BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AURILIO NAVEROS, Claimant, v. FAULKNER LAND & LIVESTOCK, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2008-027812** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED OCTOBER 10 2014**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He held a hearing in Twin Falls on September 13, 2013. L. Clyel Berry represented Claimant. Kent W. Day represented Defendants Employer and Surety. The parties presented evidence, took post-hearing depositions, and submitted briefs. The case came under advisement on April 14, 2014 and is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether and to what extent Claimant is entitled to benefits for:
    a) Temporary disability (TTD/TPD),
    b) Permanent partial impairment (PPI),
    c) Permanent partial disability in excess of impairment,
    d) Medical care; and
    e) Attorney fees.
2. Whether Claimant is totally and permanently disabled as an odd-lot worker.

The parties expressly agreed that causation and apportionment are not at issue.

CONTENTIONS OF THE PARTIES

On August 24, 2008 Claimant was seriously injured when a horse he was riding reared and fell backward on him. He suffered multiple fractures to his pelvis, sacrum, and lumbar spine, along with other injuries.

Claimant contends he is entitled to additional temporary disability. Despite the fact that Claimant continued to receive medical care from treating physician Kevin Krafft, M.D., Surety discontinued TTD benefits on December 1, 2009. Later, Surety provided Dr. Krafft a letter which erroneously asserted Claimant had preexisting lumbar surgery. Dr. Krafft opined Claimant needed no more care related to the accident and released Claimant from his care on February 17, 2011. Claimant still needed additional medical treatment then and now. Surety's denial based on the error was unreasonable. Defendants also acted unreasonably when they refused to assist Claimant in maintaining appropriate documentation to remain in the United States. Defendants manipulated Claimant's residency status in an attempt to deny benefits. Such action was unreasonable. Claimant has suffered significant permanent disability and qualifies as an odd-lot worker.

Defendants contend they have paid all medical and TTD benefits due Claimant. They acknowledge Claimant suffered some permanent disability but deny that Claimant is an odd-lot worker. Defendants had no control over Claimant's residency status. They did not act unreasonably.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant and ICRD expert David Duhaime;

2. Claimant's Exhibits A–BB;

3. Defendants' Exhibits A–T, except for a written surveillance report not admitted; and

4. Posthearing depositions of physiatrist Kevin Krafft, M.D., neurologist Richard Hammond, M.D., and vocational experts Mary Barros-Bailey, Ph.D., and Douglas Crum.

All objections in depositions are overruled.

Having analyzed all evidence of record, the Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant worked for Employer mostly as a sheepherder. The sheep grazed from Gooding to Bruneau to Fairfield in an annual round. They were trucked to California for the extreme winter months. Some lambs and new ewes remained in California but the rest of the flock returned to Idaho to graze. Claimant occasionally trucked the sheep to California.

2. In 2008 Claimant's duties changed; he drove truck more, repaired fences and cared for sick sheep. Later in 2008 a wildfire required employees to move the flock away from its grazing land. While working on August 24, 2008, Claimant's horse spooked, reared, and went over backwards. Claimant's pelvis was crushed between the horse and a rock.

3. A citizen of Peru at the time of the accident, Claimant worked legally in the United States under the Federal H-2A program.

2008 Medical Care

4. Claimant's medical history reveals no significant pre-accident conditions or injuries.

5. Immediately after the accident Claimant was taken to Gooding County Memorial Hospital. The admitting history recorded that Claimant did not strike his head or lose consciousness. Examination revealed he had "massive" swelling, bruising, tenderness, and crepitus. X-rays showed multiple, complex, comminuted fractures. Emergency room (ER)

physicians stabilized his condition and ordered him LifeFlighted to St. Alphonsus (St. Als) in Boise.

6. St. Als ER categorized his condition as "critical" but stable. Claimant was admitted. In addition to the pelvic and vertebral fractures, St. Als found a pneumothorax which Gooding had missed. Physicians discovered other injuries, including an injury to the iliac artery and hemorrhagic shock, as they stabilized the primary injuries. Claimant needed fluids and a blood transfusion. Surgeon Gregory Schweiger, M.D., was called. By the morning of August 26 Claimant's condition had stabilized sufficiently for surgery.

7. Dr. Schweiger performed multiple open reduction internal fixation procedures on August 26. Claimant's Exhibit G includes X-ray films which show the significant fixation devices used to repair Claimant's pelvis. Dr. Schweiger also repaired and reattached torn muscles and ameliorated injuries to other internal soft tissue. Claimant suffered respiratory failure because of the long duration of the required surgery and consonant anesthesia. A ventilator assisted for "several days," perhaps as many as 96 consecutive hours, until he could breathe on his own.

8. On September 1 physiatrist Michael McMartin, M.D., consulted at the request of Dr. Schweiger. Claimant remained bedridden. Bedside physical therapy began.

9. Rodde Cox, M.D., also provided inpatient post-surgical care. On September 16 Dr. Cox discharged Claimant from the hospital.

10. Claimant convalesced from a wheelchair in a rehabilitation center through October.

11. Dr. Schweiger, in post-surgical follow-up visits in October and December, gradually allowed increasing weight bearing as tolerated and addressed lingering right ankle and

foot symptoms arising from the sacral injury. Dr. Schweiger noted continued wheelchair use was indicated.

12. All 2008 physical therapy records reported that Claimant complied and improved. It was a long, involved process. A physical therapist's discharge summary dated January 28, 2009 reported that Claimant, although improved, had not reached pre-injury status.

Medical Care 2009 - Hearing

13. On January 21, 2009 Dr. Schweiger allowed Claimant to attempt to return to work as a driver with a caveat to have an observer with him for a time. The release which Dr. Schweiger provided did not identify restrictions but noted "act[ivities] as tol[erated]."

14. Claimant worked for Employer in California in January and February 2009 driving a pick-up truck and tending sick lambs. The work was too strenuous; Employer sent him back to Idaho. In Idaho Claimant worked limited hours from February 27 to about March 18, 2009. Employer terminated Claimant's employment.

15. On February 25, 2009 Claimant returned to Dr. Schweiger. Claimant reported that the work intolerably increased his pain. He complained of posterior sacral, right hip, and foot symptoms. Dr. Schweiger opined that his sacral injury was not completely healed. An injection into the right trochanteric bursa helped. Dr. Schweiger recommended additional diagnostic studies, a CT of the pelvis and CT myelogram of the lumbosacral spine. He recommended more physical therapy. Dr. Schweiger modified the work release to include a 15-pound lifting limit with motion restrictions and a 4-hour maximum workday.

