BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE DRYDEN, Claimant, v. J.D. HEISKELL HOLDINGS, LLC, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2019-015596** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED SEP 1 [illegible] INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise on April 13, 2021. Daniel M. Gariepy, of Ketchum, represented Claimant, Bruce Dryden, who was present in person. David P. Gardner, of Pocatello, represented Defendant Employer, J.D. Heiskell Holdings, LLC, and Defendant Surety, New Hampshire Insurance Company. The parties presented oral and documentary evidence. The parties did not take post-hearing depositions but submitted briefs. The matter came under advisement on August 2, 2021.

ISSUES

The noticed issues to be decided by the Commission as the result of the hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
2. Whether Claimant's condition is due in whole or in part to a subsequent injury/condition.

3. Whether, and to what extent, Claimant is entitled to the following benefits:
    a. Medical care;[1]
    b. Permanent partial impairment (PPI); and
    c. Permanent partial disability (PPD).
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.
5. Whether Claimant's condition resolved following the May 29, 2019 accident.[2]

CONTENTIONS OF THE PARTIES

Claimant injured his right Achilles tendon in an accident on May 29, 2019 while working for Employer. He contends that he is entitled to a full partial impairment rating of 13% of the lower extremity, without any apportionment, for that injury. He further alleges that he has sustained a 62% permanent partial disability, also without apportionment. Claimant contends that there should be no apportionment and that his condition is not due to a subsequent intervening event. Finally, Claimant alleges entitlement to attorney fees pursuant to Idaho Code §72-804.

Defendants acknowledge that Claimant sustained a compensable workers compensation injury on May 29, 2019 in the form of a partial right Achilles tendon tear that did not require surgery. Surety paid medical benefits. Defendants allege that Claimant reinjured his Achilles tendon on or about September 17, 2019 when he was working with one of his horses. They allege that Claimant's Achilles condition should be apportioned 25% to the industrial accident and 75% to the subsequent intervening event. Based upon a doctor's opinion to that effect, Defendants paid 25% of the permanent partial impairment. Defendants submit that their

[1] Claimant did not brief entitlement to additional medical benefits; therefore this issue is deemed waived.

[2] This issue was also not briefed and thus will be deemed waived. In any event, the proposition conflicts with Defendants' subscription to the PPD proposed by Vocational Expert Delyn Porter.

vocational expert's analysis is superior and that at most Claimant is entitled to 37.9% PPD, which should be apportioned by 75%. Finally, Defendants deny that they are liable for attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. The transcript of hearing dated April 13, 2021; and

3. Joint Exhibits 1 through 14, admitted at the hearing.

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

FINDINGS OF FACT

1. **Claimant's Background.** Claimant was born on July 27, 1957 and was 63 years of age at the time of hearing. Tr., 29:24-25; 30:6-7.

2. Claimant graduated from Rifle High School in Rifle, Colorado, in 1975. Ex. 14:236 (10:16-21) (Claimant's Deposition). He attended several colleges, including the University of Wyoming. He obtained several certifications but did not complete a degree. *Id.* at (10:22-11:13). The certificates he earned included FEMA, emergency management, communications, welding and OSHA, among others. *Id.* at (11:5-20).

3. At the time of hearing, Claimant resided in Lost Creek, Kentucky. Tr., 30:1-3.

4. **Pre-Injury Employment History**. Immediately out of high school, Claimant worked in commercial ranching as a ranch hand. He then entered the United States Marine Corps and served for two years from 1976 through 1978. When he got out of the Marines,

Claimant managed a ranch in Northern Colorado for approximately two years. Tr., 33:10-15; Ex. 14:236 (12:8-11).

5. Claimant next worked as an oilfield service operator. After that, he returned to ranching. His next occupation was an industrial mining and refining job, in addition to managing a small cow-calf operation ranch. Claimant worked in industrial mining and refining for 27 years from 1980 to 2007 for the OCI Chemical Company; he was a mine mechanic, among other various positions. He next went to work for Westmoreland Coal Company in Kemmer, Wyoming, as an industrial maintenance mechanic but ended up serving as emergency services employee for that company. Claimant earned $31 per hour working for Westmoreland. Tr., 33:16-34.10; Ex. 14:237 (13:5-15:7).

6. Claimant worked in supervisory capacities for both OCI and Westmoreland. Ex. 14:238 (19:7-9)

7. After leaving Westmoreland's employment, Claimant moved to Idaho in 2017. Tr., 34:11-15; Ex. 14:237 (15:19-21). Upon moving to Idaho, Claimant went to work for Four Aces Farm Company as a harvest truck driver, for which he earned $14 per hour. Ex. 14:237 (15:22-16:5). He worked for Four Aces for approximately three to four months, as long as the harvest lasted. Ex. 14:238 (17:10-12).

8. Upon leaving OCI and Westmoreland's employment, Claimant began receiving pension payments from those companies, totaling $2,050 per month. Ex. 14:237 (16:13-25). After his industrial injury, Claimant applied for early Social Security benefits, for which he receives $2,100 per month. Ex. 14:239 (22:7-13).

9. Claimant had intended on retiring upon moving to Idaho, however his financial circumstances changed when he and his wife divorced, and Claimant was required to return to work to meet his expenses. Tr., 35:4-16; 70:10-71:1.

10. **Subject Employment**. Employer hired Claimant as a "maintenance craftsperson" in or about January 2019. Employer's operation was based in Gooding, Idaho, and consisted of livestock feed manufacturing. In this role he bought maintenance materials, supervised maintenance crews, undertook project maintenance and development, and worked as a contractor liaison. His physical activities included accessing elevated structures that required climbing 100 to 125 feet of ladders, for bucket elevators at the top of grain silos. He also had to access staircases with 200 to 300 stairs. He engaged in heavy industrial aerial maintenance of facilities and equipment. Tr., 31:20-32:18; Ex. 14:238 (17:13-23).

11. Claimant's starting hourly wage was $19 per hour and the time of injury wage was $22 per hour, with significant amounts of overtime; Claimant was working 60 to 80 hours per week. When Claimant worked overtime hours, they were paid at time and half, thus Claimant would earn $33 an hour for those overtime hours at the time of injury. Tr., 32:19-33:6. Ex. 14:238 (18:2-3).

