BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GREGORY A. HUNT, Claimant, v. EXCEL TRANSPORT, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2008-037823** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed: 8/28/12**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Coeur d'Alene, Idaho, on March 1, 2012. Bradley J. Stoddard of Coeur d'Alene represented Claimant. Roger L. Brown of Boise represented Defendants. The parties submitted oral and documentary evidence. There were no post-hearing depositions. The parties submitted post-hearing briefs and the matter came under advisement on June 15, 2012 and is now ready for decision.

ISSUES

By order of the Referee at hearing, the issues to be decided are limited to:

1. Whether and to what extent Claimant is entitled to the following benefits:

   A. Medical care;

   B. Temporary partial or temporary total disability benefits (TPD/TTD);

   C. Permanent partial impairment (PPI); and

   D. Attorney fees.

All other issues are reserved for future consideration.

CONTENTIONS OF THE PARTIES

Claimant asserts that as the result of an undisputed industrial accident he suffered injuries to his low back, his left hip, and his left eye. Although his claim was accepted, Surety denied some medical care ordered by his treating physicians, and Surety terminated his income benefits prematurely. Claimant argues that he needs additional medical care immediately, and in addition, he will need a complete left hip arthroplasty at some point in the future, making it appropriate for the Commission to retain jurisdiction of this proceeding. Finally, Claimant contends that Defendants denied benefits to which he was entitled, including medical care and TTD benefits, were slow to pay medical bills for authorized treatment, and unreasonably delayed the payment of impairment and disability benefits, all of which required Claimant to retain legal counsel.

Defendants assert that Claimant received the medical and time loss benefits to which he is entitled. Reasonable expert medical opinions supported Defendants' decisions regarding authorization and payment of benefits. There is no basis for an award of additional benefits and no basis for an award of attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, taken at hearing;

2. Claimant's exhibits A through G; exhibit I; and exhibits K through FF; and

3. Defendants' exhibits GG through HH; page 1 and pages 3 through 85 of exhibit II; and pages 16 and 17 of exhibit LL.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was fifty-four years of age. For the twenty-five years preceding the hearing, Claimant has lived in and around Post Falls. At the time of hearing he lived with his girlfriend at her home in Post Falls.

2. Claimant dropped out of high school after completing the ninth grade. He attended various trade schools where he studied welding, small engine repair and transmission repair. He did not receive a certificate from these courses because he obtained employment before they were complete.

3. Claimant worked as a millwright (a welder in a sawmill) for many years until the fumes, particles, and dust, together with his life-long asthma, resulted in his diagnosis with chronic obstructive pulmonary disease (COPD).

4. In 1996, Claimant obtained his GED from North Idaho Community College, and completed truck-driving school. In 1999, Claimant obtained his commercial driver's license (CDL) and started working as a truck driver.

RELEVANT PRIOR MEDICAL HISTORY

5. Although Claimant has a complex medical history, only one of his pre-existing medical conditions is relevant to this proceeding. In May 2002, William Ganz, M.D., performed

a right L4 hemilaminectomy and microdiscectomy at L4-5 to alleviate low back pain and radicular symptoms that Claimant was experiencing. By early September 2002, the right radicular pain was resolved, though Claimant still reported some low back pain. At that time, Dr. Ganz released Claimant to return to work with a temporary thirty-pound lifting restriction. Dr. Ganz scheduled a follow up appointment for mid-October, but Claimant did not return to the clinic. At hearing and in his deposition, Claimant was effusive in his praise of Dr. Ganz, and reported that prior to the November 10, 2008 accident he had no restrictions and no low back complaints.

EMPLOYMENT WITH EMPLOYER

6. Employer is in the business of hauling wood waste from sawmills throughout northern Idaho and eastern Washington to the Potlatch paper plant in Lewiston, Idaho.

7. Claimant went to work for Employer in April 2008. Claimant worked the swing shift, starting work at 5:00 p.m. Although Employer's main office is in Lewiston, Claimant picked up a tractor/trailer at Employer's yard in Post Falls, then traveled to one or more mills to fill the trailer with 100,000 pounds or more of wood waste then drive the load to Lewiston.

8. Employer paid Claimant by the mile. The length of his shift varied depending upon whether he had to wait to fill his trailer, how many mills he had to visit to fill the trailer, whether he had to deal with an overfill, and, of course, road and traffic conditions. Claimant's average weekly wage was $631.25.

9. Claimant's job required a valid CDL. Physical requirements included sitting from nine to eleven hours per day, and combined standing and walking of three hours per day. Claimant was required to climb a thirty-foot ladder to access chip bins, and to lift fifty to seventy-five pounds on an occasional basis. If Claimant's trailer was overfilled, he was required

to shovel the excess wood waste out of the trailer by hand.

ACCIDENT

10. About 7:00 p.m. on November 10, 2008, Claimant was southbound on U.S. 95 with a fully loaded trailer traveling about sixty miles per hour. Just south of Moscow, Claimant rounded a corner and encountered a vehicle traveling northbound that was encroaching into his lane of travel. The trailer was tracking a bit to the right, and when Claimant moved toward the fog-line to provide room for the car to pass, the trailer traveled off the paved surface and onto the soft shoulder. The soft material at the edge of the road caused the trailer to roll over on its right side, and the tipping trailer turned the tractor onto its side into a ditch. The vehicle slid for hundreds of feet on the passenger side before coming to a full stop.

11. Though Claimant was wearing his seatbelt, the impact shook him violently. His left hand hit the left side of his face with some force, twisting his glasses. He hit his head on the rear window and slammed into the driver's side door. Once the vehicle came to a stop, Claimant found himself hanging from his seatbelt. When he released his seatbelt, he found his left leg caught between the seat and the steering wheel. Claimant "felt the crunch inside of [his] hip," and hung by his left leg until he wrenched free and escaped from the tractor. Tr. p. 84. EMTs treated Claimant at the scene and transported him by ambulance to Gritman Medical Center (GMC) in Moscow. The accident demolished the tractor and trailer.