16. The diagnostic imaging performed on February 25, 2009 did not show a nerve entrapment near the lower lumbar spine. A lumbar CT myelogram erroneously described bilateral L5-S1 laminectomies; Claimant never had such a procedure performed. One X-ray taken just after the accident showed a transverse process fracture of L5 extending into a lamina,

but this does not explain the reporting error. The CT myelogram also reported "mild effacement of the left subarticular recess with mild mass effect on the traversing left S1 nerve root." This finding is not cited as clinically significant by any physician. It is unrelated to Claimant's right leg and foot symptoms.

17. About March 28, 2009 Claimant resumed physical therapy. A physical therapist's report described Claimant's limp and cane use; it confirmed the consistently reported symptoms. This round of physical therapy lasted into August 2009. Notes show Claimant again was cooperative; he was described as being "diligent" and "very motivated."

18. By April 20 2009 Dr. Schweiger recorded that Claimant was substantially improved but still limped when not using his cane, and showed some right lower extremity muscle weakness and symptoms. Dr. Schweiger recommended more aggressive physical therapy. Work restrictions did not change.

19. At a June 1, 2009 follow-up visit Dr. Schweiger noted continued improvement but recommended continued aggressive, frequent physical therapy. This came in response to a physical therapist's suggestion that Claimant had plateaued and should be reduced to only weekly visits. Dr. Schweiger took issue with a physical therapist's finding of a 1.5" leg length discrepancy and measured them as equal. He suggested that muscle imbalance and pelvic tilt explained the therapist's observation about differing leg lengths; he argued that this condition supported his recommendation for continuing aggressive physical therapy.

20. At the July 1, 2009 follow-up visit Dr. Schweiger first suggested a work-hardening program. Considering the "very complex nature of his pelvic injury" Dr. Schweiger expressed pessimism about a lengthy and incomplete recovery. He changed Claimant's work restrictions to allow 20 pounds lifting, no crawling, and to allow Claimant to sit

as needed instead of standing.

21. Dr. Schweiger's final follow-up note, dated August 12, 2009, recorded continuing posterior pelvic pain and right foot dysesthesias which had been consistently present after the accident and surgery.

22. An August 12, 2009 CT of Claimant's pelvis reported a possible pseudoarthrosis arising from a bone fragment between the right iliac crest and the L5 vertebral body. The bone fragment "appears to be a fracture hypertrophic right L5 transverse process."

23. On September 30, 2009 physical therapist Suzanne Kelly provided a functional musculoskeletal evaluation for work hardening. She noted postural changes, limited lumbar flexibility, mild right gluteal weaknesses, and a skin temperature difference right foot versus left. She noted Claimant used a cane and showed a slight limp. Upon testing Claimant's lifting capacity as well as position and motion abilities, she noted frequent pain behaviors and some performance inconsistencies. PT Kelly opined Claimant to be a good candidate for a work-hardening program.

24. On October 15, 2009 Claimant first visited Kevin Krafft, M.D. Dr. Krafft supervised Claimant's work-hardening program.

25. Also on October 15, 2009 Claimant first visited Robert Calhoun, Ph.D., for a psychological pain evaluation prior to entering the work-hardening program. Dr. Calhoun noted Claimant's psychological need to work to provide for his family in Peru. He discussed possible depression and anxiety as factors which may exacerbate Claimant's pain perception. He suggested possible counselling and medication during the work-hardening program.

26. Work hardening actually began in November 2009. The notes of the 24 work-hardening sessions alternately reported good cooperation and motivation intermixed

with concerns about inconsistent effort and significant pain behaviors. Progress, albeit sometimes slow, was generally reported. Claimant was discharged on December 21, 2009. The final report by physical therapist Peggy Wilson described lifting and other activity in detail and concluded Claimant could perform work of medium level.

27. Dr. Krafft made follow-up examinations during the work-hardening program. He focused on helping Claimant understand that there exists a difference between hurt and harm—that is, although an activity may increase his pain, it would not injure him.

28. Dr. Krafft approved with modifications a job site evaluation for Claimant's old job as a sheepherder. He restricted Claimant from lifting over 50 pounds or working at unprotected heights. Dr. Krafft later clarified that horseback riding would be categorized as an unprotected height. Dr. Krafft also approved job site evaluations for Claimant to work as a milker and as a 10-wheel truck driver. Both of these were subject only to a restriction against unprotected heights.

29. On December 21, 2009 Dr. Krafft opined Claimant was medically stable. He rated PPI at 12% whole man, all related to the accident. He recommended permanent restrictions against lifting over 50 pounds occasionally, no unprotected heights, and, in a May 2010 modification to the sheepherder's JSE, no jumping.

30. On December 29, 2009 Surety refused Claimant's request to be rated by Dr. Schweiger.

31. Claimant's posterior pelvic pain and right leg and foot dysesthesia continued. Dr. Krafft continued to treat Claimant. In follow-up visits in 2010 and 2011 Dr. Krafft reiterated his PPI opinion and recommended no change in restrictions. After an August 24, 2010 follow-up examination, Dr. Krafft recommended an EMG of Claimant's right lower

extremity. Mild slowing of the lateral plantar nerve in an otherwise negative EMG was interpreted as ruling out radiculopathy or neuropathy.

32. On May 26, 2011 Claimant visited Richard Hammond, M.D. Dr. Hammond examined Claimant and later reviewed records. Dr. Hammond noted moderate muscle spasm in the right lumbar paraspinals and gluteals, dysesthesias in the right lateral leg and foot, and tenderness and pain with lumbar and right hip motion. He noted Claimant's limp. Dr. Hammond diagnosed the pelvic fractures from the accident and a right L5 radiculopathy.

33. On July 19, 2012 physical therapist Bryan Wright performed a functional capacity evaluation (FCE). He opined that Claimant gave full effort on all tests. Claimant showed 80-90% of normal motion in his spine and all limbs. Claimant showed himself able as follows: to walk up to 10 minutes with a cane up to a total of one hour each work day; to lift or carry up to 40 pounds occasionally; to stand up to 10 minutes at a time; to perform other tasks and assume other positions and motions on a limited basis.

Medical Opinions

34. Dr. Krafft opined that Claimant suffered permanent impairment rated at 12% of the whole person as a result of this accident. Dr. Krafft relied upon *AMA Guides*, 6th edition. He restricted Claimant from lifting over 50 pounds occasionally, from unprotected heights and from jumping. Dr. Krafft explained that the restrictions from heights and jumping would preclude horseback riding. He opined that *AMA Guides* may provide as much as an additional 5% PPI for Claimant's lumbar condition. In deposition he identified some circumstances involving positions and motions which might be difficult for Claimant to tolerate, but was unwilling to call these additional restrictions.