12. **Industrial Accident**. Prior to the industrial accident, Claimant did not have any physical restrictions or impairments. Tr., 42:11-13. He did not have any prior injuries or accidents involving his right Achilles tendon. Ex. 11:187 (Chen IME).

13. On May 29, 2019, Claimant received information from another employee that there was a broken augur underneath one of Employer's corn tanks. He went to inspect the augur to find out what would be needed to repair it. To access the area where Claimant needed to go, he had to pass over a muddy area with deep puddles where the drainage was poor. This

required him to leap across the muddy area. On the return trip, Claimant leapt over the problematic area (with a foot of water and muddy). Upon landing he hyperextended his right foot, and both heard and felt a tear/pop and immediately felt pain as his foot slid on the other side of a large puddle. Thereafter, he sought medical attention at North Canyon Medical Center in Gooding, Idaho. Tr., 30:13-31:17; Ex. 1:1 (first report of injury); Ex. 3:55-56 (Claimant's statement to Surety); Ex. 14:241 (30:20-31:14).[3]

14. **Medical Care**. At the Medical Center, Physician Assistant Aaron Inouye examined Claimant. He noted in pertinent part as follows: "This morning around 6 AM he [Claimant] was at work. He jumped over a ditch. He landed with his foot dorsiflexed. He felt something rip or tear in his Achilles tendon." Claimant reported pain scale at 6/10, worse with movement. Imaging results were as follows: "There is a swelling of the tendon as well as disruption of the normal fiber pattern. There is fluid around and within the tendon. I do not visualize a complete rupture of the tendon with static and dynamic exam." PA Inouye suspected a partial Achilles tendon rupture. He prescribed Ibuprofen, Tylenol and ice packs for Claimant. He also suggested keeping the foot elevated, limiting the amount of time Claimant spent on his feet for the next 48 hours. He then referred Claimant to Dr. Grooms, an orthopedist who was in the same Medical Center. Claimant received transportation to Dr. Grooms' orthopedic clinic by wheelchair. Ex. 8:95-97.

15. Guy Grooms, M.D., examined Claimant on May 29, 2019. He assessed an Achilles rupture/partial Achilles tendon tear on Claimant's right foot. Dr. Grooms decided to place Claimant in a CAM walker boot with a heel lift. He instructed Claimant to remain on

[3] Claimant mistakenly identified his left foot as the injured foot at hearing. All other sources of information in the record, however, identify the right foot.

crutches and to return for follow-up in one week. Dr. Grooms further placed Claimant on limited duty at work to include sedentary job duties only. Ex. 8:98-99.

16. Claimant followed up with Dr. Grooms on June 5, 2019. He reported that his right Achilles tendon was still hurting but was partially better. He was still using crutches and the CAM boot. Dr. Grooms continued the use of the boot with shoe lift and asked to see Claimant back in two weeks. Dr. Grooms continued work restrictions in the form of no excessive walking, standing or lifting. Ex. 8:100-101.

17. On June 19, 2019, Claimant's right foot was still swollen. He complained of continued pain. Dr. Grooms noted in pertinent part as follows: "On examination he is still quite swollen in the Achilles tendon. The tendon itself is intact. He is much less tender over the tendon, sensation and vascularity are intact, he has a normal stance and a moderately antalgic gait." Dr. Grooms continued the boot and the heel lift. He scheduled Claimant for follow-up in three weeks. *Id.* at 102-103.

18. On July 10, 2019, Claimant met with PA Ben Burtenshaw with Dr. Grooms' orthopedic clinic. Claimant reported that both the pain and swelling in the area of his Achilles tendon had improved. There was still some noticeable swelling and pain. Claimant had been using his boot and maintaining his work restrictions. PA Burtenshaw ordered that the heel lift be removed from the CAM boot. Claimant could remove the boot at home but should keep it on at work. *Id.* at 104-105.

19. On September 16, 2019, Claimant met with PA Burtenshaw. Claimant reported that he had been doing "very well until he re-injured his Achilles a couple of weeks ago. He states that it is now sore and stiff and a little difficult to walk on." Claimant further stated he injured his Achilles tendon as he was working with one of his horses. Upon examination,

Claimant had "excellent range of motion of the right ankle without apparent discomfort." He also displayed 5/5 motor strength of the right foot/ankle. Claimant informed PA Burtenshaw that he was not allowed to return to work until he had a full-duty release. Claimant was not released to full duty. PA Burtenshaw did not order any additional imaging or tests in light of Claimant's information concerning the incident with the horse and his Achilles tendon. Ex. 8:112-113.

20. On October 29, 2019, Claimant met with Paul Workman, M.D., in the orthopedic clinic. Dr. Workman noted in pertinent part as follows: "Patient is here for follow-up. He is doing much better. He is having very little discomfort. He has a very difficult job that requires him to be at 100% and I feel this is as good as he is going to get. PLAN: We will go ahead and release him to full activity." *Id.* at 114.

21. PA Ben Burtenshaw examined Claimant on November 21, 2019. Claimant was six months out from his Achilles tendon injury. Claimant reported that he could not return to work as his employer required a full duty release and Claimant still had difficulties climbing stairs and ladders. The injury caused him to still walk with a limp. PA Burtenshaw continued Claimant on the same work restrictions. Ex. 9:143-144.

22. Beginning on December 5, 2019 and extending through February 27, 2020, Claimant received three times a week sessions of physical therapy through Wright Physical Therapy. Ex. 10:154-174.

23. Dr. Grooms evaluated Claimant on January 6, 2020. He noted in pertinent part as follows:

> This is a 62-year-old male who is status post a work related injury which occurred on May 29, 2019, where he sustained a right Achilles tendon tear. He has been treated non operatively because the tendon was felt to still be in continuity, but he had a large amount of swelling to the tendon itself. He works as a highly skilled

> Electrician on commercial projects, which include working on grain elevators and he sometimes has to climb ladders that are very tall. He has been gradually improving, he says the swelling to the tendon has decreased. He has also been going to physical therapy and he feels he is gradually improving.

Ex. 9:145.

