BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JUSTIN EARL CARPENTER, Claimant, v. RECORD STEEL CONSTRUCTION, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2011-026100** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed June 6, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on September 7, 2012. Todd Joyner represented Claimant. The late Roger Brown represented Defendants Employer and Surety. The parties presented oral and documentary evidence and later submitted briefs. After the hearing Claimant unexpectedly required another surgery. The matter was held in abeyance while he recovered. A second hearing was held January 9, 2014. Lea Kear represented Defendants Employer and Surety. The parties again presented oral and documentary evidence and later submitted briefs. The case came under advisement on April 14, 2014 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

According to the parties' briefs, the issues have resolved to the following:

1. Whether Claimant is medically stable and, if so, on what date; and
2. Whether and to what extent Claimant is entitled to benefits for:
   (a) Permanent partial impairment (PPI), and

(b) Permanent partial disability.

An issue of attorney fees was raised in the first hearing. It was not identified as a continuing issue in the second hearing. Neither party addressed this issue in the second round of briefing. Nevertheless, the issue not having been expressly waived, it is considered herein.

CONTENTIONS OF THE PARTIES

Claimant contends his permanent disability should be rated at 80%-82%.

Defendants contend that Claimant became medically stable as of October 25, 2013 with a PPI of 14% whole person according to Vic Kadyan, M.D. and that the parties do not dispute these issues. Claimant's permanent partial disability should be rated, inclusive of PPI, at a range between 35% and 60% depending upon which physician's restrictions are adopted by the Commission.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, coworker Kevin Glovaeki, supervisor Justin Roberts, case manager Angela Cluff, and vocational expert Terry Montague;

2. Claimant's exhibits 1 through 19; also page 77A of Claimant's F (inserted into Defendants' set of exhibits), admitted at the hearings;

3. Defendants' exhibits A through E, Defendants' Exhibit F submitted without objection after the first hearing, and Defendants' A through O and 9 through 12 admitted at the hearings; and

4. Post-hearing depositions of Terry Montague and William Jordan. (Page 12 of Mr. Montague's addendum report was admitted in his deposition and is deemed appended to Exhibit O.)

All objections made in post-hearing depositions are overruled.

FINDINGS OF FACT

1. Claimant worked for Employer on October 22, 2011. He lifted a pump weighing

approximately 300 pounds. He injured his low back. The parties do not dispute that the accident was compensable and caused injury. He received medical care including surgery.

2. After a hearing before the Commission on September 7, 2012, Claimant suffered spontaneous complications of his injury. In March 2013, Claimant rolled over in bed and suddenly lost all use of his right leg. Additional surgery was required.

Medical Care

3. On October 23, 2011, the morning after the accident, Claimant sought medical care at the emergency room in Wolf Point, Montana. The initial note inaccurately records the pump as weighing "30" instead of 300 pounds. Otherwise, the description of the accident is consistent with Claimant's hearing testimony. The ER physician diagnosed an acute lumbar paravertebral muscle strain. Claimant was taken off work and given medication and home care instructions.

4. On October 26, 2011, Claimant sought emergency room treatment in Butte, Montana. His reported history of injury describes a "tank" instead of a pump, and estimates its weight at 150 pounds, but is otherwise consistent with Claimant's hearing testimony.

5. On October 27, 2011, an MRI showed mild degenerative changes from L3 through S1 with annular tears at L3-4 and L4-5. A disc bulge displaced the S1 nerve roots at L5-S1.

6. After some conservative management, Claimant was admitted to Saint Alphonsus Regional Medical Center. He received an epidural steroid injection on November 1, 2011.

7. Conservative management, including physical therapy, helped only a little.

8. Dr. Kenneth Little, M.D., provided a neurosurgical consultation on November 10, 2011. He recommended surgery on an expedited basis. Surgery was performed March 6, 2012.

9. A March 22, 2012 post-operative follow-up visit revealed substantial

improvement to Claimant's pain, but signs of neurological abnormalities persisted.

10. On May 2, 2012, at Claimant's request, Dr. Little released him to return to work without restrictions. Dr. Little expressed concern about lingering neurological abnormalities.

11. On June 29, 2012, despite "significant problems" pointing to ongoing neurologic injury, Dr. Little opined Claimant was medically stable. He rated Claimant's PPI at 10% of the whole person. He authored the following permanent limitations/restrictions for Claimant:

> Mr. Carpenter's permanent restrictions would include an inability to operate foot controls. For the foreseeable future he will not be able to crouch, stoop, bend, twist, or stand for prolonged periods of time. I would not recommend climbing ladders or working on scaffolding. I would also recommend against lifting more than 30 pounds.
>
> C. Exh. 8, p. 18.