35. Dr. Hammond opined that Claimant limps because his pelvis is no longer level; it is higher on the right; as a result, pain, sciatica, and muscle spasms are likely to continue

for life. Dr. Hammond consulted both the 5th and 6th editions of *AMA Guides*; he relied primarily on the 6th for providing a PPI rating but prefers to use the 5th edition. Dr. Hammond opined the FCE report was consistent with his observations and opinions about Claimant's physical abilities.

36. On October 24, 2011 Dr. Hammond rated Claimant's permanent impairment based upon the diagnosed pelvic fractures and right L5 radiculopathy. He reported difficulty in rating Claimant's lumbar transverse process fractures, in part, because the L5 radiculopathy was not caused by a disc bulge or fragment. Ultimately, Dr. Hammond rated Claimant's condition at 14% of the whole person according to AMA Guides, 6th edition. He opined Claimant should walk only short distances on flat surfaces with occasional cane use; no carrying more than 20 pounds, no horseback riding, extremely limited bending, no stooping, kneeling, squatting, or crawling, push and pull only 5-7 pounds with his arms, limit vibrations and jolts, no prolonged sitting or standing, rare stairs use, no ladders, avoid spinal motions, lift up to 10 pounds waist to shoulder, no lifting floor to knee or knee to waist, up to 5 pounds overhead.

37. In deposition Dr. Hammond clarified that his restrictions applied to an 8-hour work day. Claimant could lift more than 20 pounds—as much as 40 pounds or more—an insignificant number of times in a work day. Dr. Hammond opined that Dr. Krafft's restrictions were based upon temporary factors; Claimant, just having finished a work-hardening program, would have been temporarily more able to perform than usual lifestyle generalities would allow.

38. On June 24, 2013 Mr. Wright opined that although not precisely in agreement, Dr. Hammond's suggested restrictions more closely represented Claimant's abilities as shown on the FCE which he, Mr. Wright, conducted on Claimant. He criticized Dr. Krafft's conjoining of multiple tasks under a single restriction. He emphasized that while "occasionally" means

1-33% of a work day, Claimant's lifting ability included only 1-5% of a work day. Thus, although definitionally correct, to say Claimant may occasionally lift 40 pounds may create inconsistencies when comparing job requirements to Claimant's actual abilities.

39. On June 28, 2013 Dr. Hammond opined that he concurred with the FCE report. He opined it was significant that Claimant's 40-pound lifting allowance was for only 1-5% of a work day. Similar small percentages applied to other aspects of Claimant's reported abilities. Dr. Hammond acknowledged that the FCE would suggest Claimant's abilities exceed the restrictions which he, Dr. Hammond, imposed.

Vocational Factors

40. Born December 2, 1965 Claimant was 47 years old on the date of hearing. He attended school in Peru through its equivalent of high school. He still has difficulty in math and computer usage, but his grades were otherwise average.

41. Claimant stood 5' 1" and weighed about 143 pounds in September 2009. With inactivity since the accident his weight has increased somewhat.

42. As a child he helped by working with his parents who were subsistence farmers. At about age 16 in Peru he began working for a rancher. In Peru he has also worked as a machine operator at an eyeglasses factory, as a furniture and cabinet carpenter, as a maker of moccasins and door-to-door salesman.

43. Claimant came to the United States to work for Employer in 1995. As a sheepherder he lived continuously with the flock and earned $1,000 per month plus the use of a sheep wagon and a vehicle to pull it. The job involved all physical challenges associated with caring for sheep in variable terrain.

44. Initially, Claimant's work visa required him to return to Peru once every three years. After 1999 it was renewed without interruption until it lapsed after his work accident.

45. ICRD consultant Dave Duhaime began assisting Claimant's attempts to return to work in October 2009. Despite Dr. Krafft's approval—with restrictions and modifications—of a job-site evaluation (JSE) for a return to sheepherding, Mr. Duhaime remained doubtful because sheepherding requires some lifting in excess of 50 pounds. Dr. Krafft also approved JSEs for positions as a farm truck driver and dairy cow milker with restrictions and modifications.

46. Mr. Duhaime contacted Western Range Association which brokers H-2A workers for ranchers. That contact could not identify a job available within Claimant's restrictions in March 2010. Mr. Duhaime closed Claimant's file in October 2010 after his visa expired.

47. In March 2010 by certified letter, Employer offered Claimant a sheepherder's job. Claimant was unable to walk as much as the job required. Employer terminated Claimant's employment.

48. On April 27, 2010 Mary Barros-Bailey, Ph.D., provided a vocational evaluation of Claimant at Defendants' request. Her report is dated June 18, 2010. She noted the difficulties involved in assessing labor market access because of his H-2A status. She opined that if Claimant were considered for all available U.S.-based employment, his loss of access would range from 23% to 50% depending upon the geographical "local" market considered. His Peruvian labor market access diminished by "just over 50%." She opined a 30% permanent disability, inclusive of PPI. After receiving additional information, including clarification of Claimant's permanent residency, the 2012 FCE and Dr. Hammond's restrictions, Dr. Barros-Bailey updated her opinions on March 11, 2013. She opined that Claimant was totally and permanently disabled from H-2A work under Dr. Hammond's restrictions. She opined that the FCE was more consistent with Dr. Krafft's restrictions than with Dr. Hammond's. Using the FCE as representative of Claimant's baseline function, she opined

Claimant's permanent disability would increase to 31-58% inclusive of PPI, with 44% disability reflective of U.S. labor market and lesser disability reflective of a Peruvian labor market.

49. In deposition Dr. Barros-Bailey opined that, using Dr. Krafft's restrictions, she would average her 50% loss-of-local-labor-market-access opinion with a zero wage-loss opinion to arrive at a 25% overall permanent disability, inclusive of PPI; using the FCE, overall permanent disability would be 44%. She was uncertain whether Dr. Hammond's restrictions were significantly inconsistent with the FCE. Under a certain view of Dr. Hammond's restrictions, Claimant would be totally and permanently disabled. She compared and contrasted her opinions with those of Mr. Crum.

50. On June 10, 2010 Surety advised Claimant's attorney that neither Surety nor Employer "will apply for a VISA, or VISA extension, on Mr. Naveros' behalf."

51. As of June 9, 2010 Claimant became an undocumented worker. He obtained permanent residency status in the United States about March 1, 2013.

52. On March 14, 2012 Douglas Crum evaluated Claimant's vocational factors to assess permanent disability at Claimant's request. Assuming Dr. Krafft's restrictions and the Gooding area as Claimant's local labor market and ignoring the H-2A status issues, Mr. Crum opined Claimant suffered a 45% loss of access to pre-injury jobs. Assuming Dr. Hammond's restrictions instead, Claimant is totally and permanently disabled. Assuming the limitations as an H-2A worker, there are no such jobs which Claimant can do; Claimant would be totally and permanently disabled. In a supplemental report, Mr. Crum assessed the impact of the FCE by Mr. Wright. Relying largely upon personal communication with Mr. Wright and upon Mr. Wright's representation that the FCE findings closely approximate Dr. Hammond's restrictions, Mr. Crum opined that Claimant was totally and permanently disabled.