Dr. Grooms continued Claimant on physical therapy, however he opined that the majority of Claimant's recovery would be a "function of the passage of time." Dr. Grooms further noted that Claimant was concerned that an independent medical examiner (Dr. Chen) apportioned his industrial injury to 25%. Dr. Grooms felt that this was "unreasonable because there is no evidence that he had any symptoms prior to his work injury.[4] In addition, due to the patient's age and the nature of his injury, I don't think we would expect his progress to be any greater than we are currently observing." In light of the long ladders that Claimant had to use at work, Dr. Grooms believed that it was very important that Claimant recover fully before he could return to full duty status. Ex. 9:146.

24. On February 10, 2020, Dr. Grooms examined Claimant again. Claimant reported doing better. He was now walking without a limp but still had significant difficulty with stairs because of the pain to the Achilles tendon. Claimant also reported a lessening of swelling. Dr. Grooms changed his work status to include no stair climbing more than one flight of stairs and no ladder climbing greater than an 8-foot ladder. Dr. Grooms explained that it takes approximately a year to recover from an Achilles tendon injury. *Id.* at 9:147.

25. Claimant was next seen in the orthopedic clinic on May 11, 2020. Dr. Grooms and CMA McKayla Palacio examined him. CMA Palacio noted in pertinent part as follows:

[4] Claimant apparently did not explain to Dr. Grooms that the justification for the apportionment was due to a subsequent event, not a prior condition.

> This is a 62-year-old male who sustained a left[5] ankle Achilles tendon rupture on May 29, 2019. His Achilles tendon rupture was treated nonoperatively with immobilization. He has also had physical therapy, 3 times a week for 2 months and say he still has some swelling and pain especially if he is walking on it. He has tried climbing a ladder at home and says that if he goes up and down the ladder 4 or 5 times he has significant pain and is unable to continue. His original job is working on a grain elevator as a mechanic where he often has to climb very long ladders multiple times per day.

Ex. 9:148.

Dr. Grooms and CMA Palacio performed an impairment rating for Claimant on May 11, 2020. Using the 6th Edition of the *Guides to the Evaluation of Permanent Impairment*, they determined that Claimant's right Achilles injury rated as a 13% impairment of the lower extremity. Permanent restrictions included no ladder climbing, no repetitive stair climbing, no squatting, with standing allowed, and lifting up to 50 pounds from knee height. *Id.* at 9:149.

26. In response to a questionnaire from Surety, Dr. Grooms on May 27, 2020 opined that Claimant had reached maximum medical improvement (MMI) on May 11, 2020. He also reported the 13% lower extremity impairment. Dr. Grooms did not apportion the impairment. *Id.* at 9:150-151.

27. Claimant returned to the orthopedic clinic on October 14, 2020 and reported to PA Ben Burtenshaw that he continued to have worsening pain in right Achilles tendon. He still had some swelling in the area of the injury. Claimant rated the pain as 4/10. He wondered what else could be done. Claimant was willing to try some physical therapy again, so PA Burtenshaw wrote an order for it. *Id.* at 9:152-153.

28. Claimant returned to physical therapy on October 22, 2020 with Wright Physical Therapy and had sessions continuing through December 14, 2020. Ex. 10:175-186.

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[5] Again, an incorrect attribution of the industrial injury to the left ankle. The injury was to the right ankle.

29. **Independent Medical Examination**. Surety made arrangements for Claimant to undergo an independent medical examination (IME) with Qing-Min Chen, M.D., an orthopedic surgeon, on December 9, 2019. Ex. 11:187.

30. Dr. Chen noted the history of the right Achilles tendon injury, including its origin, and noted that Claimant received an ultrasound test that showed a 45% partial tearing of the tendon. *Id.* at 11:187.

31. Dr. Chen made a special note concerning the horse incident, as follows: "Of note, sometime in approximately early September, he was helping a horse on his farm that was stuck in a fence. He kind of leaned his shoulder into the horse to try to lift up that feet to get him off the fence and he felt increasing pain in his right Achilles tendon immediately after that maneuver. He says after a week, it returned to his normal achy kind of pain." *Id.* at 11:187.

32. Claimant denied any past injuries to the right Achilles tendon. He had a lumbar fusion in 1996. He had left knee surgery in 2014. Claimant denied having any other surgeries. *Id.* at 11:187.

33. Claimant displayed no overt signs of pain behavior, symptom magnification, or any other inappropriate responses. *Id.* at 11:189.

34. Dr. Chen's diagnosis of Claimant was as follows: "Right partial Achilles tendon tear, 25% work related, 75% not work related due this acute setback when he was not following precautions in trying to assist his horse around early September, ongoing." *Id.* at 11:190.

35. Dr. Chen opined that all treatment and testing have been reasonable and necessary, however:

> [A]nything past about September 17, 2019 would only be 25% work related. The reason being was at least from the records, the claimant was making gains and was becoming asymptomatic before this setback and then he was placed on a 25% weightlifting restrictions at that time. For whatever reason he decided to help out

> his horse to get him off the fence, and in the process he reinjured his Achilles tendon, which really set him back, as before that all the records were showing that he was making progress and his pain was getting better and after that incident, his pain started getting worse again. He was essentially noncompliant with precautions and potentially re-aggravated/worsened his Achilles tendon.

Ex. 11:190-191.

36. Dr. Chen opined that more treatment would be necessary, particularly physical therapy, but that it would be 25% work related. *Id.* at 11:191.

37. Dr. Chen prescribed the following work restrictions, but did not differentiate whether they were temporary or permanent: no lifting over 25 pounds, no climbing ladders, and minimizing climbing up and down stairs. "Again, it is 25% work-related." Ex. 11:191.

38. In Dr. Chen's opinion, Claimant had not reached MMI and since he had not, Dr. Chen did not assign any impairment to his Achilles tendon injury. *Id.*

39. **Employment after Industrial Accident**. After his industrial accident on May 29, 2019, Claimant returned to the workplace on light duty. He remained on light duty until in or about August 2019, when Employer informed him that he would need to have a full duty release to return to work and that light duty would not be made available to him. Tr., 61:24-62:18. After August 2019, Claimant did not return to work with Employer. *Id.* at 63:5-7.

40. On June 17, 2020, Employer wrote Claimant a letter informing him that his employment with Employer was terminated. Ex. 5:68.

