BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERIN QUINN, Claimant, v. DOUG'S FIREPLACE SALES, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-037924** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 24, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello, Idaho on January 3, 2014. Claimant, Erin Quinn, was present in person and represented by Andrew Adams, of Idaho Falls, Idaho. Defendant Employer, Doug's Fireplace Sales, Inc. (Doug's Fireplace), and Defendant Surety, Idaho State Insurance Fund, were represented by Lyle Fuller, of Preston, Idaho. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on August 22, 2014.

ISSUES

The issues to be addressed are:

1. Claimant's entitlement to additional medical benefits;
2. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
3. Claimant's entitlement to additional temporary disability benefits;

4. The extent of Claimant's permanent partial impairment;

5. The extent of Claimant's permanent partial disability in excess of impairment; and

6. Claimant's entitlement to attorney fees.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant sustained industrial injuries while working for Doug's Fireplace on November 24, 2008, when he fell approximately nine feet and landed on his back. Defendants accepted responsibility for Claimant's extensive medical care for lumbar, thoracic, cervical, and right shoulder injuries. Claimant was later released to modified duty work. Claimant now requests additional medical benefits for treatment required for his industrial injuries, including past and future medical treatment. He also requests benefits for past and future psychological treatment. He further claims additional temporary disability benefits, permanent partial impairment, permanent partial disability, and attorney fees. Defendants deny responsibility for further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Claimant's Exhibits 1-25, 27-39, 42-47, 49, 51-52, and 54, admitted at the hearing;

3. Claimant's Exhibit 40, which is hereby admitted;[1]

4. Defendants' Exhibits 1-18, admitted at the hearing;

[1] At the commencement of the hearing, the Referee withheld ruling on the admission of Claimant's Exhibit 40 (containing copies of medical bills) pending further foundation. During the hearing, Claimant testified regarding some of the appointments and medical treatments relating to the bills, and Defendants' counsel cross-examined Claimant regarding some of the bills contained in Claimant's Exhibit 40. Transcript, pp. 147-153. In their post-hearing briefing, Defendants objected to the admission of Claimant's Exhibit 40; however, given Claimant's hearing testimony and the Claimant's Exhibits admitted at hearing, the Referee finds adequate foundation for admission of Claimant's Exhibit 40.

5. The testimony of Claimant, JoeAnn Quinn, Dedra Quinn, Doug Quinn, Tina Clayson, Ted Harvala, and Brandon Quinn, taken at the January 3, 2014 hearing;

6. The post-hearing deposition of William Jordan, MA, CRC, CDMS, taken by Defendants on February 20, 2014;

7. The post-hearing deposition of Benjamin Blair, M.D., taken by Claimant on February 26, 2014;

8. The post-hearing deposition of Anthony Joseph, M.D., taken by Claimant on February 26, 2014;

9. The post-hearing deposition of Kent Granat, taken by Claimant on March 21, 2014;

10. The post-hearing deposition of Gary Walker, M.D., taken by Defendants on April 2, 2014; and

11. The post-hearing deposition of Brian Tallerico, D.O., taken by Defendants on May 2, 2014.

All objections made during the depositions are overruled, including Claimant's objections posed during Dr. Walker's deposition which are overruled pursuant to JRP 10(E)(4). After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in 1972. He is right-handed. He was 41 years old and lived in Pocatello at the time of the hearing. Doug's Fireplace is a fireplace and HVAC sales, installation, and service business in Pocatello owned and operated by Claimant's brother and sister-in-law, Doug and Dedra Quinn.

2. **Background**. Claimant graduated from high school in Pocatello in 1990. He then attended a one-year automotive technician program at Idaho State University and received an Applied Automotive Technology certificate and ASE certification. From approximately 1991 to 1993, he worked as an auto mechanic technician at Sears where he performed light diesel repair and all aspects of gasoline engine repair, including engine rebuilds and transmission, suspension, braking, and electronics system repairs.

3. In 1992 Claimant worked as a carpenter and framer for Fisher Construction.

4. In approximately 1994, Claimant began working full-time as an equipment operator at AMI Semiconductor (AMI) in Pocatello where he assisted in semiconductor manufacturing. He received on-the-job training and became highly proficient. Claimant generally worked nights and weekends at AMI. During the day Monday through Friday he attended an electronics program at ISU. The program emphasized robotics, electronics, instrumentation, computers, pneumatics, hydraulics, and other mechanical systems used in a variety of industries. In 1997, Claimant received his associate of applied science degree in electrical/mechanical engineering from ISU and his universal electronics technician certificate.

5. In approximately 1999, Claimant's brother, Doug, asked Claimant to help install fireplaces sold by Doug's Fireplace. Claimant continued working full-time for AMI and during his days off, he also began working as an independent contractor for Doug's Fireplace. From approximately 2001 through 2005, Claimant contracted with Doug's Fireplace and various other local contractors. He received on-the-job HVAC training and obtained city and state HVAC licensure. He became an HVAC journeyman installing fireplaces and other heating systems for local contractors during his days off while he continued to work full-time, four 10-12 hour shifts weekly, for AMI. Claimant ultimately became an employee of Doug's Fireplace, directing the

entire installation process, from working with the general contractor to installing duct work, stoves, and furnaces, and trimming the finished installation to the satisfaction of the homeowner. Claimant was a freelance employee, working very flexible hours. Doug's Fireplace generally paid Claimant $300 per installation, $30-$40 per service call, or $15.00 per hour. Claimant sometimes completed three installations per day. Furnace installations were more profitable for Claimant; fireplace installations were more profitable for Doug's Fireplace.

6. In 2008, AMI became known as ON Semiconductor (ON) and Claimant continued his employment there. By November 2008, Claimant was earning $28.00 per hour and working four 10-12 hour days per week at his principal employment at ON while also working 15 or more hours per week for Doug's Fireplace.

7. **Industrial accident and treatment.** On November 24, 2008, Claimant was working for Doug's Fireplace installing attic duct work in a home under construction when he fell approximately nine feet, landing on his tail bone and back. The impact knocked the wind out of him and caused immediate bowel incontinence and back spasm. Claimant was taken to the emergency room where initial examination revealed a large lumbar hematoma, thoracic and right shoulder strain, and a fractured tailbone. Lumbar MRI revealed L4-5 and L5-S1 disc bulging with shallow left L5-S1 disc protrusion. Over the ensuing months he was treated with medications, physical therapy, steroid injections, acupuncture, chiropractic adjustments, and radiofrequency ablation. He was treated by several physicians, including Benjamin Blair, M.D.

8. Claimant's right shoulder remained symptomatic and on February 16, 2009, an MRI revealed right shoulder labral tear. On March 5, 2009, Claimant began treating with pain specialist Ryan Hope, M.D., for lumbar pain management. On May 18, 2009, Claimant underwent right shoulder arthroscopic posterior capsular repair with anterior suture

capsulorrhaphy, for glenohumeral instability and labral tear. Physical therapy followed. His shoulder symptoms improved but did not entirely resolve. Richard Wathne, M.D., later rated Claimant's permanent impairment to his right shoulder at 9% of the upper extremity.

9. In June 2009, Claimant returned to modified duty work at Doug's Fireplace.

10. **Deteriorating relationship with Doug's Fireplace and continued treatment.** Doug's Fireplace attempted to accommodate Claimant's work restrictions and offer Claimant work within his restrictions. Claimant was able to perform service calls, estimating and bid work, change parts for fireplaces, install registers and filters, hook up connections, and complete trim out work. Doug's Fireplace spent approximately $500 for Claimant to obtain tools post-accident for service calls.

11. On June 11, 2009, Dedra noted a conversation with Claimant:

> Erin called and spoke with me at length about work comp and said that depending on whether he decides to pursue legal action against them that he may not be doing any work for awhile. I asked him to let me know what he decides by Fri so that if he is not going to do the a/c on Monday then Doug can make other arrangements to have Matt do it. I also informed him that as far as I knew that if he did not do the light-duty jobs that we offer him then Karen with work comp has indicated to me that he would lose his payments he's currently receiving.

Claimant's Exhibit 44, p. 10. Dedra testified of another occasion when she discussed with Claimant the impact of his light-duty work at Doug's Fireplace on his workers' compensation benefits. That discussion occurred July 10, 2009. Dedra explained:

> I had turned in his work—because we have to turn in to the State Insurance Fund his work log every couple weeks, and I had turned that in, and he questioned me about that, and said, well, if you are going to do that, then I don't think I'm going to be able to help you out. And those were the words he used. And I said, you are not helping us out; it is called light-duty; you are working. And by law, I have to turn that information in.

Transcript, p. 234 ll. 16-24. Claimant did not acknowledge Dedra's account; however, her notes of July 10, 2009, contained in Claimant's Exhibit 44, pp. 10-11, corroborate her testimony.

12. By July 2009, Claimant had returned to modified duty work at ON.

13. By July 28, 2009, Claimant retained counsel in his workers' compensation case.

14. On August 31, 2009, Doug's Fireplace had scheduled the completion of a furnace and air conditioning installation for homeowner John Gregory at 12:00 noon after Claimant had confirmed he had physical therapy at 10:00 a.m. but would be available by noon. Claimant did not appear and Doug's Fireplace attempted unsuccessfully to reach him by phone. Claimant finally appeared for the job at 1:45 p.m. without any explanation for his tardiness. Doug's Fireplace paid Claimant $1,000.00 for supervising the Gregory furnace installation. Claimant asserted that Doug's Fireplace employees left him to perform most of the furnace installation alone and he had to request a contractor to help with the lifting. Doug questioned Claimant's assertions.

15. On September 1, 2009, Industrial Commission rehabilitation consultant Ken Blanchard visited Doug's Fireplace. Dedra recorded that when advised of Claimant's tardiness the day before, Mr. Blanchard commented "we should have written him up for not coming to work at 12 like he was suppose to on 8/31/09, he go[t] to the job at 1:45." Claimant's Exhibit 44, p. 11. Mr. Blanchard noted of that contact: "The employer stated that they have had the claimant do some light-duty work such as supervising some installation projects, and they have reported his work to the surety. The employer will continue to try to provide light-duty work for the claimant." Claimant's Exhibit 33, p. 13.

