BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JAMES CLARK, Claimant, v. CRY BABY FOODS, LLC, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2008-013505** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed May 2, 2012**

INTRODUCTION

Pursuant to *Idaho Code § 72-506*, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on November 18, 2010. Claimant was present in person and was represented by Lynn Luker. (Claimant represented himself *pro se* until just less than one year before the hearing. Mr. Luker withdrew after the hearing, but before Dr. Wilson's post-hearing deposition was taken, and Claimant again represented himself *pro se*.) Defendants were represented by Alan Hull. The parties presented oral and documentary evidence and later submitted briefs. This matter was complicated by multiple post-hearing motions and arising issues. The case is now ready for decision. The undersigned Commissioners hereby issue their own findings of fact, conclusions of law, and order. The Commission finds no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility.

ISSUES

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

1. Whether Claimant remains in a period of recovery related to

post-traumatic stress disorder;

2. Whether and to what extent Claimant is entitled to:

   a. Temporary disability benefits, partial or total (TPD/TTD),
   b. Permanent partial impairment (PPI);
   c. Permanent disability in excess of impairment, including total permanent disability,
   d. Medical care, and
   e. Attorney fees; and

3. Whether Claimant is entitled to permanent total disability under the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

Claimant's hand was caught in the rollers of an onion processing machine. It pulled him in almost up to his elbow, crushing the soft tissue of his right forearm.

Claimant contends he suffered severe physical injury as well as post-traumatic stress disorder (PTSD) as a result of this life-threatening accident. He remains in a period of recovery and is entitled to TTD and medical care – past, present and future – benefits. Specifically at hearing, he asked for two more years of psychological treatment at Lifeways. In briefing, he itemizes his claim for medical benefits and asserts a five-year recovery before maximum medical improvement (MMI) for PTSD can be reached. Alternatively, if at MMI, he is entitled to all benefits including permanent total disability, 100% or by odd-lot. His prior prison record and alcoholism are factors which increase his permanent disability.

Claimant further contends he does not have a history of depression prior to the accident; antidepressants prescribed were for diagnoses other than depression. Defendants unreasonably refused to authorize or pay for prescriptions related to mental health issues arising from the accident. Prescriptions were unreasonably discontinued by Defendants in March 2010. Lack of medication is why he was jailed by Payette County in August 2008; Surety should pay those costs.

Claimant further contends Defendants wrongfully obtained certain documents from third parties, including SAIF Corporation and the Idaho Department of Correction. Some were obtained without Claimant's authorization and/or without a proper release. Others were obtained which were not related to the accident. This constitutes a denial of due process.

Claimant further contends Defendants owe his family members $300 for transportation to medical care.

Claimant further contends that ICRD consultant Sandy Baskett unreasonably misstated Claimant's prison record and conspired with Employer and Surety by creating a job site evaluation (JSE) and then covering it up to prevent Claimant from receiving knowledge of it. Defendants' attempt to return Claimant to light-duty work further exacerbated his psychological condition and put his life at risk because the work was near the scene of the accident.

Claimant further contends his attorney from January 2010 through December 2010, Lynn Luker, provided ineffective assistance and quit representing him.

Claimant further contends that Defendants have failed to prove he is not entitled to medical and other benefits.

Claimant further contends he is entitled to retraining benefits.

Claimant further contends he is entitled to an additional 50% of total benefits as a penalty under OSHA's "serious and willful misconduct" statute.

Claimant finally contends he is owed just under $1.2 million in benefits. He does not quantify damages owed him for Defendants' fraud and defamation during the course of the claim.

Defendants contend Claimant has reached medical stability. He is entitled to some permanent disability, but is not totally and permanently disabled. All TTD and medical benefits

have been paid. Claimant is not entitled to an award of attorney fees. They object to additional issues raised post-hearing and/or issues not within the Commission's jurisdiction.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. The legal file of the Commission;
2. The testimony of Claimant, Employer's former troubleshooter Kim Lukehart and private investigator Steven Jordan Porter taken at hearing;
3. Joint exhibits 1-40 admitted at hearing;
4. Pre-hearing deposition of former employer Larry Robb; and
5. Post-hearing depositions of Surety senior claims examiner Jewel Owen; physicians Robert Hansen, M.D., Richard Wilson, M.D., Craig W. Beaver, Ph.D.; and vocational expert Douglas Crum, C.D.M.S.

Objections are overruled and motions to strike are denied in all depositions, EXCEPT as follows: Claimant's pre-hearing deposition, no exceptions; Jewell Owen deposition (Referee was present telephonically and ruled contemporaneously); Larry Robb deposition, objections at pages 15 and 18 are sustained; Dr. Hansen deposition, objection at page 71 sustained; Dr. Wilson, Dr. Beaver, and Mr. Crum depositions, (Referee was present and ruled contemporaneously).

In Exhibit 20, page 22 of ICRD records is missing. It contains ICRD notes between the dates of November 16, 2009 and case closure on June 15, 2010.

FINDINGS OF FACT

The Accident

1. Claimant worked for Employer on April 17, 2008. He had worked for Employer for only about six days. As onions were unloaded from trucks, they rolled down a roller machine. A photograph of the rollers is found at Exhibit 16. The turning steel rollers stripped

onions of dirt, leaves and excess outer layers. Corkscrew action of steel bands around the rollers guided the onions along the length of the roller machine. Claimant was assigned to keep the onions moving and, with a stick to poke clogs of debris down through the space between the rollers. Truck unloading and the roller machine work occurred outside. From there, onions went by conveyor belt inside the processing plant.

2. On that date Claimant's dominant right arm was drawn between a pair of rollers after his glove got caught in the machine. He suffered a crush injury to his forearm.

Medical Care

Immediate treatment: April 17 through May 2008

3. Claimant reported to the first-responding paramedics that he was caught for 15 minutes before the machine was turned off and stuck for another 15-20 minutes before the machine could be opened enough to extract his arm. Paramedics provided first aid, a morphine analgesic, and a splint against the possibility of a fractured bone. They considered the injury, together with ongoing neurologic symptoms to his hand from an old injury to his elbow, to qualify as potentially limb threatening and as requiring the attention of a trauma center and physician. Lifeflight was called. The Lifeflight physician was qualified as both an RN and EMT. He initially noted upon examination:

> Patient is alert and oriented. Able to talk without difficulty. Skin is warm, dry and pink. Other than facial mask of pain, he is in no obvious distress or obvious life threatening situation upon initial exam. We do note that his right forearm has been splinted and bandaged.

The Lifeflight physician confirmed good pulses and blood/oxygen saturation in all fingers.

4. Claimant was initially seen at St. Alphonsus' ER by Po Y. Huang, M.D., examined, X-rayed for fracture, and referred to orthopedic surgeon Dominic L. Gross, M.D. Dr. Gross re-dressed the forearm wound, examined Claimant, and ordered more diagnostic

testing for possible fractures and infection. All physicians to this point mentioned concern about developing or worsening a preexisting compartment syndrome.

5. Nearing midnight, Claimant visited Weiser Memorial Hospital ER. He had been unable to fill his prescriptions and sought pain management. The ER dispensed an immediate analgesic and muscle relaxer and referred him back to St. Alphonsus for follow-up care.

6. On follow-up the next day, Dr. Gross observed an open wound on Claimant's forearm which Dr. Gross described as a "draining hematoma." Repeat X-rays showed negative for fractures. Claimant reported he was unable to move his thumb. Dr. Gross confirmed proper blood flow and sensation to Claimant's fingers, but deferred further evaluation of the thumb because there was too much swelling.

7. On follow-up on April 21 Claimant reported difficulty sleeping and other symptoms which suggested possible post traumatic stress syndrome (PTSD) to Dr. Gross' physician's assistant, Katherine Laible, PA-C. Claimant reported he had returned to the job site to "confront the machine." That helped, but did not eliminate the PTSD symptoms. Physically the wound was healing. Because of continued swelling, PA Laible referred Claimant to wound care and edema management. She prescribed rest and Amitriptyline. She prescribed Soma for Claimant's complaints of muscle cramps and spasms in the biceps around the elbow and in his hand. She acknowledged the possibility of a future need for counseling for the psychological symptoms.

8. Dr. Gross recommended physical/occupational therapy which Claimant began on April 22. Claimant visited occupational therapist Kent Taucer, the same therapist whom he saw in 2006. During the course of 15 visits in April and May, Claimant made slight gains.

9. Claimant made an April 22 visit to Arqam Zia, M.D., for abdominal symptoms which Dr. Zia attributed to Claimant's narcotic pain medication which had been prescribed for his right arm and hand pain following the industrial accident. X-rays and other testing were ordered. On an April 29 follow-up visit, although Claimant described some psychological symptoms which he attributed to the industrial accident, Dr. Zia noted, "However, this is not a Workman's [sic] Compensation visit." The earlier abdominal complaints had resolved. Claimant discussed his arm wound with Dr. Zia, but Dr. Zia expressly declined to become involved in the workers' compensation aspects of Claimant's health. A follow-up appointment was scheduled with Dr. Zia, but Claimant failed to attend.

10. A follow-up visit to Dr. Gross on May 2 showed good physical healing and Claimant's satisfaction with his treatment. Claimant declined to transfer his care to Robert G. Hansen, M.D. upon a suggested referral. Dr. Gross did not foresee future surgery. On that date Dr. Gross released Claimant to modified work, restricting Claimant from use of his right hand.

11. Despite not having a scheduled appointment until May 29, Claimant visited Dr. Gross' office on May 9 asking for a prescription for housekeeping and cooking services. PA Laible refused stating, "He is on his own and he can perform all of his activities of daily living and thus does not need a housekeeper." On examination she noted improvement in healing and in range of motion. She noted that wound management continued to help him and that he would soon be seeing Lifeways Mental Health Services. A second release to modified work, one-handed only, was provided.