12. On July 23, 2012, R. Tyler Frizzell, M.D., evaluated Claimant at Surety's request. On examination, Dr. Frizzell noted lingering neurological abnormalities. He opined Claimant was stable and did not need additional treatment. He rated Claimant's PPI at 14% whole person. He deferred imposing permanent restrictions without an FCE and imposed light duty until permanent restrictions could be quantified.

13. On December 4, 2012, Claimant visited podiatrist Andrew Black, DPM, for continuing neurologic complaints in his right foot.

14. On March 5, 2013, Claimant returned to Dr. Little's office with increasing neurologic symptoms in his right leg.

15. On March 6, 2013, while in bed, Claimant felt a sudden exacerbation of symptoms. Dr. Little recorded "complete flaccid paralysis of his right foot dorsiflexion and plantar flexion (strength 0/5). He also had a dense sensory deficit. Therefore, he not only had a complete foot drop, but also a complete absence of plantar flexion." (*See* Defendants'

Exhibit B at P.6.) A steroid injection was given.

16. On March 7, 2013, Dr. Little performed emergency surgery. He found a "very large lateral disk protrusion" affecting the L5 nerve root and "very thick synovial tissue" pushing on scar tissue also affecting the S1 nerve.

17. At the time of discharge on March 8, 2013, Claimant was noted to have recovered full movement and strength in his lower extremities. (*See* Defendants' Exhibit D at 61.) By March 22, 2013, Dr. Little's office reported that Claimant continued to do well following surgery, but with some recent worsening of discomfort:

> Mr. Carpenter is doing well following his operation. He reports some surgical site soreness. He reports for the first three days post op having dramatic improvement in his radicular leg pain. Since then he has had some worsening right buttock, calf, and ankle pain. This is more pronounced when he is lying flat in bed. He reports persistent right toe tingling. He is currently taking oxycodone and Relafen for pain.
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> D. Exh. B, p. 8.

18. On April 26, 2013 a lumbar MRI showed some advancing degeneration at L3-4 and surgical changes at L4-5 and L5-S1. The neurological impingement objectively appeared to have been corrected.

19. Claimant was referred by Dr. Little to Shane Maxwell, D.O., for pain management. Claimant first saw Dr. Maxwell on July 10, 2013. On the occasion of that evaluation, Dr. Maxwell recorded the following history concerning Claimant's subjective complaints:

> The patient described persistent right leg pain as well as loss of muscle function in the calf muscles. He has limited feeling in the right lower extremity below the knee and this is never healed since the surgery. He has a difficult time walking. Mornings are difficult getting up in the morning with very stiff sections of his low back which tend to improve throughout the middle of the day and then worsen again in the nighttime.
>
> . . . .

> Because of the pain the patient has not been able to work. He is not able to be physically active. He has been restricted by a surgeon with the amount of lifting, bending, twisting, and sitting.
>
> He currently describes the pain as a stabbing, aching, shooting, cramping sensation in his central low back and down into his right lower extremity. It is better when he is sitting still or lying down and worsened with moving and walking
>
> The pain affects his activities of daily living with laundry, vacuuming, dishes, sweeping, and driving.
>
> D. Exh. G, p. 78.

On exam, Dr. Maxwell noted*, inter alia*, decreased strength in the right lower extremity with plantar flexion and dorsiflexion rated at 4/5. Dr. Maxwell recommended right-sided L4-S1 medial branch blocks in an effort to control Claimant's axial low-back pain. Claimant received the first such block on July 25, 2013. Contemporaneous with the first injection, Dr. Maxwell also identified Claimant's limitations/restrictions on a form provided by the Industrial Commission Rehabilitation Division. In response to the ICRD inquiry, Dr. Maxwell reported that Claimant was capable of returning to modified duty with certain permanent restrictions. Specifically, Dr. Maxwell opined that Claimant could engage in sitting, standing, twisting, climbing and kneeling only "rarely (less than 1%)." He limited Claimant's lifting and pushing/pulling to no more than 20 pounds. For additional limitations/restrictions he referred the ICRD to previous restrictions authored by Dr. Little.

20. Claimant was next seen by Dr. Maxwell on August 27, 2013. At that time, Dr. Maxwell reported that the first injection had afforded Claimant significant pain relief for approximately 2½ weeks, but that his pain had since returned. A second injection was performed on September 13, 2013. Claimant returned for evaluation on October 11, 2013, at which time he reported that his pain had been reduced by approximately 80%. However, as of October 11,

2013, his pain had returned. Dr. Maxwell recommended radiofrequency ablation on the right at L4-S1.