53. In deposition Mr. Crum opined that post-hearing testimony by physicians reinforced his conviction that Claimant was totally and permanently disabled.

54. About July 2013 after Claimant's work visa was reinstated, Mr. Duhaime resumed providing assistance to Claimant. Claimant "seemed open" to returning to work and "very perky" about the possibility of driving a 10-wheel farm truck.

55. Based largely upon restrictions imposed by Drs. Krafft and Hammond and the results of the FCE, Mr. Duhaime opined Claimant was "virtually unemployable, which means for all practical purposes I don't think he's competitive in the labor market." He acknowledged that Dr. Krafft's work restriction "leaves some room for possible employment." Mr. Duhaime identified nonexclusive potential job descriptions which Claimant may be able to perform. These are compatible with Dr. Krafft's restrictions, but inconsistent with the FCE or Dr. Hammond's restrictions. The Twin Falls-Jerome labor market at the time of hearing was experiencing about a 6.2% unemployment rate and competition for jobs was "still pretty high."

56. As of the date of hearing, Mr. Duhaime had not completed his work with Claimant in attempting to find him a job.

57. Claimant's testimony and reports to physicians in 2010 to the date of hearing consistently alleged functional abilities greater than the FCE found but less than Dr. Krafft's restrictions suggested.

58. Claimant's Exhibit AA reflects Claimant's job search from March into August 2013.

DISCUSSION AND FURTHER FINDINGS OF FACT

Medical Care

59. An employer is required to provide reasonable medical care for a reasonable time as recommended by an injured worker's treating physician. Idaho Code § 72-432(1).

60. Dr. Hammond's involvement at the request of Claimant's attorney came outside the chain of referral. Dr. Hammond provided a single diagnostic examination on May 26, 2011. Surety denied Dr. Hammond's request for authorization for an MRI. From that single visit and after a records review, Dr. Hammond, on October 24, 2011, provided a PPI rating and restrictions. Claimant has not shown that Dr. Hammond's involvement constituted compensable medical care.

61. Otherwise, the treatment provided through the date of hearing, whether curative or palliative, was reasonably required by Claimant's treating physicians.

62. No specific future treatment is contemplated. Yet the pseudoarthrosis remains. Physicians dispute whether Claimant's right leg and foot condition is properly termed an L5 radiculopathy. Regardless, these symptoms have been consistently present since the accident. Hardware may loosen; one record suggested that an affixing screw may have "backed out" somewhat. Claimant's entitlement to appropriate, causally related, curative or palliative care in the future is not foreclosed.

Temporary Disability

63. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code §72-408, *et. seq*. A claimant is entitled to temporary disability benefits only while he is in the period of recovery. *Otero v Briggs Roofing Co.*, 2007-016876, 2011 IIC 0056 (August 12, 2011). Upon medical stability, eligibility for temporary disability benefits does not continue. *Jarvis v. Rexburg Nursing*, 136 Idaho 579, 38 P.3d 617 (2001). An injured worker who is unable to work while in a period of recovery is entitled to temporary disability benefits under the statutes until he has been medically released for work and Employer offers reasonable work within the terms of the medical release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217, (1986). The statute requires a five-day waiting period

before temporary benefits become payable but once exceeded benefits are payable for that time. Idaho Code § 72-402.

64. Two doctors have given differing opinions regarding Claimant's date of stability. Dr. Krafft's assessment of stability was given at the conclusion of the work-hardening program on December 21, 2009, and Dr. Hammond opined Claimant stable on May 26, 2011. The record shows Dr. Krafft provided additional medical treatment after he pronounced Claimant to be at MMI on December 21, 2009. Even taking the subsequent treatment into account, Dr. Krafft's testimony supports a finding of stability on December 21, 2009.

65. Dr. Krafft treated Claimant's pain complaints after December 21, 2009. However, Dr. Krafft testified that there was no change in his stability opinion or restrictions. Even at Claimant's last appointment with Dr. Krafft on February 17, 2011, Claimant did not report any change in his symptoms and Dr. Krafft testified that Claimant remained medically stable. Dr. Krafft's treatment of Claimant into 2011 does not indicate that Claimant's condition objectively worsened. Dr. Kraft assessed Claimant throughout the work-hardening program and for over a year beyond.

66. Dr. Hammond's opinion is that Claimant's condition worsened from 2009 to 2012. Yet, Dr. Hammond saw Claimant on only one occasion, May 26, 2011.

67. As Claimant's treating doctor, Dr. Krafft's firsthand observation of Claimant's condition overtime put him in the best position to opine on Claimant's stability. We are persuaded that Claimant was stable on December 21, 2009.

68. Claimant is entitled to TTD benefits through December 21, 2009.

PPI and Permanent Disability

69. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are

advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

70. The two ratings at issue are 12% as opined by Dr. Krafft and 14% opined by Dr. Hammond. As discussed above, the Commission finds the opinion of Dr. Krafft's MMI date persuasive and for similar reasons finds Dr. Krafft's opinion on impairment to be persuasive also. Dr. Krafft assessed Claimant prior to entering the work-hardening program, followed Claimant's progress during the program, and assessed Claimant again upon completion. Dr. Krafft then continued to treat Claimant's symptoms for over a year. Claimant has incurred permanent partial impairment of 12% of the whole person.

71. This case presents an unprecedented challenge to assessing disability. Claimant was a legal worker at the time of the accident. Because of his H-2A status, his legal labor market constituted approximately 1000 sheepherding jobs throughout the Western United States which the brokering agency fills annually for its member sheep ranchers. As a result of the accident Claimant can no longer work as a sheepherder. The minimalist restrictions by which Dr. Krafft modified his approval of the JSE for a sheepherding job disqualified Claimant from the realities of protecting 120-pound sheep in variable terrain. All 1000 jobs are no longer within his physical capabilities.

72. In two recent Commission cases, undocumented workers, despite being entitled to medical care, TTDs, and PPI, were denied permanent disability benefits in excess of PPI. *Diaz v Franklin Building Supply*, 206-507999, 2009 IIC 0652 (November 20, 2009); *Otero v Briggs Roofing Co.*, 2007-016876, 2011 IIC 0056 (August 12, 2011). The Commission reasoned that they had no legal labor market access and therefore could not prove a loss of

access caused by otherwise compensable accidents. *Id.*

73. 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). These legal axioms, usually recited as boilerplate in Commission decisions, are poignantly appropriate here.