12. Lifeways performed initial screening on May 6 and accepted Claimant for treatment which began May 14. Surety authorized this treatment before it began. Nevertheless,

Claimant's counselor, J. Harrison Whitcomb, LCSW, repeatedly noted that receiving payment from "Worker's [sic] Comp" would be an "obstacle" to treatment. He expressed this opinion orally to Claimant as well. Thereafter, Surety's processing of Claimant's claim became a major emotional trigger for Claimant. Indeed, at the following visit on May 21, Mr. Whitcomb noted, "A week ago he [Claimant] was almost suicidal when it was hinted that services might be difficult to get paid for in this State." Lifeways and Mr. Whitcomb are in Ontario, Oregon.

13. The history Claimant provided on this May 14 visit was inaccurate wherein he claimed he had been "clean and sober for many years"—he expressly stated "five" years—prior to the industrial accident. He denied co-occurring substance abuse. He denied complications, either physical or emotional, therefrom. Claimant did admit to polysubstance abuse in his remote history. The history he provided was inconsistent with PA Laible's assessment of Claimant's need for home care assistance. Claimant also reported he suffered from PTSD and that his symptoms were "severe" and his anxiety "extreme."

14. During this initial assessment at Lifeways, Mr. Whitcomb felt Claimant "definitely" met the DSM-IV criteria for PTSD.

15. Claimant next visited Lifeways on May 21. Mr. Whitcomb recorded his plan was for bi-weekly visits. Records show Claimant's visits and other contacts with Lifeways were significantly more frequent. Claimant continued to visit Lifeways through the dates of post-hearing briefing in early 2011.

16. Claimant transferred his physical care to Dr. Hansen as of May 21, 2008. It is significant that Claimant initially had refused a referral to Dr. Hansen and agreed to this change only after PA Laible refused to prescribe housekeeping services.

17. On May 29, Dr. Gross reviewed and approved an indoor processing job which allowed for light-duty, one-handed work, further removing debris and culls from a conveyor belt.

18. Dr. Gross reported to Surety claims adjuster Carol Garland that Claimant was totally temporarily disabled from the time of accident on April 17 through May 9, with light-duty restrictions continuing from May 9, which restrictions were to be further evaluated at a later date by Dr. Hansen, because Dr. Hansen had assumed the primary treating physician role.

19. Dr. Hansen's first visit with Claimant following the roller machine accident occurred on May 30. On examination of Claimant's forearm and hand, Dr. Hansen noted healed skin wounds and visible soft tissue compression on the forearm. Claimant reported loss of sensation in the distribution of the superficial radial nerve, with weakness in the distribution of the ulnar nerve, mild symptoms in the median nerve distribution, and absence of sensation in the posterior interosseous nerve distribution. X-rays of Claimant's right forearm and wrist showed no fractures, dislocations of soft tissue abnormalities. Dr. Hansen recommended an EMG.

Continuing treatment: June through December 2008

20. The occupational therapist, Mr. Taucer, recorded another 35 visits between June 1 and August 21. Mr. Taucer noted slow and steady progress. Claimant failed to show for an appointment on July 22. He blamed Surety, stating his mileage check had not arrived and that he would not return until August 1. Claimant attended a visit on July 25. Progress reports noted slow and steady progress with occasional setbacks and flare-ups. In all, Claimant attended over 90 physical therapy sessions in 2008. Gaps exist in the record, particularly around the times of incarceration and mental hospital commitments. Claimant would continue with this therapy until late May 2009.

21. On June 13, Dr. Hansen reported "an episode of extreme anxiety" over the

question of a return to light duty. Claimant had returned to work on June 5 after Employer offered a physically suitable light-duty job. Dr. Hansen recommended counseling and vocational rehabilitation to avoid returning to the same job at the same place as the accident.

22. Lawrence Green, M.D., performed the EMG. It showed mild denervation changes. Dr. Hansen concurred with Dr. Green's assessment of compartment syndrome and complex regional pain syndrome (CRPS).

23. On July 18, Dr. Hansen reported Claimant should remain off work because of the nerve dysesthesia in his hand and arm. He recommended an "intense" pain management program and suggested a psychological consult. On August 8, Dr. Hansen opined surgery would likely only increase the internal scarring which was likely causing the nerve dysesthesia. He recommended physical therapy, particularly range of motion exercises.

24. James Morland, M.D., at the Meridian Pain Center, evaluated Claimant on August 6. He began pain management, with follow-up visits in October, November, and December.

25. On August 15, Claimant visited Weiser Memorial Hospital ER for nausea and vomiting. ER physicians linked it to a recent change in pain medications and instructed him to discontinue taking Neurontin.

26. In late August, Claimant alleged that he unilaterally discontinued some of his medications. His psychological condition dramatically worsened to a point at which the physical therapist feared an impending catastrophe. About two days later on August 22, Claimant was arrested for reckless driving. However, in December, Dr. Hansen noted that Claimant alleged that this incident arose because he was on medication and suffered a reaction to it.

27. Lifeways notes during this period show Claimant received counseling for a few weeks in June as he dealt with the realization that he would suffer some permanent disability in his right upper extremity from the accident. Only rarely would Lifeways link ongoing or planned treatment to mental health issues directly to the original industrial accident. For example, Lifeways treatment plan dated October 23, 2008, essentially reset the focus of cause, diagnoses, and treatment concerning the original injury. That plan neglected to mention the unrelated or tangential issues that had comprised the majority of Claimant's contacts and counseling sessions with Lifeways up to that point. The plan appears to be authored not by Mr. Whitcomb, who was Claimant's primary counselor at Lifeways, but by Thomas Heriza, M.D.

28. Dr. Heriza performed an initial psychiatric assessment on September 23. This assessment appears to have come at the request of Mr. Whitcomb in response to Claimant's legal proceedings following his arrest for driving 95 mph through Ontario, Oregon on August 22. Whether this referral to Dr. Heriza was initially Claimant's idea or Dr. Hansen's idea is ambiguous from the September 15 Lifeways note.

29. Dr. Heriza's September 23 assessment is careful to note Claimant's reluctance to provide a history. Dr. Heriza noted inconsistencies between the history provided by Claimant and the prior medical records Dr. Heriza reviewed, as well as internal inconsistencies within the history orally provided by Claimant. After administering a mental status examination, Dr. Heriza cautiously considered a differential diagnosis to rule out PTSD versus "[s]ubstance induced mood disorder" versus "[m]ood disorder secondary to a medical condition (seizures/epilepsy?)" as well as the role of underlying "Cluster B" disorder features. More specific diagnosis required Dr. Heriza's access to Claimant's medication list and a more

complete psychosocial and psychiatric history.

30. On September 27, Dr. Hansen noted Claimant's hand was improving in function. He described "objective evidence" of nerve regeneration. He opined Claimant physically could probably do some part-time, light-duty work, but psychologically could not return to Employer because of his anxiety associated with the roller machine. Dr. Hansen opined that light-duty, part-time work would psychologically "be a very good thing for him."

31. In late September, Claimant hired a lawyer, Mr. Brown, to help him with his workers' compensation claim. That relationship was unsatisfactory in Claimant's opinion. He fired the lawyer and continued *pro se* for several months.

32. On October 1, Dr. Heriza had a better understanding of Claimant's then-current medication use. He expressed concern over current narcotic addiction and habituation issues. He noted Claimant's admission of prior IV heroin use as significant when addressing potential then-current narcotic abuse. Dr. Heriza primarily diagnosed "significant substance related issues," ruled out seizures and/or epilepsy as potential contributors, and retained "mild anxiety/[PTSD]" and "Cluster B features" on a list of possible diagnoses.

33. On October 9, psychiatrist Eric Holt, M.D. evaluated Claimant at Surety's request. Psychological testing revealed that Claimant responses showed dramatically that he was "faking bad." He responded positively to 84 of 90 elements of the Symptom Distress Checklist-90-R. Any score over 50 indicates the person is exaggerating for secondary gain. His exaggerations were "off the chart" on six separate scales. As an aside, the Referee notes that Claimant can learn how to respond. He responded on the SCL-90-R "Not at all" to the issue "Having urges to beat, injure, or harm someone"; this response came after two occasions where he expressed such urges to Lifeways counselors; police were directed to his home for

follow-up. Similarly, the MMPI-2 showed elevations on the scales for Hysteria Conversion and Hypochondriasis. Where a score of 65 is considered abnormal, Claimant scored over 100. These and other elevated scores indicate Claimant was "faking bad" on his responses in the MMPI-2. Dr. Holt opined:

> In my opinion, Mr. Clark has had chronic problems with narcissistic, addictive, and acting-out behavior with manipulative maneuvers, emotionalism, and portraying himself as in the role of being a victim. It was noticed in the records that he cries when he needs succorance and support (there was a medical report in which he called an ambulance to come to his home and this might have been feigning.) If support is not forthcoming, his poorly suppressed anger becomes manifest and he may use this as a bullying technique on those who are vulnerable. He is prone to alarmism and catastrophizing and I agree with Mr. Whitcomb's statements in that regard.

34. In the interview by Dr. Holt, Claimant claimed to be unable to recall much of specific events. However, Claimant testified in great detail about these same events at trial. Dr. Holt's report and records review sets forth dozens of examples where Claimant has reported inconsistent histories at differing times, apparently, in Dr. Holt's view, to manipulate physicians, law enforcement, and others for purposes of secondary gain.

35. Dr. Holt diagnosed PTSD related to the industrial accident, rated at 5% of the whole person. He diagnosed additional longstanding and preexisting psychological conditions which he opined were unrelated to the industrial accident and were not exacerbated by it. He opined that Claimant should not be excluded from work; psychologically, work would be very beneficial.