INITIAL POST-ACCIDENT MEDICAL CARE

12. At GMC, Claimant complained of soreness in his neck, low back, buttocks, and calf. Imaging was limited to a cervical spine x-ray, which was negative. Emergency room doctors diagnosed Claimant with a neck strain, provided pain medication, and discharged him. Employer's safety officer met Claimant at GMC and drove Claimant home to Post Falls.

EMPLOYER'S POST-ACCIDENT ACTIONS

13. The day following the accident, Employer terminated Claimant's employment, citing the accident as the reason. Employer thereafter never made Claimant an offer of light-duty work.

14. In the week following the accident, Claimant repeatedly attempted to contact Employer about his need for additional medical care, but was not able to speak to anyone in authority regarding his accident. During that time, Claimant sought care on his own from a chiropractor.

15. After nearly two weeks, Employer authorized Claimant to seek additional treatment at North Idaho Immediate Care (NIIC).

MEDICAL CARE

Low Back

16. Claimant presented at NIIC on November 20, 2008 and saw Kirk Hjeltness, M.D., a family practice physician. He complained of neck pain, low back pain, and numbness in his legs after sitting for a short period of time. Claimant marked a pain diagram locating pain in the middle of his lumbar spine, muscle spasm in his buttocks bilaterally, and pain extending from his left hip down his left leg to a point below his knee. A lumbar MRI performed the same day revealed multilevel degenerative changes most evident at L4-5. Dr. Hjeltness diagnosed acute myofascial lumbar strain, and prescribed medication. He imposed restrictions on lifting more than ten pounds, bending, and prolonged sitting.

17. Claimant returned to Dr. Hjeltness on November 24, at which time Dr. Hjeltness noted that Claimant's left hip might be involved in his symptomatology. Dr. Hjeltness continued the restrictions and prescribed physical therapy.

18. In early December, Claimant reported to Dr. Hjeltness that he was still experiencing "pinching in lower back" and "stinger pain" radiating down both legs. Ex. S, p. 11. Dr. Hjeltness referred Claimant to Dr. Ganz for a neurosurgical evaluation. On January 5, 2009, Claimant reported to Dr. Hjeltness that he was feeling left hip joint pain and grinding. Dr. Hjeltness continued Claimant's medication regime and his work restrictions.

19. Claimant saw Dr. Ganz on January 21, 2009. Dr. Ganz noted that Claimant presented with symptoms of low back pain and bilateral lower extremity paresthesias that were the result of the November 2008 accident. He ordered physical therapy and a series of epidural steroid injections (ESIs) administered by Scott Magnuson, M.D. Dr. Ganz imposed a temporary twenty-pound lifting restriction.

20. Claimant attended all scheduled physical therapy sessions and had three ESIs. The ESIs at L5-S1, provided good relief, but the ESI at L3-4 provided no benefit.

21. Claimant returned to Dr. Ganz for follow up on his low back on April 29, 2009. Although two of the ESIs were helpful, Claimant still suffered from low back discomfort and intermittent paresthesias in both legs. Dr. Ganz ordered additional physical therapy.

22. When Claimant returned to Dr. Ganz in early September 2009, he was still experiencing numbness in both feet that occurred when he sat for forty-five minutes or more. Dr. Ganz attributed Claimant's symptoms to the November 2008 accident and ordered an EMG study of Claimant's lower extremities. The EMG results were interpreted as showing old radiculopathy on the right at L4 and L5 (the symptoms that Dr. Ganz treated with the 2002 surgery) but no current radiculopathy or neuropathy. Following the EMG testing, Dr. Ganz released Claimant from care for his low back.

23. In May 2010, Claimant saw orthopedic surgeon George Harper, M.D., for an

independent medical evaluation (IME) at the request of Surety. Dr. Harper concluded that as a result of the industrial accident, Claimant suffered a lumbar strain superimposed on a prior laminectomy. Dr. Harper opined that the lumbar strain was a *temporary aggravation* of Claimant's pre-existing condition that was fixed and stable. Dr. Harper did not attribute any permanent impairment to the lumbar strain.

24. Dr. Harper also noted that Claimant had permanent restrictions: He could stand or walk for only thirty minutes at a time for a total of two hours per day; could not lift more than thirty-five pounds occasionally; and could not kneel, crouch, or use stairs or ladders. Dr. Harper's report addressed both Claimant's low back and his hip, but it is not clear whether the restrictions discussed in Dr. Harper's report related to the low back injury, the hip injury, or both.

25. Six months or so after the IME by Dr. Harper, Claimant's low back pain remained symptomatic. It was aggravated by bending, driving for more than thirty minutes, prolonged standing, sitting, and increased physical activity. In late November 2010, Claimant grasped a piece of kindling from the woodpile and turned to place it in his girlfriend's arms. When he turned, he experienced an increase in left sacroiliac pain. When his pain had not resolved by January 2011, Claimant returned to Dr. Ganz. Claimant told Dr. Ganz of the exacerbating incident and complained of low back pain that waxed and waned with pain radiating into his buttocks. Dr. Ganz concluded that Claimant had exacerbated the industrial injury to his low back. He prescribed physical therapy and referred Claimant to Dr. Magnuson for a second series of three ESIs at L5-S1 and directed Claimant to return for follow up in three months.