21. Claimant was seen by Vic Kadyan, M.D., for the purposes of an independent medical evaluation on October 25, 2013. Dr. Kadyan took the following history from Claimant concerning his subjective complaints:

> He reports current pain as 6/10. Over the last month it has averaged 7-8/10 with a high of 10/10 and a low of 5/10. He feels like he has weakness in his right leg. He has no bowel or bladder issues. He feels like his entire foot is numb. The patient reports that he has difficulty with lifting and has been impaired in sitting, walking and bending. He believes he can only do that for short periods. He feels like his right leg gives out significantly. Currently, he feels like he has been limited in horse riding, hiking, sports, and 4-wheeling. He is unable to hike or hunt. He recently sold his 4-wheeler. He reports specific activities that increase his pain include walking, sitting, bending, standing, and twisting. Activities that relieve his pain include laying flat on his back.

On exam, Claimant was found to have significantly reduced strength in the right lower extremity with plantar flexion at 2/5 and dorsiflexion at 2/5. Dr. Kadyan felt that Claimant had reached a point of maximum medical improvement. He gave Claimant a 14% PPI rating based on Claimant's history of surgery and residual radiculopathy. He noted that Claimant exhibited atrophy, loss of muscle reflex and abnormal sensation on exam. He felt that Claimant was entitled to a 14% PPI rating, the same rating previously given by Dr. Frizzell.

22. Concerning limitations/restrictions, Dr. Kadyan noted that, unbeknownst to Claimant, Dr. Kadyan had the opportunity to review certain social media pages associated with Claimant, which revealed some information about Claimant's functional abilities. Dr. Kadyan stated that he felt the activities alluded to on these social media pages were consistent with his professional judgment concerning the limitations/restrictions that should be assigned to Claimant. Dr. Kadyan assigned to Claimant the following permanent limitations/restrictions:

> I would limit lifting to 30 pounds with no bending, crawling, or working at unprotected heights.

Other Background

23. Claimant was born on July 12, 1982, and was 31 years old on the date of the second hearing.

24. Claimant graduated high school with a C average. WRAT testing performed by Witco, shows that his reading and math skills are at a seventh grade level while his spelling skills are at a sixth grade level. Claimant testified that he feels his reading has improved since high school graduation. H.T. 16:11-15 (September 7, 2012).

25. Since graduating from high school in 2001, Claimant has been employed mainly in semi-skilled jobs having medium and heavy physical/exertional requirements. He has worked as a ranch hand, farm hand, lumber yard worker, forklift operator and industrial coder. Mr. Jordan also reported that Claimant is trained as a welder and is a journeyman pipefitter. Concerning Claimant's training and work as a pipefitter, Mr. Jordan stated:

> Claimant has worked at a Journeyman level status for Pipe Fitter: this was a result of participating in 54 months of training. He said he is capable of performing all related tasks of Journeyman level work, but was never licensed or certified as such.

D. Exh. F, p. 47.

26. ICRD records reflect that Claimant has received no specialized training following high school graduation. However, the initial interview performed by the ICRD reflects that Claimant does have past work experience as a pipefitter and welder. Based on his assumption concerning Claimant's proficiencies at welding and pipefitting, Mr. Jordan stated that Claimant demonstrates the capacity to be trained for skilled employment. Indeed, Mr. Jordan proposed a number of possible training opportunities for Claimant that would mitigate his inability to perform any of his past relevant employment.

27. Concerning pipefitting and welding, Claimant denied having any significant welding skills. He admitted that he had learned some basic welding techniques from his father, but denied having any marketable welding skills:

> Q There's also the issue of the welding that your attorney brought up. I understand your dad's a welder; is that correct?
>
> A He knew how to weld. He welded for the sugar factory.
>
> Q Okay. The sugar, is that Amalgamated?
>
> A Yeah, Amalgamated Sugar. Sorry.
>
> Q Did he ever teach you anything about welding?
>
> A Here and there. He was retired, disabled before I got up to the age for him to really teach me anything.
>
> Q Okay. So you said here and there. What specifically did he teach you about welding?
>
> A How to tack, you know. I can weld little stuff. He taught me how to weld little stuff up, but stuff for actual business use, no. We never had the actual welder or anything like that to actually teach me how to go any farther than that.
>
> Q So when you say little stuff, what do you mean by that?
>
> A. He taught me how to weld a mailbox post together, stuff that doesn't take much strength.
>
> H.T. 36:14 to 37:11 (January 9, 2014).