16. On September 22, 2009, and October 7, 2009, Claimant was late for work assignments by Doug's Fireplace. Claimant repeatedly failed to return phone calls from Doug's Fireplace. On several occasions local contractors and longtime Doug's Fireplace customers called Doug reporting they had been trying to reach Claimant "and he was refusing to return calls

on maintenance, on service, on bids—everything." Transcript, p. 265, ll. 13-14. Doug's Fireplace had similar experiences of Claimant failing to respond to repeated phone messages and concerns of contractors and customers. Claimant testified that he turned off his phone during the day because he worked at ON at night and slept during the day.

17. On October 14, 2009, Dr. Blair released Claimant to full duty at ON but restricted him to lifting 30 pounds frequently and 50 pounds occasionally. ON accommodated his restrictions.

18. On October 16, 2009, Mr. Blanchard discussed Claimant's work restrictions with Doug's Fireplace. Mr. Blanchard noted: "The employer stated that they have contacted the claimant on several occasions to have him do installation work within his restrictions. The claimant has not returned any of the messages left for him. The employer stated that they are contemplating firing the claimant for not accepting available work." Claimant's Exhibit 33, p. 14.

19. On November 3, 2009, Mr. Blanchard spoke with Claimant about his work at Doug's Fireplace. He noted that Claimant:

> stated they are only giving him a few hours here and there. The claimant stated that he can do everything but the grunt work. He said he can still make the company a lot of money, but they are not using him because of this claim. The claimant stated that he has talked to some contractors that have told him they have called for service, and the employer passed the work off instead of having him do it.

Claimant's Exhibit 33, p. 14.

20. On November 5, 2009, Mr. Blanchard met with Doug's Fireplace who "again stated that they have contacted the claimant on several occasions to have him do work within his restrictions, and he has only responded to a few calls." Claimant's Exhibit 33, p. 14.

21. On November 9, 2009, Mr. Gregory called Doug's Fireplace for assistance with the thermostat of his furnace installed the prior September. Doug's Fireplace directed him to call Claimant, who had installed the thermostat. Claimant received Mr. Gregory's call, but initially refused to assist him.

22. On November 10, 2009, Mr. Gregory called Doug indicating Claimant: "said something to the effect that I didn't get paid enough for that job, so I'm not going to basically help you with that job." Transcript, p. 264, ll. 20-22. Mr. Gregory was irate and told Doug: "what is up with this? This guy works for you. He was here. He put it in. He trimmed it out, and I need some help, and he's refusing to come out." Transcript, p. 265, ll. 1-4. On November 11, 2009, Doug spoke with Claimant who confirmed Mr. Gregory's statements. Doug reminded Claimant that Claimant had received the agreed payment for the Gregory furnace installation. Claimant thereafter went and addressed Mr. Gregory's concerns.

23. On November 12, 2009, Mr. Blanchard spoke with Claimant who indicated: "the employer is not taking work that they should be, that he could make decent money on, and then sending him on some service calls that don't even cover his gas." Claimant's Exhibit 33, p. 15.

24. A short time after the Gregory furnace incident, and without any request that Claimant return tools belonging to Doug's Fireplace, Doug testified that Claimant showed up one morning at the Doug's Fireplace parking lot:

> somewhere around 7:00 a.m. And he had a trailer that he kept HVAC equipment in and fittings and pipes and gas line gauges and all sorts of tools that belonged, of course, to us that we purchased—and showed up with his son and backed up to a little area that we have in the parking lot and just basically threw it out of the trailer into the parking lot. And the [Doug's Fireplace] employees apparently saw them leaving—as they were showing up.

Transcript, p. 272, ll. 13-22. Claimant denied throwing tools into the parking lot, but admitted that he unloaded and stacked some materials in Doug's Fireplace's parking lot one evening.

After this incident, Doug's Fireplace stopped calling Claimant with work assignments. Ken Blanchard then arranged for a meeting with Claimant, Doug, and Dedra.

25. On December 1, 2009, Claimant, Doug and Dedra Quinn, and Ken Blanchard met at Doug's Fireplace to discuss Claimant's employment by Doug's Fireplace. Claimant testified that the meeting went well, but at the conclusion of the meeting Doug said to Claimant: "I never want to see you here ever again." Transcript, p. 93, ll. 9-10. Doug denied making any such statement. Dedra testified she never heard Doug make any such statement and that she never fired Claimant from Doug's Fireplace. Mr. Blanchard's notes regarding the meeting indicate:

> I met with the employer and claimant to discuss the claimant's work status. I explained that, even though the employer is his brother, as far as work goes he needs to work within the company's policy. The claimant is not happy with the work that he has been given because he is not making much money compared to before the injury. The employer stated that the claimant has been too unreliable for them to give him jobs, if he is not going to work with them. The employer also stated that they cannot just pay the claimant to supervise jobs if the employer can do that. The employer is willing to work with the claimant as jobs become available that is [sic] within his restrictions if the claimant is willing to work with them. The employer expects the business that the claimant is proficient at to pick up in the spring.

Claimant's Exhibit 33, p. 15. Thus, Mr. Blanchard's notes suggest the exact opposite of Claimant's assertion that Doug essentially fired Claimant on the spot.

26. All witnesses and evidence indicate that for at least a year after the December 1, 2009 meeting, Doug's Fireplace never offered Claimant work and Claimant did not request any further work from Doug's Fireplace. On January 15, 2010, Mr. Blanchard recorded: "claimant stated that he has not worked for Doug's Fireplace since our meeting, and he needs to be at 100% to go back to work for them." Claimant's Exhibit 33, p. 15.

27. On February 11, 2010, Gary Walker, M.D., examined Claimant at Defendants' request. He found substantial left lower extremity weakness and diagnosed lumbar strain and

disc disease with mild L4-5 and L5-S1 disc bulging. Dr. Walker agreed with Dr. Blair's 50-pound lifting restriction. On March 10, 2010, Dr. Hope performed an L4-5 epidural steroid injection. On March 26, 2010, Dr. Walker found Claimant's lumbar condition stable and rated his lumbar impairment at 3% of the whole person.

28. On March 31, 2010, Dr. Hope performed left and right L3-5 medial branch blocks with fluoroscopy guidance. On April 19, 2010, Dr. Hope performed right L3-5 medial branch high temperature radiofrequency lesioning with fluoroscopy guidance. Claimant's Exhibit 13, p. 6. The ablation procedure decreased Claimant's back pain for approximately seven months.

29. In May 2010, Claimant was divorced.

30. On July 20, 2010, Michael O'Brien, M.D., examined Claimant at his counsel's request and restricted Claimant to lifting no more than 30 pounds. Dr. O'Brien recommended Claimant not return to HVAC work. Dr. O'Brien rated Claimant's lumbar impairment at 10% of the whole person.

31. **Change in principal employment and further treatment.** On November 5, 2010, Claimant was discharged from ON. Controversy surrounds the circumstances of his discharge.

32. In the fall of 2010, ON production management reported concerns about Claimant's whereabouts on the plant site. This prompted an investigation by ON security that identified a pattern of discrepancies between plant video surveillance footage and Claimant's time clock entries. Claimant's immediate supervisor, Ted Harvala, reviewed the discrepancies with Harvala's manager and the HR department who determined the discrepancies were substantial rather than trivial. On November 5, 2010, Claimant met with Harvala and ON HR representative Dennis Cook. Harvala testified that Claimant was told his employment with ON

was being terminated for "Falsification of records." Transcript, p. 116, l. 5. Harvala testified that Claimant responded: "something to the effect that, is this what you are pinning on me because you can't pin anything else on me?" Transcript p. 117, ll. 5-7. Harvala also testified that during this conversation Claimant accused Harvala of breaking up his marriage by assigning Claimant to work the night shift at ON. Harvala affirmed that Claimant had long since resumed all of his required duties at ON and his termination had nothing to do with his industrial injury at Doug's Fireplace.

33. Claimant testified at hearing that prior to his industrial accident at Doug's Fireplace, ON gave him a promotion and pay raise. After returning from his accident, Claimant was put on night shift and his project assignments were largely taken away. Claimant testified that he was unhappy and was actively looking for other employment. Regarding the reason for his termination, Claimant testified: "I actually had no idea at the time. Nothing was presented to me. There was no—nothing for me to sign. I walked in. They—I don't even know the exact words they said, but it was, you are no longer working here, and they walked me out. I didn't take it as a termination. I didn't even know how to even take it." Transcript, p. 74, ll. 5-11. Claimant testified he became aware of an alleged time card issue only later after reading Mr. Harvala's pre-hearing deposition. At hearing Claimant asserted he had a faulty employee badge that allowed him to enter ON facilities, but was not recognized by the time clock reader. Thus, Claimant had to manually enter his work time on his computer. He subsequently applied for and received unemployment benefits.

34. Claimant's description of his faulty employee badge and manual time clock entries does not entirely explain the pattern of discrepancies between his manual time entries and actual video surveillance records. The Referee finds Mr. Harvala's testimony more credible than

Claimant's regarding the circumstances surrounding his departure from ON and concludes that Claimant's employment at ON was terminated for falsification of time records and that Claimant was so informed on November 5, 2010.

35. Claimant sought other employment and located a contractor at the INL near Idaho Falls. On January 26, 2011, INL physician Dr. Creighton approved Claimant to work at the INL with a 35-pound lifting restriction. On February 3, 2011, Claimant commenced working full-time for Idaho Treatment Group (ITG) at the INL as an electrical instrumentation technician earning $29.00 per hour.

36. In April 2011, Dr. Walker examined Claimant again at Defendants' request. He diagnosed chronic low back pain, reaffirmed a 3% whole person impairment for Claimant's lumbar condition, and confirmed a 30-pound lifting restriction. Dr. Walker found nothing suggesting malingering or symptom exaggeration.

37. In April 2011, during his days off from ITG, Claimant commenced remodeling his mother's farmhouse at her request. On June 6, 2011, Dr. Hope indicated Claimant may be a candidate for lumbar surgery.

38. Claimant called his mother, JoeAnn Quinn, as a witness at hearing. JoeAnn testified she asked Claimant to remodel her farmhouse. She was aware he had some restrictions after his 2009 shoulder surgery. Claimant commenced in April 2011 and remodeled two bathrooms. He removed sheetrock, flooring, a bathtub, vanities, and toilets. The bathtub was very heavy cast iron and had to be broken apart with a sledge hammer. He installed a new bathtub, vanities, and toilets. By approximately September 2011, he finished remodeling one bathroom entirely except for installing the moulding. He also completed most of the work in the second bathroom. In October 2011, Claimant demolished the back porch and put in new

cupboards. Claimant and his girlfriend Tina testified that Claimant's brother Brandon, and Brandon's sons Andrew (age 15) and Jadin (age 11) helped Claimant do the work. Andrew, Jadin, and Brandon pulled up the old carpet and scraped up the glue and rubber backing. Tina, JoeAnn, and Claimant lifted the new porch cabinet up and Claimant then screwed it into place. The cabinet was high enough that Claimant had to work from a ladder. JoeAnn saw Claimant lift building materials into his vehicle—sometimes with help, sometimes alone—and use a sledge hammer to break apart the old cast iron tub. Claimant asserted that in all of this remodeling he did not exceed his lifting restrictions.