26. Surety did not authorize the medical care ordered by Dr. Ganz. On March 22, 2011, Claimant's counsel wrote Surety and provided a copy of Dr. Ganz's chart note and physical therapy referral. Surety responded on March 28, 2011 stating that they were

"clarifying" whether Claimant's need for physical therapy and ESIs was related to his industrial injury or to his activity "stacking wood." Ex. C, p. 51.[1]

27. On August 31, and again on September 8, 2011, Claimant's counsel wrote to Surety requesting that Surety authorize the treatment Dr. Ganz ordered in January. On September 30, 2011, counsel for Surety notified counsel for Claimant by letter that Surety had authorized the three ESI injections ordered by Dr. Ganz. The letter made no mention of the physical therapy that Dr. Ganz had also ordered.

28. Claimant had his first of the second series of ESIs on October 6, 2011. In early November 2011, Dr. Magnuson's office reminded Surety that Dr. Ganz had ordered three injections in this series. Claimant had the second ESI on November 15, 2011. Because of the eight-month delay in Surety's initial authorization of the ESIs, Claimant missed his April 2011 follow up with Dr. Ganz. Surety did not authorize Claimant to return to Dr. Ganz for follow up, and at the time of hearing Claimant had not had the third of the ESIs ordered by Dr. Ganz.[2]

29. At hearing, Claimant reported that although he was asymptomatic in his low back *prior* to the industrial accident, he has never been free of pain *since* the accident. Claimant testified that his low back pain ranged from four to six on a ten scale, depending upon his activity level.

Left Hip

30. Early in the course of Claimant's accident-related medical care, Dr. Hjeltness suspected that Claimant might have suffered a left hip injury in the accident. Dr. Hjeltness

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[1] Dr. Ganz's chart note from January 26, 2011 clearly stated that Claimant's need for additional treatment was due to an exacerbation of his industrial injury.

[2] It is unclear from the record whether Surety failed to authorize the third ESI or whether Claimant was "holding out" as long as he could before he got the third injection.

referred Claimant to Lloyd Witham, M.D., an orthopedist, for a consultation regarding Claimant's left hip pain. Claimant saw Dr. Witham in mid-February 2009. Dr. Witham suspected cartilaginous or labral impingement resulting from the November 2008 accident and ordered an MRI of Claimant's left hip and pelvis. The MRI was suspicious for a non-displaced labral tear and a bump deformity of the left femoral head. Dr. Witham referred Claimant to Patrick Lynch, M.D., for a surgical consult.

31. Claimant saw Dr. Lynch on March 24. Dr. Lynch thought Claimant was a surgical candidate and performed an arthroscopic hip repair on April 22. Dr. Lynch found that Claimant suffered from a delaminating flap tear at the superior portion of the acetabular articular surface that seemed to abut the labrum causing fraying. Dr. Lynch also noted osteoarthritic changes in the hip that he related to the industrial accident. Dr. Lynch repaired the tear, and debrided the articular cartilage. Following surgery, Claimant underwent an extensive course of physical therapy. Although Claimant experienced some improvement in his hip pain as a result of the surgery and physical therapy, he was unable to return to the activities he enjoyed prior to his industrial accident, and Dr. Lynch opined that he would need a total hip replacement within five to ten years, solely as a result of the industrial accident.

32. Dr. Harper conducted an IME on Claimant's left hip at the same time he did the IME for Claimant's low back. With regard to Claimant's hip, Dr. Harper diagnosed:

> Strain of left hip with osteochondral fracture, postoperative arthroscopy, removal of osteochondral fragment, debridement of the labrum and microfracture chondroplasty of the superior acetabular defect. This is related to the industrial injury in question, it is fixed and stable, and the examinee does have some impairment.

Ex. AA, p. 8. Dr. Harper went on to state that he agreed with Dr. Lynch that Claimant would require a total hip replacement in the future, due to the industrial injury. As Dr. Harper noted,

Claimant "had a significant osteochondral fracture either at or near the maximum weight-bearing surface of the left hip." *Id.*, at p. 10. As discussed previously, Dr. Harper imposed significant permanent restrictions. Using the *AMA Guides to the Evaluation of Permanent Impairment,* 6th ed., (*AMA Guides* 6th) Dr. Harper awarded Claimant 16% permanent impairment of his left lower extremity, which converts to a whole person impairment of 6%. Dr. Lynch expressed his agreement with Dr. Harper's IME *vis a vis* Claimant's left hip.

Left Eye

33. In early August 2009 Claimant saw Dr. Hjeltness complaining of blurring and double vision, which he related to the November 2008 accident. Claimant's hand struck his eye during the accident, and immediately thereafter he experienced some blurriness and irritation. The symptoms largely resolved, but the left eye remained sensitive. Claimant experienced gradual changes in his vision to the point that he realized he had to tilt his head in order to maintain single vision. These conditions worsened over the summer, and Claimant's girlfriend noted that his left eye seemed to be sinking into its socket. Dr. Hjeltness diagnosed left facial weakness and diplopia and referred Claimant to Thadeus Buckland, M.D., an ophthalmologist.

34. Claimant saw Dr. Buckland on August 12. Dr. Buckland ordered a CT scan which showed a large floor fracture on the left orbit with possible abnormalities (adhesions or atrophy) of the inferior rectus muscle. Dr. Buckland diagnosed an old blowout fracture with enophthalmos and diplopia in all gazes except for downgaze. He referred Claimant to Nicholas T. Ranson, M.D., a board certified ophthalmologist, for a surgical consult.

35. Dr. Ranson saw Claimant on October 12. Dr. Ranson opined that as a result of the November 2008 accident, Claimant sustained a mild to moderate medial wall fracture and a very large floor fracture with significant displacement of the bone and soft tissue into the

maxillary sinus. Although he believed that the orbital floor could be reconstructed, Dr. Ranson was uncertain whether the reconstruction would improve Claimant's double vision since the "prime window for surgical repair . . . would have been in the first two to three weeks" after the accident. Ex. X, p. 1. Dr. Ranson referred Claimant to John Hoffman, M.D., an ENT specialist in Spokane for further evaluation.