Claimant denied ever having worked in the past as a welder. Concerning his alleged work as a pipefitter, Claimant testified as follows at the first hearing of this matter:

> Q Okay. There has been some indication you worked in the oil fields. Have you worked in the oil fields?
>
> A Yes, I have.
>
> Q How long did you do that?
>
> A Approximately four to five years.

Q Okay. Have any back injuries in the oil fields?

A Never.

Q Did you - - what kind of things were you doing in the oil fields?

A I was a pipefitter.

Q What did that require you to do?

A Mostly just fitting pipes and taking care of a welder, doing their clean up, getting their pipes fit so they can weld them up and - -

Q Did that require you to lift more than 30 pounds?

A Yes.

Q How about bending, stopping, standing, twisting?

A Day in and day out.

H.T. 72:6-24 (September 7, 2012).

Claimant elaborated on his work as a "pipefitter" at the time of the second hearing:

Q There was some indication you had been a welder in a previous occupation. Have you ever been a welder in a previous occupation?

A No, sir. I was what they call a pipefitter.

. . . .

Q I understand from reading one of the vocational reports, which is again that Exhibit F which is distinguished from the F that we have in this record before us, that you were a journeyman level pipefitter. Is that correct?

A No. I was the pipefitter's helper. Some places you work, they call them different things. You know, everybody's got their different wording for them. But like I said, if you go to a union, a pipefitter, you've got to actually have schooling to do. If you just go to a welding shop, they'll call you a pipefitter, but it's just a grunt worker.

Q So what I'm referring to in Exhibit F, and it's page 4, it says claimant has worked at a journeyman level status for pipefitter. This was the result of participating in 54 months of training. He is capable of performing all related tasks of journeyman level work but was never licensed or certified as such. Do you agree with that statement?

A I could do them all or was trained to do them all is what you're asking? No, I wasn't trained to do everything a pipefitter does, no.

Q Did you receive about 54 months of training?

A I worked. I think that's what they're calling training. I've never went to school or was actually put into training, no.

Q Okay. But when you worked, did you have someone who was responsible for showing you different things and different job tasks?

A The welder.

Q The welder, okay. And how did that go? Did you feel like you were able to learn the tasks he was showing you?

A Yeah.

Q Do you think you did a good job at those tasks?

A Yeah.

Q And do you recall what employer that was that you got that 54 months in?

A That was the Aspen Fabrication in Rock Springs, Wyoming.

Q And so I just wanted to kind of break down some of the tasks. I know that your attorney touched on this as well, but what specifically were you trained to do in that job?

A For the welding or for the pipefitters?

Q For the pipefitter. I think we're calling it journeyman, but we agree that you didn't get a certification in that.

A Yes. Pretty much just cleaning up, going to get stuff that he needed to be welded up and everything. A gofer. Just pretty much when he pointed his finger and said go get this, I went and got it.

H.T. 17:15-19; 33:7-35:10 (January 9, 2014).

28. Claimant testified that the second surgery did restore some right-leg function. However, Claimant continues to have significant pain and discomfort. (January 9, 2014 HT, 10/12-18). Claimant described his complaints at the time of the second hearing as follows:

Q Okay. What are some of the difficulties you have after the second surgery?

A Meaning what I can and can't do?

Q Yeah. What can you not do?

A It's hard to even tie my shoes, no bending, twisting. I can't sit for very long. I can't stand for very long. I haven't been sleeping very good. I get like three to four hours a night. That's about it. The rest of the time I'm tossing and turning or have to get up and move. Pretty much an everyday think is just moving from a chair to standing, to walking, back to the chair, to bed.

Q Now, you had a final evaluation by Dr. Kadyan; is that correct?

A Yes.

Q And that report came in approximately December of 2013.

A Yeah.

Q Is that your understanding?

A Yes. Yes.

Q Dr. Kadyan indicates that you probably shouldn't be lifting more than 30 or 35 pounds. Have you been attempting to lift weight in regards to getting better?

A No. It hurts. There's no way I could pick up 30 pounds right now without hurting.

Q Okay. How about getting on ladders or stuff like that?

A No. I don't trust my leg to get off the ground.

Q You still have problems with your leg?

A Oh, yes.

Q Describe those.

A A lot of times it just goes out from underneath me and it goes numb for hours sometimes. You know, the last one I had, it went out from underneath me and it was gone for six hours before I - - and then it just felt like it was asleep, started tingling and coming back.

H.T. 12:2 to 13:15 (January 9, 2014).