74. Because Claimant was a legal worker on the date of his accident and on the date of hearing, the holdings of *Diaz* and *Otero* do not directly apply. However, to analyze PPD in this matter these cases must be addressed.

75. In *Diaz,* the Commission held that the claimant's status as an undocumented worker trumped all other factors of disability in excess of PPI. Denying reconsideration, the Commission clarified, "Claimant's loss of earning capacity is due to his status as an undocumented worker, not his industrial injury." *Diaz*, Order Denying Reconsideration, 2010 IIC 0148 (February 23, 2010). In *Otero*, the Commission followed *Diaz*, and elaborated, "The Commission then held that Mr. Diaz's illegal status *was a more limiting factor that entirely eclipsed his injury-related impairment.*" (emphasis in original).

76. Other language of *Otero* is problematic for the instant analysis. In *Otero* the Commission, identifying the claimant's illegal status as a factor of disability stated: "Before the accident, claimant had no access to the labor market" and, referring to the claimant's legal ability to engage in gainful activity in his relevant labor market, "He did not possess that ability in the first place." The *Otero* decision repeatedly quantifies claimant's pre-injury labor market as zero and notes this as a factor in ultimately declaring Mr. Otero's

disability in excess of PPI to be zero.

77. Cases not involving a claimant's legal status are relatively simple: After analysis of all medical and nonmedical factors, a claimant's loss of labor market access is arrived at by determining the number of jobs available to a claimant before his accident, determining the number of jobs available to a claimant at the time of hearing, and dividing. The "before accident" jobs represent the denominator; the "after accident" jobs represent the numerator. The resulting fraction represents the percentage of remaining access to the labor market. The resulting fraction's complement (1 minus the fraction) represents the loss of access to the labor market.

78. Here is the problem: If we are to be consistent in our analysis of permanent disability, *Diaz* and *Otero* suggest that we are only allowed to consider, at most, the 1000 nationwide jobs for sheepherders which Claimant was legally allowed to perform as the denominator for calculating permanent disability. Restricting the scope to Claimant's *local* labor market would severely restrict that number further. Since none of these sheepherding jobs are currently suitable, from a certain point of view he is automatically, technically, totally and permanently disabled from his time-of-injury, local, and legal labor market. We can speculate that Claimant may have been awarded no disability if the hearing had been held between June 2010 and March 2013 when Defendants refused to assist Claimant's attempts to renew his expired H-2A visa.

79. Since the accident Claimant has become a legal permanent resident of the United States. He held a valid green card on the date of hearing; all jobs legally open to any unskilled or semiskilled manual laborer were legally open to him.

80. The Idaho Supreme Court in *Brown v. Home Depot*, 152 Idaho 605, 609, 272

P.3d 577, 581 (2012) held that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. But the Court went on to say that where the Commission perceives that "a party has taken an action that has the effect of manipulating the outcome of a disability determination, the Commission possesses the authority to disregard the effect of that action." *Brown* 152 at 609, 272 P.3d at 581. In this case both parties were aware of these particular facts and how each party could receive an advantage by rescheduling the hearing date. Further, the record divulges actions by both parties to alter the hearing date to secure the advantage. Yet, the Commission finds that, notwithstanding the actions of the parties, Claimant's ability to engage in gainful activity would be most accurately measured at the date of the hearing. Therefore, Claimant's disability will be determined as of the hearing date.

81. Distinguishing *Diaz* and *Otero* on the fact that here, Claimant had legal, albeit legally limited, access allows us to avoid technical application of the analysis in *Otero*. Claimant's status consonant with his limited visa on the date of accident is considered to be one factor among the many relevant medical and non-medical factors for purposes of evaluating disability. Such status does not trump all other considerations by establishing a limited denominator for purposes of calculating percentage loss of local labor market access.

82. Although not precisely analogous, analyzing Claimant's status as a factor in disability is similar to those cases in which a Claimant moves from a disadvantaged local

labor market to a better one. *See*, *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994). In *Davaz*, the court acknowledged a practical approach to situations in which a Claimant's time-of-injury labor market and his time-of-hearing labor market do not allow a direct mathematical or logical comparison. That approach is reasonable here. Like Mr. Davaz, Claimant's access to the labor market has actually increased, but is still less than it would have been but for the accident.

83. Claimant showed he is well motivated to work. Indeed, his opinion of himself is significantly tied to his ability to work and earn to provide for his family. As shown on the surveillance video, he walks with an occasional limp obvious even to a layman. Although he can bend and squat, it appears from the video that he sometimes squats to avoid bending at the waist. He can lift molded plastic auto ramps or a muffler, and can crawl under a car and help replace a muffler. Nothing in the video demonstrates what he can do over the course of an 8-hour work day. Claimant's English has reportedly improved while in the United States but an interpreter was required at the hearing. The record shows that he likely would have difficulty in a job involving significant math or computer work. Age 47 at hearing and having the Peruvian equivalent of a high school education, Claimant is intelligent, experienced in manual labor, and possesses a mature view of work. Claimant makes a good first impression because of his sincere desire to work.

84. Claimant earned $1000 per month and Employer provided food to eat and a sheep wagon to cook and sleep in. Claimant was on duty 24/7 when on the range with the sheep. Assuming a full-time, minimum-wage job, Claimant has suffered no loss of wage earning capacity. Claimant is able and qualified to work some jobs that pay more than minimum wage.

85. The Commission is the ultimate evaluator of impairment and disability. *See*,

Urry, *supra*. The assessments of Claimant's abilities are contentious. Restrictions imposed by Drs. Krafft and Hammond vary significantly. Vocational experts cannot agree on whether the FCE more closely reflects Dr. Krafft's or Dr. Hammond's restrictions. Claimant's own subjective assessment of his abilities lies between the two doctors' opinions. The different sets of restrictions greatly affect Claimant's actual job availability and his perception of what he is safely allowed to do. Dr. Krafft received information from therapists at the work-hardening program along with his personal observations of Claimant during examinations during and after that program. We note that physicians who treated and evaluated Claimant who are not associated with the work-hardening program consistently were impressed with Claimant's work ethic and effort at recovery. Physicians associated with the work-hardening program expressed more equivocation and even, at times, disparaged Claimant's integrity in these areas. In this light, Dr. Krafft's restrictions appear ungenerous in recognizing Claimant's residual loss of function. Moreover, Dr. Krafft demonstrated that he was willing, without sufficient records review, to opine unfavorably to Claimant based upon an erroneous radiologist's comment. This lessens the weight assigned to Dr. Krafft's restrictions which, in part, are based upon comments from the work-hardening program therapists which allege that Claimant demonstrated equivocal effort and motivation.