36. Dr. Hoffman evaluated Claimant in mid-October 2009. He diagnosed orbital floor blowout fracture, diplopia, and enophthalmos. Dr. Hoffman concluded Claimant was a surgical candidate for repair of the orbital floor fracture, but noted that "delayed repair such as this carries a significantly higher risk of permanent double vision." Ex. Y, pp. 3-4. Dr. Hoffman performed the surgery on December 2, 2009.

37. On January 6, 2010, Dr. Hoffman responded to an inquiry from the Industrial Commission Rehabilitation Division (ICRD) concerning Claimant's work status. Dr. Hoffman replied that Claimant could return to his time of injury job "unless he still has double vision." Ex. Y, p. 13. On January 11, Dr. Hoffman examined Claimant and noted that he still had double vision in certain gazes.

38. Following the surgery by Dr. Hoffman, Claimant continued to treat with Dr. Maher for his double vision. In late March, Dr. Maher responded to an inquiry from ICRD by advising that Claimant may never be able to return to work as a truck driver due to his double vision. In late April, Dr. Maher discussed with Claimant the possibility of performing an additional surgery to better align Claimant's eyes and lessen his diplopia.

39. In early May 2010, Surety scheduled Claimant for an IME with an ophthalmologist, Michael Berg, M.D. Dr. Berg noted that Claimant experienced double vision with difficulty focusing, and problems with depth perception. Dr. Berg diagnosed "residual

diplopia after a left blowout fracture, which is completely the result of his truck accident in November 2008." Ex. Z, p. 9. Then Dr. Berg opined that Claimant needed no further treatment for his visual problems and that his double vision did not constitute an impairment. He approved Claimant to *return to work as a chip truck driver*.

40. In mid-June 2010, after reviewing Dr. Berg's report, Dr. Maher advised Surety: "For the most part I would agree with Dr. Berg's report. However, Mr. Hunt does have diplopia on up gaze, which may improve with eye muscle surgery." Ex. X, p. 15. Dr. Maher continued to monitor Claimant's persistent vision issues.

41. On September 17, 2010, Dr. Maher responded to an inquiry from Surety regarding Claimant's eye injury. Dr. Maher clearly stated that Claimant suffered from double vision solely as a result of his industrial injury; that his subjective complaints were confirmed by objective findings; that if untreated Claimant would have permanent diplopia in his primary and up gaze; that Claimant may benefit from eye muscle surgery; and that he was not medically stable since additional surgery could improve his condition.

42. Claimant saw Dr. Maher again on September 24, at which time they discussed in some detail the risks and benefits of eye muscle surgery. On October 1, 2010, Dr. Maher refined Claimant's diagnosis as "right hypertropia secondary to restriction of left inferior rectus muscle." *Id.*, at p. 27. Dr. Maher recommended eye muscle surgery to eliminate the double vision or prism glasses to help correct the diplopia. Surety declined to authorize the surgery, and in late October, Claimant expressed an interest in trying the prism glasses. At that time, Dr. Maher noted that Claimant had diplopia when looking up, down and to both sides, as well as having vertigo.

43. Surety scheduled Claimant for a second ophthalmologic IME, this time with

Jeffrey Snow, M.D., in early January 2011. Dr. Snow spent ninety minutes reviewing Claimant's medical records and determined that Claimant had double vision that had not been present prior to his industrial accident. Dr. Snow was nonplussed that Claimant's significant orbital fracture was not repaired immediately following the accident. On exam he found that Claimant had double vision in his primary gaze that was *partially* relieved by prism glasses, but if Claimant looks to either side, the vision becomes double again. His diagnoses were left orbital blowout fracture, status post open reduction internal fixation related to the industrial accident and diplopia, also related to the industrial accident.

44. Based on the *AMA Guides* 6th, Dr. Snow determined that in his *present* condition, Claimant had a 100% visual impairment on a functional basis, which converts to an 85% whole person impairment. However, he went on to state that eye muscle surgery can eliminate the double vision from the central twenty to thirty degrees of Claimant's vision; therefore, Claimant was not at maximum medical improvement and a final impairment rating could not be made until Claimant has stabilized following surgery. Dr. Snow opined that there was a fifty to seventy-five percent chance that surgery could eliminate the diplopia in Claimant's multiple fields of gaze. Dr. Snow recommended that Claimant obtain the opinion of *at least* two strabismus surgeons before proceeding with surgery.

> The proper way of dealing with diplopia caused by motility defects is to operate on the combination of muscles that will give the best result, and based on the reports of a strabismus surgeon whose services are entertained to provide this, surgery should be allowed in any muscles that that doctor recommends, which may include both eyes because the eyes do function as a pair.

Ex. BB, p. 4. Dr. Snow concluded by stating that it was illegal for Claimant to drive professionally because of the diplopia was present in multiple fields of gaze.

45. Surety sent Claimant for a *third* ophthalmologic IME with Richard Bensinger,

M.D., in late March 2011. Dr. Bensinger diagnosed "restricted eye motility of the injured left eye with doubling of vision outside of a small central area of single vision . . ." Ex. DD, p. 6. Dr. Bensinger attributed the double vision entirely to the industrial accident. Dr. Bensinger did not recommend further surgery, explaining to Claimant that the delay in repairing the blowout fracture caused development of scar tissue. Based on the *AMA Guides* 6th, Dr. Bensinger assigned Claimant 76% whole person impairment. He concurred with Dr. Snow that Claimant could not drive commercially.

TTDs

46. Surety paid TTD benefits to Claimant from November 11, 2008 through March 24, 2010. Surety terminated those benefits on and after March 25, 2010 for the stated reason that, "your doctor advises you returned to work with permanent restrictions." Ex. FF, p. 3. Claimant had not returned to work on March 25, 2010, nor had he returned to work at the time of hearing some two years later. The Referee was unable to locate any contemporaneous medical report that included such a statement.