Claimant's hearing testimony is not inconsistent with information obtained from Claimant on June 6, 2013 at the time of his initial interview by the ICRD:

> After two back surgeries, he reports he is 'fairly okay' from his right knee to his hip. He has constant pain in his lower leg and lower back and experiences episodes of numbness in his right leg that lasts 6 – 7 hours. The claimant is doubtful without additional medical treatment he will regain the strength in his right leg.
>
> Current activities: The claimant states due to the physical limitations of his right leg he is unable to drive a standard transmission vehicle. Some days, with pain, he performs light household chores. There are days, though, due to pain, stiffness and numbness, he is unable to help with even the lighter housekeeping duties.
>
> IRCD Interview, pp. 1-2.

Even so, Claimant has not been entirely sedentary since the second surgery. An avid hunter and fisherman prior to the subject accident, Claimant has still managed to pursue these avocations since the second surgery, albeit to a much lesser degree than he would like. He has managed to go hunting once or twice to an area near New Meadows, approximately a one-and-a-half-hour drive from his residence. He is unable to drive a manual transmission owing to his right-lower extremity problems, but is still able to operate a vehicle equipped with an automatic transmission.

Vocational Experts

29. Claimant retained the services of Terry Montague to render a forensic opinion on the extent and degree of Claimant's accident-produced disability. Defendants retained William Jordan to perform a similar analysis. Both Mr. Montague and Mr. Jordan performed initial evaluations preparatory to the first hearing. Following the second surgery, both experts revised their original opinions in light of the further restrictions authored by Drs. Kadyan and Maxwell. Not surprisingly, Mr. Jordan and Mr. Montague have come to different conclusions concerning

the extent and degree to which Claimant has suffered a loss of wage-earning capacity as a consequence of the subject accident.

30. Terry Montague's opinions on the extent and degree of Claimant's accident-produced disability are contained in reports of August 24, 2012 and December 25, 2013, and in post-hearing deposition testimony taken February 11, 2014. Without quantifying the extent and degree of Claimant's pre-injury access to the labor market, Mr. Montague proposed that under Dr. Little's limitations/restrictions, Claimant suffered a 90% loss of access to his labor market, and that under Dr. Frizzell's limitations/restrictions, Claimant had suffered a 50% loss of access to his labor market. Mr. Montague assumed that Claimant had a time-of-injury wage of just over $27.00 per hour. Mr. Montague calculated this wage based on Claimant's stated hourly wage of $20.00 per hour and a significant amount of overtime Claimant was paid during his work for Record Steel. Based on a $27.00 per hour hourly wage, Mr. Montague calculated that Claimant had suffered wage loss of at least 60% as a consequence of the subject accident. Mr. Montague concluded that Claimant's disability from the subject accident was in the range of 55%, although how he arrived at this figure is not explained in his August 24, 2012 report.

31. Following the second surgery, Claimant received a new set of limitations/restrictions from Drs. Kadyan and Maxwell. Mr. Montague's December 25, 2013 report relies on the restrictions imposed by Dr. Maxwell to calculate Claimant's disability. Again, Mr. Montague did not quantify the extent and degree of Claimant's pre-injury labor market, but nevertheless proposed that based on Dr. Maxwell's limitations/restrictions, Claimant has suffered a loss of labor market access in the range of 95-99%. For reasons unexplained, Mr. Montague stated that Claimant's wage loss as the result of the subject accident is now in the range of 65%, versus the 60% figure he originally proposed in 2012. Considering Claimant's

wage loss and loss of access to the labor market, Mr. Montague concluded that Claimant has suffered disability in the range of 80-82% as a consequence of the subject accident.

32. Explaining his opinions, Mr. Montague testified that he chose to rely on Dr. Maxwell's opinion concerning Claimant's limitations/restrictions because Dr. Maxwell's assessment was more thorough than Dr. Kadyan's IME. Mr. Montague reasoned that since Dr. Maxwell spent several months as Claimant's treating physician, his opinion was better informed than that of Dr. Kadyan, who had spent only 45 minutes with Claimant. Mr. Montague was also critical of Dr. Kadyan for reviewing Claimant's social media pages as part of the data set he considered in calculating Claimant's permanent limitations/restrictions.

33. William Jordan's opinions are contained in his reports of September 19, 2012, his supplemental letter December 13, 2013, and his deposition of February 13, 2014. Using Vertex OASYS software, Mr. Jordan calculated that Claimant had access to approximately 27% of the total labor market prior to the subject accident. As a result of the limitations/restrictions proposed by Dr. Kadyan, Mr. Jordan opined that Claimant had lost 64% of his pre-injury labor market. Importantly, Mr. Jordan's opinion in this regard appears to be premised on his belief that because Claimant performed skilled work in the past, i.e. welding and pipefitting work, he is capable of being trained to learn new skills that would allow him to access other areas of the labor market. Mr. Jordan did not believe that Claimant's performance on the WRAT tests necessarily made him a poor candidate for retraining, particularly in view of what Mr. Jordan felt was Claimant's past skilled employment. Mr. Jordan opined that if one considers the limitations/restrictions imposed by Dr. Maxwell, Claimant's loss of access to the labor market would increase to approximately 93%. (*See* Jordan Deposition 26/6-19.)