39. JoeAnn testified that she showed some pictures of the new farmhouse cupboards at a party where Dedra Quinn was present. Claimant became angry upon learning that his mother had shown the pictures, fearing that if word got out, it would jeopardize his workers' compensation benefits. Thereafter Claimant refused to complete the farmhouse remodel and JoeAnn had to get Doug Quinn to complete it. Claimant's mother testified Claimant was not reliable and did not follow through and complete the remodeling work he had started at the farmhouse. The Referee finds Claimant's mother's testimony credible.

40. On January 19, 2012, Dr. Blair noted Claimant's back pain had worsened and was now accompanied by left leg pain. Dr. Blair suggested consideration of surgical intervention.

41. On June 25, 2012, Claimant underwent a thoracic MRI that disclosed minimal degenerative disc disease at T5 through T8. Dr. Blair reviewed the thoracic MRI and concluded it demonstrated no surgical lesion. Claimant's lumbar symptoms continued.

42. On September 5, 2012, Dr. Blair determined that Claimant had reached maximum medical improvement, restricted him to lifting 35 pounds continuously and 50 pounds rarely, and

rated his permanent lumbar impairment at 8% of the whole person. Dr. Blair noted Claimant might elect lumbar fusion surgery in the future.

43. **Cervical surgery and impairment ratings.** On January 18, 2013, Claimant began treating with Anthony Joseph, M.D., for progressive arm pain with numbness in his thumb and index finger. Dr. Joseph diagnosed cervical disc pathology which he attributed to Claimant's industrial accident. Cervical MRI confirmed a herniated C5-6 disc. Claimant had one unsuccessful steroid injection in his neck. Surety approved cervical surgery and in April 2013, Claimant underwent C5-6 discectomy and fusion with instrumentation by Scott Honeycutt, M.D.

44. On October 25, 2013, orthopedic surgeon Brian Tallerico, D.O., examined Claimant at Defendants' request. He rated Claimant's permanent cervical impairment at 10% of the whole person. Dr. Tallerico recorded Claimant's report of daily back ache radiating to his "love handle area and sometimes down his left leg, but with no associated numbness or tingling, or obvious radicular pattern to the foot." Tallerico Deposition, Claimant's Exhibit 1, p. 6. Claimant's deep tendon reflexes were all symmetrical. Dr. Joseph agreed with Dr. Tallerico's 10% whole person impairment rating of Claimant's cervical spine.

45. On December 5, 2013, Dr. Blair found Claimant medically stable from his cervical, thoracic, and lumbar injuries. Dr. Blair concluded Claimant suffered L4-5 and L5-S1 disc bulges, thoracic back sprain, and herniated C5-6 disc due to his industrial accident. Dr. Blair utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and rated Claimant's lumbar impairment at 8% of the whole person, and his cervical impairment at 26% of the whole person, for a combined rating of 29% permanent impairment of the whole person. Blair Deposition, pp. 24-25. Dr. Blair restricted Claimant from lifting, pushing, or

pulling more than 30 pounds. Utilizing the AMA Guides Sixth Edition, Dr. Walker opined that Claimant sustained 3% whole person impairment due to his lumbar injuries.

46. **Condition at the time of hearing.** At the time of hearing, Claimant continued to work full-time at ITG and was earning $31.00 per hour plus benefits. He anticipated that the ITG contract for which he was hired will end in late 2014 and he will then have to seek other employment. At hearing Claimant also continued to experience back pain and radiating left leg pain. Claimant continued to treat regularly with Dr. Hope.

47. **Credibility.** Claimant asserts Doug's testimony should not be accepted because of a remote prior conviction. Having observed Claimant and all of the other witnesses at hearing, and compared the testimony of each with other evidence in the record, the Referee finds that Doug is generally a credible witness. The Referee also finds several areas of Claimant's testimony conflicting with other evidence as set forth below.

48. 2007 earnings discrepancy. Claimant's 2007 earnings statements appear inconsistent with Social Security records and Doug's Fireplace payment records. Claimant's 2007 tax returns reported total earnings of $97,500 from all his employments. Claimant's vocational expert Kent Granat estimated Claimant's 2007 annual earnings at $60,000 from Doug's Fireplace and approximately $53,000 from ON, for a total of approximately $113,000—noticeably more than Claimant reported on his tax returns. Defendants' vocational expert Bill Jordan also noted this discrepancy and testified he was unable to reconcile it.

49. Request for payment under the table. Doug testified that Claimant asked "if there was a chance that he could be paid under the table" for his post-injury work at Doug's Fireplace. Transcript, p. 267, ll. 24-25. Dedra testified similarly. Claimant denied ever making such a request. Dedra's notes of July 10, 2009, support her testimony. Claimant's Exhibit 44,

pp. 10-11. Both Doug and Dedra refused Claimant's request. The Referee finds that Claimant suggested and Doug's Fireplace declined to pay Claimant under the table by failing to report his earnings at Doug's Fireplace while receiving temporary disability benefits.

50. Reliability for light-duty work at Doug's Fireplace. Claimant represented at hearing that after returning from his industrial injury he was reliable, available for work at Doug's Fireplace, and prompt in returning phone calls and keeping appointments. Doug and Dedra Quinn testified that Claimant was repeatedly unreliable, would not return phone calls, and was late for scheduled service calls, thus jeopardizing important business relationships for Doug's Fireplace. Ken Blanchard's notes corroborate their testimony. The record establishes several occasions in the fall of 2009, including the Gregory furnace installation and thermostat servicing incidents, when Claimant was late and/or unresponsive to Doug's Fireplace work assignments or customers' requests.

51. December 1, 2009 meeting at Doug's Fireplace. Claimant's account of the conclusion of the December 1, 2009 meeting between Claimant, Doug, Dedra, and Ken Blanchard is directly contrary to the testimony of Doug and Dedra and also contrary to Mr. Blanchard's written notes.

52. Discharge from ON. Claimant represented to various medical providers and vocational experts that he was discharged from ON because of difficulty performing his work duties because of his injuries at Doug's Fireplace. Vocational expert Bill Jordan testified that Ted Harvala advised him Claimant was terminated at ON for falsifying his time records, while Claimant told Mr. Jordan he did not understand why he was terminated. Claimant represented to Dr. Walker that he was terminated at ON due to work limitations resulting from his industrial accident. Mr. Granat believed Claimant lost his job at ON because of the physical limitations

caused by his industrial injuries at Doug's Fireplace. Mr. Blanchard's notes reflect a similar misunderstanding. Claimant testified in his pre-hearing deposition that he did not know why he was terminated at ON. Claimant's Exhibit 47, p. 48. These representations do not enhance Claimant's credibility.

53. Many discrepancies between witnesses' testimonies can be reconciled by taking into account their different perspectives, perceptions, or memories resulting in honestly differing reports. However, the instant case presents some matters of irreconcilable conflicting testimony. To the extent Claimant's representations are contrary to other evidence of record, his representations are unpersuasive. The Referee finds Claimant's credibility suspect.

DISCUSSION AND FURTHER FINDINGS

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

55. **Additional treatment and causation.** The first two issues are interrelated and address whether Claimant is entitled to past and future treatment due to his industrial accident. Claimant requests additional benefits, including future cervical treatment, past and future lumbar treatment, and past and future psychological treatment. Defendants argue that Claimant's cervical and lumbar conditions are medically stationary and by definition he is not entitled to further medical benefits for either condition. Defendants also assert that Claimant has not proven his entitlement to any psychological benefits.

56. It is well settled that "An employee's employer and surety are only liable for medical expenses incurred as a result of 'an injury' (i.e. an employment related accident), or 'disability from an occupational disease.' I.C. § 72-432(1). An employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus a claimant must provide medical testimony that supports his claim for compensation to a reasonable degree of medical probability, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995), and "probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). Thus Claimant's requests for benefits must be supported by medical evidence establishing causation.

57. Future cervical treatment. Claimant alleges it is more probable than not that he will need future cervical treatment because he is still at some risk for non-union of his cervical fusion. He also alleges he suffers daily nosebleeds and recurring headaches since his 2013 cervical surgery; however, no physician has related these symptoms to his industrial accident or subsequent treatment. Claimant further asserts continued cervical symptoms for which he has received various permanent impairment ratings as addressed hereafter. Most significantly, all of the doctors that have addressed the subject have found Claimant's cervical condition medically stable. With the exception of Dr. Blair's recommendation of routine follow-up x-rays at 3, 6, and 12 months post-fusion, none has recommended specific future treatment. See Defendants'

Exhibit 8, p. 2. Claimant has not proven Defendants' present liability for future cervical treatment, except routine follow-up x-rays at three, six, and 12 months post-fusion.

58. Past medical treatment. Claimant alleges entitlement to reimbursement for past lumbar and upper extremity treatment. Defendants initially urge that the issue of past medical benefits was not noticed for hearing and object to its consideration herein. However, the issue of medical care was properly noticed for hearing and will be addressed. See Notice of Hearing and Pre-Hearing Telephone Conference filed November 26, 2013, p. 1.

59. Claimant's Exhibit 40 contains copies of medical bills for which Claimant requests reimbursement. Defendants maintain some of the bills contained in Claimant's Exhibit 40 have already been paid. Defendants further argue Claimant has not provided doctors' chart notes corresponding to the remaining medical bills for which he seeks payment and, thus, there is inadequate medical evidence to relate the bills to Claimant's industrial accident. At hearing Claimant testified regarding some of the appointments and medical treatments relating to the bills; however, Claimant provides little explanation and very little citation to the record to support his requests. The bills contained in Claimant's Exhibit 40 are each examined below.