PPI

Left Eye

47. Assuming for purposes of argument that Claimant's left eye condition is medically stable, three physicians have evaluated Claimant for PPI for his left eye injury. Dr. Snow, Surety's IME physician, rated Claimant at 85% whole person PPI due entirely to the industrial accident. Dr. Bensinger, another of Surety's IME physicians, rated Claimant at 76% whole person PPI, again, due entirely to the industrial accident. Neither party disputes either of these ratings. Dr. Berg, the first ophthalmologist to examine Claimant at Surety's request, determined that Claimant had no PPI despite his having diplopia in multiple gazes. Claimant

argues that Dr. Berg's opinion regarding PPI is not credible and the Referee should not consider it. Although Defendants discuss Dr. Berg's opinion in their decision, they do not rely on Dr. Berg's opinion and make no serious argument that is should be controlling. The Referee agrees with Claimant that Dr. Berg's IME is not credible, and the Referee disregards Dr. Berg's opinion in these findings.

Left Hip

48. Assuming for purposes of argument that Claimant's left hip is medically stable, Surety's IME physician, Dr. Harper, awarded Claimant 6% whole person PPI for his left hip injury, which he attributed wholly to the industrial accident. Claimant has not disputed Dr. Harper's PPI rating for his left hip.

Low Back

49. In May 2010, Dr. Harper, one of Surety's IME physicians, evaluated Claimant's low back. He determined that Claimant did sustain an injury, which he described as a temporary aggravation of a pre-existing problem. At the time of evaluation, Dr. Harper opined that Claimant's low back was fixed and stable, and awarded no PPI related to the industrial injury.

50. In January 2012, Surety obtained an additional IME of Claimant's condition from Dennis Chong, M.D., a physical medicine specialist. Dr. Chong diagnosed the following relevant conditions relating to the industrial accident:

- Lumbar strain—temporary aggravation of a pre-existing degenerative spine disease previously treated surgically in 2002 and now fixed and stable without impairment;
- Left hip labral tear repaired surgically and rated at 16% lower extremity (6%) whole person.

Dr. Chong deferred a rating of Claimant's left eye condition to the ophthalmologists. Although not relevant in this proceeding, he also found Claimant had 5% whole person impairment that pre-existed the industrial accident attributable to his 2002 low back surgery.

DISCUSSION AND FURTHER FINDINGS

MEDICAL CARE

51. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

52. *Sprague* provides *retrospective* guidance as to what constitutes reasonable medical care: 1) the Claimant makes gradual improvement from the treatment; 2) the treatment was required by the Claimant's physician; and 3) the treatment was within the physician's standard of practice and charges were fair and reasonable. In this case, however, the question of what constitutes reasonable medical care is *prospective* in nature—is Claimant entitled to an additional surgery for his left eye, and further care for his low back?

53. In 2011, the Commission had an opportunity to discuss how Idaho Code § 72-432 should be applied when the reasonableness of the medical care in dispute is prospective in nature. In *Ferguson v. CDA Computune, Inc., et al.,* 2011 IIC 0015.1, the Commission discussed

the *Sprague* standard, then stated:

> However, the *Sprague* standard anticipates a situation in which treatment has already been rendered. The Court has announced no comparable standard for cases, as here, in which the treatment has been proposed but not yet rendered. In the absence of such an enunciated standard, we will look to *Sprague* for guidance, but judge the case based on the totality of the circumstances.

Ferguson, 2011 IIC 0015.12.

Left Eye

54. The Referee finds, based on the totality of the circumstances, that Claimant is entitled to additional medical care for his left eye. Claimant's treating physician, Dr. Maher, as well as one of Surety's IME physicians, Dr. Snow, both recommend that Claimant be evaluated for surgery that may significantly improve his vision. Dr. Maher has opined that it is more likely than not that Claimant could benefit from an additional surgery. Dr. Snow specifically recommended an evaluation of Claimant by *at least* two eye surgeons who specialize in strabismus surgery. Dr. Berg did not recommend any additional treatment. Dr. Bensinger discussed the possibility of additional surgery with Claimant, but believed that the delay in repairing the orbital fracture made it unlikely that surgery could correct Claimant's diplopia.

55. The Referee finds the opinions of Drs. Maher and Snow persuasive. Both physicians were fully apprised of all of the circumstances surrounding Claimant's care, and each recommended independently that additional surgery be considered. Both physicians appreciate that there are surgeons with particular expertise in this type of surgery, and that Claimant should have the opportunity for at least two such evaluations before deciding whether he wishes to proceed with the surgery.

56. Dr. Bensinger based his opinion that Claimant would not benefit from an additional eye surgery in part, on his belief that Claimant's treating physician had not recommended additional surgery. In his report, Dr. Bensinger noted of Claimant:

> He continues to receive regular eye examinations at the Spokane Eye Clinic, but no further surgical therapy has been suggested by them, although there is a hint in the record that he might be seen by a strabismus specialist who might endeavor to increase his field of single vision.

Ex. DD, p. 4. Dr. Maher, Claimant's treating physician at Spokane Eye Clinic, recommended consideration of surgical intervention early in his treatment of Claimant. Dr. Snow, who also practices at the Spokane Eye Clinic and prepared an IME at Surety's request, also recommended evaluation of Claimant for the surgery. Dr. Bensinger's lack of awareness of these recommendations suggests he did not have the relevant medical records or failed to review them. In either event, the Referee gives Dr. Bensinger's opinion less weight than the opinions of Drs. Maher and Snow.

