into the future. This evidence is especially critical when dealing with a progressive condition such as diabetic neuropathy.[13] Claimant carries the burden of proof on this issue, and failed to establish his claim to the requisite level of proof based upon a preponderance of the evidence.

80. Claimant has failed to prove he is entitled to medical benefits for an alleged increase in his diabetes treatment and/or costs of medications as a result of the industrial accident of February 9, 2008.

TEMPORARY DISABILITY

81. The next issue for resolution is Claimant's entitlement to additional TTD benefits. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery" which ends when the worker is medically stable. *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005). The burden is on a claimant to present medical evidence of the extent and duration

[13] As noted by Dr. Ispirescu at page 31 of his deposition.

of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980).

82. Surety terminated Claimant's TTD benefits on April 4, 2011. Claimant argues that he is still in a period of recovery, subject to treatment with an SCS and corresponding cognitive counseling. As such he is entitled to TTD benefits from April 4, 2011 until he reaches medical stability. Claimant raised no argument that he is at MMI, but reached medical stability at a date later than April 4, 2011.

83. Claimant understands that his claim for TTD is subject to the ruling on whether Claimant is at MMI. As he noted in briefing, "[t]he salient question in this matter is whether the disability caused by Claimant's industrial injuries is 'temporary' or 'permanent.'" Because Claimant is medically stable, his disability at issue is permanent, not temporary.

84. Claimant has failed to prove he is entitled to additional TTD benefits over those previously paid.

PERMANENT DISABILITY

85. The next issue for resolution involves Claimant's permanent disability. Claimant may have suffered disability in excess of his impairment, but less than total, or total 100% disability, or total disability pursuant to the "odd-lot" doctrine.

86. 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, which states:

> [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.

In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

87. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

88. There is no question that Claimant cannot return to his time-of-injury job, or its equivalent. As late as October 2016 Dr. Krafft reaffirmed that position and no party has seriously disputed it. Instead, each party hired vocational rehabilitation experts to render opinions on the extent of Claimant's permanent disability, and whether it is total or less than total.

Vocational Experts

Dan Brownell

89. Claimant hired Dan Brownell of Coeur d'Alene in 2013 to evaluate and prepare a report on the impact of Claimant's 2008 industrial accident on his local labor market employability. Mr. Brownell's report was dated December 5, 2016. He was not deposed.

90. In his report, Mr. Brownell stated he interviewed and spoke with Claimant on multiple occasions, monitored Claimant's ongoing medical treatments, reviewed Claimant's 2012 and 2014 deposition transcripts, and traveled to Claimant's home north of Priest River. Mr. Brownell also reviewed the vocational reports from the other experts.

91. Mr. Brownell noted that Dr. Bostwick acknowledged Claimant had severely impaired grip strength. He also found Claimant had anger and irritability issues. Mr. Brownell opined that it would not be appropriate for Claimant to pursue substitute teaching with those physical and personality issues. Further on in his report, Mr. Brownell also noted that Idaho now requires an Idaho Education Credential for substitute teachers, which Claimant lacks. Claimant's limited grip strength would preclude Claimant from "most of the available jobs" in the Priest River labor market. CE NN, pp. 1920, 1922. Mr. Brownell noted that jobs not requiring hand use would be limited to "service type jobs" which require extensive interaction with the public. Given Claimant's personality issues, Mr. Brownell felt those public interaction jobs would not be suitable for Claimant.

92. Mr. Brownell acknowledged that Dr. Krafft had limited Claimant to medium duty work capacity in 2010. Mr. Brownell is mostly dismissive of Dr. Krafft's opinions, but did note that the doctor indicated Claimant could not return to his time-of-injury employment. This same "no time-of-injury" work opinion was endorsed by several other physicians, as noted in the report. Mr. Brownell opined that if Claimant could not return to such employment, he was "effectively precluded most [sic] of the jobs historically, and currently, available in his local labor market." CE NN, p. 1920.