60. *2009 MRI.*[2] Claimant's Exhibit 40, p. 1 contains a bill from Idaho Medical Imaging for service rendered April 21, 2009, for MRI upper extremity with contrast. The parties mistakenly referred to this as an MRI completed June 22, 2009—the date of partial payment.[3] A corresponding MRI report of April 21, 2009, appears in Claimant's Exhibit 3. Claimant testified at hearing that this MRI might have been ordered by Dr. Wathne, who treated Claimant for his

[2] Claimant's briefing asserts that Claimant "had to pay for MRIs that were never reimbursed." Claimant's Opening Post-Hearing Brief, p. 37. However, Claimant has only identified one MRI in Claimant's Exhibit 40 for which he alleges Defendants have not paid.

[3] Close scrutiny reveals the actual date of the MRI appears near the center of the document as "PAYMENT FOR SERVICES RENDERED 04/21/09" and part of the date of the MRI also appears at the left margin where the first three digits of the date of service were removed by the center hole punch. Claimant's Exhibit 40, p. 1.

industrial shoulder condition. Indeed, Dr. Wathne's records indicate he examined Claimant on April 7, 2009, and ordered a right shoulder arthrogram with contrast. Claimant underwent a right shoulder MRI arthrogram with contrast on April 21, 2009. Defendants' Paid Cost Summary confirms that Defendants paid for this expense on October 4, 2009. Claimant's Exhibit 32, p. 6. Claimant has not proven his entitlement to further benefits for his 2009 MRI.

61. *Superior Physical Therapy.* Claimant's Exhibit 40, pp. 2-8 contains a summary from Superior Physical Therapy of treatment dates and charges from January 21, 2009 through September 21, 2009. Claimant testified at hearing that Surety covered these bills. Transcript, p. 149, l. 18 through p. 150, l. 4. Claimant has not proven his entitlement to further benefits for his treatment at Superior Physical Therapy.

62. *Radiofrequency ablation.* Claimant's Exhibit 40, pp. 9-10 and 19-20 is Claimant's patient ledger from Skyline Surgery Center showing payments for various services. Of note are charges regarding lumbar/sacral facet joint injections on March 31, 2010, and radiofrequency ablations on April 19, 2010, for which Surety declined payment. Claimant's Exhibit 40, pp. 11-14 contain Claimant's patient ledger from Ryan Hope, M.D., LLC, which—contrary to Claimant's assertions—shows multiple payments by Surety for treatment by Dr. Hope from June 23, 2009 through July 7, 2011. However, of note are charges for a March 31, 2010 facet lumbar/sacral three level injection with fluoroscopic guidance, an April 19, 2010 paravertebral neurolytic destruction with fluoroscopic guidance, and a May 18, 2010 ablation follow-up visit, all of which Surety declined to pay.

63. Dr. Hope advised Surety's claims examiner Claimant had lumbar facet joint degeneration which no epidural injection would address, but which could be treated by "a test medial branch block, and if successful followed up with high temperature radiofrequency

lesioning." Claimant's Exhibit 8, p. 4. As previously noted, Dr. Hope performed L3-5 medial branch blocks with fluoroscopy guidance on March 31, 2010, and L3-5 medial branch high temperature radiofrequency lesioning with fluoroscopy guidance on April 19, 2010, to address Claimant's lumbar facet joint pain. Claimant's Exhibit 13, p. 6. Defendants contend that treatment of Claimant's facet joints is not related to his industrial accident.

64. Dr. Walker testified that Claimant's facet degeneration documented on lumbar MRI pre-existed his industrial accident. Dr. Walker described radiofrequency lesioning or ablation as using radiofrequency to ablate the medial nerve branches that enervate the lumbar facet joints, thereby blocking the patient's perception of facet joint pain. Walker Deposition, p. 42. Dr. Walker's records of his April 18, 2011 examination of Claimant document that he discussed this with Claimant and that he improved after the procedure:

> I was asked about a medial branch block trial and radiofrequency lesioning. I had suggested that he had very mild facet changes and doing such a procedure would not be related to his work injury. He states that on his own he had a radiofrequency ablation procedure done April 19, 2010. He state[s] that Dr. Hope did this and that the pain level went from a 7, 8/10 down to a 2, 3/10 in the low back.

Claimant's Exhibit 7, p. 33.

65. Dr. Walker testified that since Claimant received some relief from prior radiofrequency ablation, another radiofrequency ablation procedure would be reasonable. However, when specifically asked whether Claimant's industrial accident caused or aggravated his lumbar facet joint pain, Dr. Walker reiterated counsel's question and opined:

> The question is in his case does having muscular injury, does that aggravate or somehow pull the facet joints tighter because his muscles are tighter; and therefore, bring out the facet pain that maybe wasn't there before? Maybe.
>
> In his case, he had a radiofrequency procedure which is specifically done to the facet joints and he felt some better after that, which would suggest then that some of his pain was coming from the facet joints. Again, did his facet injury—

> did he have facet arthritis because of the injury? No. But did the fall and the shaking around or contusion of his joints stir it up and bring it out? Maybe.

Walker Deposition, p. 40, l. 22 through p. 41, l. 10 (emphasis supplied). Thus, Dr. Walker stopped short of relating Claimant's lumbar facet joint pain to his industrial accident.

66. Dr. Blair opined that Claimant's low back symptoms, necessarily including his lumbar facet joint pain, were caused by his industrial accident. Dr. Blair recommended radiofrequency ablation on January 20, 2010. He related Claimant's lumbar facet joint pain and need for radiofrequency ablation treatment to the work injury. Claimant's Exhibit 11, p. 22. Similarly, Dr. Thomas testified that from the medical records he reviewed and what he had seen in the case, Claimant's treatment was reasonable and was related to his industrial accident. Dr. Thomas specifically noted that Claimant had tried "electro—radiofrequency treatments, epidural steroid injections" directed to his lumbar spine. Thomas Deposition, p. 28, ll. 17-18, and p. 30, ll. 14-22. The radiofrequency ablation decreased Claimant's low back symptoms for approximately seven months.

67. Dr. Blair's opinion that Claimant's lumbar facet joint pain and need for radiofrequency ablation treatment is related to Claimant's work injury is persuasive inasmuch as Claimant was "asymptomatic prior to this injury. Since the time of injury, he has had consistent and ongoing symptomatology without other associated traumas." Claimant's Exhibit 11, p. 21.

68. Claimant has proven his entitlement to past medical benefits for his lumbar facet treatment by Dr. Hope, including the March 31, 2010 medial branch blocks with fluoroscopic guidance, April 19, 2010 radiofrequency ablation with fluoroscopic guidance, and May 18, 2010 ablation follow-up visit.

69. *Portneuf Medical Center.* Claimant's Exhibit 40, p. 21 contains Claimant's information statement account summary from Portneuf Medical Center showing billed charges

of $2,193.00 as of June 17, 2011. There is no mention of any symptom, attending physician, or procedure. Claimant has not identified or cited to, and the Referee has not located, any evidence of record establishing that the expenses appearing in this account summary from Portneuf Medical Center are related to Claimant's industrial accident. Claimant has not proven his entitlement to further benefits for his treatment at Portneuf Medical Center.

70. *All American Chiropractic.* Claimant's Exhibit 40, pp. 15-18 contain Claimant's patient transaction summary from All American Chiropractic from December 22, 2009, through July 3, 2012. Claimant's Exhibit 12 contains the records of All American Chiropractic. The December 22, 2009 notes reflect a chief complaint of neck pain of three days' duration, and low back pain of unspecified duration. Many of the notes appear on legible pre-printed forms but the hand-written notes themselves are virtually unreadable. One undated page of handwritten notes appears to state under Chief Complaint: "C spine twisted or something – S working @ home or something AM got worse as day went on …." Under Onset/Reason, the handwritten notes appear to state: "1 yr ago fell out attic when trusses broke, broken coccyx & herniated discs (L4-5-S1) …." Claimant's Exhibit 12, p. 3. The rest of the handwritten entries are not decipherable with certainty. Whether all of the treatments provided Claimant by All American Chiropractic were necessitated by his industrial accident is thus open to question. Claimant has not identified or cited to, and the Referee has not located, any medical evidence of record establishing that all of the treatment provided and all of the bills generated by All American Chiropractic are related to Claimant's industrial accident.

71. Defendants further note under Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989), that Claimant is generally entitled to medical care when prescribed by his treating physician and when Claimant is improved thereby. In the present case,

it does not appear that Jessie Smith, D.C., was ever affirmed or recognized as Claimant's treating physician. Additionally, on April 18, 2011, Dr. Walker recorded that Claimant told him "He had done chiropractic treatments, stating that it primarily helped the upper back when he would get twisted or cramped. However, it would really not help much at all with the low back or the left leg." Claimant's Exhibit 7, p. 33. Moreover, during the period spanned by the records of All American Chiropractic, Defendants were providing Claimant medical treatment for his right shoulder, back, and neck through Drs. Wathne, Blair, Hope, Joseph, Honeycutt, and Walker. Some of Dr. Smith's own notes document that Claimant was simultaneously treating with Drs. Blair and Walker. Claimant's Exhibit 12, p. 6. It does not appear that Claimant was ever referred to Dr. Smith by any of his treating physicians. Although Claimant testified he asked Surety for chiropractic treatment, Defendants were already providing medical treatment through one or more physicians and there is no showing Claimant asked any of his treating physicians for a referral to Dr. Smith or ever requested a change of physician to Dr. Smith pursuant to Idaho Code § 72-432(4)(a) or JRP 20.

72. Idaho Code § 432(5) provides: "Any employee who seeks medical care in a manner not provided for in this section, or as ordered by the industrial commission pursuant to this section, shall not be entitled to reimbursement for costs of such care." Claimant has not proven his entitlement to further benefits for his treatment at All American Chiropractic.

73. *Randall Family Chiropractic.* Claimant's Exhibit 40, p. 22 contains Claimant's patient ledger from Randall Family Chiropractic from December 1 through 8, 2011. Claimant received three chiropractic treatments from Randall Family Chiropractic during this time. Claimant's Exhibit 17 contains the records of Randall Family Chiropractic. The December 1, 2011 notes reflect a complaint of low back pain with onset of "fell thru [sic] roof 3 yrs ago WC

setting" and acknowledge medical treatment by Drs. Honeycutt and Hope. Claimant's Exhibit 17, p. 6. Whether all of the treatments provided Claimant by Randall Family Chiropractic were necessitated by his industrial accident is not fully established. Claimant has not identified or cited to, and the Referee has not located, any medical evidence of record establishing that all of the treatment provided and all of the bills generated by Randall Family Chiropractic are related to Claimant's industrial accident.