36. On October 15, Dr. Heriza noted Claimant visited in a "very agitated" state over some difficulty with his legal representation. Dr. Heriza recorded that Claimant stated that "he is having difficulty maintaining control, particularly when he starts thinking about all the issues that he is facing." Dr. Heriza recorded no change in diagnosis and opined, "The patient

describes a long history of mood symptoms that are difficult to separate from substance related issues, the use of narcotics as well as possible posttraumatic symptoms and cluster B features."

37. On an October 22 visit, Dr. Heriza discussed treatment intervention for Claimant's narcotic and other medication use.

38. On November 4, Dr. Morland approved a return to one-handed work on a processing line. Three days later, Claimant persuaded Dr. Hansen to reverse his opinion about surgery.

39. On November 7, Dr. Hansen recommended a posterior interosseous nerve resection to alleviate chronic pain in Claimant's hand. In general, Dr. Hansen's notes of examinations conducted by him in the latter half of 2008 show significant, objective, ongoing physical damage to the musculature and nerves in Claimant's hand and arm. This damage continued to heal and his function continued to improve with nerve blocks, physical therapy, and other treatment. Dr. Hansen's reversal in his disapproval of surgery appears almost entirely related to Claimant 's subjective complaints that he was not improving.

40. On November 13, Claimant was evaluated by Richard Wilson, M.D., at Surety's request. Claimant's story of the accident had become exaggerated over time. A careful and detailed examination – including EMG testing – of Claimant's right forearm, wrist and hand, showed atrophy and mild autonomic dysfunction, all complicated by functional overlay and poor effort. Dr. Wilson opined Claimant's right upper extremity was not at MMI, although he expected Claimant's dysesthesias and autonomic dysfunction should improve in time. Claimant's psychological condition led Dr. Wilson to consider Clamant a poor candidate for surgery. He opined Claimant never needed chronic narcotic pain medication and suggested Claimant's narcotic regimen be decreased to discontinuance within 30 days. Dr. Wilson

recommended Claimant *not* return to the type of work he was performing at the time of the accident, but rather limit himself to sedentary to light work which did not require significant right-hand use.

41. Nearly all Lifeways visits during the latter half of 2008 related to Claimant's emotional and psychological responses to his legal trouble from the reckless driving incident, to Surety's attempt to return him to work, to Surety's refusal to pay him as much as he thought he should be compensated, or to other collateral or entirely unrelated issues. Counseling was about dealing with the criminal justice system and his legal representation, and Claimant's complaints about Surety processing the claim, his financial expectations, or unrelated legal problems. He complained to counselors that Surety wanted to return him to work and, conversely, that he was a "workaholic" who found it intolerable to be off work. Usually, in these visits, Claimant's issues about the accident itself went entirely unmentioned.

42. Lifeways notes additionally show that Claimant was frequently vociferous and emotional in his manner. Counselors let him "vent." However, after two episodes in which Lifeways asked local law enforcement to perform a welfare check after Claimant hinted at or threatened suicide, Claimant began modulating his comments and behavior. When Lifeways called his brinksmanship bluff, Claimant discontinued the bluff. He changed his tune and thereafter became "adamant" that he was *not* having suicidal thoughts.

43. On December 8, Dr. Hansen reported on a December 4 examination. He described the continuing recovery of Claimant's hand and arm condition. He critically addressed the opinions of Dr. Wilson. He agreed with Dr. Wilson that Claimant might well require another six months of recovery before an impairment rating would be appropriate, but disagreed with Dr. Wilson's opinion that Claimant showed no neurological impairment. Dr. Hansen disagreed with

Dr. Wilson's opinion about discontinuing pain medication. Dr. Hansen recommended continuing administration of appropriate medications under the supervision of a pain management program. He opined that "abruptly stopping his medications at this point would be very counterproductive."

44. On December 26, Dr. Hansen prognosticated that if the recommended posterior interosseous nerve neurectomy were performed, then after a six-week course of rehabilitation and physical therapy, Claimant likely would be medically stable and ratable.

Continued pre-surgical treatment: 2009

45. Claimant continued to receive counseling through Lifeways and medication from Dr. Heriza. From November 2008 through January 2009, Dr. Heriza's primary diagnosis stabilized at PTSD. He diagnosed a possible underlying mood disorder. This change in diagnosis occurred without clear explanation in any single record and without any discernible from his notes of visits. By February 2009, Dr. Heriza added "opiate dependence" as a diagnosis. Dr. Heriza's notes show Claimant was being treated for "issues" related to obtaining compensation for the injury rather than for the injury itself. Some pain management continued as well as counseling about possible upcoming surgery. Claimant's anxiety and outbursts escalated as the date of any legal proceeding approached.

46. Claimant continued monthly follow-up visits with Dr. Morland for pain management.

47. On January 22, Claimant admitted he was addicted to hydrocodone.

48. The surgery recommended by Dr. Hansen was approved and scheduled. On February 5, Claimant's surgery was postponed because Claimant had nicked himself trying to shave his pre-operative surgical site on his forearm by himself. Also, in counseling Claimant

described himself as a "champion" for "oppressed" workers' compensation claimants.

Continued treatment – surgery: February 19, 2009

49. Surgery was performed by Dr. Hansen on February 19. Dr. Hansen noted the presence of fibrotic tissue surrounding the interosseous and other nerves and tendons in Claimant's forearm and wrist. These nerves and tendons were freed and the posterior interosseous nerve was resected without complications.

Continued post-surgical treatment: 2009

50. On his first postsurgical counseling visit to Lifeways on March 5, Claimant discussed hiring an attorney. He discussed financial troubles. He did not discuss any emotional or psychological concerns related to his arm. His March 17 visit to Dr. Heriza related to Claimant's concerns about a PPI rating and insurance rather than the rehabilitation or functionality of his arm.

51. Lifeways notes, particularly those of Mr. Whitcomb in Spring 2009, are often—even predominantly—ambiguous as to whether and to what extent Mr. Whitcomb is restating Claimant's statements, accepting and adopting Claimant's statements as fact, or expressing Mr. Whitcomb's own thoughts and opinions.

52. On April 1, Claimant visited Weiser Memorial Hospital ER with nausea and vomiting. He had failed to take his prescribed medications as directed. He admitted he had "smoked a mushroom of some kind" to reduce his gastric symptoms.

53. On April 3, Dr. Hansen found tendinitis in Claimant's first dorsal extensor compartment. Physical recovery was otherwise progressing well.

54. On an April 17 examination Dr. Hansen opined Claimant to be at maximum medical improvement. He opined Claimant's numbness from the resected nerve and

the dysesthesia and pain in the distribution of the superficial radial nerve were permanent. He anticipated permanent symptoms in the forearm due to the compression and scarring. Using the *Guides*, 5th edition, Dr. Hansen rated Claimant's Permanent Partial Impairment for his arm injury at 17% of the upper extremity with a 10% addition for persistent dysesthesia, pain, muscular weakness and atrophy. The result was a 16% whole-person PPI. He restricted Claimant from "heavy duty manual type of work activity." Dr. Hansen later specified that restrictions of use for that arm included no lifting over 15-20 pounds, limited repetitive activity, limited rotational movement of his hand and forearm, and limited repetitive flexion/extension of his wrist, but that keyboarding and clerical activities were not limited. Dr. Hansen recommended that a home physical therapy program be established by a physical therapist to maintain functionality. He expected Claimant to continue to have some chronic pain which would be managed with over-the-counter remedies as needed. He did not expect future surgery.

55. On May 20, Mr. Taucer issued an occupational therapy discharge note. He opined Claimant had made only "slight" progress since the February surgery. Mr. Taucer recommended a home exercise program, vocational rehabilitation, and psychosocial counseling. With these programs, he opined Clamant could perform "clerical or paraprofessional type employment."

56. On a July 9 visit to Lifeways, Mr. Whitcomb recorded, "His [Claimant's] ultimate goal is either to have WC pay him monthly until he retires or give him a lump sum settlement for what they would pay him monthly for 15 years."

57. In August, Claimant visited Dr. Hansen and requested institutionalization for psychological issues. While Dr. Hansen thought this would be a good idea, his notes indicate

the issues arose from legal, social, and familial stressors.

Continuing treatment – Intermountain Hospital: September 3-7, 2009

58. Claimant was admitted to Intermountain Hospital after appearing voluntarily on September 3. He arrived by private vehicle, doing his own driving. The primary admitting diagnosis and focus for treatment was "anger dyscontrol." During the 5-day inpatient stay, Claimant expressed anger about the process of obtaining workers' compensation benefits. A note of Nicole Thurston, M.D., records, "On interview today he states, 'I'm not getting what I came here for. Nobody will sit down and listen to me for my story from A to Z about the insurance company.'" Her conclusion from the interview was that Claimant was not "holdable or committable" and that he should be discharged from inpatient status. Discharge diagnoses included: "PTSD, chronic; adjustment disorder with disturbance of mood and conduct; Narcissistic and borderline personality disorder traits; right arm injury; chronic pain; severe—legal, financial, occupational stressors." He was rated at discharge, GAF-45.

Continuing treatment: September – December 2009

59. On October 15, Claimant visited Mark Jepson, NP-C, at St. Alphonsus' behavioral health services on referral from Dr. Hansen. Claimant provided an incomplete history, inconsistent in many points with other history given to other physicians. Nurse Jepson attempted to address Claimant's psychiatric medication regimen.

60. On the morning of September 11, Claimant drove himself to West Valley and Idaho Emergency Physicians and sought mental health treatment. He self-referred, presenting himself that morning. He eloped after beginning treatment. He returned that afternoon and was admitted, tested, and treated. He expressed thoughts of harming others, he would not name who. A lab test showed Claimant positive for marijuana and amphetamines which had not been

prescribed, but did not show the presence of narcotic opioids which had been prescribed. Generally while at West Valley, Claimant and his treatment was overseen by psychiatrist Olurotima "Tim" Ashaye, M.D.