93. Mr. Brownell noted that beyond medical factors, Claimant was, at the time of the report, 64 years old and had not worked for eight years. Claimant lived in a remote area, and most jobs are an hour or more from his residence by car on a good day. In winter conditions, Claimant may not be able to even leave his home until he plows the road. These realities weigh against Claimant finding work, independent of any injury. It would not be appropriate to consider employment beyond the Priest River labor market.[14]

94. Mr. Brownell discussed the fact that Claimant worked with ICRD from 2011 to look for employment. Despite multiple leads, no job offers were forthcoming.

95. Since 2013, Mr. Brownell was involved in Claimant's job placement search. He claims he made over 110 attempts to find Claimant work. That number includes reviewing job listings from the IDL analyst, Integrated Personnel, Inc., West Bonner School District, Priest River Business Directory, Priest River Chamber of Commerce, and direct contacts by Mr. Brownell.

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[14] While Mr. Brownell does not define the borders of the labor market, it apparently does not extend to Spokane Valley or Coeur d'Alene, as there is no discussion of jobs in those areas.

96. Mr. Brownell met with the Human Resource Director for West Bonner School District. He learned Claimant's personnel file no longer existed and they had no record of his past service as a substitute teacher. Mr. Brownell also learned of the credentials requirement discussed above. He determined that, in his opinion, Claimant was not capable of any job within the school district. Mr. Brownell felt that substitute teacher would have been Claimant's best bet for finding a job within his limitations.

97. Mr. Brownell also met with representatives from Integrated Personnel, the largest personnel agency in the Priest River area. He reviewed all job openings from the past year and determined that in his opinion no jobs were physically compatible with Claimant's functional limitations. Mr. Brownell further noted that many jobs contain a drug testing provision, which Claimant would not pass due to his prescription narcotic use.

98. Next, Mr. Brownell followed up on a few job applications Claimant had previously submitted, including Nantronics, an electronics store in Newport, WA. Unfortunately the store was not hiring, and even if there was an opening, Mr. Brownell felt the job requirements would preclude Claimant.

99. Mr. Brownell also met with the owner of Oldtown Auto Sales to check on listings for lot attendant and salesperson. The salesperson job was commission only, seasonal, and part time. It was not available at the time of Mr. Brownell's inquiry. Also, the job required lot attendant duties in addition to salesperson, which would be, in Mr. Brownell's opinion, beyond Claimant's functional capacity.

100. Mr. Brownell assumed "limitations of reaching, handling, and fingering, imposed by CRPS in the upper extremities" when determining Claimant's work limitations. CE NN, p. 1924. It is not clear in the report what limitations he is imposing (rarely, never, occasional, etc.) or from where he got the restrictions, or how he concludes the limitations are imposed by CRPS. In any event, using that criterion Mr. Brownell computed the number of DOT-listed jobs Claimant lost at over 90% at a national level. In Claimant's job market, that percentage number could be even higher.

101. Mr. Brownell concluded:

> it is unfortunate that the reality is that [Claimant] will not in the foreseeable future develop a friend or locate a sympathetic employer willing to hire him. It is my opinion, based upon [Claimant's] industrial injury cause [sic] limitations and personal circumstances including, but not limited to, his personality traits, that any further or additional attempt (in the absence of further treatment that actually does benefit him) to search for work would be futile; therefore, [Claimant] is totally and permanently disabled under the odd-lot doctrine.

CE NN, p. 1926.

Mary Barros-Bailey

102. Surety hired Mary Barros-Bailey, Ph.D, to perform a disability evaluation on Claimant. Dr. Barros-Bailey reviewed medical and past worker's compensation records and interviewed Claimant in 2013. She was not deposed.

103. In her June 27, 2013 report, Dr. Barros-Bailey summarized Claimant's medical, educational, and work history. She noted that in spite of having acquired at least two associate's degrees and a bachelor's degree, Claimant's work history represents a substantial underemployment. Prior to the time-of-injury employment, making $10/hr, Claimant had worked at Selkirk Ace Hardware for 2.5 years at $8.50/hr.