74. A claimant is generally entitled to medical care when prescribed by his treating physician and when the claimant is improved thereby. Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). However, in the instant case no chiropractic physician from Randall Family Chiropractic was ever recognized as Claimant's treating physician. Moreover, during the period of Claimant's treatment at Randall Family Chiropractic, Defendants were providing Claimant medical treatment for his back and neck through Drs. Blair and Hope. It does not appear that Claimant was ever referred to any physician at Randall Family Chiropractic by any of his treating physicians. Although Claimant testified he asked Surety for chiropractic treatment, Defendants were already providing medical treatment through one or more physicians and there is no showing Claimant asked any of his treating physicians for a referral to Randall Family Chiropractic or ever requested a change of physician pursuant to Idaho Code § 72-432(4)(a) or JRP 20. Claimant has not proven his entitlement to further benefits for treatment at Randall Family Chiropractic.

75. *Evans Chiropractic.* Claimant's Exhibit 40, p. 23 contains an itemized statement of charges from Nathan Evans, D.C., of Evans Chiropractic from October 10 through December 2, 2012. Claimant's Exhibit 18 contains the records of Evans Family Chiropractic. Dr. Evans' notes are thorough and legible. His notes of October 5, 2012, relate his treatment to Claimant's

industrial accident and "fall through a roof and fell on his back and broke his coccyx." Claimant's Exhibit 18, p. 1. However, Dr. Evans was never recognized as Claimant's treating physician. Moreover, during the period of Claimant's treatment by Dr. Evans, Defendants were providing Claimant medical treatment for his back and neck through Drs. Blair and Hope. It does not appear that Claimant was ever referred to Dr. Evans by any of his treating physicians. Although Claimant testified he asked Surety for chiropractic treatment, Defendants were then providing medical treatment through one or more physicians and there is no showing Claimant asked any of his treating physicians for a referral to Dr. Evans or ever requested a change of physician to Dr. Evans pursuant to Idaho Code § 72-432(4)(a) or JRP 20. Claimant has not proven his entitlement to further benefits for treatment at Evans Chiropractic.

76. In summary, Claimant has proven Defendants' liability for past medical benefits for treatment of his lumbar facet joint pain via injection and radiofrequency ablation, but not to any other past medical benefits.[4]

77. Future lumbar surgery. Claimant requests a determination that he is entitled to future lumbar surgery. Several medical practitioners have considered Claimant's alleged need for future lumbar surgery. Their opinions are examined below.

78. *Dr. Walker*. Dr. Walker examined Claimant at Defendants' request in February 2009, February 2010, and April 2011. He reviewed Claimant's lumbar MRI scans and identified bulging discs and mild facet degeneration. Dr. Walker opined there was no evidence of any acute disc herniation or protrusion. Walker Deposition, p. 11. He found Claimant to be a reliable examinee and found Claimant's back condition medically stable. Dr. Walker opined that

[4] Claimant's Exhibit 40, pp. 24-27 contains bills from Psychological Assessment Specialists for interviews, biofeedback, and individual psychotherapy by Dr. Amen, a psychologist, who treated Claimant for his psychological condition. Defendants' liability for treatment of Claimant's psychological condition generally, and Dr. Amen's bills specifically, is addressed hereafter.

Claimant's 2009 and 2011 MRI scans did not look any different and concluded there was no indication his condition was spiraling downward such that Claimant would need lumbar surgery in the foreseeable future. Walker Deposition, p. 32.

79. *Dr. Tallerico.* Dr. Tallerico noted that Claimant had no lumbar instability and no neurologic findings in his lower extremities. Tallerico Deposition, p. 46. Dr. Tallerico explained that Claimant would have "a very poor chance of improvement" with lumbar surgery. Tallerico Deposition, p. 45, ll. 20-21. He estimated Claimant would have, at best, only a 50% chance of improvement with lumbar surgery. Dr. Tallerico testified that Claimant needed no further medical treatment.

80. *Dr. Blair.* In his December 5, 2013 report, Dr. Blair opined that Claimant may need future lumbar surgery. Dr. Blair wrote:

> In my opinion, on a medical certainty of 51% more probable than not basis, Mr. Quinn may require future surgery. In particular, Mr. Quinn's low back symptomatology has been ongoing for over five years at this point and has been recalcitrant to multiple attempts at conservative therapy. I have discussed the possibility of surgical intervention in the form of lumbar interbody fusion and although he states he may be interested in pursuing this at a later date, currently he does not wish to pursue it as he does not believe his symptoms are severe enough to warrant this. If he does elect to undergo surgical treatment in the future, I would estimate the cost …would be approximately $65,000 to $75,000.

Claimant's Exhibit 12, p. 42 (emphasis supplied).

81. In his post-hearing deposition, Dr. Blair recommended lumbar fusion, if Claimant desired it, but testified that Claimant had only a 60% chance of improvement with lumbar fusion and noted that "sixty percent is a pretty poor success rate for surgery." Blair Deposition, p. 40, ll. 15-16. Dr. Blair testified he understood that Claimant planned to have lumbar fusion surgery, but not in the near future. Blair Deposition, p. 47.

82. *Weighing the medical opinions.* Drs. Walker and Tallerico concluded Claimant needs no lumbar surgery presently or in the reasonably foreseeable future. Dr. Blair's report is tentative in that Claimant may require and may be interested in future surgery. It is definite in that Claimant does not presently want surgery because his symptoms are not severe enough. Claimant asserts medical stability and requests substantial permanent impairment and permanent disability based upon his being medically stable. His present request for surgery which he may desire, if ever, only in the event his symptoms worsen, speculates a change of condition. Claimant clearly does not presently desire lumbar surgery and the speculated change in condition is inconsistent with his claim of present medical stability. Claimant has not proven Defendants' present liability for additional medical expenses for possible future lumbar surgery.

83. Future lumbar facet radiofrequency ablation. Claimant requested a repeat radiofrequency ablation procedure as recommended by Dr. Hope. Both Dr. Hope and Dr. Walker recorded Claimant's improved symptoms for approximately seven months after his initial radiofrequency ablation. Dr. Walker testified that since Claimant received some relief from prior radiofrequency ablation, another radiofrequency ablation procedure would be reasonable, although Dr. Walker did not consider such related to the industrial accident. As noted above, Claimant has proven that his facet symptoms are related to his industrial accident and is thus entitled to repeat facet radiofrequency ablation as recommended by Dr. Hope as palliative treatment for his chronic low back symptoms.

84. Psychological benefits. Claimant requests payment of past and future psychological treatment pursuant to Idaho Code § 72-451. Defendants object to consideration of this issue, asserting it was not noticed for hearing; nevertheless Defendants have thoroughly briefed this issue. Claimant's request for hearing asserted his entitlement to medical benefits, but

did not request consideration of his entitlement to psychological benefits. Although treatment of psychological conditions is customarily provided by medical professionals, benefits for psychological treatment are governed by Idaho Code § 72-451 rather than § 72-432. Here the record establishes that Claimant clearly advised Defendants well prior to hearing of his demand for psychological treatment benefits[5] and Defendants have persuasively responded to the issue in their briefing. Inasmuch as there is no surprise and no prejudice to Defendants from Claimant's failure to expressly specify Idaho Code § 72-451 as an issue in his request for hearing, it will be addressed herein at Claimant's repeated express insistence.

85. While medical evidence of causation to a reasonable medical probability is required to recover medical benefits, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995), a more rigorous causation standard applies when treatment for psychological injuries is sought. Idaho Code § 72-451 requires:

> Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:
>
> (1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by accident and physical injury as defined in section 72-102(18)(a) through (18)(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where: (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and
>
> (2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

[5] Claimant's July 1, 2013 letter to Defendants expressly requested payment of psychological benefits. Defendants' Exhibit 18, p. 1.

> (3) Such accident and injury must be the predominant cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; and
>
> (4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and
>
> (5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho worker's compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered; and
>
> (6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

86. *Predominant cause*. Of the six required elements enumerated in Idaho Code § 72-451, one is particularly disputed by the parties herein: whether Claimant's industrial injuries are the predominant cause of his psychological condition. The Commission has observed:

> Idaho Code § 72-451(3) does not present a "but for" standard of causation. Under the predominant cause standard, it is not sufficient that the industrial injury be merely the proverbial "straw that breaks the camel's back." Although an employer takes an employee as he is, in determining the predominant cause of a psychological condition, the contribution of all of the employee's pre-accident factors must be weighed against the contribution of the industrial accident. To be the predominant cause, the work injury must be a greater cause of the psychological condition than all other causes combined. Thus, if a percentage of contribution were assigned to each and every factor which collectively produce a claimant's psychological condition, the contribution of the industrial accident must be more than 50% of the total of all of the causes. Against this standard, the evidence, including expert testimony, produced by the parties must be evaluated.

Smith v. Garland Construction Services, IC 2007-002698, 2009 WL 5850562 (Idaho Ind. Com. Apr. 27, 2009).

87. Claimant herein alleges that he had no prior psychological condition but developed depression after his industrial accident. He asserts this shows that his accident caused

his psychological condition. Several licensed psychologists have evaluated the cause of his psychological conditions. Their opinions are reviewed below.

88. On November 26, 2012, psychologist Theresa Ross, Ph.D., reported her psychological assessment of Claimant seeking to "quantify the psychological factors that may be contributing to Mr. Quinn's current functional difficulties." Claimant's Exhibit 22, p. 2. She recounted his industrial accident and resulting 35-pound lifting restriction and his termination at ON. She also recorded his report "that the stress of his injury contributed to the demise of his marriage." Claimant's Exhibit 22, p. 2. Dr. Ross specifically identified Claimant's recent stressors "including the time he was bedridden after his injury, losing his job, conflicts with his brother and sister-in-law, his divorce, losing his kids, and losing his house." Claimant's Exhibit 22, pp. 3-4. She diagnosed pain disorder related to both psychological factors and a general medical condition, generalized anxiety disorder, and recurrent mild major depressive disorder. It is clear that Dr. Ross considered Claimant's psychological disorders related in part to his industrial accident; however, Dr. Ross did not quantify the contribution of Claimant's accident to his psychological condition and certainly did not opine that Claimant's industrial accident was the predominant cause of his psychological disorders as compared to all other causes combined.