57. Claimant's double vision causes substantial impairment. Surgery has the potential to either greatly benefit Claimant or to cause further visual damage. The Referee finds the opinions of Drs. Snow and Maher to be persuasive. Claimant is entitled to such further evaluation/treatment consistent with the opinions of these physicians.

58. If, following the recommended consultations, Claimant decides not to pursue the surgery, he will be medically stable with regard to his left eye, though Surety shall be required to provide Claimant with prism glasses as necessary.

Low Back

59. Dr. Ganz released Claimant from care for his low back injury in September 2009. Dr. Harper opined in May 2010 that Claimant's low back was fixed and stable. However, Claimant returned to Dr. Ganz in January 2011 with continuing complaints. Claimant stated that

his low back pain had never completely resolved, but became worse in December 2010. Dr. Ganz diagnosed an exacerbation of the industrial low back injury. Surety has offered no medical evidence disputing Dr. Ganz's diagnosis nor is there any evidence that suggests that the kindling episode described by Claimant constitutes an intervening event of such seriousness as to break the causal connection between Claimant's condition and the subject accident. Dr. Ganz prescribed physical therapy and a series of three ESIs as treatment for the exacerbation of Claimant's back injury. Surety delayed authorization of Dr. Ganz's orders for eight months then ultimately allowed only two of the three previously authorized ESIs. Surety never authorized the physical therapy that Dr. Ganz ordered, or a follow up visit with Dr. Ganz following the prescribed treatment, nor did it explain why.

60. At the time of this writing, Claimant may or may not require additional medical care for his low back. That is a decision for Dr. Ganz, his treating physician. Claimant is entitled to return to Dr. Ganz for an evaluation of his low back injury as it relates to the industrial accident and the subsequent exacerbation. Surety shall be responsible for such diagnostic procedures and treatment as are reasonably medically necessary.

Left Hip

61. There is no dispute among the treating and IME physicians that Claimant will need a total hip replacement in the future, due entirely to the industrial accident. Claimant does not dispute that his hip is medically stable at the present time. Surety remains responsible for any prescription medications prescribed by Claimant's treating physicians for his hip, including analgesics and anti-inflammatories.

TTDs

62. Pursuant to Idaho Code § 72-408, a claimant is entitled to income benefits for total and partial disability during a period of recovery. The burden of proof is on the claimant to present expert medical evidence to establish periods of disability in order to recover income benefits. *Sykes v. C.P. Clare & Compan*y, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980).

63. As discussed in the previous section, Claimant remains in a period of recovery as regards his left eye and possibly his low back. While Claimant has been released for light duty work, Employer has made no offer of employment. Neither have Defendants presented any evidence that there is employment available in the general labor market which Claimant has a reasonable opportunity of securing, and which employment is consistent with the terms of his light duty work release. See, *Malueg v. Pierson Enterprises,* 111 Idaho 789, 791, 727 P.2d 1217, 1219 (1986). Claimant has engaged in a reasonable job search from April 2010 to April 2011, without success. Ex. I. Claimant's inability to secure work as a result of his own job search supports a finding that Claimant remained in a period of recovery at the time of hearing, and, at least with regard to his left eye, will be in a period of recovery until he has recovered from or opted to forego eye surgery.

64. Claimant is entitled to TTD benefits based on an average weekly wage of $631.25 from March 25, 2010 until such time as his eye surgeon determines he is medically stable. In the event that Claimant declines surgery within a reasonable time after consulting with strabismus specialists, he will be considered stable and no longer within the period of recovery.

PPI

65. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of the evaluation. Idaho Code § 72-422.

"Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Left Eye

66. The Referee has found that Claimant has not yet reached medical stability as regards his left eye, as he may choose to pursue an additional surgery.

67. In the event that Claimant declines to pursue the additional surgery, however, the issue of PPI is ripe at this time. There is no dispute that in his current condition, Claimant has significant impairment as a result of his diplopia. Dr. Bensinger awarded Claimant 76% whole person PPI, and Dr. Snow awarded 85% whole person PPI solely for his injury-related diplopia. In cases such as this where there is little disparity in the ratings, the Commission has generally averaged the two ratings to establish a PPI award. In this case, averaging Dr. Bensinger's 76% rating and Dr. Snow's 85% rating results in an 80.5% whole person PPI for Claimant's left eye.

Low Back

68. No physician has given Claimant a PPI rating for low back injuries related to the industrial accident for the reason that they have all opined that Claimant's low back complaints were a *temporary aggravation* of his pre-existing, but asymptomatic condition. The Referee has found that Claimant is potentially entitled to additional medical care for his low back, so an impairment rating is not appropriate at this time. However, given the *persistence* of Claimant's

low back pain, the length of time since the accident, and Claimant's complete lack of symptoms before the accident, the parties may wish to revisit the issue of PPI for Claimant's low back once any additional treatment has concluded and Claimant has reached maximum medical improvement.

Left Hip

69. There is no dispute that Claimant has reached maximum medical improvement with regard to his left hip injury. Dr. Harper has awarded 6% whole person PPI related to the hip injury, which Claimant does not dispute. It is also undisputed that Claimant will require a total hip replacement in the future, and when that eventuality comes to fruition, a new PPI rating for the left hip will be required.

ATTORNEY FEES

70. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides in pertinent part:

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

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

71. Claimant seeks an award of attorney fees for Surety's unreasonable delays in authorizing treatment for Claimant's low back, in paying for medical treatment, for denial of medical treatment for Claimant's left eye, and for wrongful termination of or delay in paying TTD benefits. The record in the instant proceeding provides a basis for an award of some attorney fees in this matter, as discussed herein.