Before that employment, he was a substitute teacher, making $59/day when he worked. He had also worked as a telephone technician, a radiology technician, a network technician, a ramp/ground operator for American West Airlines, and for Whole Foods. Claimant's reported wages from 2003 through 2010 showed the most Claimant had made in any given year was $10,000 in 2007, while in previous years he made no more than $3000 per year, and in 2003 and 2004 he reported no income.

104. Dr. Barros-Bailey noted that post-accident Claimant had unsuccessfully applied for work at Selkirk Ace Hardware, and Axil's Pawn Shop in Spokane. She discussed records from ICRD showing they provided Claimant with numerous job leads, but the report is unclear if Claimant pursued any of those leads.

105. Dr. Barros-Bailey used the O-Net program to list "transferable skills" jobs for Claimant. These are categories of jobs, and do not imply that there are actual available jobs within Claimant's work area for which he could be hired. It is unclear from her report how this information was utilized, if at all.

106. Dr. Barros-Bailey noted that the only physician (Dr. Krafft) to opine on the subject felt that Claimant could do medium strength capacity work. She also acknowledged that Dr. Bostwick diagnosed Claimant with several psychological issues which would negatively impact his employment opportunities. However, Dr. Bostwick found no neurocognitive deficits, limitations, or restrictions.

107. Dr. Barros-Bailey determined, without elaboration, that "from a purely physical standpoint" Claimant's industrial injuries resulted in a 6% loss of access to the labor market in the North Idaho Nonmetropolitan Area, which includes Bonner County "and the surrounding labor market." DE H, p. 206. She did not define the parameters

of that market. She also concluded Claimant incurred a 15% loss of wage earning capacity, since the jobs she felt Claimant could do paid around $8.50 hourly. The jobs she listed in her analysis were those "kinds of occupations that [Claimant] was referred to by the [ICRD] consultant." *Id.* They included fuel attendant and clerk at Safeway, clerk at Selkirk Ace Hardware, dishwasher, grounds keeper and marina attendant at Priest Lake Marina, fast food worker, security officer, custodian and shipping technician.

108. Considering Claimant's loss of access and loss of wage capacity figures, Dr. Barros-Bailey opined that Claimant, from a physical standpoint, had sustained a 15.5% permanent disability, inclusive of an undefined impairment. She noted that "from a mental health standpoint, it appears there may be pre-existing aggravated factors that may impact his employability, however." *Id.* She assigned no numerical additional disability for those factors.

109. In November 2016, Dr. Barros-Bailey authored a supplemental report after reviewing additional medical records and Ms. Taft's FCE reports. After reviewing and summarizing them, she noted that Dr. Krafft questioned the validity standards employed in the FCEs, and did not note any changes in his restrictions. She then concluded that Claimant does have measured functional limitations, but no one had attempted to apportion the limitations between Claimant's industrial injuries and his pre-existing conditions. Therefore she felt she was unable to expand on or change her previous opinions.

Douglas Crum

110. ISIF hired Douglas Crum, vocational rehabilitation consultant, to conduct an evaluation of factors which might expose ISIF to liability in connection with

Claimant's disability claim. On October 15, 2014, Mr. Crum authored an assessment report. Therein, he extensively detailed Claimant's prior medical and educational history, and reviewed Claimant's testimony from his two depositions. He did not evaluate Claimant's pre-and post-accident labor market access and wage earning capacity prior to reaching his conclusions.

111. Mr. Crum noted that only Dr. Krafft gave any input on Claimant's permanent restrictions, and did so speculatively. Dr. Krafft felt that Claimant "likely" had a medium work capacity, which involves lifting to fifty pounds. Mr. Crum opined that "even if" Claimant had a fifty pound lifting capacity, he would "clearly not be totally and permanently disabled based only on that limitation." IE 2, p. 50.

112. Mr. Crum also felt that many of the subjective complaints attributed to Claimant in Dr. Barros-Bailey's report had not been endorsed by any physician as representing permanent physical limitations/capacities, and therefore Mr. Crum felt it would be inappropriate to base a disability assessment on such complaints. Mr. Crum iterated his belief that Claimant was not totally and permanently disabled. He further stated that if Claimant was totally and permanently disabled, it was not due to a combination of pre-existing conditions and the industrial accident.