41. **Intervening Event**. Claimant described the "horse incident" which occurred in or about September 2019, as follows:

> Q. In this horse incident can you describe what happened that day?
> A. Sure. I wandered around down there taking a look at the property and found that I had a big mare that had stepped over and put a foot over a piece of wire and she was pretty good about it, not doing – cut her foot, so I walked up to her hind end and put my left shoulder into her hip at, oh, say a 15 degree angle and shoved her to get her to pick up her foot and get out of the wire. When I was

doing that I noticed that there was ouch kind of a pain in my right ankle, that right foot thing, and I stopped. Horse took her foot out of the wire and I went back to the house.
Q. Did you feel a pop --
A. No.
Q. -- in your –
A. No. nothing
Q. -- right Achilles'?
A. It's one of those things you, ouch, you know, it felt like – no, maybe that's not what I'm going to do anymore and just stop. Glad it was successful.
Q. And what was the difference between what happened in the horse incident and what happened in the original accident of May 29, 2019, as far as what happened to your ankle?
A. Well, insofar as what happened is a hyperextension is what you are doing in this manner. Actually putting my foot in this manner on the flat and pushing off. You know, it's not like I'm trying to lift a horse – you know, everybody – you are seeing horse. Who can lift a horse? You know. No. That's ridiculous. I'm not pushing off with my toe. I'm not using my foot in order to do it. Actually, I was just straightening up my legs and that's – that's potentially what that is. There was no tear, there was no rip, there was no, you know, really excruciating pain, no noises, no nothing, you are just kind of – ouch, kind of twinge, and that hurt.

Tr., 50:13-51:4.

42. **Claimant's Condition at Time of Hearing**. Claimant understood his doctor-ordered work restrictions from Dr. Grooms to be no ladder climbing, no repetitive stairs, no squatting and lifting up to 50 pounds from knee height. *Id.* at 51:5-9.

43. Claimant described the effects of his injury on his daily living as follows:

Q. Do you have any other limitations due to your right Achilles' injury?
A. Yeah I do. It's very difficult to perform stuff that I used to do. I like to hunt and fish. I was an avid rock climber in my years of industrial rope rescue that kind of morphed into one of those hobbies. Bareback riding. Training colts, various things like that. Those kinds of things are not – are not eligible for me to do any longer. Even simply pushing a garden – a big grocery cart is hard, because of the actual action of walking strains that tendon. Walking on slanted or sloped surfaces is difficult. Yeah. This has actually impacted a great deal more than – yeah, if you can't walk correctly, then, you know, most of the things that you can do can be directly impacted by that.
Q. Okay. And as we sit here today can you describe your symptoms in your right ankle, right Achilles' tendon.
A. Symptoms currently?
Q. Yes.

> A. Based on the – on the one to ten scale, primarily – and today is no different. I wake up in the morning with a four, four and a half. I get up, take an Ibuprofen, take a hot shower and wrap it, as compression actually helps with that, and I will go about the rest of my day. Depending upon my level of activity, what I'm doing, I sometimes go to a seven or eight requiring still to have to stop and throw some ice on it or discontinue whatever it was I was doing that was making that thing hurt. Dull, achy pain, sometimes radiating. Yeah.

Tr., 51:10-52:15.

44. Claimant believes he would be unable to perform his job with Employer due to requirement to use ladders, repetitive stairs, and squats. Tr., 52:21-24.

45. For similar reasons, Claimant believes he could not now perform his former jobs at Westmoreland Coal and Ace Farms. *Id.* at 53:7-54:2.

46. **Claimant's Attempts to Become Employed**. Since he was declared at MMI, Claimant states that he has repeatedly attempted to become reemployed, with no success. When asked to explain what factors were impeding his reemployment, Claimant cited his age, permanent work restrictions, and lack of a bachelor's degree, as hampering his job search. "[O]ut of the hundred odd, maybe more, applications, resumes that I have submitted, I have had one face-to-face interview, two on the phone. Almost had three, but they decided that they didn't want me and most of it they just don't ever call me back." *Id.* at 54:10-55:25.

47. **Indemnity Payments**. Claimant alleges that Surety unreasonably delayed payment of his temporary disability benefits and also unfairly denied him full payment of his 13% PPI payment on the basis that it was apportioned by 75% from the horse incident. Following is a breakdown of the PPI and temporary disability payments that Claimant received:

Payment Date	Payee	Amount	Pay Period	Type Benefit
July 17, 2020	Bruce Dryden	$2809.95	July 17 – July 17, 2020	PPI paid "in full" (25% of 13%)
May 11, 2020	Bruce Dryden	$2829.60	April 11 – May 8, 2020	Temporary Total Benefits

April 12, 2020	Bruce Dryden	$707.40	April 4 – April 10, 2020	Temporary Total Benefits
April 12, 2020	Bruce Dryden	$707.40	March 28 – April 3, 2020	Temporary Total Benefits
March 29, 2020	Bruce Dryden	$707.40	March 21 – March 27, 2020	Temporary Total Benefits
March 20, 2020	Bruce Dryden	$707.40	March 14 – March 20, 2020	Temporary Total Benefits
March 17, 2020	Bruce Dryden	$707.40	March 7 – March 13, 2020	Temporary Total Benefits
March 6, 2020	Bruce Dryden	$707.40	February 29 – March 6, 2020	Temporary Total Benefits
February 26, 2020	Bruce Dryden	$6,366.60	December 28 – February 28, 2019	Temporary Total Benefits
December 26, 2019	Bruce Dryden	$4,648.63	November 12 – December 27, 2019	Temporary Total Benefits
November 12, 2019	Bruce Dryden	$1,414.80	October 29 – November 11, 2019	Temporary Total Benefits
September 12, 2019	Bruce Dryden	$1,616.91	August 28 – September 12, 2019	Temporary Total Benefits
August 29, 2019	Bruce Dryden	$920.06	August 4 – August 27, 2019	Temporary Partial Benefits
August 14, 2019	Bruce Dryden	$1,114.08	July 7 – August 3, 2019	Temporary Partial Benefits
August 1, 2019	Bruce Dryden	$1,683.61	May 30 – July 6, 2019	Temporary Partial Benefits

Ex. 6:81-86.