61. On October 1, Claimant visited Holy Rosary ER with complaints of vomiting and diarrhea. Studies showed negative for flu and negative for heart or chest problems.

62. On October 6, Dr. Hansen reported that Claimant requested a reevaluation of his PPI based on the *Guides*, 6th edition. Dr. Hansen opined an 18% whole-person PPI under the criteria of that edition.

63. On November 13, Claimant visited Dr. Hansen to discuss medications and driving, as well as to request some lab studies to determine liver and kidney function related to his psychiatric medications.

64. At Lifeways, Claimant exhibited anger and psychological imbalance when he believed Surety or other entities were not doing what he wanted them to do. He exhibited a calmer demeanor otherwise.

Continued treatment: 2010

65. Claimant visited Dr. Hansen in early 2010. Dr. Hansen deferred when psychological issues were addressed. Dr. Hansen was willing to prescribe medications Claimant requested. Dr. Hansen considered a TENS unit or a Wii game to be reasonable therapeutic appliances.

66. Claimant continued his monthly pain management visits with Dr. Morland. Dr. Morland recorded no significant, permanent changes in Claimant's reports of pain throughout the duration of his involvement. Attempts to change medications or dosages did not result in improved pain management. Occasional flare-ups, related once to a bee sting and once

to lifting a heavy object, were noted. In the March visit, Claimant was particularly agitated. He asked for information about amputation.

67. On January 7, 2010, Mr. Whitcomb noted, "He [Claimant] responded well to the observation that all of his troubles stem from the injury." This note is ambiguous about whether Mr. Whitcomb believed and offered this "observation"– that all of Claimant's troubles stem from the industrial accident. Such a hypothesis is clearly inconsistent with information available to Lifeways on or before the date of that note.

68. Mr. Whitcomb remained Claimant's primary mental health counselor throughout 2010.

69. A physician's assistant (PA) at Lifeways encountered Claimant. On a March 15th visit, the PA sought assistance from Mr. Whitcomb. Claimant fled. Lifeways asked local law enforcement to perform a welfare check, and contacted Surety about personal threats. The PA referred Claimant to Si Steinberg, M.D., Lifeways' medical director.

70. Mid-afternoon that day, police brought Claimant to West Valley Medical Center ER. While providing a history, he admitted to drug use "anything and everything" in the past, including intravenous drugs, without further specificity to time or type. A urinalysis/drug screen showed positive for marijuana and opiates, but negative for amphetamines or other non-prescribed drugs.

Continued treatment – Intermountain Hospital: March 15-24, 2010

71. Yet later that day, Claimant abruptly appeared at Intermountain Hospital's ER claiming he wanted to amputate his arm. A transfer record from ER to Admitting notes, "[History] of meth use." He again fled. Law enforcement returned him to Intermountain. He expressed homicidal ideation towards Surety's adjustor. During a psychiatric evaluation

Claimant denied using methamphetamine for several years. Diagnoses from that evaluation included: "Major depressive disorder, severe; nicotine dependence; marijuana abuse; history of methamphetamine abuse; PTSD; role out cluster B traits (antisocial); history of injury to right arm; chronic pain in right arm; severe – chronic pain; financial.: GAF – 25. To a consulting physician, Claimant admitted, "No other drugs since he went to prison in 1997, except for occasionally." His urinalysis/drug screen was normal except for prescribed opiates, which were expected, and for marijuana which was not.

72. On March 23, the Lifeways PA opined Claimant's behavior was related to pain and trauma from the accident which was related to delusions which was related to inappropriate behavior, including making threats, which was related to his arrest and hospitalization. The PA's reasoning for making these links was tenuous or absent.

Continued treatment: April – December 2010

73. On April 6, Richard Wilson, M.D., and Craig Beaver, Ph.D., evaluated Claimant at Surety's request. Psychological testing resulted in several indicators of "faking bad" on testing. Physical testing did not significantly indicate Claimant to be malingering. Oddly, upon examination Claimant reported dysesthesia in parts of his hand which should have been entirely numb after Dr. Hansen's nerve resection. After a detailed examination and records review, they opined Claimant was both physically and psychologically stable, that he suffered an 8% whole-person PPI as a result of the accident with 5% attributable to PTSD and 3% attributable to his physical arm and hand condition. Dr. Beaver also rated an additional 5% whole-man psychological PPI for a pre-existing psychological condition not related to the accident. They recommended discontinuance of narcotic analgesics over a 60-90 day period. They recommended a temporary 10-pound lifting limit for his right hand.

74. On May 6, Mr. Whitcomb wrote Claimant's attorney and opined that PTSD symptomatology "is not something that is a short-term thing." He related an episode when Claimant retold the story of the accident to members of his counseling group. Mr. Whitcomb described images – which images Mr. Whitcomb neglects to mention are scenes which never actually happened – in Claimant's head and stated, "It was obvious he was seeing that picture in his mind."

75. On May 10, in response to correspondence from Claimant's attorney, Dr. Steinberg opined that Claimant's self-reported PTSD symptoms were continuing but progressively diminishing. He opined they were "100% work/PTSD related." He recommended Claimant "gradually increase medications to hopefully progressively diminish PTSD symptoms over the next several years of treatment." On June 1, Dr. Steinberg again replied to correspondence from Claimant's attorney. He opined that Claimant was unable to work with others or do independent manual labor, He opined Claimant would be unable to begin the two- to five-year recovery process from PTSD until related legal issues were completed. He opined that the March 2010 Intermountain Psychiatric Hospitalization "was directly related to Mr. Clark's work related injury."

76. Lifeways notes in August and September focus on Claimant's reactions to attempts to settle his workers' compensation claim by way of mediation and lump-sum settlement. Ultimately, Claimant was agitated at the wording which he found to be disputable in the settlement document. He was upset and angry that he "was expecting 400K or more and got offered 40K." He was upset that his income benefits would be fully paid out in September and discussed how he would live until the hearing date set for November.

77. The dollar amounts in the immediately foregoing paragraph are quoted from

Dr. Steinberg's note dated September 13. These amounts are not taken for their truth and are not considered evidentiary of settlement negotiations or for any purpose except to show that the litigation and, consequently, the potential money it would bring him, was the focus of Claimant's mental and emotional attention. Claimant's focus on obtaining money from Surety was typical throughout Lifeways' notes in 2010, indeed throughout his treatment there. Claimant's focus on litigation and money is more prevalent than discussions about or requests for medication; it is by far more prevalent in these notes than concern about becoming functional or returning to work; it is by far more prevalent even than complaints of physical or mental symptoms about the accident; it is more prevalent than complaints of social, familial and other stressors unrelated to the accident and injury.

78. Other recitations of settlement offers or expectations found in Lifeways notes or elsewhere in the record are similarly not considered to be evidence of the truth of such offers or expectations nor of the amounts recited.

79. On September 30, Mr. Whitcomb noted that Claimant "is not allowed to earn a single cent until the settlement is completed." Once again, it is ambiguous whether this preposterous idea was Claimant's only, whether Claimant's idea with Mr. Whitcomb's approbation, or whether Mr. Whitcomb's misunderstanding of the facts and law.

Prior Medical Care

80. Claimant was hospitalized at Holy Rosary in Ontario, Oregon, following a suicide attempt in June 1989, an intentional overdose of muscle relaxers. Claimant somehow related this to a work injury, sequelae of a back injury suffered while being robbed in a convenience store. He had also recently separated from his wife.

81. July 1989 X-rays showed degenerative spurring at L1 and a negative kidney study.

82. In August 1989, Claimant visited Holy Rosary ER for back pain and received some Darvocet. A bone scan a few days later showed no injury or healing. A repeat lumbar x-ray qualified the spurring as "minimal"; "minimal scoliosis" was also reported.

83. Holy Rosary saw Claimant on July 9-12, 1996 for chronic low back and right hand pain. Claimant had lifted a heavy sink two weeks earlier, but mild discomfort became severe pain after a coughing spasm on the morning of July 9. Dr. Barton considered this an exacerbation of the 1988 convenience store robbery injury. MRI showed extruded disks at T12-L1 and L1-L2. The right hand pain mentioned on the admission sheet is nowhere else referred to in the records for this visit.

84. Claimant was hospitalized at Holy Rosary August 15-17, 1996, following a suicide attempt, an intentional overdose of Amitriptyline. Urinalysis showed positive for benzodiazepine, marijuana, opiates, and antidepressants; negative for amphetamines, cocaine, and phencyclidine. Holy Rosary released him for admission to West Valley/Intermountain Hospital.

85. On January 6, 1997, Claimant visited Holy Rosary ER for chest pain; chest X-rays, negative.

86 On December 9, 2003, Claimant visited Holy Rosary ER for eight seizure-like events and vomiting, unverified by medical personnel. A head CT scan was negative, except for some sinus inflammation. Brad Barlow, M.D., noted Claimant reported he felt an impending event, but taking a supine position with elevated feet prevented it. Dr. Barlow suspected these were more likely syncopal episodes rather than seizures. An EEG was entirely negative.

87. Claimant filed an Oregon workers' compensation claim for an injury occurring at Red Apple about May 2005 where he bagged recyclable aluminum cans. To his physician, he claimed right elbow pain gradually arose, with stiffness and dysesthesia radiating to his fingers, which symptoms he associated with use at work. Inconsistently, on a workers' compensation claim form, he described a specific incident of injuring his right elbow while attempting to avoid a child in his way at work.

88. Claimant sought treatment with Vernon Barton, M.D., on June 9, 2005. Claimant did not describe the onset or precipitating event. He told Dr. Barton it began two months prior and that he waited to report it for one month and waited another month for this treatment. He also complained of bruised ribs from an unrelated event at work and described a history of seizure-like events. Dr. Barton diagnosed right elbow strain, tennis elbow.