113. In December 2016, Mr. Crum prepared a supplemental report. He reviewed additional medical documents, Ms. Taft's FCE reports, and Mr. Ohrstrum's reports, and provided a detailed synopsis of the same.

114. When Mr. Crum factored in the FCE results from 2014 and 2016, his opinion was that if the FCE results are accurate, then Claimant is totally and permanently disabled." IE 3, p. 84. This opinion was based upon Claimant's age, education, skills, history,

and the local labor market composition in Priest River in conjunction with the FCE findings. Mr. Crum also felt Claimant's total disability was not due to a combination of pre-existing conditions and the industrial accident in question.

115. If Dr. Krafft's opinions and observations (medium work restrictions) were the basis for determining disability, then Mr. Crum felt that Claimant was not totally and permanently disabled. Mr. Crum pointed out that Drs. McNulty and Bostwick, and Mr. Ohrstrom, did not discuss disability and so their records could not be used as a basis to determine disability.

116. Mr. Crum was deposed post hearing. His deposition mainly elaborated on his report findings. He did acknowledge that without the use of his upper extremities, as found by Ms. Taft and endorsed by several of Claimant's treating physicians and Dr. McNulty, Claimant would be unemployable in the Priest River labor market. Mr. Crum noted that Claimant has difficulty with activities of daily living, and little capacity for lifting, pushing, pulling, gripping, and holding. With those limitations, there are no available jobs for him. Mr. Crum also denied Claimant's prior right shoulder surgery, his bilateral knee surgeries and his heart surgery contributed to his total disability, and carried no permanent restrictions.

Vocational Expert Analysis

117. The vocational experts' reports are of limited usefulness. Mr. Brownell's report is a narration of his opinions with a considerable amount of quasi-legal analysis. The report in many aspects lacks foundation. However, parts of his report are important to the issue of disability and will be discussed further below.

118. Dr. Barros-Bailey's report ignored reality, relied too heavily on Dr. Krafft's preliminary thoughts of Claimant's potential work capacity, and as a result arrived at an unreasonably low disability rating. She basically ignored Claimant's mental health issues and the FCE findings. Perhaps she should have conceded that she lacked the foundational information to accurately assign Claimant a disability rating rather than continuing to stick with her rating when she knew or should have known it was based on inadequately-developed data.

119. Mr. Crum's report also ventured well into the fact finder's province. His legal conclusions carry no weight. His opinion that Claimant is not totally and permanently disabled is a mere conclusion with no underlying data other than Dr. Krafft's speculation that if Claimant can lift 50 pounds he is not totally disabled. Mr. Crum listed no specific available jobs in Claimant's job market available at the time, nor did he attempt to show what percentage of the market was lost to Claimant when he suffered his industrial accident. Granted, he was not asked to do that analysis, but in limiting his assignment ISIF ended up with a report full of legal conclusions lacking in foundation. His deposition was more useful, as discussed below.

PERMANENT DISABILITY ANALYSIS

120. Total and permanent disability may be proven either by showing that Claimant's permanent impairment together with nonmedical factors totals 100%, or by showing that he fits within the definition of an odd-lot worker. *Christensen v. S.L. Start & Assoc., Inc.*, 147 Idaho 289, 292, 207 P.3d 1020, 1023 (2009). Claimant's claim to 100% disability is considered first.

100% Disability

121. Under the 100% method, Claimant must show that his medical impairment and nonmedical factors combine to equal a 100% disability. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 989 P.2d. 854 (1997).

122. Claimant's vocational expert opined that Claimant is 100% disabled (and also that he is totally disabled under the odd-lot theory). Surety's expert found that Claimant had a 15.5% total disability. ISIF's expert gave two scenarios; under one, Claimant is not totally disabled (but lists no disability rating); under the other scenario, Claimant is 100% disabled. At deposition, Mr. Crum listed the factors affecting Claimant which would support a 100% disability rating. Those factors have a basis in the evidence.