48. **Vocational Assessments.** ***Delyn Porter.*** Defendants commissioned Delyn D. Porter, M.A., CRC, CIWCS to prepare a vocational evaluation report concerning Claimant. His report is dated February 23, 2021, Ex. 12:193. Mr. Porter's qualifications are known to the Commission.

49. Mr. Porter reviewed relevant medical and vocational records, as well as standard vocational treatises, in preparing his report. *Id.* at 12:194-198.

50. Mr. Porter noted that Claimant reported having good computer skills. "He has experience using a computer as part of his work duties and is familiar with various software programs." Ex. 12:199.

51. Claimant and Mr. Porter met via Zoom, instead of an in-person interview, due to the COVID-19 epidemic. *Id.* at 12:201.

52. Claimant's post-injury functional capacity includes the following: extended walking is difficult; walks with a limp; can lift up to 40-50 pounds from the waist up but has difficulty carrying weight; has some difficulty pushing and pulling; has difficulty kneeling; has difficulty bending and stooping; has difficulty ambulating stairs and ladders; and reports chronic pain in his right lower extremity. *Id.* at 12:201-202.

53. Mr. Porter identified the following job titles as relevant to Claimant's past employment: maintenance mechanic; maintenance mechanic supervisor; field hauler (agriculture); construction equipment mechanic; farm equipment mechanic; emergency medical technician; emergency medical services coordinator; instrument maker and repairer; general manager, farm; supervisor, maintenance; mine superintendent; ranch manager; and plumber. *Id.* at 12:203-208.

54. In his transferable skills analysis, Mr. Porter determined that Claimant had demonstrated the ability to perform jobs with skill levels 3 (semi-skilled) through 8 (highly skilled and requiring over 4 years and up to and including 10 years for proficiency). *Id.* at 12:208.

55. Based upon the assigned permanent physical restrictions from Dr. Grooms/CMA McKayla Palacio that includes no ladder climbing, no repetitive stair climbing, no squatting, and lifting up to 50 pounds from knee height, Mr. Porter determined that Claimant was capable

of MEDIUM physical demand jobs with accommodations for climbing and squatting. Ex. 12:209-210.

56. For general education development, Mr. Porter opined that Claimant was at Level 4 – high school graduation with more demanding curriculum. For experience education, Mr. Porter similarly placed Claimant at Level 4, successful work experience in organized technology. *Id.* at 12:210.

57. For the applicable labor market area, Mr. Porter considered a 50-mile radius from Claimant's home in Rupert, Idaho.[6] *Id.* at 12:211.

58. Mr. Porter concluded in pertinent part as follows:

> Mr. Dryden possesses numerous transferable skills as a result of his past work experience and past management experience. He has good technical and mechanical skills and expertise as well as experience operating heavy equipment and mining/milling equipment. He also has experience supervising others and his past work experience has required complex problem-solving skills.
>
> Mr. Dryden has been assigned the following permanent work restrictions: He was assigned permanent work restrictions that included no ladder climbing, no repetitive stair climbing, no squatting[7], standing will be allowed, lifting up to 50 pounds from knee height.
>
> Based upon the assigned permanent restrictions resulting from the 05/29/2019 industrial accident, Mr. Dryden continues to be capable of MEDIUM physical demand work with restrictions from performing repetitive stair climbing and squatting. Based on the assigned restrictions, Mr. Dryden would still be capable of medium physical demand work with up to occasional stair climbing and squatting.[8]

Id. at 12:212.

59. Mr. Porter opined with regard to a labor market loss for Claimant as follows:

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[6] Prior to the hearing, Claimant moved to Lost River, Kentucky. Nevertheless, the proper time for determining Claimant's disability under most circumstances is the time of the hearing. *Brown v. Home Depot,* 152 Idaho 605, 609, 272 P.3d 577, 581 (2012). Because the parties have not submitted vocational analyses based upon Claimant's time of hearing residence and corresponding labor market, the Referee will consider the appropriate labor market as one based in Jerome, Idaho, where Claimant previously lived.

[7] Later in his report, Mr. Porter changed "no squatting" to "occasional squatting." *See*, Ex. 12:214.

[8] Mr. Porter's assertion that Claimant could handle a job with "occasional" squatting is belied by his earlier

> In my opinion if you exclude those jobs requiring lifting more than 50 pounds, requires ladder climbing, or requires more that OCCASSIONAL stair climbing or squatting, Mr. Dryden would still have access to approximately 2,100 total jobs in his labor market resulting in a calculated 50.0% labor market loss post-injury.

Ex. 12:214.

60. Mr. Porter notes that Claimant receives pension payments from OCI Chemical Company and Westmoreland Coal Company of $1,400 per month and $650 per month respectively, combined with monthly Social Security retirement benefits of $2,100 per month. "Combined he has approximately $4,150 per month to offset his living expenses... These resources could be viewed as a disincentive for Mr. Dryden to actively participate in job development activities." *Id.* at 12:214.

61. With regard to wage earning capacity, Mr. Porter opined as follows: "Based upon his vocational profile and using the post-injury occupations identified by Dr. Collins, Mr. Dryden has an average post-injury wage earning capacity in the Twin Falls labor market of up to $61,460 per year as a production supervisor... Assuming a pre-injury wage of $82,836 per year, and a post-injury wage earning capacity of $61,460 per year, Mr. Dryden has sustained a calculated 25.8% wage earning capacity loss." *Id.* at 12:215.

62. Mr. Porter's ultimate conclusion regarding permanent partial disability was as follows: "Based upon the assigned permanent work restrictions, Mr. Dryden has sustained a calculated 50.0% labor market loss. His calculated wage-earning capacity loss is 25.8%... In my professional opinion, using his vocational profile and the assigned permanent work restrictions, and weighing labor market loss and wage-earning capacity loss equally, Mr. Dryden has sustained a permanent partial disability (PPD) of 37.9% inclusive of impairment." *Id.* at 12:215-216.

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acknowledgement that Claimant's assigned restrictions include "no squatting." *See*, Ex. 12:212.

63. ***Dr. Nancy Collins***. Claimant's attorney commissioned Nancy J. Collins, PhD, to prepare a vocational evaluation report concerning Claimant. Her report is dated November 4, 2020. Ex. 13:219. The Commission is familiar with the credentials of Dr. Collins.