89. To Nathan Church, PA-C, on June 29, 2005, Claimant specifically described the onset of elbow pain arising from an event in which he avoided hitting a little boy while Claimant was moving recyclables in the store.

90. A recheck by Dr. Barton in July 2005 showed point tenderness at the radiohumeral joint with some pain toward but not including the wrist. An injection resulted in a couple days of increased pain followed by great improvement according to Claimant. The August recheck mentioned left shoulder myalgia and/or muscle strain, a new problem. Claimant associated this with increased use of his left arm to compensate reduced right arm activity to reduce the right elbow pain. In a later letter to Claimant's workers' compensation attorney, Mr. Rock, Dr. Barton confirmed that the left shoulder only, and not the left arm, was involved at that time. By the next month's recheck, Claimant included paresthesias in his right fingers and chronic right elbow pain. By the October recheck, Dr. Barton was suspecting paresthesias in

Claimant's digits could be sourced to developing carpal tunnel syndrome rather than to the right elbow arthritis/tendinitis.

91. In October 2005, Barbara Quattrone, M.D., evaluated Claimant's bilateral hand paresthesias. Claimant characterized the precipitating event only as a sudden onset of pain. A November EMG testing indicated right carpal tunnel syndrome but no abnormality on the left.

92. Red Apple's workers' compensation surety (SAIF) requested an IME by neurologist Brian Denekas, M.D. Claimant described himself as being a "day laborer his entire life." On the November 18, 2005 examination, Dr. Denekas noted giveway weakness generalized throughout the upper extremity musculature. Dr. Denekas opined that Claimant's reported right forearm symptoms did "not localize well to the epicondyle"; that reported finger paresthesias was "somewhat inconsistent" and nonanatomic for carpal tunnel syndrome; and that functional overlay on examination precluded making a useful diagnosis. Dr. Denekas further questioned the reported left trapezius pain based upon inconsistent reports by Claimant. Asymmetry of range of motion was deemed an elaboration by Claimant. Dr. Denekas opined Claimant's work caused his right elbow pain but did not relate other right hand or left trapezius symptoms to his work. No impairment was found. A brief physical therapy trial was suggested.

93. An intervening, overnight hospitalization occurred on January 13-14, 2006 for complaints of seizure-like symptoms, 15-20 times per day for several days, accompanied by amnesia of events within 15-20 minutes of the symptoms. These were unverified clinically. Fortunately for Claimant, he described a warning taste sensation or discomfort which preceded the seizure-like event. Thus, his driving privileges were not at risk. His wife described gradually increasing delay and disorganization in his thought function, but did not unequivocally

confirm seeing seizure-like symptoms. An examination and diagnostic testing, including an EEG, all showed no cranial abnormalities. A repeat CT of his head was also negative.

94. A February 3, 2006 examination by orthopedist Randolph Peterson, M.D., resulted in a diagnosis of "right elbow pain lateral aspect consistent with lateral epicondylitis and tendinitis of his forearm."

95. On February 6, 2006, Claimant visited Holy Rosary Medical Center for occupational therapy for his right elbow. A prior cortisone injection provided only temporary relief. Examination revealed decreased grip strength and loss of range of motion right versus left. He reported his pain generally at 7/10. Lateral epicondylitis testing was positive. Functional goals on that date included "lifting, pulling, or pushing material over 2 to 5 pounds free of pain."

96. Claimant attended 39 occupational therapy visits from February 6 to June 5, 2006. Despite continuing complaints of "severe" or "7-10/10" pain, the therapist recorded reduced tenderness. He also noted an inconsistency, reduced right grip strength upon testing as of the March 6 visit. By April 17, the therapist recorded Claimant made "satisfactory to good" progress; pain associated with activity had decreased, and strength had improved. By May 29, the therapist reported "inconsistent" progress. Despite episodes of "fair-good functional strength & minimal pain" the therapist recommended consideration of surgical nerve ablation to alleviate Claimant's reports of pain.

97. On April 19, 2006, Claimant appeared at Weiser Memorial Hospital ER following a work injury to his right elbow one year earlier. He described pain and "electrical shocks" bilaterally from elbows to fingertips which began one hour prior to his visit. ER diagnosed tendinitis with radiculopathy.

98. In July 2006, Dr. Denekas confirmed by letter to SAIF that Claimant did not report any consistent left elbow or forearm symptoms at the November 2005 IME, "only a slight bit of tenderness over the proximal forearm" which was non-physiologic and inconsistent with every other part of the examination of his left upper extremity. Upon a review of intervening records, Dr. Denekas opined any recent left upper extremity symptoms were more likely related to an intervening April 19, 2006 event and not to the right elbow injury from May 2005. He noted: "Of concern is the fact as mention above, that this individual appears to have spreading complaints in regard to his right arm as well, which again would bring to question the objective nature of the complaints."

99. Claimant visited Dr. Hansen in July 2006 for right elbow pain and concomitant inability to lift "any heavy object's [sic]." This visit occurred more than one year after a May 2005 accident and injury. On examination Dr. Hansen found "mild swelling and tenderness over the elbow area" without bruising. He diagnosed a "soft tissue injury." An August 4 MRI showed joint effusion without other trauma or cause. Upon the equivocal MRI and Claimant's complaint of year-long pain, Dr. Hansen recommended surgery.

100. On July 7, 2006, Dr. Peterson opined Claimant's work at Red Apple was not strenuous and he refused to opine about a causal link between Claimant's elbow complaints and his work. He opined surgery was "notoriously ineffective" for treating the elbow inflammation Claimant demonstrated.

101. On August 23, 2006, Dr. Denekas and orthopedic surgeon Jon Vessely, M.D., performed a second IME, this time mainly for left shoulder and upper back complaints. The panel reviewed intervening records. Examination again revealed uncertain results due to Claimant's nonanatomical subjective reports and functional overlay.

102. On September 6, 2006, Claimant sought treatment for a low back strain allegedly suffered at work. An x-ray showed mild degeneration in the form of small osteophytes, but no acute condition. Clint Baker, PA-C, released Claimant to work with a temporary lifting restriction of 40 pounds.

103. A February 6, 2007, Holy Rosary ER visit for chest pain revealed no acute disease.

104. A July 12, 2007, a functional evaluation was performed by occupational therapist Flint Stearns. He described Claimant's effort as resulting in a valid test. He described significantly limiting restrictions for Claimant. He noted Claimant was then-currently working as a forklift driver, despite the fact that this functional evaluation would have precluded such a job. The work release provided listed these temporary restrictions but specifically noted "may drive Hyster."

105. At an August 7, 2007 Holy Rosary visit for right elbow pain, Claimant described nauseating pain radiating down his forearm. On examination there was no swelling and good circulation in his fingers. He was given Vicodin and released.

106. On February 6, 2008, Claimant visited Holy Rosary ER following a methamphetamine overdose which caused shortness of breath and chest pains. Urinalysis was positive only for methamphetamine. This episode immediately followed his receipt of a lump sum settlement on his May 2005 right elbow workers' compensation claim. The medical treatment prompted follow-up chest studies including a stress test in late February 2008 which showed normal heart function.

Physicians' Depositions

107. Treating orthopedic surgeon Robert Hansen, M.D., testified by way of

post-hearing deposition. Throughout Claimant's treatment, Dr. Hansen was only peripherally aware of Claimant's emotional or psychiatric treatment, illegal drug use, and legal issues whether criminal or related to his workers' compensation claim.

108. Dr. Hansen opined that generally among patients with a crush injury similar to Claimant's, and specifically for Claimant, as soon as possible after such an injury, increased use of the crushed upper extremity, especially the hand, would help desensitize the affected area. A claimant would experience an earlier and a more complete return to normal sensation. By the time Dr. Hansen began recommending surgery, Claimant's muscle strength and tone had returned; temporary lifting and other restrictions were based upon Claimant's reports of pain; Dr. Hansen opined that resection of the sensory nerve would ameliorate Claimant's reports of pain, and, therefore, his restrictions should be amenable to being lessened or removed. Lifting restrictions applied to the injured hand only; Dr. Hansen placed no restrictions on Claimant's left hand.

109. Post-surgically, Claimant healed normally to the date of MMI when Dr. Hansen opined Claimant's numbness on the dorsum of his wrist, which related to the nerve resection surgery, was permanent; also permanent was Claimant's wrist pain near the thumb, which related to the superficial radial nerve. Dr. Hansen opined it was difficult to rate Claimant's PPI because of the functional overlay exhibited by Claimant. Dr. Hansen is more comfortable using the *Guides*, 5th edition than the 6th edition; nevertheless, he opined Claimant's rating under the 6th edition is valid. Both ratings include emotional and psychiatric overlay; if limited specifically to the physical condition of Claimant's arm, PPI would be rated at 4% of the upper extremity, however, the loss of use or range of motion should be included regardless of whether it is affected by emotional factors. Dr. Hansen stands by his 5th edition PPI rating.

Dr Hansen opined Claimant will not be able to perform repetitive assembly-line type activities with his right hand; Claimant will be able to work a forklift.

110. IME neurologist Richard Wilson, M.D., testified by way of post-hearing deposition. He opined Claimant suffered an injury to the sensory, but not motor, branches of his radial nerve. Fatty tissue and connective tissue were compressed by the crush injury and resulted in the deformation at Claimant's forearm. Dr. Wilson would not have recommended the resection of the sensory nerve; such surgery merely would replace dysesthesia with anesthesia. Physical therapy for desensitization of the area of dysesthesia was used and should have been used to the exclusion of surgery. Claimant's continuing use of narcotic analgesics was not therapeutic and could and did cause other problems for Claimant.