86. By contrast, Dr. Hammond only saw Claimant on one occasion. Claimant's attorney expressly requested that Dr. Hammond evaluate specific position and motion aspects of potential restrictions. Claimant acknowledged that he can lift and move more than Dr. Hammond's restrictions would allow. Eventually, even Dr. Hammond acknowledged that the restrictions he suggested were overly restrictive.

87. Nevertheless, the record shows Claimant would have difficulty standing without

being allowed to sit or walk as needed, and would have difficulty with bending and other motions involving the lumbar spine, pelvis, and hips on much more than a rare frequency. Dr. Krafft's 50-pound lifting restriction is shown likely to be appropriate, but lifting lesser weights more than a few times per day is shown likely to cause significant difficulty. While we agree with Claimant's assertion that he may have been more functional immediately after the work-hardening program than he was when Mr. Wright's FCE was performed, we also are persuaded by the record that with regular work Claimant's ability to tolerate work which he is capable of performing likely will be enhanced and that his perception—even fear—of disability will diminish.

88. Claimant likely is able to work at some dairy jobs, drive truck in the appropriate situation, or perform other light-duty, unskilled or semiskilled, manual labor jobs which do not exceed his reasonable restrictions which accurately lie between those expressed by the two doctors.

89. Considering and weighing all medical and nonmedical factors, Claimant suffered permanent disability rated at 80%, inclusive of PPI.

Odd-Lot Considerations

90. If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). *Also see*, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would

be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

91. Claimant asserts he is an odd-lot worker. The vocational experts acknowledge that analysis of Claimant's disability swing widely depending upon what restrictions are recognized, from a low of 25% to possible total and permanent. We find that a reasonably stable market exists in the Gooding area for light-duty unskilled and semi-skilled jobs suitable to Claimant's ability. A need for analysis of the odd-lot factors does not arise.

92. However, even if odd-lot factors are analyzed, Claimant would fail to qualify. Claimant attempted to return to work unsuccessfully while he was still in recovery from the accident. His failure to perform the lighter-duty work with which Employer attempted to accommodate his condition is not surprising; it does not, by itself, demonstrate it likely that Claimant has tried and failed other work for purposes of odd-lot analysis. Claimant has conducted somewhat of a job search as evidenced by the summary of contacts he provided and Mr. Duhaime was in the process of assisting Claimant with a job search at the time of the hearing. Mr. Duhaime testified that despite his belief that Claimant was "virtually unemployable" he (Mr. Duhaime) was continuing to search for an appropriate job connection; the job search was not considered complete. Further, we are not persuaded that the summary Claimant provided establishes it likely that his job search was sufficient to qualify him as an odd-lot worker. In fact, we are convinced that Claimant likely can and will find a job; recognizing that it may take somewhat more time to complete a job search, efforts at a job search are not futile. Claimant failed to establish it likely that he is an odd-lot worker.

Attorney Fees

93. Attorney fees are awardable where the criteria of Idaho code § 72-804 are met.

94. Claimant alleges Defendants unreasonably denied medical care because Surety denied an MRI and related treatment suggested by Dr. Hammond.

95. In a July 7, 2011 letter to Dr. Krafft, a Surety adjustor referred to a CT report which erroneously suggested Claimant had undergone bilateral L5-S1 laminectomies. The adjustor asked Dr. Krafft to opine whether, if claimant needed an MRI for possible L5 radiculopathy, it would be related to the accident. Dr. Krafft's handwritten note in response suggested "it appears the decompression was pre-existing."

96. A February 25, 2009 CT report actually does erroneously describe bilateral L5-S1 laminectomies.

97. Claimant's assertion that Surety's action constitutes unreasonable conduct is not well taken. A Surety should ask a physician for an opinion rather than refusing to authorize a procedure based upon an adjustor's interpretation of a medical record. Surety did not mislead Dr. Krafft about the question. The adjustor asked whether Dr. Schweiger had performed a laminectomy. (The facts show he did not.) Medical transcription errors and other errors may infiltrate medical records from time to time. Indeed, some of Dr. Krafft's own records in this matter erroneously identify the left foot instead of correctly identifying Claimant's right foot as a locus of symptomatology.

98. A medical record made an erroneous statement. An adjustor asked for clarification. A physician responded with an opinion. The adjustor acted in good faith based upon the physician's opinion. Claimant does not suggest this cascade of events arose from a conspiracy including the radiologist who made the erroneous statement or the physician who did not exhaustively recheck Claimant's voluminous medical records to verify whether the radiologist's statement was made in error. On these facts, the refusal to authorize another diagnostic MRI—even if erroneous—was not unreasonable.

99. Claimant failed to establish a basis for finding that Idaho Code § 72-804

should apply.

CONCLUSIONS

1. Claimant is entitled to all medical care to the date of hearing, except for Dr. Hammond's care which was outside the chain of referral;

2. Claimant is entitled to TTD benefits through December 21, 2009;

3. Claimant is entitled to PPI rated at 12% of the whole person;

4. Claimant is entitled to permanent disability rated at 68% of the whole person, exclusive of 12% PPI;

5. Claimant failed to show he qualifies as an odd-lot worker; and

6. Claimant failed to show he is entitled to attorney fees.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 17TH day of JULY, 2014.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:
/S/_____
Assistant Commission Secretary dkb

CERTIFICATE OF SERVICE

I hereby certify that on the 10TH day of OCTOBER, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

L. CLYEL BERRY
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TWIN FALLS, ID 83303-0302

KENT W. DAY
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BOISE, ID 83707

dkb

/S/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

AURILIO NAVEROS, Claimant, v. FAULKNER LAND & LIVESTOCK, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2008-027812** **ORDER AND DISSENTING OPINION** **FILED OCTOBER 10 2014**

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

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

1. Claimant is entitled to all medical care to the date of hearing, except for Dr. Hammond's care which was outside the chain of referral;

2. Claimant is entitled to TTD benefits through December 21, 2009;

3. Claimant is entitled to PPI rated at 12% of the whole person;

4. Claimant is entitled to permanent disability rated at 68% of the whole person, exclusive of 12% PPI;

5. Claimant failed to show he qualifies as an odd-lot worker; and

6. Claimant failed to show he is entitled to attorney fees.

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

DATED this 10TH day of OCTOBER, 2014.

INDUSTRIAL COMMISSION

/S/_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

COMMISSIONER THOMAS P. BASKIN DISSENTING

For the reasons set forth below, I respectfully dissent.

