BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, v. ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-007698** **ORDER ON ISIF LIABILITY** Filed November 26, 2014

This matter went to hearing before the Industrial Commission on August 21and August 22, 2012. On or about January 29, 2014, the Industrial Commission entered its Findings of Fact, Conclusions of Law, and Order finding, *inter alia*, that Claimant is totally and permanently disabled, and that ISIF shares in responsibility for Claimant's total and permanent disability by virtue of a pre-existing thoracic spine injury. However, because Employer put on no proof that would allow the Commission to quantify apportionment of total and permanent disability between the Employer and the ISIF, the Commission retained jurisdiction over the case for the purpose of adducing additional proof on the extent and degree of Claimant's permanent physical impairment for his pre-existing thoracic spine injury. The Commission's decision specifies that the decision is final and conclusive as to all matters adjudicated pursuant to Idaho Code

§ 72-718. No party filed a motion for reconsideration within 20 days of the Commission's decision as allowed by Idaho Code § 72-718. By order dated April 22, 2014, the Commission set the following issue for hearing:

> The extent of ISIF liability for total permanent benefits as previously addressed by the Industrial Commission.

As noted, having found that responsibility for Claimant's total and permanent disability should be shared between Employer and the ISIF, the only element remaining to quantify ISIF liability is the identification of the impairment rating related to Claimant's pre-existing thoracic spine injury.

The parties referred this question to physicians of their choosing. Dr. McNulty evaluated Claimant on behalf of Employer while Dr. Sears evaluated Claimant on behalf of ISIF. In rendering their opinions on the extent and degree of Claimant's thoracic spine impairment, both physicians relied on the *AMA Guides to the Evaluation of Permanent Impairment,* 5th Edition (*Guides*). Dr. Sears testified that he thought it more appropriate to rely on the 5th Edition to the *Guides* because the 5th Edition affords an opportunity to rate Claimant's impairment based on a diagnosis-related estimates method, which, according to Dr. Sears, offers a more accurate way to assess Claimant's impairment for his thoracic spine injury under the peculiar facts of this case. (Sears deposition 15/10-17/19).

Following his examination of Claimant, Dr. McNulty proposed that Claimant qualifies for rating under DRE thoracic category IV, which suggests a rating ranging between 20% to 23% of the whole person for individuals with alteration of motion segment integrity or bilateral or multilevel radiculopathy. Dr. McNulty rated Claimant at the lower range of category IV, giving him a 20% whole person rating.

Dr. Sears testified that on exam Claimant had no evidence of bilateral or multilevel radiculopathy, so the only way that category IV status could be entertained for Claimant is if he can be said to have "alteration of motion segment integrity". Dr. Sears testified that Claimant cannot qualify for this diagnosis since alteration of motion segment integrity is identified from flexion and extension radiographs demonstrating translation of one vertebra on another of more than 2.5 mm. Since Claimant is fused at T12-L1, and since the fusion is solid, it follows that he does not have any motion at T12-L1, and cannot, therefore have any translation of one vertebral body on another with flexion and extension.

The complete qualifying criteria for DRE thoracic category IV reads as follows:

> Alteration of motion segment integrity or bilateral or multilevel radiculopathy; alteration of motion segment integrity is defined from flexion and extension radiographs as translation of one vertebra on another of more than 2.5 mm; radiculopathy as defined in thoracic category III need not be present if there is alteration of motion segment integrity; if an individual is to be placed in DRE thoracic category IV due to radiculopathy; the latter must be bilateral or involve more than one level.

AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

Using the definition of alteration of motion segment integrity quoted above, it would not seem that Claimant can qualify for a category IV diagnosis since he has neither radiculopathy, nor alteration of motion segment integrity.

However, as pointed out during the deposition of Dr. Sears, the *Guides* contain expanded definitions of "alteration of motion segment integrity" at several places. At page 378 of the 5th Edition to the *Guides*, the following definition of alteration of motion segment integrity is found:

> Alteration of motion segment integrity can be either loss of motion segment integrity (increased translational or angular motion) or decreased motion resulting mainly from developmental changes, fusion, fracture healing, healed infection, or surgical arthrodesis.

At page 383 of the 5th Edition to the *Guides*, a similar definition of alteration of motion segment integrity is found:

> Motion segment alteration can be either loss of motion segment integrity (increased translational or angular motion) or decreased motion secondary to developmental fusion, fracture healing, healed infection, or surgical arthrodeses.

From these sections, it appears that alteration of motion segment integrity is intended to refer to both alteration and loss of motion segment integrity. Loss of motion due to fusion is specifically included in these definitions of alteration of motion segment integrity.