34. In conducting his wage-loss analysis, Mr. Montague considered only a comparison of Claimant's time-of-injury wage with what Mr. Montague thought he could earn in

his residual post-injury labor market. Mr. Jordan used several different approaches to calculate Claimant's wage loss.

35. First, rather than focusing on Claimant's time-of-injury wage, he felt that an average of Claimant's wages during the five-year period immediately preceding the accident provided a more accurate assessment of Claimant's pre-injury wage-earning capacity. Mr. Jordan testified that, on average, Claimant earned $9.03 per hour in the five years preceding the work accident. Mr. Jordan also testified that the average wage available to Claimant in the various jobs comprising his post-injury labor market is $9.56 per hour. Mr. Jordan then compared Claimant's $9.03 pre-injury wage with his anticipated post-injury wage of $9.56, which yields wage loss in the range of 6%.

36. Mr. Jordan's second approach to measuring wage loss is to compare Claimant's time-of-injury wage of $20-plus dollars per hour with his anticipated post-injury wage, which yields wage loss of 52%.

37. Mr. Jordan's third method of measuring wage loss is to simply average the first two approaches, which yields a wage loss of 29%.

38. These three wage-loss figures were used with each of the labor market access loss figures to produce six different opinions on Claimant's disability, each outcome depending on a different combination of loss of labor market access and wage loss variables. Per Mr. Jordan, he felt that the assumption of a 64% loss of labor market access and a 29% wage loss yielded the most accurate assessment of Claimant's disability at 47%, inclusive of impairment.

DISCUSSION AND FURTHER FINDINGS OF FACT

39. 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).

Medical Stability

40. As noted above, at the request of the ICRD, on July 27, 2013 Dr. Maxwell responded to a fill-in-the-blank form to identify what he considered to be Claimant's permanent restrictions. Notably, in that form, Dr. Maxwell did not affirmatively state that Claimant was at a point of maximum medical improvement. Indeed, Dr. Maxwell continued to treat Claimant after July 25, 2013, performing a number of nerve blocks which improved, at least on a temporary basis, Claimant's pain complaints. We do not believe that Dr. Maxwell's July 25, 2013 pronouncement concerning Claimant's permanent limitations/restrictions is adequate to define the date of maximum medical improvement. Nor do Defendants assert otherwise. From the briefing before us, it appears that there is no dispute that the date of medical stability is the date of Dr. Kadyan's closing exam of October 25, 2013. Dr. Kadyan specifically found Claimant to be at a point of maximum medical improvement on that date, and also felt it appropriate to assess Claimant's permanent partial impairment on that date. We find that Claimant reached a point of medical stability on October 25, 2013.

Permanent Partial Impairment

41. Dr. Little originally gave Claimant a 10% PPI rating. Dr. Frizzell followed with a 14% PPI rating. Both of these impairment ratings were issued prior to Claimant's second surgery. Following the second surgery, Claimant was given a 14% impairment rating by Dr. Kadyan. Although this impairment rating is challenged by Mr. Montague, it is not challenged by any medical expert. Nor does it appear to be a serious issue in dispute between the parties, judging from the post-hearing briefing. Whether Claimant's PPI rating is 14% or some figure higher or lower is not particularly relevant to the outcome of this case since, as developed below, Claimant's disability far outstrips the included PPI rating. Regardless, having reviewed Dr.

Kadyan's methodology and opinion, we find that it adequately supports the conclusion that Claimant has suffered a 14% PPI rating as a consequence of the subject accident and related low-back surgeries.

Permanent Partial Disability

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

43. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment 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, 766 P.2d 763 (1988). 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, 896 P.2d 329 (1995).