I believe these unusual facts are best approached by first determining which of Claimant's several immigration statuses should be considered in assessing Claimant's disability. In *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012), claimant appealed a decision of the Commission which evaluated his disability as of claimant's 2005 date of medical stability and found him to be profoundly, but not totally and permanently, disabled. On appeal, Brown argued that the Commission should have assessed his disability as of the date of the 2009 hearing, a time when many more jobs were foreclosed to him due to the recent economic

recession. The Court agreed, stating that if Idaho Code § 72-425 is to be given meaning, an assessment of claimant's "present and probable future" ability to engage in gainful activity must be based on relevant facts as they exist as of the date of hearing. The Court remanded the matter to the Industrial Commission for its determination of claimant's disability as of the date of the 2009 hearing, and with reference to the labor market as it existed on that date.

It might be argued that *Brown* should be narrowly read to simply require that in evaluating an injured worker's disability, consideration must be given to the labor market as it existed on the date of hearing. However, the rationale which underlies the Court's decision applies with equal force to all nonmedical factors which the Commission must consider in evaluating disability. If the Commission must evaluate Claimant's "present" ability to engage in gainful activity then it must make its disability assessment based on all nonmedical factors as they exist as of the date of hearing. *Brown* clearly anticipates this:

> The word "present" implies that the Commission is to consider the Claimant's ability to work as of the time evidence is received. There is no "present" opportunity for the Commission to make its determination apart from the time of hearing. As we stated in *Daraz*, it is the Claimant's personal and economic circumstances at the time of hearing, not at some earlier time, that are relevant to the disability determination. . .

Therefore, strictly speaking, *Brown* requires the Commission to consider Claimant's immigration status as of the date of hearing. Clearly, immigration status is a personal circumstance, i.e., a nonmedical factor that has significant implications in measuring both the size of Claimant's labor market and his access to it.

However, in ruling that disability should be evaluated based on the injured worker's nonmedical factors as they exist as of the date of hearing, the Court recognized that the Commission is afforded some leeway in application of the decision to avoid gaming of the Court's holding:

> Thus, in an instance where the Commission perceives that a party has taken an action that has the effect of manipulating the outcome of a disability determination, the Commission possesses the authority to disregard the effect of that action.

The majority has alluded to the attempts made by the parties to obtain an advantage by manipulating the date of hearing. However, to fully appreciate the unsuitability of the general rule of *Brown* to this case requires further explanation of the facts. Also, more attention needs to be given to the question of which of Claimant's several immigration statuses should be considered in assessing disability.

At the time of his industrial accident, Claimant was legally employed in the United States under an H2A Visa, which entitled him to pursue only one type of employment in this country, sheep herding. He lost his H2A Visa on June 9, 2010, and was unable to persuade employer to assist in obtaining a renewal of his Visa. On October 17, 2011, Claimant requested that the case be set for hearing. A hearing was eventually set for April 25, 2012. On or about March 7, 2012, the Decision in *Brown v. The Home Depot, supra*, was issued. As set forth in Mr. Berry's affidavit of April 11, 2012, as the hearing date approached, the parties became concerned that insufficient time remained before hearing within which to complete certain of their preparations. Specifically, Defendants expressed concern that their vocational rehabilitation expert would not have sufficient time to review and respond to the vocational report prepared by Claimant's expert. The parties conferred in early April and agreed to stipulate to vacate the April 25, 2012 hearing. Counsel for Claimant prepared a stipulation and submitted it to opposing counsel for review and signature. After hearing nothing from defense counsel, and with the date of hearing approaching, counsel for Claimant contacted defense counsel to inquire as to the status of the stipulation. Claimant's counsel was advised that a careful review of *Brown* had led Defendants to conclude that they could no longer stipulate to vacation of the hearing since it was to their

advantage to take the case to hearing at a time when Claimant could no longer legally work in the United States. If Claimant can no longer work in the United States then disability is moot under the Commission's Decision in *Diaz v. Franklin Building Supply*, I.C. 2006-507999 (Idaho Ind. Com. Nov. 20, 2009).

On or about June 2, 2011, Claimant married an American citizen, or thought he did. Following the marriage, Claimant engaged separate counsel to assist him in obtaining permanent residency status. This process was grinding forward as of the time immediately preceding the scheduled April 25, 2012 hearing, and Claimant's counsel had some reason to be hopeful that Claimant's application for permanent residency would eventually be approved.

Mr. Berry moved the Commission to vacate the scheduled April 25, 2012 hearing. The Commission granted the motion and reset the hearing for August 24, 2012. Mr. Berry clearly had designs on making sure that the hearing was not reset until Claimant had obtained permanent residency status. This is evidenced by the July 18, 2012 affidavit filed by Mr. Berry in support of his motion to vacate the August 24, 2012 hearing. In that affidavit, Mr. Berry expressed his concern that Claimant's application for permanent residency would not be acted upon by August 24th, and that unless the August 24th hearing was vacated, Claimant's case would be prejudiced by virtue of his illegal status as of the date of hearing. Defendants resisted the motion, stating that they wished to retain the August 24, 2012 hearing date precisely because they expected to take advantage of Claimant's immigration status as of the date of hearing. The Commission granted the motion to vacate.

In early August of 2012 Claimant's application for permanent residency was denied owing to the fact that the woman he thought he married on June 2, 2011 was still married to another man at the time. Claimant's counsel advised the Commission that Claimant and his

intended planned to immediately re-marry and that Claimant would then re-apply for permanent residency. Claimant obtained permanent residency status on March 1, 2013. On or about March 13, 2013 Claimant requested that the matter be calendared for hearing. A hearing was set for September 13, 2013.

On these facts, can there be any doubt that the parties to this case have done exactly what the *Brown* Court was concerned about when it acknowledged that the Commission should be vested with discretion to depart from the general rule when it appears that the parties are attempting to manipulate the date of hearing to suit their particular agendas?[1] I believe the facts discussed above warrant our departure from the rote application of the general rule that Claimant's disability should be evaluated based on the medical and nonmedical factors extant as of the date of hearing.

By manipulating the date of hearing, the parties each hoped to define to their respective advantage the immigration status that would be considered by the Commission in evaluating Claimant's disability. Therefore, we must make some judgment about which of Claimant's several immigration statuses should inform our evaluation of Claimant's disability.

A number of choices are presented. First, Claimant's disability could be measured using his immigration status on the date of injury. At that time, Claimant had legal access to only a handful of sheep herding jobs in the western United States. I believe the evidence is clear that Claimant is no longer physically capable of performing that type of employment. Per *Diaz* and *Otero*, Claimant has lost access to 100% of his legal labor market, and by that yardstick, would be totally and permanently disabled and entitled to lifetime benefits at the applicable rate.

[1] While I recognize that we are bound to apply *Brown* in most cases, I believe this case illustrates that there is nothing magic about the date of hearing. It is entirely arbitrary, and there is no good reason to use that date to cement the circumstances which the Commission should consider in evaluating disability.