123. Mr. Brownell assisted Claimant in looking for suitable employment for three years, but no jobs were available within Claimant's severe UE limitations.[15]

124. While the validity of the FCEs were questioned, it is important to note that several treating physicians found the results of the FCEs were consistent with their medical findings and observations. Even without validity testing, the FCE results lined up with the observations of those treating physicians, thus lending credence to the findings.

125. The opinions of Mr. Brownell and Mr. Crum (100% scenario) carry more weight than the opinions of Dr. Barros-Bailey. The totality of the evidence supports a finding that there are no jobs in the Priest River labor market available to Claimant. His very limited use of

[15] While no doctor has specifically given Claimant permanent restrictions, even if the suggestion that Claimant could have a 50 pound lifting restriction was a final decree, restrictions are not the same as limitations. *See Talbot v. Summit Wall Systems*, IIC 2012-004039. Claimant's limitations are far less than 50 pounds.

his arms, hands, wrists and fingers, coupled with his psychological reality,[16] and his location of residence, combine to render Claimant totally and permanently disabled under the 100% method.

126. Claimant has proven he is totally and permanently disabled under the 100% method.

ISIF LIABILITY

127. Defendants brought a claim against ISIF under Idaho Code § 72-332, which states in relevant part;

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury … arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury … suffers total and permanent disability, the employer and its surety shall be liable for payment of compensation benefits only for the disability caused by the injury … and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account.

128. After Claimant is found to be totally and permanently disabled, four elements must be established to apportion liability to ISIF under Idaho Code § 72-332: (1) preexisting impairment(s); (2) which was/were manifest; (3) constituted a subjective hindrance to employment; and (4) the preexisting impairment and the subsequent injury combined to result in total and permanent disability. *Hope v. Indus. Special Indemn. Fund*, 157 Idaho 567, 571, 338 P.3d 546, 550 (2014), *reh'g denied* (Dec. 9, 2014), *citing Bybee v. Indus. Special Indem. Fund*, 129 Idaho 76, 80, 921 P.2d 1200, 1204 (1996).

[16] Those doctors who have opined listed Claimant's psychological barriers, but Mr. Ohrstrom felt the term "barrier" is too negative, and should not be used. The term "psychological reality" may better describe Claimant's condition.

PRE-EXISTING MANIFEST IMPAIRMENTS

129. There is no dispute in this case that Claimant had manifest pre-existing permanent physical impairments, including his diabetes, multiple trigger fingers, left five-finger tenosynovitis, right shoulder, chronic pain syndrome, bilateral knees, and cardiac condition. Of those conditions, Claimant's knees, right shoulder, and cardiac conditions were never rated. Claimant's diabetes was rated at 11%, each trigger finger 6%, and left five-finger tenosynovitis 6% WP PPI. The first two elements for ISIF liability are met.

SUBJECTIVE HINRANCE TO EMPLOYMENT

130. Defendants note that when Claimant was in his early to mid-20s, his application with the U.S. Forestry Service was rejected due to his diabetes. Claimant also testified that he could not get a chauffeur's or pilot's license, become a flight attendant, or join the military with diabetes. He did not testify that he had ever tried or even wanted to get these licenses, join the military, or become a flight attendant.

131. Claimant consistently testified that his various conditions never impeded his ability to work at any job he chose, including heavy lifting work such as with Employer. He testified that he might have felt pain in various activities prior to his industrial accident, but "pain isn't necessarily a problem until it becomes debilitating. I was able to perform the job." Tr. p. 131.

132. Nothing in the record suggests that Claimant ever found he could not do certain tasks at his work, sought accomodation at any employment, shied away from certain lines of work, or changed fields of employment due to his impairments. By law, his diabetes prevented Claimant from certain lines of work or military service, and he actually had one application rejected more than three decades ago due to his impairment.