89. Dr. Ross referred Claimant to clinical psychologist Cynthia Amen, Ph.D., for psychological counseling sessions. Dr. Amen provided approximately 16 psychological treatment sessions commencing in November 2012. She noted Claimant's chronic pain, anxiety, and recurrent depressive symptoms. Dr. Amen's assessment from January 27, 2013 concluded:

> In my opinion, Mr. Quinn's accident resulted in dramatic life changes, both in his adjustment to functional limitations as well as in his experience of significant psychological distress. Anxiety and depressive symptoms are related in part to changes in his self-esteem as well as in his perceptions of conflict in family relationships. Mr. Quinn's psychiatric symptoms currently are exacerbated by

> daily reminders of pain and functional limitations, as well as by the lack of resolution in his Workman's [sic] Compensation dispute.

Claimant's Exhibit 23, p. 2. Dr. Amen noted that Claimant's psychiatric symptoms "reportedly began after the injury he sustained at work; there is no reported history of psychiatric symptoms before this injury." Claimant's Exhibit 23, p. 4. Again, it is clear that Dr. Amen considered Claimant's psychological disorders related to his industrial accident. However, she also related them in part to his perceptions of conflict in family relationships. Moreover, Dr. Amen did not quantify the contribution of Claimant's accident to his psychological conditions, and nowhere concluded that Claimant's industrial accident was the predominant cause of his psychological disorders as compared to all other causes combined.

90. On March 1, 2013, board certified clinical neuropsychologist Carol Anderson, Ph.D., evaluated Claimant at Defendants' request. Claimant acknowledged that Defendants paid for Dr. Anderson's evaluation. Claimant's Opening Post-Hearing Brief, p. 37. Dr. Anderson diagnosed pain disorder associated with both psychological and medical factors, recurrent severe major depressive disorder, and anxiety disorder not otherwise specified. She concluded her evaluation by directly responding to two specific questions:

> 1. Has Mr. Quinn sustained any psychological symptoms as a direct result of the fall on November 24, 2008?
>
> A. As previously explained in detail … Mr. Quinn has severe mood deficits that, at least in part, appear to be temporally related to this accident. Accordingly, in this way, I believe that Mr. Quinn did sustain psychological symptoms as a direct result of the fall on November 24, 2008. Some of his symptoms of depression and anxiety can be attributed to consequences of his chronic pain condition and functional limitations. However, I do believe that the severity and perpetuity of his emotional difficulties exceeds what may be typically expected from the accident history and physical complaints alone.
>
> 2. Is it your professional opinion that Mr. Quinn's current psychological problems are related to his industrial injury? If so, please explain in detail.

> A. While I believe that Mr. Quinn has a persisting chronic pain condition and functional limitations that relate directly to the fall, there are also many psychological symptoms that Mr. Quinn has experienced and continues to experience that are probably better classified as indirectly related to the 11/08 fall. For example, I believe that there are additional situational stressors (e.g. pre-existing marital conflict that escalated into divorce, conflict with brother) that have played and continue to play a part in Mr. Quinn's psychological state, and which ultimately have interfered with his recovery of maximum functioning.

Claimant's Exhibit 25, p. 15.

91. Dr. Anderson concluded that Claimant's severe mood deficits were temporally related to his accident, "at least in part." She recommended psychological counseling. While she opined that Claimant sustained psychological symptoms directly related to his fall, and that "some" of his symptoms can be related to his pain syndrome from the fall, she observed that his emotional difficulties exceeded those expected given his accident history and physical complaints and opined that additional stressors—such as Claimant's divorce—played a part in his psychological state and interfered with his recovery. Significantly, Dr. Anderson did not quantify the contribution of Claimant's accident to his psychological conditions and certainly did not indicate that Claimant's industrial accident was the predominant cause of his psychological conditions as compared to all other causes combined.

92. The record establishes several other events causing Claimant psychological stress. In May 2010, Claimant was divorced. He acknowledged at hearing that this was very traumatic for him. Claimant subsequently lost his house and the custody of his children. In 2011, Claimant lost his job at ON due to factors other than his industrial accident. Dr. Ross identified these as significant psychological stressors. Although all of the psychologists affirmed the psychological stress caused by Claimant's accident, none have opined that his industrial accident was the predominant cause of his psychological conditions as compared to all other causes

combined. Claimant has not proven Defendants' present liability for past or future treatment of his psychological conditions.

93. **Temporary disability.** The next issue is Claimant's entitlement to temporary disability benefits. Idaho Code § 72-102 (11) defines "disability," for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980). Additionally:

> [O]nce a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work *and* that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light-duty work release.

Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986). However, an injured worker otherwise entitled to temporary disability benefits may lose such benefits if he refuses suitable work or is unable to return to work for the employer due to the termination of his employment for cause, rather than for any limitation from his industrial injury. Idaho Code § 72-403, Griffin v. Extreme RV, 2008 WL 5426353 (Dec. 5, 2008), Smith v. Champion Building Products, 1994 IIC 1511 (Dec. 14, 1994).

94. In the present case, Claimant alleges additional temporary disability benefits during his time of recovery from December 1, 2009 until June 14, 2010. Defendants counter that Claimant was not reliable for work assignments and effectively terminated his employment at Doug's Fireplace by his own conduct.

95. The record establishes that in the fall of 2009, Claimant was repeatedly late for scheduled appointments, failed to return calls timely, and stopped presenting for work at Doug's Fireplace. Claimant acknowledged that he turned off his phone during the day because he worked at ON at night and slept during the day. Claimant justified his actions saying that Doug knew where he lived and could have gotten a message to him at any time. Many employers know the addresses of their employees; however, they still expect employees to respond to phone messages without the employer having to visit the employee's home. Claimant also initially refused to assist Doug's Fireplace customer John Gregory with his furnace thermostat problem. Claimant ultimately addressed the problem, but only after an initial refusal and sufficient delay to prompt a complaint from Mr. Gregory. Claimant's return of tools to Doug's Fireplace's parking lot sometime between November 12 and November 30, 2009, sent a clear message. Although Claimant at hearing would only acknowledge that he cleaned out his garage and took Doug's materials and tools and dropped them off at Doug's Fireplace's parking lot one evening, the more credible evidence established that Claimant "backed up to a little area that [Doug's Fireplace has] in the parking lot and just basically threw it out of the trailer into the parking lot." Transcript, p. 272, ll. 17-20. Doug then justifiably concluded: "that pretty much tells me that he's probably not willing or interested—and tools all over the place—interested in working for me anymore. That was pretty much it." Transcript, p. 266, l. 25 through p. 267, l. 3.

96. Mr. Blanchard's notes indicate he was not aware of Claimant's return of the tools. The notes from his December 1, 2009 meeting with Claimant, Doug and Dedra Quinn, indicate that Claimant needed to be reminded of the expectations customary to an employment relationship:

> I explained that, even though the employer is his brother, as far as work goes he needs to work within the company's policy. The claimant is not happy with the work that he has been given because he is not making much money compared to before the injury. The employer stated that the claimant has been too unreliable for them to give him jobs, if he is not going to work with them. …. The employer is willing to work with the claimant as jobs become available that is [sic] within his restrictions if the claimant is willing to work with them.

Claimant's Exhibit 33, p. 15. While Mr. Blanchard's notes indicate that Doug's Fireplace was willing to work with Claimant if he was willing to work with them, noticeably absent is any mention of a reciprocal expression of willingness on Claimant's part to work with Doug's Fireplace. Without Claimant's assurance that he would work reliably with Doug's Fireplace, it is not surprising that after the December 1, 2009 meeting, Doug's Fireplace never offered Claimant further work. Mr. Blanchard recorded on January 15, 2010: "claimant stated that he has not worked for Doug's Fireplace since our meeting, and he needs to be at 100% to go back to work for them." Claimant's Exhibit 33, p. 15. There is no persuasive evidence that Doug's Fireplace required a full-duty work release before it would re-employ Claimant. Rather, given Claimant's dissatisfaction with his earnings, it appears Claimant elected not to accept anything less than full-duty work at Doug's Fireplace.

97. The weight of the credible evidence establishes that, no later than November 30, 2009, Claimant quit his employment at Doug's Fireplace and Doug's Fireplace had ample justification to terminate Claimant's employment for cause not related to his industrial accident. The December 1, 2009 meeting with Claimant, Doug and Dedra Quinn, and Ken Blanchard at

Doug's Fireplace did not resurrect the severed employment relationship. Claimant's loss of earnings from Doug's Fireplace after December 1, 2009, was due to the termination of his employment by his own discretionary conduct, rather than for any limitation from his industrial injury. Claimant has not proven his entitlement to additional temporary disability benefits.

98. **Permanent partial impairment.** The next issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014), Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

99. In the present case, many physicians have rated Claimant's permanent impairments due to his industrial accident. Their conclusions are summarized below.

100. Right shoulder. On November 16, 2009, Dr. Wathne rated Claimant's permanent impairment to his right shoulder at 9% of the upper extremity which is equivalent to 5% of the whole person. Drs. O'Brien and Blair also rated Claimant's permanent impairment of his right shoulder at 5% of the whole person.

101. Lumbar spine. On July 20, 2010, Dr. O'Brien rated Claimant's permanent impairment due to his lumbar spine at 5% of the whole person. On September 5, 2012, Dr. Blair utilized the AMA Guides, Fifth Edition, and rated Claimant's permanent impairment to his lumbar spine at 8% of the whole person. Dr. Walker found Claimant to be a reliable examinee and, utilizing the AMA Guides Sixth Edition, rated Claimant's permanent impairment to his lumbar spine at 3% of the whole person on March 26, 2010 and April 22, 2011. Dr. Walker testified that Claimant has lumbar disc bulges, but not herniations, and that the AMA Guides, Sixth Edition, do not permit rating of a lumbar disc bulge because 35% of the population aged 20 to 40 has a disc bulge or herniation and over 50% of the population after age 40 has disc bulges or herniations. Dr. Walker therefore rated Claimant's lumbar impairment at 3% of the whole person due to lumbar sprain/strain. Walker Deposition, p. 39. Claimant was only 36 at the time of the accident and had no significant prior back symptoms. Per Dr. Walker's testimony, there was a 65% probability that Claimant had no disc bulge or herniation prior to his industrial accident. A lumbar MRI taken shortly after the accident documented disc bulging at two levels, L4-5 and L5-S1 with shallow left L5-S1 disc protrusion. It is more probable than not that Claimant's industrial accident is the cause of his disc pathology as well as his chronic lumbar sprain/strain. Dr. Blair's rating of 8% is the most persuasive given the record as a whole.