111. Dr. Wilson rated Claimant's PPI at 3% whole-person per the *Guides*, 5th edition. For this injury, Dr. Wilson opined the 5th edition is better than the 6th edition.

112. Dr. Wilson opined Claimant's injury would not preclude him from operating a forklift. The surveillance video demonstrated Claimant has normal function in his right hand; restrictions mentioned at the time of the IMEs certainly would be liberalized. Dr. Wilson opined that Claimant should use his right hand as much as possible and that as he does, Claimant is expected to experience reduced sensory issues. Overuse will not reinjure or otherwise harm Claimant, although he may temporarily experience an increase in pain or dysesthesia from overuse.

113. IME neuropsychologist Craig Beaver, Ph.D., testified by way of post-hearing deposition. He opined Claimant's post-accident behavioral issues and psychological diagnoses were "very similar" to those seen by Dr. Kruzich pre-accident. Dr. Beaver cited specific examples. Particularly conspicuous examples related to how Claimant handled a May 2005

workers' compensation claim which also involved his right upper extremity, focused at his right elbow. The early life history Claimant described is consistent with development of Cluster B personality disorder. Claimant's confirmed substance abuse for methamphetamine and marijuana amplifies and complicates psychological issues and diagnoses. Dr. Beaver opined that Claimant gave some "okay effort" on psychological testing but performed below his actual abilities. For example Claimant's IQ tested at 66, a score obviously below Claimant's true function. Dr. Beaver noted similar inconsistencies in other psychological test results. Dr. Beaver opined that such inconsistencies indicate a Cluster B personality disorder. He opined Claimant suffers no neurocognitive deficits from any physical basis, disease or injury. He opined Claimant's testing indicated long-term, "very chronic psychological problems, not so much an acute issue," and that these pre-existed Claimant's April 2008 accident. Testing for PTSD showed "a lot of over endorsement of items" and exaggeration of symptoms. Nevertheless, testing suggested some PTSD symptoms were being experienced. Using the *Guides*, 6th edition, Dr. Beaver rated Claimant with a psychological PPI of 10% whole-person, one-half related to the accident and one-half preexisting.

114. Claimant's probable need for lifetime counseling relates to his pre-existing Cluster B personality disorder. Having reviewed the surveillance video, Claimant's physical function of his right arm and hand is significantly greater than Claimant exhibited and reported during testing. No psychological issues related to the accident preclude Claimant from returning to work, except that Dr. Beaver does not recommend Claimant return to work on the machine that injured him. Psychologically, Claimant can drive a forklift.

115. Claimant's March 2010 hospitalization was not related to this industrial accident.

116. Claimant's preexisting psychological disorder requires an object of focus. Although seeking benefits for this industrial accident became the object of Claimant's focus, it was not likely the cause of Claimant's disorder nor of his behavior. By succinct analogy, Dr. Beaver opined that is not the fault of the moon that a telescope is pointed at it; the moon does not cause the pointing. Similarly, the industrial accident did not cause Claimant's undue psychological focus on it.

Vocational Factors

117. Born November 10, 1958, Claimant was 49 years of age at the date of the accident.

118. Claimant sought the job with Employer only after his unemployment benefits had been exhausted following a layoff from another employer.

119. At the date of injury, Claimant earned $7.00 per hour. His average work week comprised 43.75 hours. He only worked that one week before the accident.

120. Although Claimant finished 9th grade, he was illiterate. He has since become self-educated. In 1997, he passed a GED test in prison before the industrial accident. His multiple letters to the Commission demonstrate an adequate vocabulary and a fair grasp of spelling and grammar.

121. He has worked, by his estimate, over 100 jobs since he was 15 years old. His work history is replete with short-term, unskilled and semi-skilled jobs and off and on again unemployment. A list of verified employments from 1978 to Employer at the time of this accident is compiled at Exhibit 20. It lists a variety of industries for which Claimant performed a variety of types of jobs. A more succinct, but less inclusive, summary can be found among ICRD notes at exhibit 20, page 24.

122. Claimant considers himself to be primarily a forklift driver. He also has claimed self-employment as a "shade tree mechanic."

123. In 2009, Claimant attended Treasure Valley Community College and obtained some vocational aptitude testing and training.

124. Claimant's forearm is mildly disfigured. There is some loss of circumference with flattening of tissue where muscle and nerves were damaged. It is obvious when he wears a short-sleeved shirt. Claimant perceives the disfigurement to be greater than it appears at social distances. Dr. Hansen opined this disfigurement to be the result of loss of subcutaneous fatty tissue over some atrophy of the subcutaneous tissue.

125. In August and September of 2010, Surety intermittently conducted surveillance on Claimant. The video of the surveillance provides better evidence than the investigator's written report of what he saw. Moreover, the investigator's written report includes unfounded opinions about Claimant's ability and exhibition of pain behavior. Surveillance video of Claimant with his attorney is given no weight. Staking out Claimant's attorney's office was not acceptable.

126. Surveillance video dated October 20, 2010, is helpful in demonstrating Claimant's capabilities. The video shows him removing an air cooler from an opening in his trailer. Only with foreknowledge of Claimant's accident, pre-accident hand dominance, and medical reports does one see that Claimant exhibits any loss of functionality in his right hand. To uninformed reasonable scrutiny, Claimant appears to be using his right hand normally. If one looks closely, one can find moments when Claimant prefers to use his nondominant left hand for a particular fine motor function or carries a greater portion of a weight with his left upper extremity versus his right. Nevertheless, the salient point to be observed by the video

is that Claimant has grossly overreported his disability in testimony and to virtually every physician of record.

127. Claimant has a longstanding record of polysubstance abuse, including multiple incarcerations. His Idaho criminal/incarceration history from 1993 to 2007 may be found in Exhibit 35. Claimant's multiple requests for special treatment while incarcerated are given little weight. His assertions of medical conditions to gain privileges or special items while incarcerated are considered to be a form of gaming that system rather than evidence of admissions about preexisting conditions or of inconsistent claims.

128. Claimant's 1987 back injury has not limited his work. He was treated for it from 1987 to 1996. It continues to hurt occasionally.

129. Claimant was convicted of a felony not involving dishonesty. Vocational restrictions involving being bondable, etc., apply. He is registered as a sex offender, but the record does not show that this registration results in any vocationally relevant restrictions.

130. One of Claimant's former Employers, Larry Robb testified. Claimant was hired to work at the recycling center of an Oregon grocery store, Red Apple, on July 28, 2004. He did not reveal to Red Apple legal restrictions, if any, pertaining to his dealings with customers. He did not report any prior physical restrictions. His work required him to lift up to 30 pounds.

131. Claimant was terminated for theft of Red Apple property in February 2006. He admitted he had kept money due Red Apple so he could buy methamphetamine. He was criminally convicted for the theft, a misdemeanor.

Vocational experts

132. ICRD consultant Sandy Baskett began working with Claimant about one week after the accident.

133. Through ICRD, Dr. Gross approved and Employer offered modified, one-handed employment. Ms. Baskett performed a job site evaluation (JSE). Employer offered physically suitable work effective June 3, 2008. Claimant was a no-show. Claimant did appear for work on June 5. After a few hours he left stating he had a doctor's appointment. He did not return. During Ms. Baskett's follow-up call to Claimant, he reported he felt he could not do the light-duty because his left arm began to hurt. About two weeks later, Claimant characterized this attempt to work to a Lifeways counselor as being too traumatic; it reminded him of his accident because the roller machine was "on the other side of the wall" from where his light-duty work was located. This revised version of the reason for Claimant's unsuccessful return to work was used by the Lifeways counselor as a partial basis for diagnosing PTSD.

134. In mid-October 2008, Claimant was again released to part-time, light-duty, one-handed work, this time by Dr. Hansen. Dr. Hansen expressed reservations about whether placement in a food processing plant would be psychologically optimum. On November 4, Dr. Morland concurred with the physical limitations for a potential return to work, but opined a return to the line in a food processing plant would also be appropriate.

135. On November 18, 2008, Claimant reported to Ms. Baskett that he had been inquiring regularly at the temporary agencies without success. In a January 28, 2009 meeting with ICRD supervisor Danny Ozuna, Claimant "indicated that his intent is to discontinue seeking employment" pending upcoming surgery. Claimant expressed suspicion about Ms. Baskett's motives. Claimant later importuned upon ICRD department head Terrisa Wyatt about his suspicions. To alleviate Claimant's irrational and unfounded concerns, Claimant's vocational counseling was reassigned.

136. The new ICRD consultant, Darrell Holloway, agreed to travel from Boise to Weiser to ease Claimant's transportation reimbursement complaints. Mr. Holloway recorded that Claimant stated:

> [H]e would like to become a paralegal as his first choice and an advocate/motivational speaker as a second choice. Claimant would like to earn $13-16 per hour, is willing to work any schedule and would like to work at least 40 hours per week. Claimant is willing to drive up to 60 miles one-way to work and would like a full benefit package including retirement. Claimant wants to eventually become self-employed.

Claimant and Mr. Holloway scheduled and usually kept weekly appointments, usually in Weiser. After three months' contact, Mr. Holloway noted, "Claimant does not appear to be interested in following any kind of ICRD plan toward return to work." Nevertheless he persevered, "I will maintain contact with the claimant at lease [sic] on a weekly basis and hopefully more often."

137. An ICRD closure note identifies a 21% whole-person PPI and restrictions without identifying the source of this rating.

138. Doug Crum evaluated Claimant's vocational opportunities at Surety's request. He opined Claimant's restrictions of limited right arm lifting and repetitive motion would result in a 40% to 45% reduction in labor market access and a 0% restriction in wage-earning capacity. Overall, Mr. Crum opined that Claimant suffered a 40% PPD, inclusive of PPI, as a result of the accident. He found no additional disability based upon accident-related or preexisting psychological impairment. Mr. Crum noted that under Mr. Steinberg's opinions, it would be impossible to determine whether and how much Claimant would be unemployable for several more years.