133. Subjectively, Claimant did not feel he had suffered any permanent physical impairment, or had a symptomatic condition prior to February 9, 2008, as evidenced by his answers to interrogatories. IE 4, pp. 7-8. However, the "subjective hindrance" requirement looks not only at Claimant's attitude toward his pre-existing conditions, but also his medical condition and other evidence concerning the effect of the pre-existing conditions on Claimant's employability. *See, Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 686 P.2d 557 (1990).

134. The issue is whether Claimant's rejected application and preclusion to certain lines of work due to his diabetes are sufficient to satisfy the "subjective hindrance to obtaining employment" prong for ISIF liability.

135. The record is silent as to whether the U.S. Forestry Service still rejects persons with diabetes from certain positions, such as game warden, for which Claimant applied early in his work career. When analyzing the "subjective hindrance" component, Claimant's pre-existing condition must be a hindrance as of the time immediately before his industrial accident. *Accord. Colpaert v. Larsens, Inc.*, 115 Idaho 852, 771 P.2d 46 (1989); *See also, Ritchie v. State of Idaho, Industrial Special Indemnity Fund*, IIC 2016-0038 (August 15, 2016); *Lubow v. Gentle Touch Health Care, Inc, Order Denying Motion for Reconsideration*, 2016 WL 7975630 (Idaho Ind. Com., Dec. 21, 2016).

136. Other than noting that Claimant had a job application with the Forest Service rejected due to his diabetes, Defendants did not develop any arguments or cite to any factual authority to support the idea that Claimant's pre-existing diabetes was a subjective hindrance to employment at or near the time of his industrial accident in question. The single game warden job for which Claimant applied over three decades ago and which was rejected, at least ostensibly due to his diabetes, is insufficient to establish a subjective

hindrance to employment.[17] In fact, the record amply and consistently supports the concept that Claimant's pre-existing impairments did not in any way hinder his ability to obtain or maintain multiple employment opportunities for years prior to his subject accident.

137. Defendants have failed to prove that Claimant's pre-existing impairments constituted a subjective hindrance to Claimant obtaining or maintaining employment.

138. Defendants have failed to establish the necessary elements for ISIF liability for apportionment of permanent disability benefits.

ATTORNEY FEES

139. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 which provides:

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

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

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[17] As an aside, Claimant's application was rejected; there is nothing in the record to suggest that, but for Claimant's diabetes, he would have been offered the job. There is no way of knowing if Claimant had the requisite qualifications, experience, and skills to obtain that job even without diabetes. Many individuals apply for jobs with little realistic chance of obtaining the position.

140. Claimant argues it was unreasonable for Surety to require him to attend a multi-week treatment program in Boise, when comparable treatment was available much closer to Claimant's residence. While the record is not entirely clear if such was really the case, nevertheless there is nothing in the record showing Surety attempted to work with Claimant to provide needed care closer to his home. Dr. Lewis indicated that Claimant could have similar treatment to the program proposed by Surety done in Spokane, but all of Claimant's treatment could not be performed "under one roof" in Spokane, like it could be in Boise. CE R p. 730. So, while the most convenient treatment facility was in Boise, with some planning it appears Claimant could have received adequate treatment in Spokane. Insistence on Claimant leaving his home for four weeks given his living circumstances was unreasonable.

141. In early June 2008 and several times thereafter, Dr. Venters opined that Claimant's DeQuervain's tenosynovitis needed surgery, but Surety denied authorization until after Dr. Tallerico advised of its necessity in August 2008. While the record is not clear exactly when Surety first agreed to authorize surgery, their records show that in December 2008 the issue was discussed. In summary, by mid-June surgery was advised, noting time was of the essence on this type of procedure. An insurance IME was performed in August; the physician recommended surgery. The surgery was scheduled for January 2009, some seven months after authorization was first requested. There is indication in Dr. Venter's medical records that the delay may have resulted in less than optimal results. Claimant's development of CRPS advanced during this time frame.