102. Cervical spine. Dr. Blair rated Claimant's cervical impairment at 26% of the whole person utilizing the AMA Guides, Fifth Edition. Dr. Blair utilized the Fifth Edition because he believed that the Sixth Edition was inaccurate. Blair Deposition, pp. 24-25, 47. Dr. Tallerico examined Claimant on October 25, 2013, and rated his cervical impairment at 10% of the whole person utilizing the AMA Guides, Sixth Edition. Dr. Tallerico mistakenly believed Idaho required use of the Sixth Edition. Drs. Hope, Joseph, and Walker all agreed with

Dr. Tallerico's 10% cervical impairment rating. The weight of the medical evidence establishes that Claimant suffers a 10% whole person cervical impairment.

103. The Referee finds that Claimant suffers a permanent impairment of 8% of the whole person due to his lumbar spine, 5% of the whole person due to his right shoulder, and 10% of the whole person due to his cervical spine, for a total of 23% permanent impairment due to his industrial accident.

104. **Permanent disability**. The next issue is the extent of Claimant's permanent disability. "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. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896

P.2d 329, 333 (1995). Wage loss may be a consideration. Baldner v. Bennett's Inc., 103 Idaho 458, 649 P.2d 1214 (1982). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

105. Work restrictions. In the present case, Dr. O'Brien gave Claimant a 30-pound permanent lifting restriction in July 2010. Physical therapist Briggs Horman performed an extensive and objective functional capacity evaluation on October 1, 2013. He concluded Claimant put forth good effort and produced valid findings. Based on the FCE, Mr. Horman restricted Claimant to lifting 52 pounds. Dr. Blair restricted Claimant to lifting no more than 30 or 35 pounds. Dr. Walker ultimately opined that a lifting restriction of 30 to 35 pounds was "a very reasonable number based on the patient's subjective complaints." Walker Deposition, p. 31, ll. 8-9. The Referee finds that Claimant is permanently restricted to lifting no more than 30 pounds due to his industrial injuries.

106. Vocational experts. Two vocational experts have addressed Claimant's permanent disability. Their conclusions are evaluated below.

107. *Kent Granat.* Kent Granat testified for Claimant regarding the extent of his permanent disability. Mr. Granat is paid by the federal government to determine whether an individual is disabled pursuant to Social Security criteria. He has a graduate degree from Cornell in human resources and labor relations. He was the HR director for Josephine County, Oregon for four years. He has operated his own vocational consulting business for approximately 14 years. He obtained CCRC certification but let it lapse over seven years ago.

108. Mr. Granat interviewed Claimant on September 21, 2012. Claimant reported that he could not lift overhead; however, he could lift and carry 30 to 35 pounds, stand and walk for

six hours, sit for two or three hours, and occasionally bend and twist. Mr. Granat observed that Claimant had worked as an auto mechanic, construction worker, maintenance mechanic, semiconductor processor, instrument mechanic, and HVAC mechanic and, thus, had experience in skilled and semi-skilled light, medium, and heavy jobs. Accepting Claimant's 30-pound lifting restriction, Mr. Granat concluded that Claimant could not perform medium work (defined as requiring lifting up to 50 pounds occasionally), but was limited to light work (defined as only requiring lifting up to 20 pounds occasionally). However, Mr. Granat acknowledged that Claimant's job at ON was classified as medium work. Mr. Granat understood that Claimant's industrial injuries prevented him from continuing his employment at ON. In fact, Claimant's discharge from ON was due to other factors. After a period of recovery, Claimant resumed most of his duties at ON. However, Claimant testified that he could not perform all of his prior duties at ON after his accident and that coworkers performed the heavier tasks.

109. Mr. Granat opined that Claimant had lost access to 64.4% of the labor market due to his industrial injuries. Considering hourly wages plus benefits at the time of the accident, Mr. Granat calculated that Claimant was earning $19.04 per hour at Doug's Fireplace and $35.86 per hour at ON. Mr. Granat added those hourly rates together and concluded Claimant was earning $54.90 per hour based on a 40-hour work week. Granat Deposition, p. 30. Mr. Granat calculated that Claimant is now earning $33.01 per hour ($31.93 plus $1.08 in benefits) at INL and concluded Claimant had a disability of 49.6 to 66.1%. Mr. Granat testified that Claimant's disability is at the upper end of this range because of his cervical fusion surgery. Granat Deposition, p. 37.

110. *Bill Jordan*. Bill Jordan, CRC, CDMS, testified on behalf of Defendants. Mr. Jordan testified that Claimant presented well, would likely interview well, had extensive experience in skilled and highly skilled electrical engineering work, and opined:

> [H]e's really such a skilled guy that he would be attractive to a number of employers in the electronics industry, and industry as a whole, because he could do things like programmable logic. And that's a big thing in industry today, to be able to use computers to make machines work. And having an understanding of electrical and the computers and the electronics, it is a great field, and he has that.

Jordan Deposition, p. 18, ll. 8-17.

111. Mr. Jordan observed that Claimant's duties at ON included: "robotics specialist, built and rebuilt robot control systems, worked on different equipment, hydraulic, electrical systems, computer systems." Jordan Deposition, p. 24, ll. 5-8. His duties for ITG at INL included: "calibrating instruments, testing equipment, doing programmable logic controller work. He used control devices to monitor the state of equipment and systems at the plant, and he would test equipment using all kinds of calibration equipment." Jordan Deposition, p. 27, ll. 19-24.

112. Mr. Jordan opined that Claimant had restored his primary wages through his employment by ITG at INL. Mr. Jordan believed that Claimant could restore at least half of his pre-injury income from the ancillary work he performed for Doug's Fireplace. Mr. Jordan thus concluded that Claimant had lost wages of approximately 25%. He further determined that Claimant had lost labor market access of approximately 17 to 35.5% if medium or light-duty work restrictions were applied respectively. Mr. Jordan calculated that Claimant suffered a permanent disability "ranging from 21% to 30.25% (inclusive of PPI)." Claimant's Exhibit 21, p. 19. After receiving updated restrictions from Dr. Blair, Mr. Jordan ultimately

concluded that Claimant suffered a permanent disability of 30.25%, inclusive of permanent impairment. Jordan Deposition, p. 36.

113. *Weighing the vocational opinions.* Mr. Granat estimated Claimant's disability at 49.6% to 66.1%. Claimant's Exhibit 20, p. 19. After further consideration of Claimant's cervical condition, Mr. Granat opined Claimant's permanent disability is on the high end of the range he identified, i.e., 66.1%. Mr. Jordan opined that Claimant sustained permanent disability of 30.25% inclusive of impairment. Jordan Deposition, p. 36. The respective bases for the vocational experts' disability opinions are contrasting in several respects.

114. Claimant's lifting restriction of 30 to 35 pounds is substantially greater than the customary light-duty restriction of 20 pounds, but also substantially less than the customary medium-duty restriction of 50 pounds. Mr. Granat concluded Claimant could work at light-duty work, i.e., lifting 20 pounds, whereas Mr. Jordan opined Claimant could work at light medium-duty, a more current vocational classification suggesting lifting up to 30-35 pounds. Jordan Deposition, p. 46. Applying the light-duty classification criteria ensures that the employment opportunities thereby identified are all well within Claimant's actual physical capacity.

115. Mr. Jordan noted that Mr. Granat's opinion assumed Claimant could only work 40 hours per week post-accident. Pre-accident, Claimant worked approximately 64 hours per week (40 at ON, plus 20-24 at Doug's Fireplace[6]). There was no persuasive medical conclusion that Claimant is presently restricted to a 40-hour work week. At the time of hearing, Claimant actually worked four-12 hour days at INL and then had three or four days off during which he could supplement his primary income if he desired. Jordan Deposition, p. 35. While Claimant

[6] Mr. Granat reported Claimant worked an average of 24 hours per week at Doug's Fireplace before his accident. The job site evaluation prepared by Ken Blanchard for Claimant's time of injury job at Doug's Fireplace indicates Claimant worked "possibly 20 hrs/wk, depending on business." Claimant's Exhibit 7, p. 1.

told Mr. Granat that he was unable to work more than 40 hours per week due to pain from his industrial injuries, there is no medical evidence that any physician has restricted Claimant from working on any of his days off each week. The record establishes that Claimant worked post-accident remodeling his mother's farmhouse and helping his girlfriend remodel her yoga studio, all while working four 12-hour shifts each week.

116. Mr. Jordan questioned Mr. Granat's analysis of Claimant's pre-accident earnings. Mr. Granat concluded that Claimant earned $54.90 per hour ($19.04 + $35.86) and approximately $114,000 annually pre-accident. In fact, it does not appear Claimant ever earned $54.90 per hour. In 2007, Claimant's tax returns reported earnings of $97,500 from all employments. In 2008—the year of his industrial accident—his tax returns reported earnings of $102,000 from all employments. Yet Mr. Granat estimated Claimant's annual earnings pre-accident at $60,000 from Doug's Fireplace and $53,964.90 from ON, for a total of nearly $114,000. This figure is noticeably larger than reported on Claimant's tax returns. Mr. Jordan recognized the discrepancy and was unable to reconcile or explain it.

117. Mr. Jordan also questioned Mr. Granat's calculations and projections of Claimant's post-accident earnings. Mr. Granat confirmed that his disability calculations were based upon Claimant earning $65,000 to $68,000 annually at INL. At hearing, Claimant testified he was earning $80,000 annually at INL, which equates to approximately $38.46 per hour. Mr. Granat later acknowledged that this increase in earnings would lower his estimate of Claimant's loss of wage earning capacity from 34.7% to 30%. Granat Deposition, p. 59. However, if the additional $1.08 of benefits were added to this hourly wage, as Mr. Granat added to his initial INL earnings calculation, this would equate to $39.54 per hour or $82,243.00

annually, and would presumably lower Mr. Granat's estimate of Claimant's wage earning capacity loss below 30%.

118. Mr. Granat's analysis takes Claimant's estimated loss of annual wage earning capacity—from $114,000 pre-accident to $80,000 post-accident—and concludes this constitutes a 66% permanent disability. This conclusion is unpersuasive. Even assuming Claimant was earning $114,000 rather than $102,000 pre-accident, his actual post accident earnings are 70% ($80,000 ÷ $114,000) of that amount. He has only demonstrated a loss of 30% of his actual earnings. Assuming Claimant earns $82,243.00 annually, he has demonstrated post-accident earnings of 72% ($82,243 ÷ $114,000) of his pre-accident wages, and has demonstrated an actual earnings loss of only 28%.[7]

119. Claimant asserts Mr. Jordan underestimated Claimant's loss of labor market access by assuming Claimant will access electronic engineering technician positions across the western United States. However, Mr. Jordan testified that the loss of labor market access across the western United States and the area within approximately 50 miles of Claimant's residence was comparable. Furthermore, Mr. Jordan's 35.5% estimated loss of labor market access based upon the Skill Tran program is reasonably similar to Mr. Granat's 41.6% estimated loss of labor market access based upon the Skill Tran program.