Medical Care

72. Despite the seriousness of Claimant's accident and the minimal care he received at GMC, it took Employer two weeks to authorize Claimant's follow-up care. During that period, Claimant was unable to contact or speak with anyone in authority at Employer regarding his need for care. Many of Claimant's current medical concerns result from the failure of his early providers to diagnose significant injuries to Claimant's face and hip in a timely fashion. While the failures of the medical care system in this regard are troubling, they are not attributable to Surety, though Surety will undoubtedly bear the cost of some of those early diagnostic failures. Once Employer authorized medical care and filed a first report of injury, Surety managed the claim appropriately for nearly two years.

73. However, there is substantial evidence in the record to conclude that but for the intervention of Claimant's counsel in the fall of 2010, Claimant would not have received medical care to which he was entitled, including physical therapy and ESIs ordered by Dr. Ganz for his low back. Claimant is entitled to attorney fees for the medical care that Dr. Ganz ordered in January 2011.

74. In light of the circumstances that brought Claimant to his present visual dysfunction, Surety would have done well to follow the recommendations of Drs. Maher and Snow regarding treatment of Claimant's diplopia. However, Dr. Bensinger's IME report

supported Surety's denial and reasonable professionals can differ on treatment recommendations. Surety's denial of additional consultations and possible surgery does not constitute grounds for an attorney fee award, though the Referee has found Claimant entitled to such care. However, Surety unreasonably delayed payment to Dr. Maher and Spokane Eye Clinic for services that it had authorized. As a result of Surety's delay, Claimant's counsel wrote Surety on three separate occasions between October 2010 and February 2011 requesting payment for services dating back to mid-September 2010. Claimant is entitled to an award of attorney fees for those medical bills that Surety authorized but did not pay promptly.

TTDs

75. In March 2010, Surety terminated Claimant's TTD benefits for the stated reason that he had returned to work. This information was not correct. On March 18, Claimant saw Dr. Maher, and on that date he completed a form sent to him by ICRD. On that form, Dr. Maher indicated that Claimant "appeared stable."

76. While the termination of TTD benefits in March 2010 may have been reasonable based on Dr. Maher's response to the ICRD inquiry, in June 2010, Dr. Maher specifically reported in a note to Surety that Claimant was a candidate for eye muscle surgery—a clear indication that Claimant was not medically stable as regards his left eye. Further, in January 2011 Dr. Ganz had ordered additional physical therapy and a series of ESIs, indicating that Claimant was not stable regarding his low back, either. Thereafter, counsel for Claimant wrote Surety on five different occasions with documentation concerning Claimant's medical stability as regards his low back, his left eye, or both.[3] Despite the efforts of Claimant's counsel, Surety

[3] Counsel wrote to Surety regarding TTD benefits on September 21, 2010, October 4, 2010, March 15, 2011, August 31, 2011, and September 8, 2011.

repeatedly refused to reinstate Claimant's TTD benefits. At hearing, Surety represented that it had approved payment of TTD benefits from March 25, 2010 through March 15, 2011 totaling $29,739.94. Ex. C, p. 76 is a transcript of compensation payments dated February 24, 2012, showing such payment. As of the time that Claimant prepared his brief, he had not received these TTDs. Claimant is entitled to an award of attorney fees on all TTDs due and owing from March 25, 2010 until such time as Claimant is medically stable as regards his left eye and his low back as discussed *supra.*

PPI/PPD

77. Shortly after Surety discontinued payment of TTD benefits in March 2010, it began paying Claimant PPI benefits for 6% whole person impairment related to his hip. That PPI award had been paid out by mid-September 2010.

78. In late October 2010, Claimant's counsel contacted Surety and pointed out that Claimant was certainly going to have some disability in excess of his impairment as a result of his accident, and asked Surety to begin payment of a conservative estimate of disability benefits as Claimant was without income. Surety declined.

79. In January 2011, Surety's own IME physician awarded Claimant PPI of 85% whole person for his left eye. In March of the same year, another of Surety's IME physicians awarded Claimant whole person PPI of 76% for his left eye. In May 2011, Claimant's counsel contacted Surety noting the two impairment ratings, and requesting Surety start paying some PPI benefits. Finally, in mid-July 2011, Surety began *advancing* Claimant some of his PPI benefits. It is true that one of the fundamental disputes in this proceeding regards Claimant's medical stability. However, Surety cannot have its cake and eat it too—if Claimant was stable, as Surety asserted, then Surety should have started paying PPI benefits in the spring of 2011. If Surety did

not yet owe PPI benefits because PPI ratings were tentative depending upon Claimant's medical stability, then Surety should have been paying TTD benefits. Surety paid neither. Claimant is entitled to an award of attorney fees on PPI benefits due Claimant based on Dr. Bensinger's 76% whole person impairment. The difference in benefits representing the dispute between Dr. Bensinger and Dr. Snow's ratings is not subject to an award of attorney fees.

Additional Considerations

80. The Referee finds by Surety's handling of this matter once it was set for hearing troubling. As the hearing approached, Claimant repeatedly asked for copies of IME reports, together with the letters sent to the physicians asked to perform the IMEs. This information is discoverable, and according to correspondence found in Ex. C, Claimant requested it on several occasions. Surety agreed to provide the requested materials and then either failed to provide them or did not provide them in a timely manner. Counsel for Surety asserted that while some of the requested information was not in *his* possession, he admitted it was in the possession of *his client*. The Referee excluded one exhibit because Surety's counsel did not receive it from his client in a timely manner. Surety's failure to comply with discovery requests was sanctionable.

81. Finally, just days before the hearing was scheduled, Surety asked that the hearing be vacated so that it could implead the Industrial Second Injury Fund (ISIF) since it was apparent that Claimant had significant pre-existing impairments and might be found to be an odd-lot worker. Defendants objected to the motion to vacate, pointing out that almost a year before, Claimant had written to Surety suggesting that in light of Claimant's pre-existing conditions, Surety may wish to consider impleading ISIF. Claimant viewed Surety's failure to implead ISIF in a timely manner as a delaying tactic consonant with the obstacles and delays Claimant had encountered in the management and litigation of his claim. To resolve the issue, the Referee

ordered the hearing to proceed on all issues except PPD. At hearing, the Referee ordered Surety to initiate their impleader within ten days from the date of the hearing. Thirty days later, Surety had not yet sent ISIF a notice of intent to file, and Surety did not do so until Claimant had filed a request for calendaring on the issue of PPD.