139. Mr. Crum testified by way of post-hearing deposition. Mr. Crum assumed Dr. Hansen's lifting restrictions meant bilateral lifting. Dr. Hansen clarified in deposition that

Claimant's left hand lifting was unrestricted, that the restriction applied only to Claimant's right hand. Upon Mr. Crum's original assumption, he opined Claimant's loss of local labor market access at 40% to 45%, with no loss of wage earning capacity. Having no loss of wage earning capacity, Mr. Crum correctly opined Claimant qualifies for no formal retraining program. Ultimately, Mr. Crum opined Claimant's PPD at 40% inclusive of PPI.

Findings on Ancillary Issues

140. Claimant testified that there were many instances where Surety refused to authorize a treatment or physician, where scheduled appointments were cancelled, and where Surety acted without notice to him. The record shows that Surety acted reasonably and promptly. Surety provided notices as required and attempted to keep Claimant informed. The very few instances when appointments were cancelled were unavailable. Claimant's behavior caused communication breakdowns.

141. Claimant testified that Surety withheld a job site evaluation from him. As a result, he claimed that his attempt to return to work was sabotaged. He further testified that ICRD encouraged him to omit reporting his restrictions to potential employers, including a temporary staffing agency. The record shows ICRD acted appropriately. Claimant's complaints against Ms. Baskett are unfounded. Claimant, not ICRD, sabotaged his return to work.

142. Claimant's need and demands for payment for transportation to his physicians' appointments was significant. Claimant testified that Surety refused to pay $150 to his "lady" and his mother for transportation to surgery. Dr. Hansen felt there was "no need for care" because Claimant would undergo only local, not general, anesthesia. Dr. Hansen followed-up personally with a letter confirming his recommendation for transportation, but not post-operative home care.

143. Regarding transportation: On another occasion, Dr. Hansen opined that, because of his medication regimen, Claimant should not have been driving himself to the hospital in mid-August. In general, the record shows Claimant drove where and when he wanted to. He made claims for a chauffeur when he thought he could get Surety to pay. His arguments of need are disingenuous.

144. Claimant objected to Surety having received records from SAIF regarding his May 2005 Red Apple workers' compensation claim. Once litigation has begun, parties are allowed wide range in seeking both formal and informal discovery. If Claimant has any reason to object to this secondary release of his medical records without his prior authorization, he should address it to SAIF, not to Surety. Moreover once he has filed a claim and/or a complaint for workers' compensation benefits, Claimant is required to allow Surety to review his prior medical records, subject to very few limitations. Claimant's reluctance to sign appropriate authorizations unduly increased the time necessary for the parties to prepare this case for trial. Indeed, the matter was held in abeyance because of Claimant's refusal to sign as directed and the Referee ultimately, albeit reluctantly, fined Claimant for his repeated, defiant refusal to comply with interlocutory orders surrounding issues of discovery. The foregoing analysis similarly applies to records received by Surety from Idaho Department of Corrections. Claimant was not denied due process.

145. Claimant painted out many instances of disagreement, discrepancy, and/or error which he found in medical records and other documents. Each of these instances has been considered. None is dispositive regarding any finding of ultimate fact or conclusion of law.

146. Claimant's contentions regarding OSHA violations and/or fraud and/or defamation are not within the jurisdiction of the Commission in this proceeding.

DISCUSSION AND FURTHER FINDINGS OF FACT

147. 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).

Psychiatric Recovery Period

148. Psychiatric injury is governed by *Idaho Code § 72-451*. The measurement of a recovery period does not differ from a physical recovery period. Although different physicians have identified different diagnoses, the parties do not dispute that Claimant suffered a psychiatric injury superimposed upon a preexisting psychiatric condition.

149. The Lifeways notes demonstrate that for the most part Claimant's primary counselor, Mr. Whitcomb, uncritically accepts Claimant's stories of events and subjective complaints. Mr. Whitcomb rarely questions the veracity of Claimant's reports, even when such reports are manifestly inconsistent with Claimant's reporting to him on other occasions. As a result, the evidentiary weight of Mr. Whitcomb's recitations of "facts" and his opinions are undercut.

150. By contrast, Dr. Heriza's Lifeways notes show a mixture of acceptance and critical evaluation which bolsters the evidentiary weight afforded his opinions.

151. Dr. Steinberg's opinions demonstrate that he is a caring treater, but do not receive significant weight when he discusses when a recovery period may begin or end.

152. Dr. Holt opined Claimant was psychologically stable when examined on October 9, 2008.

153. Dr. Beaver found Claimant psychologically stable when examined on April 6, 2010.

154. Claimant's preexisting psychological condition will remain both cyclic and erratic, depending upon stressors in his life. The psychological PTSD suffered as a result of the accident has stabilized. Further, with the resolution of this litigation, a stressor disappears and Claimant's need to hold on to the accident is ameliorated.

155. Ultimately, because Claimant's psychological condition did not preclude work, whether Dr. Holt's or Dr. Beaver's date of stability is chosen has no effect upon income benefits.

Temporary Disability

156. Temporary disability benefits are statutorily defined and calculated for the time when a claimant is in a period of recovery. *Idaho Code* § *72-408*, *et. seq.* Upon medical stability, a claimant is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111 (2005).

157. Employer offered and Claimant worked for one-half day on June 5, 2008, at a physician-approved, light-duty job which allowed him to work using only his left hand. When Claimant left the job, he told Employer he was going to a doctor's appointment. He told ICRD consultant Ms. Baskett that it hurt his left arm to use it so much. Despite Employer's offer to allow him extra rest in the break room, Claimant walked off the job. Claimant told Employer he would try to come back in a few days, less than one week. He did not again show up for work. Several days later, Claimant began telling physicians and others he suffered a

psychological reaction to knowing that he was working on the other side of the wall from the machine on which he was injured. He represented that he left the job in a panicked and anxious state because he was unable to deal with the thought of the roller machine. This representation is inconsistent with Claimant's own representations and demeanor when he walked off the job and for days after.

158. Claimant's initial reports of why he left that job and did not return are given greater weight than the report Claimant later made. Claimant rejected suitable work when he left the light-duty, one-handed job which Employer offered. As a result, Claimant is not eligible for full TTD/TPDs. He is entitled to full TTD benefits only to June 5, 2008, and for the period of recovery after the surgery performed February 19, 2009 to MMI on April 17, 2009. The record does not clearly show, and Claimant did not address, whether the light-duty job offered was full time or part time. If part time only, Claimant is still entitled to temporary partial disability benefits based upon the difference between his regular wage and hours and the part-time hours offered.

159. Dr. Hansen is neither a psychologist nor a psychiatrist. To the extent he based his releases from work upon psychological factors, these are not considered a basis for calculating temporary disability.

Medical Care Benefits

160. An employer is required to provide reasonable medical care for a reasonable time. *Idaho Code § 72-432(1*). Despite Claimant 's assertion to the contrary in his brief, Claimant must show it likely that he is entitled to medical benefits. It is not Defendants' burden to prove the reverse.

161. The record shows Defendants provided such care, even despite indications that Claimant's conditions were preexisting or otherwise unrelated to the accident. Defendants paid for this care, much of which was merely palliative.

162. One disputed bill, for mental health care on September 11, 2009, was denied by Surety. In hindsight, it appears likely that this care is related to the industrial accident. Although Claimant self-referred for care, no treating physician had reasonably required it, and the *Sprague* criteria are not met, Dr. Ashaye did approve the treatment while Claimant was admitted, and agreed to act as a treating physician for follow up. Moreover, Claimant, in his own mind, attributed his then-current dysfunction to stress from the industrial accident and sequelae of litigating his claim for benefits. This is not to suggest that a claimant's own perception of a relationship between mental or psychiatric dysfunction and an industrial accident is *per se* a factor for or against the likelihood of compensability. Rather, given the wide swings of Claimant's post-accident moods and psychiatric behaviors, together with his undue focus on the litigation surrounding the industrial accident, this treatment was not unlike many other instances of mental health treatment which had been approved by Surety as compensable. In other words, this treatment was more like than unlike compensable treatment. This bill, by West Valley and Idaho Emergency Physicians is likely a compensable medical benefit.

163. An inconsistency arises. Claimant received prescriptions for narcotics to manage his chronic arm pain. Dosages and number of pills prescribed were in the higher range of amounts with which the Commission is familiar among claimants with chronic pain. However, lab tests sometimes failed to show the presence of these narcotics in Claimant's system. Rather, these tests showed the presence of metabolized marijuana and methamphetamine.

Physicians did intermittently attempt, albeit unsuccessfully, to wean Claimant from narcotics. Moreover, he declined to provide a sample for drug screening in September 2010. Absent further evidence and discussion by the parties to explain this inconsistency or the reasoning behind declining a drug test, speculation will not be indulged. It forms no part of the basis for this decision. Nevertheless, Claimant is entitled to medical benefits for all related prescriptions to the date of hearing. It appears from the record that dispensing and payment issues involving Stone River have been resolved, but should any unpaid bill or bills for prescriptions up to the date of hearing remain outstanding, Defendants are liable for it or them.

164. Surety provided a large amount of benefits for essentially palliative psychological care. Although this care appears to have been much more significantly related to Claimant's underlying and preexisting psychological conditions, to the extent that some of it may have related to the accident, Surety extended benefits.

165. Claimant is entitled to medical benefits for treatment to the date of hearing. Claimant failed to show it likely he is entitled to future medical care, including mental health care in the future.

PPI and Permanent Disability

166. Permanent impairment is defined and evaluated by statute. *Idaho Code §§ 72-422* and *72-424*. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

167. **"**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*.

168. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

169. Permanent disability is defined and evaluated by statute. *Idaho Code § 72-423* and *72-425 et. seq*. Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

170. Dr. Hansen rated Claimant's right upper extremity impairment at 16% and 18% whole-person PPI using the *Guides*, 5th and 6th editions, respectively. That rating necessarily included subjective psychological and emotional elements, for example, Claimant's reports of pain and activity limits, and exhibitions of limited range of motion. Dr. Wilson rated Claimant's physical PPI at 3% of the whole person. Coupled with Dr. Beaver's rating of

Claimant's psychological impairment at 10% whole-person, one-half attributed to preexisting psychological conditions, the panel rated Claimant's total PPI at 8% of the whole person related to this accident. Dr. Holt rated Claimant's psychological impairment at 5%. Dr. Steinberg opined Claimant could not be rated for PPI because he was not stable concerning his PTSD and would not become stable for two to five years after this litigation concluded.

171. When Dr. Beaver's assessment of Claimant's preexisting PPI is added to the panel rating, the PPI rated by Dr. Hansen is reasonably consistent with Drs. Beaver and Wilson.

172. The record does not show that Claimant was rated for PPI attributable to his old back injury or to his May 2005 right elbow injury. Claimant's right elbow condition and restrictions remained relevant and problematic well into 2007 and were not cleared by a physician before the April 17, 2008 industrial accident occurred. Instead Claimant settled that claim in February 2008, just before his hospitalization for a methamphetamine overdose. Right upper extremity restrictions in place immediately before the April 17, 2008 accident were remarkably similar to those recommended by physicians when they rated Claimant for PPI for the April 2008 accident.

173. The record of Claimant's ability to cope, as far back as 1989, shows Claimant suffers from a preexisting psychological permanent partial impairment. As a result, his behavior has waxed and waned in correlation to perceived stressors in his life. Dr. Beaver's apportionment appears to undervalue the preexisting psychological permanent partial impairment. Nevertheless, his rating is reasonable and is accepted as fact.

174. The record demonstrates that Claimant consistently overreports his perceived loss of function in workers' compensation claims. The surveillance video more accurately depicts Claimant's tolerance for using his right hand.

175. As of the date of Ms. Owen's post-hearing deposition, Surety had paid 16% whole-person PPI in full in accordance with Dr. Hansen's original opinion.

176. Dr. Hansen's rating did not apportion for preexisting physical and/or psychological impairment. Claimant's actual PPI, related to the April 17, 2008 accident, including both physical and psychological components, is found to be 10% of the whole-person. Surety is entitled to credit for overpayment when liability for permanent disability is calculated and paid.

177. Claimant has worked about 100 jobs in his life. He has essentially always been a day laborer with occasional employment which lasted somewhat longer. His work history shows only several jobs—a small percentage of the total—which might be classified as heavy or medium-to-heavy work. The majority of his employment consisted of light and light-to-medium work. Mr. Crum's analysis was faulty in assuming bilateral lifting restrictions; it disqualified Claimant from many occupations Claimant can demonstrably do.

178. Claimant's preexisting psychological PPI has not stopped him from working these "100" jobs when he was available and wanted to. Dr. Beaver opined that Claimant's PTSD related to the accident would affect access only to working on that particular type of roller machine. Psychologically, Claimant can work at other assembly-line machines.

179. The burden of establishing permanent disability is Claimant's to bear. Claimant established he is permanently disabled because he retains some dysesthesia at his radial wrist and at the back of his hand into his fingers. Physicians have testified that this will likely subside with use and that the completion of this litigation will eliminate a stressor that exacerbates Claimant's perception of disability. Claimant is found to be permanently partially disabled, rated at 25% of the whole-person.

180. Because there has been no showing that Claimant's earlier restrictions and impairments affected his permanent disability, there is no apportionment.

181. **Odd-lot.** If a claimant is able to perform only services so limited in quality, quantity, or dependability that no reasonably stable market for those services exists, he is to be considered totally and permanently disabled. *Id.* Such is the definition of an odd-lot worker. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 700, 619 P.2d 1152, 1153 (1980). Taken from, *Fowble v. Snowline Express*, 146 Idaho 70, 190 P.3d 889 (2008). Odd-lot presumption arises upon showing that a claimant has attempted other types of employment without success, by showing that he/she or vocational counselors or employment agencies on his/her behalf have searched for other work and other work is not available, or by showing that any efforts to find suitable work would be futile. *Boley*, *supra.*; *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997).

182. Claimant failed to show it likely that he qualifies as an odd-lot worker. For failing to return to the light-duty job Employer offered, his belated excuse is not considered genuine. He was physically able to perform it. He has not attempted other work. Claimant thwarted ICRD's attempts to help him find available work. ICRD showed available work existed. Employer's offer of a return to suitable work on June 5, 2008 demonstrated a search would not be futile.

Attorney Fees

183. Attorney fees are awardable where the defendants have unreasonably denied or delayed payment of benefits due a claimant. *Idaho Code*, *§ 72-804*.

184. Surety senior claims examiner Ms. Owen testified and well explained in detail her reasoning when Surety denied specific claims for medical bills in this otherwise accepted

claim. These explanations were rational, well based upon specific facts, and in accordance with Idaho Workers' Compensation Law.

185. Surety's discontinuance of psychiatric medications based upon Claimant's preexisting psychological conditions and upon the absence of reports from Dr. Heriza during November 2008 through June 2, 2009, was not unreasonable.

186. Surety's denial of the Holy Rosary bill for tests ordered by Dr. Zia and conducted April 22, 2008, was not unreasonable.

187. Surety's denials of the Lifeways bill for service August 31, 2009, and the Intermountain Hospital bill for service September 3 through 7, 2009, were not unreasonable.

188. Surety's denial of the West Valley Medical Center and Idaho Emergency Physicians bill for service September 11, 2009, was not unreasonable.

189. Surety's denials of the Lifeways bill for service August 31, 2009, and the Intermountain Hospital bill for service September 3 through 7, 2009, were not unreasonable.

190. Surety's denials of Ontario Emergency Physicians and Snake River Radiology bills for service October 1, 2009, were not unreasonable.

191. Surety's denial of the Intermountain Hospital bill for service March 15 through 24, 2010, was not unreasonable.

192. Generally, Surety has demonstrated professional competence and reasonable processing of this unusually difficult claim. Claimant failed to show an appropriate basis for an award of attorney fees pursuant to section 804.

CONCLUSIONS OF LAW

1. Claimant suffered a compensable accident on April 17, 2008. He suffered physical and psychological injuries from which he has recovered to medical stability. The date

of psychological stability does not affect entitlement to any benefits claimed or paid to the date of hearing;

2. Claimant is entitled to temporary disability benefits from the date of the accident to June 5, 2008, and for the period of recovery from surgery beginning February 9, 2009, through the date of medical stability on April 17, 2009; and, if applicable, for benefits based upon the difference in hours, if any, between full-time work and the light-duty job which Claimant began June 5, 2008;

3. Claimant is entitled to PPI rated at 10% of the whole person. Surety is to receive credit for overpayment which is to be applied toward permanent disability;

4. Claimant is entitled to permanent partial disability, without apportionment and inclusive of PPI, rated at 25% of the whole person;

5. Claimant failed to show he is totally and permanently disabled and/or that he qualifies as an odd-lot worker;

6. Claimant is entitled to benefits for medical care to the date of hearing, but not in the future; and

7. Claimant failed to show he is entitled to an award of attorney fees.

ORDER

Based upon the foregoing, the Commission hereby orders:

1. Claimant suffered a compensable accident on April 17, 2008. He suffered physical and psychological injuries from which he has recovered to medical stability. The date of psychological stability does not affect entitlement to any benefits claimed or paid to the date of hearing;

2. Claimant is entitled to temporary disability benefits from the date of the accident to June 5, 2008, and for the period of recovery from surgery beginning February 9, 2009, through the date of medical stability on April 17, 2009; and, if applicable, for benefits based upon the difference in hours, if any, between full-time work and the light-duty job which Claimant began June 5, 2008;

3. Claimant is entitled to PPI rated at 10% of the whole person. Surety is to receive credit for overpayment which is to be applied toward permanent disability;

4. Claimant is entitled to permanent partial disability, without apportionment and inclusive of PPI, rated at 25% of the whole person;

5. Claimant failed to show he is totally and permanently disabled and/or that he qualifies as an odd-lot worker;

6. Claimant is entitled to benefits for medical care to the date of hearing, but not in the future; and

7. Claimant failed to show he is entitled to an award of attorney fees.

8. An Attorney's Lien was filed on December 27, 2010, by Claimant's prior counsel, Lynn Luker for services rendered in prosecuting this difficult case and taking it to hearing. Claimant objected to the lien. In order to resolve the pending lien the Commission will allow 14 days from the date of this order for Mr. Luker to file a brief setting forth his specific request for attorney fees and costs. Claimant will then have 14 days from the date of Mr. Luker's brief within which to file a response. The Commission will issue a final ruling after review of the arguments provided.

Pending the Commission's ruling on potential attorney fees, Surety is instructed to hold 25% of the benefits awarded that have not yet been paid (9% PPD). If Mr. Luker does not file a

brief within 14 days the Commission will issue an order releasing the remaining funds to Claimant.

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

IT IS SO ORDERED.

DATED this __2nd_____ day of ___May_____, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ____2nd_____ day of __May_____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

JAMES W. CLARK
3515 HARNEY ST
VANCOUVER, WA 98660

Courtesy Copy to:
LYNN LUKER

AND by personally delivering the same upon RACHEL O'BAR, through her agent, at the Industrial Commission Offices, 700 S. Clearwater Lane, Boise, Idaho.

_/s/_____