142. Between the instances set out above, with the delay in surgery and insistence on treatment in Boise, Surety herein violated Idaho Code § 72-804 in at least two ways. First, it unreasonably delayed needed medical care, and second, it failed to provide reasonable

medical care by unnecessarily forcing Claimant to either leave his home unattended (and unheated) for a prolonged period of time, or forego recommended care.

143. Beyond the specific instances cited, the record when read as a whole demonstrates a continuing tug of war between the parties, and leaves the general impression of "mutual combat" between Surety and what is assuredly a difficult Claimant. The overarching tenor is one of a poorly managed claim file, with multiple instances of delay, heavy handedness, failure to timely respond to suggestions and requests, even from physicians hired by Surety, and a sense of obstruction. Unfortunately, Surety cannot lower its standards of professionalism to compete with Claimant's belligerence without consequences. *See e.g., Millard v. ABCO Construction, Inc.,* IIC 2007-008413 (August 21, 2015), citing *Overall v. Walgreen,* 2007 IIC 0245, (April 24, 2007), "where Defendants' unreasonableness in adjusting this claim was so pervasive, Claimant should be awarded attorney fees fully, without reduction for the brief flashes of reasonableness by Defendants."

144. Claimant has proven, pursuant to Idaho Code § 72-804, a right to attorney fees on all benefits awarded herein.

145. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof, with appropriate elaboration on *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984). The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of

the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel files the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

CONCLUSIONS OF LAW

1. Claimant is at MMI.

2. Claimant has failed to prove he is entitled to a spinal cord stimulator and cognitive therapy.

3. Claimant has failed to prove he is entitled to reimbursement of past prescriptions or future prescription benefits for Oxycodone (by that name or other trade names, such as Roxicodone) and/or Norco (or any trade or generic name for substantially the same drug).

4. Claimant has proven he is entitled to reimbursement for morphine pain medication prescribed since February 9, 2008, and continuing into the future as long as it is prescribed for his industrial upper extremities injuries.

5. Claimant has failed to prove he is entitled to medical benefits for an alleged increase in his diabetes treatment and/or costs of medications as a result of the industrial accident of February 9, 2008.

6. Claimant has failed to prove he is entitled to additional TTD benefits over those previously paid.

7. Claimant has proven he is totally and permanently disabled under the 100% method.

8. Defendants have failed to prove that Claimant's pre-existing impairments constituted a subjective hindrance to Claimant obtaining or maintaining employment.

9. Defendants have failed to establish the necessary elements for ISIF liability for apportionment of permanent disability benefits.

10. Claimant has proven a right to attorney fees on all benefits awarded herein.

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 15th day of February, 2018.

/s/
Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 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:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

/s/

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRADFORD WALKER, Claimant, v. ALBENI FALLS BUILDING SUPPLY, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2008-006200** **ORDER** **Issued 2/23/18**

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant is at MMI.

2. Claimant has failed to prove he is entitled to a spinal cord stimulator and cognitive therapy.

3. Claimant has failed to prove he is entitled to reimbursement of past prescriptions or future prescription benefits for Oxycodone (by that name or other trade names, such as Roxicodone) and/or Norco (or any trade or generic name for substantially the same drug).

4. Claimant has proven he is entitled to reimbursement for morphine pain medication prescribed since February 9, 2008, and continuing into the future as long as it is prescribed for his industrial upper extremities injuries.

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6. Claimant has failed to prove he is entitled to additional TTD benefits over those previously paid.

7. Claimant has proven he is totally and permanently disabled under the 100% method.

8. Defendants have failed to prove that Claimant's pre-existing impairments constituted a subjective hindrance to Claimant obtaining or maintaining employment.

9. Defendants have failed to establish the necessary elements for ISIF liability for apportionment of permanent disability benefits.

10. Claimant has proven a right to attorney fees on all benefits awarded herein.

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

DATED this 28th day of February, 2018.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

/s/
Thomas P. Baskin, Commissioner

/s/
Aaron White, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D ALENE ID 83816

MATTHEW VOOK
PO BOX 6358
BOISE ID 83707

THOMAS CALLERY
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LEWISTON ID 83501

/s/

jsk