64. Dr. Collins reviewed all relevant medical and vocational records concerning Claimant, including applicable vocational treatises. She also conducted an interview of Claimant. *Id.* at 13:219.

65. Dr. Collins found the following job titles from the *Dictionary of Occupational Titles* to be relevant to Claimant's employment background: mine superintendent; supervisor, mine; hydraulic repairer (any industry); construction equipment mechanic; instrument maker and repairer (petrol and gas); general manager, farm; farm equipment mechanic; emergency medical technician; and farm machine operator. *Id.* at 13:224-225.

66. For Claimant's skill level of work, Dr. Collins found that he had functioned in positions that required up to highly skilled work. She found that he was capable of performing work up to a specific vocational preparation level of 8. *Id.* at 13:226.

67. For level of physical exertion, Dr. Collins concluded in pertinent part as follows: "The majority of Mr. Dryden's past work experience has been categorized generally in the *Dictionary of Occupational Titles* at the Medium physical exertion level. Some of his management work would be considered light, while some of his equipment maintenance work was heavy. His limitations now preclude him from heavy work, because of lifting restrictions. He still has access to medium level work with restrictions for climbing and squatting." *Id.* at 13:226.

68. Dr. Collins determined that Claimant was highly skilled based upon his past work and that these skills were transferable. She concluded that with his transferable skills and given

his permanent work restrictions, Claimant was best suited for working in a management or supervisory setting, supervising workers in his past fields of work. Nevertheless, given his lack of a bachelor's degree that may impede access to jobs in mid and upper management. Ex. 13:227.

69. For a labor market access analysis, Dr. Collins developed a database of relevant jobs in the Twin Falls job market, indicating whether heavy work, climbing, and squatting was required. Based upon that research, she determined that Claimant had access to approximately 4,125 jobs in his pre-injury labor market. With his lifting, climbing and squatting restrictions, he would now have access, post-injury, to 787 jobs, a loss of 81%. *Id.* at 13:228.

70. For an earning capacity analysis, Dr. Collins concluded in pertinent part as follows:

> At the time of Mr. Dryden's injury, he was earning $22 per hour as an equipment maintenance worker for J.D. Heiskell. His W-2 shows he earned $33,461 from his date of hire in late January 2019 to his injury at the end of May 2019. Had he been able to continue working in this job, his earnings would have been around $80,000. He had previously worked as a supervisor in the coal mining industry, where he earned as much as $89,000 annually.
> It appears Mr. Dryden was able to earn an annual wage of $80,000 because of consistent overtime hours. Now, with his restrictions, he will not be able to work in the same industry. My analysis finds he can work as a construction supervisor ($45,979), mobile heavy equipment mechanic, production supervisor ($58,439), and as a forklift operator. At his age of 62, it is not probable he will be hired to work as a supervisor for a new employer. Mobile heavy equipment mechanics earn a median annual wage of $45,253 and forklift operators earn $35,670. If he is able to find this kind of work, I anticipate he will have a 43% loss of earning capacity.

Id. at 13:229.

71. Dr. Collins' ultimate opinion and recommendation concerning Claimant's disability was as follows:

> Mr. Dryden has suffered an 81% loss of access to the labor market as a result of the permanent restrictions he has from injuries sustained in an industrial accident.

> Because he has worked in skilled positions in the past, he has a skill set that should allow him to earn around $45,000 a year. His pre-injury earnings would have been closer to $80,000 a year leaving him with a 43% loss of earning capacity. If these two vocational factors are given equal weight, his permanent partial disability rating inclusive of impairment is 62%.

Ex. 13:230.

72. On March 2, 2021, Dr. Collins wrote a letter to Claimant's counsel updating her vocational analysis in light of the analysis she had read from Mr. Porter. *Id.* at 13:231.

73. She first pointed out that Mr. Porter made a mistake by including occasional squatting as a physical capacity that Claimant could perform, as follows: "Mr. Porter assumes Mr. Dryden's permanent physical restrictions include a medium physical exertion level, no ladder climbing, and no repetitive stairs or repetitive squatting. He assumes Mr. Dryden can perform squatting up to 33% of a day and that is not accurate." Ex. 13:231. The actual restrictions include "no squatting." Dr. Collins stated that "My original analysis assumed he could not squat per the restrictions." *Id.* at 13:231.

74. Dr. Collins further criticized Mr. Porter's wage capacity analysis for assuming that Claimant would be able to find work at a management level "at age of 62." Dr. Collins noted that Claimant could not find management level work when he moved to Idaho, and he is having to move again because he cannot find work. *Id.* at 13:232.

75. Dr. Collins repeated her disability conclusion, as follows: "Taking into consideration Mr. Dryden's actual restrictions for medium level lifting, no ladder climbing and no squatting, he has suffered an 82% loss of access to the labor market. With a 43% loss of earning capacity, his permanent partial disability rating, inclusive of impairment, is 62%. *Id.* at 13:232.

76. **Credibility**. Claimant testified credibly at hearing.

DISCUSSION AND FURTHER FINDINGS

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

78. **Causation/Apportionment of Subsequent Intervening Event.** A claimant must prove that he was injured as the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001).

79. Claimant carries the burden of proving causation. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014) (*quoting Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000)). "The proof required is 'a reasonable degree of medical probability' that the claimant's 'injury was caused by an industrial accident.'" *Id.* (*quoting Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)). Put

another way, the "claimant has the burden of proving a probable, not merely a possible, causal connection between the employment and the injury or disease." *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 332, 179 P.3d 288, 295 (2008) (*quoting Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995)). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Estate of Aikele v. City of Blackfoot*, 160 Idaho, 903, 911, 382 P.3d, 352, 360 (2016) (*quoting Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). "The Commission may not decide causation without opinion evidence from a medical expert." *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (quoting *Anderson*, 143 Idaho at 196, 141 P.3d at 1065).

80. There is no dispute that the industrial accident of May 29, 2019 caused a partial tear/rupture to Claimant's right Achilles tendon, necessitating nonoperative medical treatment. Both PA Inouye and Dr. Grooms assessed a partial rupture/tear to Claimant's right Achilles tendon as a result of the industrial accident on the day that it occurred. *See*, Ex. 8:95-99. Furthermore, they described the mechanism of injury in which Claimant's right Achilles tendon became injured industrially. *Id.* Dr. Chen did not dispute the mechanism of injury but rather recited the appropriate underlying facts concerning it in his IME report. *See*, Ex. 11:187.