120. Claimant also asserts Mr. Jordan underestimated Claimant's loss of wage earning capacity at 25%. However, as noted above, Claimant's actual earnings post-injury demonstrate at most only a 28% actual loss of earnings and this based solely upon his demonstrated earnings from his primary job at ITG without any secondary job earnings. Claimant acknowledged at hearing that he has made no effort to obtain jobs in HVAC and has apparently not sought other

[7] If Claimant's pre-accident earnings per his tax returns are considered, Claimant has demonstrated actual post-accident earnings of 80% ($82,243 ÷ $102,000) and thus an actual earnings loss of only 20%.

part-time work to replace the income he lost from Doug's Fireplace. [8] The additional earnings from any part-time minimum wage job would further reduce this 28% earnings loss.

121. The Referee finds Mr. Jordan's analysis and conclusions more realistically assesses Claimant's loss of wage earning capacity and permanent disability.

122. Based on Claimant's permanent impairment of 23% of the whole person for his right shoulder injury, cervical and lumbar spine conditions, his work restrictions imposed by his treating and examining physicians, his physical capacity established by the FCE, and considering his non-medical factors including but not limited to his age of 36 at the time of the accident and 41 at the time of the hearing, GED, applied automotive technology certificate, associate of applied science degree in electrical/mechanical engineering, journeyman HVAC licensing and experience, experience in construction, experience in self-employment, extensive experience in electrical instrumentation maintenance and repair, and his demonstrated ability to competitively return to his time of injury employment at INL, the Referee concludes that Claimant's ability to compete for regular gainful employment in the open labor market in his geographic area has been reduced. Claimant has proven that he suffers permanent disability of 7.25%, in addition to his permanent impairment of 23% of the whole person.

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

[8] Mr. Jordan questioned Mr. Granat's using only $17.66 per hour in calculating Claimant's probable future earning capacity. Mr. Jordan persuasively observed that Claimant is not limited to earning $17.66 per hour as an electronic engineering technician and has demonstrated he can exceed this wage. Jordan Deposition, p. 48.

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

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

124. In the present case, Claimant asserted entitlement to attorney fees for Defendants' denial of psychological treatment benefits and temporary disability benefits; however, inasmuch as Claimant has not proven Defendants' liability for any past psychological benefits or temporary disability benefits, Defendants' denial thereof was entirely reasonable. Claimant also asserts entitlement to attorney fees for Defendants' denial of past medical benefits and permanent disability benefits. As Claimant has proven entitlement to additional medical and permanent disability benefits, both of these areas merit further consideration.

125. Medical benefits. Defendants' denial of all past medical benefits requested by Claimant herein was justified with the possible exceptions of Defendants' delay in payment of Claimant's 2009 MRI and Defendants' denial of payment for facet radiofrequency ablation by Dr. Hope in 2010. Claimant also requests attorney fees for Defendants' denial of repeat facet ablation as recommended by Dr. Hope.

126. *2009 MRI.* Claimant requested payment of his 2009 right shoulder MRI. Although Defendants were ultimately shown to have paid for this MRI, the question remains

whether the payment was unreasonably delayed. Claimant underwent a right shoulder MRI arthrogram with contrast on April 21, 2009. A corresponding MRI report of April 21, 2009, appears in Claimant's Exhibit 3. Claimant's Exhibit 40, p. 1 contains a bill from Idaho Medical Imaging for service rendered April 21, 2009, for MRI upper extremity with contrast. The parties mistakenly referred to this as an MRI completed June 22, 2009—the date of partial payment. Defendants paid for this expense on October 4, 2009. Claimant's Exhibit 32, p. 6. Although payment was delayed more than five months, Claimant has not established when medical records and billing information were provided to Surety, and thus has not proven this delay was unreasonable.

127. *Radiofrequency facet ablation.* Dr. Hope performed lumbar/sacral facet joint injections on March 31, 2010, radiofrequency facet ablations on April 19, 2010, and an ablation follow-up examination on May 18, 2010, all for which Defendants denied payment. Dr. Hope later recommended a repeat facet radiofrequency ablation which Defendants denied. Prior to hearing Dr. Walker opined on at least two occasions that Claimant's industrial accident did not cause his lumbar facet joint pain, rather it was the product of pre-existing facet degeneration. See Claimant's Exhibit 7, p. 33; Claimant's Exhibit 35, p. 14. In his post-hearing deposition, when asked whether Claimant's accident aggravated the facet joints, Dr. Walker still declined to affirmatively relate the two, responding: "Maybe." Walker Deposition, p. 41, l. 10. Although Dr. Walker's opinion on this issue was unpersuasive, Defendants reasonably relied upon his expert medical opinion in refusing to pay for Claimant's past or future lumbar facet joint treatment.

128. Permanent disability benefits. Claimant requests attorney fees for Defendants' failure to pay 12% permanent disability pursuant to Bill Jordan's expert opinion that Claimant

suffered 30% permanent disability inclusive of his 18% permanent impairment which Defendants have already paid.[9]

129. In Dennis v. School District #91, 1999 WL 222508 (Idaho Ind.Com. Feb. 12, 1999), Dennis proved total permanent disability and the Commission initially granted attorney fees for defendants' denial of permanent disability in excess of impairment when defendants and their expert witness asserted Dennis suffered permanent disability of 36%, while defendants withheld payment for permanent disability beyond 19% whole person impairment. However, on reconsideration the Commission reversed the award of attorney fees stating:

> [T]he parties took widely varying positions on the issue of disability. ….
>
> The evidence was conflicting. As a result, until the extent of disability was finally resolved, the nature of Defendants' position was merely an argument and not an admission of ultimate responsibility. Even though this Commission does find it concerning that Defendants would not begin payment of disability benefits in accordance with their position, it is clear that the entire range of disability was noticed for the Commission to decide. …. Given that the parties' positions on disability were so far apart based on credible evidence, a Commission decision was necessary to resolve the dispute.

Dennis v. School District #91, 1999 WL 719737 (Idaho Ind.Com. Aug. 13, 1999).

130. In the present case, the evidence supported widely varying positions on permanent disability and a Commission decision was necessary to resolve the dispute. Claimant has not proven Defendants acted unreasonably in failing to pay an additional amount for permanent disability.[10]

131. Claimant has not proven Defendants' liability for attorney fees.

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[9] Claimant acknowledged in his briefing that "combined impairments from the surety of 18% whole person (shoulder, low back, and cervical) have already been paid." Claimant's Opening Post-Hearing Brief, p. 30.

[10] It is further noted that if Briggs Horman's medium duty restrictions had been adopted, Claimant's loss of labor market access would have been only 17%, which, if averaged with the part-time earnings from any minimum wage job when added to his current earnings at ITG, would have produced a disability estimate very similar to the 18% permanent impairment Defendants have already paid.

CONCLUSIONS OF LAW

1. Claimant has proven Defendants' liability for past and future medical benefits for facet radiofrequency ablation as recommended by Dr. Hope. Claimant has also proven Defendants' liability for routine follow-up cervical x-rays at 3, 6, and 12 months post-cervical fusion, as recommended by Dr. Blair. Claimant has not proven Defendants' present liability for any other past or future medical treatment, including lumbar surgery.

2. Claimant has not proven Defendants' liability for any past or future psychological treatment benefits.

3. Claimant has proven he sustained permanent partial impairment of 23% of the whole person due to the industrial accident.

4. Claimant has proven he sustained permanent disability of 7.25%, in addition to his 23% permanent partial impairment, due to the industrial accident.

5. Claimant has not proven Defendants' liability for attorney fees.

RECOMMENDATION

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

DATED this __18th____ day of December, 2014.

INDUSTRIAL COMMISSION

____/s/_____
Alan Reed Taylor, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _24th__ day of __December_____, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

ANDREW ADAMS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

LYLE FULLER
PO BOX 191
PRESTON ID 83263-0191

mg _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERIN QUINN, Claimant, v. DOUG'S FIREPLACE SALES, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-037924** **ORDER** Filed December 24, 2014

Pursuant to Idaho Code § 72-717, Referee Alan Reed Taylor 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 has proven Defendants' liability for past and future medical benefits for facet radiofrequency ablation as recommended by Dr. Hope. Claimant has also proven Defendants' liability for routine follow-up cervical x-rays at 3, 6, and 12 months post-cervical fusion, as recommended by Dr. Blair. Claimant has not proven Defendants' present liability for any other past or future medical treatment, including lumbar surgery.

2. Claimant has not proven Defendants' liability for any past or future psychological treatment benefits.

3. Claimant has proven he sustained permanent partial impairment of 23% of the whole person due to the industrial accident.

4. Claimant has proven he sustained permanent disability of 7.25%, in addition to his 23% permanent partial impairment, due to the industrial accident.

5. Claimant has not proven Defendants' liability for attorney fees.

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

DATED this _24th__ day of __December____, 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 __24th__ day of __December_____, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

ANDREW ADAMS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

LYLE FULLER
PO BOX 191
PRESTON ID 83263-0191

mg _____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ERIN QUINN, Claimant, v. DOUG'S FIREPLACE SALES, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-037924** **ERRATUM ON FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 29, 2014

On December 24, 2014, the Findings of Fact, Conclusions of Law and Recommendation, and Order were filed by the Commission in the above-entitled case. The following omission should be changed as follows:

Issue number 3, Claimant's entitlement to additional temporary disability benefits, was omitted from the Conclusions of Law, and Order. The Referee had addressed the issue, and specifically stated his findings on page 38, paragraph #97, Claimant has not proven his entitlement to additional temporary disability benefits. Therefore, number 5(a) on the Conclusions of Law, and the Order, should read as follows:

5(a): Claimant has not proven his entitlement to additional temporary disability benefits.

DATED this 29th day of December, 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 29th day of December, 2014 the foregoing **Erratum to Findings of Fact, Conclusions of Law, and Order** was served by FACSIMILE transmission upon each of the following:

ANDREW ADAMS
(208) 542-6993

LYLE J FULLER
(208) 852-2683

mg

_____/s/_____