44. 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. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

45. Per Idaho Code § 72-425, disability is evaluated by considering Claimant's permanent impairment in light of relevant non-medical factors. Permanent impairment often results in permanent limitations/restrictions, and it is an injured worker's permanent limitations/restrictions, in combination with relevant non-medical factors, which are most important in informing our decision concerning the extent and degree to which the industrial accident has affected the Claimant's ability to engage in gainful activity. *Gardner v. Barrett Business Services, Inc.*, 2012 IIC 0055 (June 2012); *Geisendaffer v. Dan Wiebold Ford, Inc.*, 2011 IIC 0010 (February 2011); *Barton v. Seventh Heaven Recreation, Inc.*, 2010 IIC 0379 (December 2010); *Poljarevic v. Independent Food Corp.*, 2010 IIC 0001 (January 2010). Therefore, we must first make some judgment concerning the extent and degree of Claimant's permanent limitations/restrictions. Here, the opinions of Drs. Kadyan and Maxwell differ significantly. Dr. Maxwell issued his limitations/restrictions on a fill-in-the-blank form in the course of his second office visit with Claimant. Dr. Maxwell was not deposed, and his fill-in-the-blank response provided little to no opportunity for elaboration. For example, we find it difficult to accept that Claimant can sit, stand, twist, climb, and kneel less than 1% of an eight hour workday. That would mean that Claimant could neither sit nor stand for more than 4.8 minutes out of an eight hour workday. This is clearly inconsistent with Claimant's testimony, which describes his ability to tolerate a one-and-a-half-hour drive to New Meadows for recreational hunting. If Claimant was truly unable to stand or sit for more than 4.8 minutes per eight hour workday, we believe that the testimony of record would reflect that he is essentially bedridden. We can glean no such suggestion from the record. Possibly, Dr. Maxwell could explain his abbreviated response had he issued a report or been deposed. However, based on the evidence at hand, we are unable to make any judgment as to what he might have intended by indicating that Claimant can only "rarely" sit or stand.

46. However, in other respects, Dr. Maxwell's opinion does find support in the record. Claimant's testimony concerning his subjective complaints and sense of what he can and cannot do is much more consistent with the limitations imposed by Dr. Maxwell than those proposed by Dr. Kadyan. Claimant's severe right calf atrophy tends to support his subjective complaints, and there does not appear to be any dispute between the medical providers that he suffers from a significant and real post-surgical radiculopathy, as well as decreased strength in the right lower extremity. With the caveats referenced above, we find that Dr. Maxwell's opinion comes closest to accurately reflecting Claimant's permanent limitations/restrictions.

47. As developed above, Mr. Montague's opinion is based on his acceptance of Dr. Maxwell's limitations/restrictions. Though we have found Dr. Maxwell's July 25, 2013 reply to the ICRD to be a reasonably accurate representation of Claimant's permanent limitations/restrictions, we do not do so on the basis reached by Mr. Montague. We do not find anything in the fact that Dr. Kadyan reached his opinion after only one visit that would denigrate that opinion. Nor do we believe that Dr. Maxwell's opinion should be elevated simply because he was a physician who treated Claimant and saw him over a period of months. In this regard, it is important to recall that Dr. Maxwell issued his limitations/restrictions on his second visit with Claimant. It is well within the realm of the possible that at the time Dr. Kadyan rendered his opinions on Claimant's limitations/restrictions, he had actually spent more time with Claimant than Dr. Maxwell had when he rendered an opinion on Claimant's permanent limitations/restrictions.

48. Mr. Montague's opinion is also informed by his belief that Claimant suffers from a permanent right foot drop. Both Mr. Montague and Mr. Jordan testified that a foot drop, if extant, would be a significant disabling factor. However, Mr. Montague's insistence notwithstanding, the medical record does not support the conclusion that Claimant currently

suffers from a right foot drop. Dr. Little's postoperative notes reflect that at the time of discharge following the second surgery, full movement and strength had returned to Claimant's right lower extremity. Testing performed by Dr. Maxwell on the occasion of his first visit with Claimant revealed that Claimant had 4/5 plantar flexion and dorsiflexion. At the time of his evaluation of Claimant on October 25, 2013, Claimant was found by Dr. Kadyan to have dorsiflexion and plantar flexion of 2/5. Clearly, Claimant has loss of strength in the right lower extremity, but there is no evidence that Claimant currently has a right foot drop.

49. Mr. Montague's opinion on Claimant's loss of labor market access is not well explained, particularly without an explanation of what Mr. Montague considered Claimant's pre-injury access to the labor market to be. Though it is easier to understand Mr. Montague's calculation of Claimant's wage loss, we question whether his methodology yields the most objective assessment of Claimant's wage loss caused by the industrial accident. Mr. Montague picked the highest pre-injury wage he could contrive in conducting his analysis and the lowest post-injury wage available, i.e. the federal minimum wage. This approach altogether fails to recognize that Claimant has not been a steady wage earner over the years, with many spikes and dips in his annual income over time.