81. The pertinent causal dispute in this case is whether a subsequent intervening event, the so-called "horse incident," sufficiently re-injured Claimant's right Achilles tendon to constitute a permanent aggravation/acceleration justifying apportionment of the injury. Dr. Chen in his IME made note of the horse incident as justifying a 75% apportionment of Claimant's condition. *See*, Ex. 11:190-191. For the reasons set forth below, Dr. Chen's apportionment of the injury is incorrect, and the horse incident caused only a temporary aggravation of the injury.

82. The first clue to determining whether the horse incident caused a permanent injury to Claimant's right Achilles tendon is Dr. Chen's own statement that "after a week, it returned to his normal achy kind of pain." Ex. 11:187. Thus, Claimant's right Achilles tendon returned to baseline only after a week following the horse incident. Such an injury does not qualify as causing a permanent aggravation of a previous injury.

83. Another indicator that the horse incident caused a mere temporary aggravation comes from Dr. Chen's description of the mechanism of injury in the horse incident itself. Claimant was helping the horse become unstuck from a wire fence by pushing on the horse's shoulder. There is no indication that Claimant's right Achilles tendon was directly struck or otherwise touched in any way. Claimant felt an "ouch" pain in his tendon; that is all.

84. Additionally, Claimant's own description of the horse incident does not support a finding that it resulted in serious injury; he felt no "pop" nor tear, nor did he use his foot or toe to "push off" while pushing the horse. Under these circumstances, it is difficult to conclude that Claimant's right Achilles tendon was subjected to any serious or consequential injury. *See*, Ex. 11:187 *and* Tr., 50:13-51:4.

85. There is no imagery such as X-rays or MRIs in the record documenting a serious injury to Claimant's right Achilles tendon after the horse incident. Dr. Chen's conclusion, therefore, was purely subjective and not supported by objective medical evidence.

86. Next, if the horse incident caused a serious enough injury requiring 75% apportionment, one would expect it to affect the course of Claimant's recovery negatively or even extremely negatively. Nevertheless, the medical records from Dr. Grooms' clinic do not bear that out. Rather, on October 29, 2019, only a month from the alleged horse incident in September, Claimant was "doing much better. He is having very little discomfort." Ex. 8:114.

Again, on January 6, 2020, Claimant "has been gradually improving, he says the swelling to the tendon has decreased." Ex. 9:145.

87. Dr. Grooms, Claimant's treating physician, did not feel that Dr. Chen's proposed apportionment was reasonable, although he was not informed that it was based on a subsequent rather than preceding event. Furthermore, Dr. Grooms noted that Claimant's recovery from the right Achilles tendon injury was proceeding normally, as follows: "In addition, due to the patient's age and the nature of his injury, I don't think we would expect his progress to be any greater than we are currently observing." Ex. 9:146.

88. For all these reasons, the horse incident resulted in only a temporary aggravation to Claimant's right Achilles tendon injury. There is no reasonable basis to apportion the industrial injury based upon the horse incident. Claimant's entitlement to impairment and permanent disability is based upon the industrial injury without any apportionment. The accident in Employer's workplace on May 29, 2019 caused the industrial injury.

89. **Permanent Partial Impairment (PPI)**. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

90. Dr. Grooms and CMA Palacio assigned Claimant a 13% lower extremity impairment on May 11, 2020. *See*, Ex. 9:149. Claimant is entitled to recover the full amount of this 13% lower extremity impairment, without apportionment, with a credit to Surety for the 25% already paid.

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

92. The test for determining whether Claimant has suffered a permanent disability is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company,* 115 Idaho 293, 294, 766 P.2d 763, 764 (1988) (claimant at time of hearing was earning a salary equal to his pre-injury employment and did not present significant evidence of disability).

93. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic

circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995) (claimant's limitations exclusively preexisted industrial injury, thus he had no disability in excess of his impairment).

94. The proper time for determining Claimant's disability under most circumstances is the time of the hearing. *Brown v. Home Depot,* 152 Idaho 605, 609, 272 P.3d 577, 581 (2012) (Commission's finding regarding disability was reached in error because it was based upon his circumstances at time of medical stability rather than hearing).

95. Claimant bears the burden of proving that he has suffered a disability. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 34, 714 P2d 1, 3 (1985) (claimant failed to establish disability where her complaints of chronic back pain were not supported by an anatomical cause of her pain or physical evidence of injury). "[A] permanent disability rating need not be greater than the impairment rating if, after consideration of the non-medical factors in Idaho Code § 72–425, the claimant's 'probable future ability to engage in gainful activity' is accurately reflected by the impairment rating." *Graybill,* 115 Idaho at 294, 766 P.2d at 764.

96. In *Poljarevic v. Independent Food Corporation*, 2010 IIC 0001 (permanent work restrictions assigned to claimant by independent medical examiner were appropriate), the Commission observed in pertinent part as follows:

> In assessing Claimant's permanent partial disability, it is first helpful to understand whether Claimant's permanent impairment has caused a loss of functional capacity, which impacts his ability to engage in physical activity. Indeed, a loss of functional capacity figures prominently in all cases involving a determination of an injured worker's disability in excess of physical impairment.

> *Absent some functional loss, it is hard to conceive of a factual scenario that would support an award of disability over and above impairment*; if the injured worker is physically capable of performing the same types of physical activities as he performed prior to the industrial accident, then neither wage loss nor loss of access to the labor market is implicated.

Id. at 2010 IIC 0001.7 (emphasis added). Without a finding of permanent impairment, therefore, there can be no disability. *See, e.g. Hanson v. Z., Inc., dba Paul's Market*, 2010 WL 1832647, 9 (Idaho Ind. Comm. 2008-021218) (March 10, 2010); *Davidson v. Riverland Excavating, Inc.*, 147 Idaho 339, 345 209 P.3d 636, 642 (2009); *and Rivas v. K.C. Logging*, 134 Idaho 603, 608, 7 P3d 212, 217 (2000) ("Disability only results when the claimant's ability to engage in gainful activity is reduced or absent because of permanent impairment. I.C. § 72-423. Only after the impairment reduces the claimant's earning capacity do the pertinent nonmedical factors come into play.")