It is clear that a finding of alteration of motion segment integrity is one of the paths towards obtaining a DRE thoracic category IV diagnosis. What is puzzling is that in defining that term for the purposes of DRE thoracic category IV, the editors of the *Guides* chose to give a narrower definition than that used by the editors to more generally describe what is meant by altered motion segment integrity. From this, it could be argued that the more specific definition described in the qualifying criteria for DRE thoracic category IV should govern. However, as Employer has pointed out, one of the illustrative examples provided by the editors to the *Guides* augers against this conclusion. In example 15-11, at page 391 to the 5th Edition, an individual with a thoracic spine fusion was found qualified for DRE thoracic category V, in part, because he demonstrated "alteration of motion segment integrity given the fusion" under category IV. Therefore, it seems clear that the editors of the *Guides* anticipated that a loss of motion segment integrity can be demonstrated by a successful fusion surgery which produces a decrease in motion.

Dr. Sears testified that he found that Claimant was not qualified for inclusion in category IV because he had no abnormal translation of one vertebral body over another. However, on cross examination, Dr. Sears conceded that the definition of alteration of motion segment

integrity appears to include decreased motion by way of successful fusion. Based on this definition, he acknowledged that an individual with a thoracic spine fusion would qualify for inclusion in category IV.

Even so, Dr. Sears declined to amend his opinion on the appropriate impairment rating for Claimant, who assuredly had a T12-L1 fusion as part of the treatment for his pre-existing thoracic spine injury. Dr. Sears explained that loss of motion segment integrity at this level is not significant, and that an individual with a successful fusion following surgery should be able to return to good function. Accordingly, he testified that he continued to abide by the 16% rating he awarded to Claimant, even though he had previously acknowledged the propriety of applying the 5th Edition to the *Guides* to this situation exactly because it offered a diagnosis-based method of evaluation that would not confuse the contributions of Claimant's various injuries to his complaints.

Having considered the evidence, we conclude that the evaluation performed by Dr. McNulty is more persuasive, and that Employer has met its burden of showing that Claimant suffers from a 20% PPI rating for the effects of his pre-existing thoracic spine injury.

With this conclusion in place, it is now possible to perform the calculations necessary to apportion Claimant's total and permanent disability between the ISIF and Employer.

Claimant's impairments total 65% (20% lumbar spine, 25% cervical spine, 20% pre-existing thoracic spine). This leaves 35% residual disability to apportion between Employer and the ISIF under *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984). Using the formula adopted in that case, Employer's liability for the payment of PPI and PPD is calculated as follows: 45/65 x 35 = 24.23 + 45 or 69.23 of the whole person. This represents Employer's liability for disability, inclusive of the 45% impairment found owing.

Claimant is entitled to the payment of 346.15 weeks of PPI/PPD benefits, at the appropriate rate, commencing on the date of medical stability. Thereafter, Claimant is entitled to the payment of total and permanent disability benefits at the statutory rate by the ISIF.

In its brief, the ISIF has raised a number of challenges to the Commission's January 29, 2014 decision. As noted by Employer, that decision is final and conclusive as to matters adjudicated pursuant to the provisions of Idaho Code § 72-718. Neither party filed a timely motion for reconsideration following the January 29, 2014 decision. As such, the Commission is not authorized to entertain a motion to revisit the matters decided in the original decision.

Idaho Code § 72-718 adopts a version of the doctrine of *res judicata* peculiar to the Idaho workers' compensation system. A decision of the Commission is *res judicata* as to matters actually adjudicated in the absence of a timely motion to reconsider. The decision became final and conclusive as to matters adjudicated therein by the Commission 20 days after the date of the decision. Neither the parties, nor the Commission may disturb such a decision lest the plain meaning of "final and conclusive" be ignored.

As we noted in the recent case of *Powell v. Northwest Cascade, Inc.*, Order Denying Reconsideration, 2007-001470, 2014 IIC 0050 (2014), we are mindful of the fact that in the recent case of *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893 (2014), the Supreme Court observed that an order of the Commission making an award to Claimant of medical benefits in an amount certain was not a "final order", but was, instead, an "interlocutory order", which could have been revisited by the Commission at any time until a final appealable order was issued. In *Powell*, the order at issue was final and conclusive per Idaho Code § 72-718, and no timely motion for reconsideration had been filed. We noted that while *Vawter* might suggest a contrary result, we were unwilling to read that case as broadly as might be

suggested, where the Court did not treat the specific application of the provisions of Idaho Code § 72-718. It is difficult to square *Vawter* with the unambiguous provisions of Idaho Code § 72-718. At present, we will be guided by what we perceive to be the applicable provision of the statutory scheme. We decline to entertain the ISIF's several arguments against the Commission's January 29, 2014 decision.

DATED this _26th__ day of _November____, 2014.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

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

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _26th___ day of __November__, 2014, a true and correct copy of the foregoing **ORDER ON ISIF LIABILITY** was served by regular United States Mail upon each of the following:

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ka _/s/_____