CONCLUSIONS OF LAW

MEDICAL CARE

1. Claimant is entitled to additional medical care for his left eye, including *at a minimum*, consultation with two strabismus specialists to be identified by Drs. Snow and Maher, and follow-up consultations with Drs. Snow and Maher. Should Claimant thereafter opt to have eye muscle surgery, he shall be entitled to surgical and follow up care as required. If, following the consultations with surgical specialists and Drs. Snow and Maher, Claimant opts not to pursue the surgery, he shall be deemed medically stable and entitled to a PPI rating of 80.5% for his eye injury.

2. Claimant is entitled to such additional medical care for his back as is medically reasonable, including treatment already ordered by Dr. Ganz. Once Claimant's low back is medically stable, he should be re-evaluated for PPI related to his low back.

TTDs

3. Claimant is entitled to TTD benefits from March 25, 2010 until he is deemed medically stable as regards both his low back and his left eye or has returned to work as set out in Idaho Code § 72-408.

PPI

4. As of the date of hearing, Claimant is entitled to whole person PPI of 80.5% for his left eye. Should Claimant have eye surgery PPI will have to be re-evaluated. Dr. Harper has

rated Claimant at 6% whole person impairment for his left hip, which Surety has paid. Claimant has not received a PPI rating for the exacerbation of his pre-existing low back injury. Should Dr. Ganz order additional treatment for Claimant's low back, the issue of PPI will need to be revisited particularly with regard to whether the industrial accident temporarily or permanently exacerbated Claimant's pre-existing but asymptomatic low back condition.

ATTORNEY FEES

5. Claimant is entitled to an award of attorney fees for Surety's unreasonable delay or denial of the following benefits:

- Medical care received or reimbursed as a result of intervention by Claimant's counsel, including billings from Dr. Maher and Spokane Eye Clinic and treatment ordered by Dr. Ganz in the spring of 2010;
- TTD benefits from March 25, 2010 forward; and
- Whole person PPI benefits of 80.5% if Claimant obtains no further treatment for his left eye and low back or such PPI as is awarded following such treatment.

REMAINING ISSUES

6. The issue of disability in excess of impairment and related issues is reserved for future proceedings. Claimant asked that the Commission retain jurisdiction of this matter as Claimant will require a total hip replacement in the future. As these findings and conclusions do not constitute a final order, jurisdiction over this matter will remain with the Commission as a matter of practice. However, in the event that settlement is reached on the remaining issues without an additional hearing, and in the event that the settlement does not close out Claimant's medical claims, the Commission will retain jurisdiction over this matter until Claimant is found medically stable following left hip arthroplasty.

RECOMMENDATION

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

DATED this 30 day of July 2012.

INDUSTRIAL COMMISSION

/s/_____
Rinda Just, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GREGORY A. HUNT, Claimant, v. EXCEL TRANSPORT, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2008-037823** **ORDER** **Filed: 8/28/12**

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

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

1. Claimant is entitled to additional medical care for his left eye, including *at a minimum*, consultation with two strabismus specialists recommended by Drs. Snow and Maher, and follow-up consultations with Drs. Snow and Maher. Should Claimant thereafter opt to have eye muscle surgery, he shall be entitled to surgical and follow up care as reasonably medically

required. If, following the consultations with surgical specialists and Drs. Snow and Maher, Claimant opts not to pursue the surgery, he shall be deemed medically stable and entitled to a PPI rating of 80.5% for his eye injury.

2. Claimant is entitled to such additional medical care for his back as is medically reasonable, including treatment already ordered by Dr. Ganz.

TTDs

3. Claimant is entitled to TTD benefits from March 25, 2010 until he is deemed medically stable as regards both his low back and his left eye or has returned to work as set out in Idaho Code § 72-408.

PPI

4. As of the date of hearing, Claimant is entitled to whole person PPI of 80.5% for his left eye. Should Claimant have eye surgery, PPI will have to be re-evaluated. Dr. Harper has rated Claimant at 6% whole person impairment for his left hip, which Surety has paid. Claimant has not received a PPI rating for the exacerbation of his pre-existing low back injury. Should Dr. Ganz order additional treatment for Claimant's low back, the issue of PPI will need to be revisited particularly with regard to whether the industrial accident temporarily or permanently exacerbated Claimant's pre-existing but asymptomatic low back condition.

ATTORNEY FEES

5. Claimant is entitled to an award of attorney fees for Surety's unreasonable delay or denial of the following benefits:

- Medical care received or reimbursed as a result of intervention by Claimant's counsel, including billings from Dr. Maher and Spokane Eye Clinic and treatment ordered by Dr. Ganz in the spring of 2010;
- TTD benefits from March 25, 2010 forward; and

- Whole person PPI benefits of 80.5% if Claimant obtains no further treatment for his left eye and low back or such PPI as is awarded following such treatment.

Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

REMAINING ISSUES

6. The issue of disability in excess of impairment and related issues is reserved for future proceedings.

7. These findings and conclusions do not constitute a final order, so jurisdiction over this matter will remain with the Commission as a matter of practice. However, in the event that the parties reach a settlement on the issue of disability that leaves future medical care open, the Commission will retain jurisdiction over this matter until Claimant is found medically stable following left hip arthroplasty.

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

DATED this 28 day of August, 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 28 day of August, 2012, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

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kla /s/_____