97. There are two competing vocational formulations of Claimant's permanent partial disability, 37.9% put forward by Mr. Porter and 62% put forward by Dr. Collins. For the reasons stated below, the formulation of Dr. Collins is entitled to greater weight in these findings.

98. Mr. Porter mistakenly read Claimant's physical restrictions from Dr. Grooms to include "no repetitive squatting." *See*, Ex. 12:214. The correct restriction was "no squatting." *See*, Ex. 9:149. This artificially inflated the number of post-injury jobs for which Claimant would be eligible, for example the supervisor mechanic position, which requires both ladder climbing and occasional squatting. *See*, Ex. 13:789. Another example is maintenance repair work jobs, which Mr. Porter stated there were 90 such positions in his analysis. *See*, Ex. 13:789.

99. Mr. Porter's wage capacity analysis is also flawed because he assumes that Claimant will be able to obtain a supervisory and/or management position at age 62 (now 63).

For example, Mr. Porter used the job of production supervisor in his analysis to arrive at a wage-earning capacity of $61,460. *See*. Ex. 12:215). The wage-earning capacity opined by Dr. Collins of $45,253 is more realistic, as is the corresponding loss of wage-earning capacity of 43%. *See*, Ex. 13:229.

100. Because Mr. Porter's analysis is not consistent with the facts of this case, the analysis of Dr. Collins is entitled to greater weight. This finding is bolstered by both the medical and nonmedical factors in this case. Claimant has a 13% lower extremity impairment and corresponding physical restrictions of no ladder climbing, no repetitive stair climbing, no squatting, with standing allowed, and lifting up to 50 pounds from knee height. Such restrictions would prevent him from performing the time of injury job with Employer, as well as any of the mechanical heavy jobs that he has performed in the past. Claimant's age of 63 years must be considered in his employability and unfortunately it is a negative factor. Furthermore, Claimant's lack of a bachelor's degree is a barrier to employment in the managerial and supervisory occupations for which he would otherwise be well qualified.

101. Claimant is not averse to working and the record supports a finding that he is motivated to seek employment, based upon his applications, despite his receipt of pension funds and Social Security.

102. Based upon all of the medical and nonmedical factors, Claimant is entitled to recover permanent partial disability, inclusive of impairment, in the amount of 62%.

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

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for

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

104. Claimant alleges entitlement to attorney fees first, for alleged unreasonableness in refusing to pay the full amount of his 13% permanent partial impairment but rather apportioning it by 75%, and second, for alleged unreasonableness in repeatedly delaying payment of time loss benefits.

105. The first reason does not support an award of attorney fees. Although they were ultimately incorrect in apportioning Claimant's 13% PPI, nevertheless Defendants had a basis for doing so in Dr. Chen's opinion concerning apportionment.

106. The second reason, however, does support an award of attorney fees. The listing of TTD/TPD payments contained in the record discloses six delays in paying time loss benefits. Two of the most egregious are December 28, 2019 – February 28, 2020 and November 12 – December 27, 2019.

107. Defendants plead the need to investigate the facts of both the horse incident and Claimant's hernia as the reason for the delays in payments of time loss benefits. Nevertheless, those events did not coincide with the most serious periods of delayed payments. For example, the horse incident occurred in or about September 2019 and the hernia occurred in or about August 2019, but the longest period of delay in benefits was between November 12 and December 27, 2019, and again between December 28 and February 28, 2019. *See*, Ex. 2:6; Ex. 6:69-86.

108. For the foregoing reasons, Claimant is entitled to recover attorney fees for the unreasonableness of the payment delays.

CONCLUSIONS OF LAW

1. Neither Claimant's permanent partial impairment nor his disability should be apportioned.

2. Claimant is entitled to an impairment of 13% of the lower extremity, subject to a credit to Defendants for their previous payment of 25% of that impairment.

3. Claimant has sustained a permanent partial disability of 62%, inclusive of impairment.

4. Claimant is entitled to recover attorney fees pursuant to Idaho Code § 72-804 due to the Defendants' unreasonable delays in paying certain time loss benefits. Claimant shall only recover attorney fees for his attorneys' efforts to argue the unreasonableness of the payment delays. Unless the parties can agree on an amount for reasonable attorney's 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. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 18, 684 P.2d 900, 995 (1984). 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 objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing

pleadings, will review the matter and issue an order determining attorney fees and costs.

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 14th day of September, 2021.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2021, 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:

DANIEL M GARIEPY
PO BOX 3869
KETCHUM ID 83340
dgariepy@gariepylawoffices.com

DAVID P GARDNER
412 W. CENTER, STE. 2000
POCATELLO ID 83204
dgardner@hawleytroxell.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE DRYDEN, Claimant, v. J.D. HEISKELL HOLDINGS, LLC, Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2019-015596** **ORDER** FILED SEP 2 - 2021 INDUSTRIAL COMMISSION

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

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

1. Neither Claimant's permanent partial impairment nor his disability should be apportioned.
2. Claimant is entitled to an impairment of 13% of the lower extremity, subject to a credit to Defendants for their previous payment of 25% of that impairment.
3. Claimant has sustained a permanent partial disability of 62%, inclusive of impairment.
4. Claimant is entitled to recover attorney fees pursuant to Idaho Code § 72-804 due to the Defendants' unreasonable delays in paying certain time loss benefits. Claimant shall only

recover attorney fees for his attorneys' efforts to argue the unreasonableness of the payment delays. Unless the parties can agree on an amount for reasonable attorney's 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. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees and costs in the matter. *See, Hogaboom v. Economy Mattress*, 107 Idaho 13, 18, 684 P.2d 900, 995 (1984). 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 objects to any representation made by Claimant, the objection must be set forth with particularity. Within seven (7) days after Defendants' response, Claimant may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees and costs.

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

DATED this 27th day of September, 2021.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2021, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

DANIEL M GARIEPY
PO BOX 3869
KETCHUM ID 83340
dgariepy@gariepylawoffices.com

DAVID P GARDNER
412 W. CENTER, STE. 2000
POCATELLO ID 83204
dgardner@hawleytroxell.com

sc