50. We prefer the approach taken by Mr. Jordan in this case. Not only did he find it possible to avoid denigrating Mr. Montague's professional acumen, he offered a number of plausible scenarios from which to calculate Claimant's disability from the work accident. However, Mr. Jordan's underlying assumptions bear further scrutiny. Claimant testified that he worked between 4-5 years as a "pipefitter." Both Mr. Jordan and the ICRD consultant who conducted Claimant's initial interview noted that Claimant described himself as a pipefitter and welder. Claimant earned over $40,000 in 2007. Mr. Jordan explained that assuming a 2,080 hour work year, this corresponds to an hourly wage of close to $20.00 per hour. According to

Mr. Jordan, a $20.00 per hour wage is consistent with what a journeyman pipefitter might be expected to earn. However, in no other year do Claimant's annual wages approach $40,000 per year. In other years, it might be said that Claimant's annual income is more consistent with what he might be expected to earn as a pipefitter's helper, again, assuming that Claimant worked a 2,080 hour work year in each of those years. As developed above, Claimant has consistently testified that he has no marketable welding skills, and although he might have been classified as a "pipefitter" for some purposes, he was never anything more than a pipefitter's helper. The Claimant's high earnings in 2007 are puzzling, but are not sufficient to denigrate his testimony that he is neither a journeyman pipefitter nor a certified welder. Therefore, the record fails to support Mr. Jordan's conclusion that Claimant's work history includes skilled labor. Moreover, in view of Claimant's marginal performance on WRAT testing, we question whether Claimant is a good candidate for any of the retraining programs envisioned by Mr. Jordan.

51. Also, since we have found that Claimant's limitations/restrictions are likely more severe than those proposed by Dr. Kadyan, we must necessarily reject Mr. Jordan's preferred scenario in which Claimant has 64% loss of access to the labor market and 29% wage loss, yielding disability of 47%. Mr. Jordan convincingly testified that if Dr. Maxwell's limitations/restrictions are taken into account, Claimant probably has loss of access to the labor market in the range of 93%. We believe this is an accurate assessment of the extent and degree to which the subject accident has reduced Claimant's access to his pre-injury labor market. Further, we believe that in averaging Claimant's wage loss, Mr. Jordan has appropriately balanced the different methods that could be used to assess wage loss in this case. We conclude that Claimant has suffered wage loss in the range of 29%.

52. We acknowledge that, in many cases, the convention employed to arrive at a loss of wage-earning capacity is to average Claimant's loss of access to the labor market and his

wage loss. However, our review of this case persuades us that Claimant's loss of access to the labor market is a more significant factor than his wage loss. Claimant was, at most, a semi-skilled worker prior to the accident. He has borderline reading, writing, and math skills, which do not make him a good candidate for skilled labor or retraining. He would probably be relegated to semi-skilled heavy and medium labor jobs for the rest of his work life, had it not been for the industrial accident. As a result of the accident and the ensuing limitations, Claimant's pre-injury labor market is now foreclosed to him. What sedentary jobs he might be able to perform from a physical standpoint likely require skills which he is unlikely to obtain. The devastating loss of access to the labor market caused by the subject accident is something that we deem to be of more significance than Claimant's wage loss. Accordingly, we conclude that Claimant has suffered disability of 75% of the whole person, inclusive of his 14% PPI rating.

Attorney Fees

53. Attorney fees are awardable where the criteria of Idaho Code § 72-804 are met.

54. Here, Claimant showed Surety denied this claim and reversed its denial only a couple of weeks before the first hearing. Surety's adjustor testified to her actions and basis for these actions. Claimant's initial statements about the accident and the first two ER records provided somewhat inconsistent accounts of the accident. Surety acted reasonably based upon the information it had when denying the claim. Surety complied with its continuing duty to evaluate a claim. It reversed its decision and accepted the claim despite the presence of some inconsistent facts about whether a compensable accident occurred. Surety's actions were not unreasonably untimely. Claimant failed to show he is entitled to attorney fees.

CONCLUSIONS OF LAW AND ORDER

1. Claimant became medically stable on October 25, 2013;

2. Claimant's compensable PPI should be rated at 14% of the whole person;

3. Claimant's compensable permanent partial disability should be rated at 75% of the whole person, inclusive of PPI; and

4. Claimant failed to show attorney fees are awardable under Idaho Code § 72-804.

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

DATED this _6th_____ day of ____June_____, 2014.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

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

RECUSED

_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _6th___ day of __June_____, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

TODD M. JOYNER
1226 EAST KARCHER ROAD
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LEA L. KEAR
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BOISE, ID 83707

_/s/_____