Second, Claimant's disability could be evaluated by using his immigration status following the loss of his H2A Visa. As of that date, Claimant had no legal access to the United States labor market. Again, per *Diaz* and *Otero*, if a claimant has no legal access to the U.S. labor market on a post-injury basis, then the permanent limitations/restrictions which would otherwise cause significant disability are rendered irrelevant. In this scenario, Claimant would have no disability in excess of impairment. I do not favor picking this date since Claimant's inability to renew his H2A Visa is simply a consequence of the original injury. Claimant did not enter the United States illegally. It seems overly harsh to visit upon him a change in legal status which was beyond his control.

Third, Claimant's disability could be evaluated as of the date of hearing, when Claimant had access to the entire U.S. labor market. I agree with the majority that in this setting, Claimant is profoundly, but not totally and permanently, disabled.

Other less plausible scenarios could be considered as well. An assessment of disability typically involves an examination of Claimant's labor market access and wages at the time of injury, as compared to labor market access and wages as of the date of hearing. Here, let us say that Claimant had access to 100 sheep herding jobs in Idaho as of the date of injury. As of the date of hearing, Claimant has significant permanent limitations/restrictions. However, even with these restrictions he probably has access to more jobs in his current labor market than he did as of the date of injury. Under *Diaz* and *Otero*, it is at least arguable that Claimant has suffered no disability over and above impairment simply because he is more employable as of the date of hearing than he was as of the date of injury.

These scenarios, and others that might be imagined, demonstrate how ultimately unhelpful the rule of *Diaz* and *Otero* actually is in discharging the Commission's statutory

responsibilities under Idaho Code § 72-425 and Idaho Code § 72-430. Consider the variety of outcomes under the scenarios discussed above. They all rely, in one way or another, on various assumptions about Claimant's legal access to the labor market. The outcomes range from zero disability, to total and permanent disability, to the accident actually making Claimant more employable than he was before. It is unsettling, to say the least, that application of *Diaz* and *Otero* result in such a wide range of potential disability outcomes. It is equally unsettling that the Commission could be required to choose one of these outcomes over another, based on *Brown*. There is, after all, only one of Claimant, and he can't be both permanently and totally disabled and entitled to zero disability simply because of assumptions we impose concerning his legal labor market.

As to what the Commission should do to evaluate Claimant's disability, I do not believe it is fair to perform a disability evaluation by comparing Claimant's employability in one immigration status to his employability in a different immigration status. This is assuredly comparing apples to oranges and will yield untenable, if not ridiculous, results, as illustrated above.

Rather, it seems to me that Claimant's disability must be assessed by evaluating his disability under scenarios one or three, as set forth above. I am inclined to believe that the fairest approach is to evaluate Claimant's disability using his time of injury immigration status. I recognize that Claimant now legally resides in the United States, and that this reality should arguably govern his entitlement to benefits, notwithstanding that it is only by dint of skillful maneuvering of the parties that the hearing was held after Claimant became a legal resident. I am disinclined to accede to this for the following reason: to the extent the parties gave any thought to workers compensation at the time of employment, it was probably with this immigration status

in mind. Using Claimant's H2A status to evaluate his disability is more likely to be consistent with the expectations of Claimant and employer, as well as the surety who chose to underwrite this risk.

As I noted above, applying the rule of *Diaz* and *Otero* to Claimant's status would clearly support a finding that Claimant is totally and permanently disabled. However, as I explained in my dissent to both *Diaz* and *Otero*, I believe that the rule of those cases inappropriately confuses legal access to the labor market with actual access to the labor market. Claimant had legal access to a handful of sheep herding jobs in the western United States, but he, like other undocumented workers, had actual access to many other jobs in his geographic locale. His pre-injury labor market consisted of the legal sheep herding jobs he could access, as well as those other actual jobs he was physically and otherwise capable of performing, and which were offered by employers who would either not care about Claimant's immigration status or could be fooled into believing that they could legally employ Claimant. What I am here calling Claimant's post-injury labor market consists of those same jobs, both legal and actual, which he is currently physically capable of performing. Claimant cannot perform the jobs associated with the legal part of his labor market, and his restrictions are such that most of his actual labor market is probably foreclosed to him as well. Most of the employers who knowingly hire undocumented laborers, or who are so unsophisticated that they can be fooled into hiring undocumented laborers, are likely hiring for the meanest type of physical labor. Under the approach I believe most appropriately measures Claimant's accident-caused disability, Claimant may not be 100% disabled, but he is likely totally and permanently disabled under the odd-lot doctrine. I doubt very much that a meaningful labor market currently exists for Claimant among those employers

who will knowingly skirt the law and employ undocumented laborers, or those employers who lack the desire or sophistication to appropriately vet employees at the time of hire.

I hasten to add that while I believe Claimant's disability should be evaluated using his H2A visa status, there is no reason that the Commission should not consider other medical and non-medical factors as they exist as of the date of the hearing.

I admit that I am not altogether satisfied with this approach. It does yield a higher disability than would be awarded to a similarly situated legal resident, as illustrated by scenario number three. There are some who will find this unpalatable, arguing that Claimant's legal inability to penetrate the entire labor market should not inure to his benefit when it comes to assessing disability. I acknowledge this difficulty, but return to the provisions of Idaho Code § 72-204, which makes it clear that the Act affords coverage to all employees whether lawfully or unlawfully employed. I believe that Claimant's disability must be measured by reference to lawful and unlawful labor markets, i.e., his actual labor market. Moreover, the provisions of Idaho Code §§ 72-425 and 72-430 do not endorse substitution of a legal fiction for the actual medical and nonmedical factors applicable to a particular claimant.

I have considered another way to resolve these cases that departs from the position I have taken in this case, and in *Diaz* and *Otero*. Perhaps it would be best to simply evaluate disability without reference to immigration status. *See Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. Appeals 346, 560 S.E.2d 870 (2002). This would place an undocumented worker's disability assessment on par with other injured workers. It would avoid the arguably inflated disability awards which I believe will obtain under the approach I favor. It is a rule of simple administration, and would not require the Commission to guess about the size and nature of the labor market for illegal workers. However, at its heart, such an approach employs just another

fiction (this one in Claimant's favor) about the size and extent of Claimant's labor market. It should be equally unpalatable to those who seek to actually measure the disability resulting from an industrial injury as anticipated by the statutory scheme.

DATED this 10TH day of OCTOBER, 2014.

INDUSTRIAL COMMISSION

/S/_____
Thomas P. Baskin, Chairman

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10TH day of OCTOBER, 2014, a true and correct copy of **ORDER AND DISSENTING OPINION** were served by regular United States Mail upon each of the following:

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dkb /S/_____