BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FERNANDO OTERO, Claimant, v. BRIGGS ROOFING COMPANY, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2007-016876** **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND DISSENTING OPINION** Filed August 12, 2011

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue, who conducted a hearing in Idaho Falls on August 5, 2010. Claimant, Fernando Otero, was present in person and represented by Paul T. Curtis. Defendant Employer, Briggs Roofing Company, and Defendant Surety, Liberty Northwest Insurance Corporation, were represented by Kimberly A. Doyle. The parties presented oral and documentary evidence, took post-hearing depositions, and submitted briefs. The matter came under advisement on January 24, 2011. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact and conclusions of law.

ISSUES

The issues to be decided[1] are:

1. Whether and to what extent Claimant is entitled to the following benefits:
    a. Temporary partial and/or temporary total disability benefits (TPD/TTD);
    b. Permanent partial impairment (PPI);
    c. Disability in excess of impairment, including total permanent disability;
    d. Medical care; and
    e. Attorney fees.
2. Whether Claimant is entitled to total permanent disability benefits pursuant to the odd-lot doctrine.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered an industrial accident on May 14, 2007. Defendants have paid workers' compensation benefits on this claim. Claimant contends that he is entitled to additional medical, TTD and PPI benefits. He also contends that he should be awarded total permanent disability benefits. In the absence of a finding that Claimant is totally and permanently disabled, he should be awarded permanent partial disability (PPD) benefits. Claimant asserts entitlement to attorney fees, because additional benefits have been unreasonably denied.

Defendants argue that Claimant has received all of the benefits to which he is entitled on this claim. Claimant should not receive permanent disability benefits, because his loss of earning capacity is due to his status as an undocumented worker, not to impairment resulting from the industrial accident.

[1] Other issues, including causation and apportionment, were noticed for hearing. However, Defendants concede that these issues are not in dispute and do not need to be addressed. *See* Defendants' Response Brief, p. 2.

The parties acknowledge that the primary issue in this case is permanent disability. The parties disagree as to whether the Commission's decision in *Diaz v. Franklin Building Supply*, 2009 IIC 0652 (November 20, 2009), is of precedential value. Claimant argues that his case is distinguishable from the *Diaz* case and that, in any event, the *Diaz* decision is unlawful and unfair. Defendants reply that the *Diaz* case controls, and that the precedent set in *Diaz* precludes Claimant from qualifying for permanent disability benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Justin Briggs, Salvador Garcia, and Cornelio Munoz taken at hearing;
3. Claimant's Exhibits 1 through 17;
4. Defendants' Exhibits A through S; and
5. The post-hearing deposition testimony of Mary Barros-Bailey, Douglas N. Crum, David C. Simon, and Stewart Curtis.

All objections posed during the depositions are overruled.

After considering the above evidence and the arguments of the parties, the undersigned Commissioners make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born on January 2, 1974 in Queretaro, Mexico. At the time of hearing, he was thirty-six years old and resided in Idaho Falls. Claimant attended primary school in Mexico, but left secondary school in order to support his family. He has the equivalent of a seventh or eighth grade education. Claimant cannot speak, read, or write English.

2. In 2002, Claimant left Mexico to work in the United States. Claimant's family, including his children, remained in Mexico, and Claimant has not seen them since 2006. Claimant is neither a citizen nor a legal resident of the United States.

3. In both Mexico and the United States, Claimant has worked primarily as a laborer in the construction industry. He has also worked as a laborer in a potato warehouse, and as a landscape laborer. Claimant has performed minimal farm work. His wages in the United States have ranged from $6.50 to $10.00 per hour.

4. Claimant began working for Employer in February 2005. Employer requires that new employees provide two forms of identification. Claimant presented a valid Utah driver's license and a counterfeit Social Security card. Salvador Garcia, Employer's project manager, hired Claimant and testified that he was not aware that Claimant was an undocumented worker until after Claimant's employment was terminated in 2008. Justin Briggs, Employer's owner, testified that the company has never knowingly hired an undocumented worker. However, Mr. Briggs admitted that the company does not verify identification documents and has retained at least one employee after discovering that he was an undocumented worker.

5. Employer is a roofing contractor that installs roofing and also performs roof repairs. Claimant worked as a general laborer. His duties included tearing off and installing roofing, driving truck, and cleaning up worksites. Mr. Garcia testified that Claimant's roofing duties were physically demanding. Mr. Garcia described Claimant, pre-accident, as an excellent worker. This opinion was shared by Mr. Briggs.

6. On May 14, 2007, Claimant was at work on a roofing project when he slipped on some plywood and fell 10-13 feet to the ground, hitting another roof in the process. The fall rendered Claimant unconscious. He was taken to the emergency room, where he was conscious but disoriented. Neurosurgeon Brent Greenwald, M.D., attended Claimant in the emergency room.

Claimant was diagnosed with a compression fracture with posterior displacement of fragments at L1. Notes indicate that Claimant also suffered a "mild closed head injury."

7. On May 16, 2007, Dr. Greenwald, along with Dr. Eric Baird, performed an anterior corpectomy at L1 and fusion from T12 to L2. There were no post-surgical complications, and Claimant was discharged from the hospital on May 22, 2007. He had no spinal cord injury and was deemed to be "neurologically intact." He also sustained no acute cervical injury.

8. Claimant presented to Dr. Greenwald for a follow-up evaluation on June 27, 2007. He complained of discomfort in his back, legs, feet, and hips. Dr. Greenwald noted:

> His strength testing was unreliable as his effort was extremely poor probably due to pain….After testing his strength while sitting I felt that the weakness was fairly profound however after standing him up he was able to do shallow knee bends and stand on his toes without much difficulty. He could also lower himself from the examination room table. These exercises required a great deal more strength than he demonstrated for me while sitting.

9. Dr. Greenwald prescribed physical therapy, and Claimant presented to Russell Griffeth, M.P.T., on June 28, 2007. Mr. Griffeth's records indicate that Claimant attended physical therapy on a regular basis from June 28, 2007 through August 24, 2007.

10. On August 24, Claimant returned to Dr. Greenwald for further evaluation. Claimant reported discomfort in his lower left extremity, as well as numbness. He also stated that he was having difficulty urinating. Dr. Greenwald observed that Claimant was healing well and appeared to react to Claimant's leg complaints with some skepticism. Dr. Greenwald noted:

> When he walks he does so in a very slow, labored gait but at the same time when I asked him to walk 2-3 miles a day he says he already does. At the rate I watched him walk across the room, it would take about 4-5 hours to walk 2-3 miles.

11. Dr. Greenwald released Claimant to light duty work with restrictions. Claimant was not to lift more than 20 pounds at one time, or push or pull more than 20 pounds at one time. He should engage only in limited bending, twisting, or turning, and should not climb, crawl, or perform strenuous work. On August 27, Employer offered Claimant a light duty position as a yard assistant. Claimant would work full-time for $10.00, the same wage he earned at his time-of-injury position. Claimant accepted the offer and returned to work on August 28. His duties included driving truck, lifting items that did not exceed his weight restrictions, and cleaning up worksites.

12. Claimant presented to Dr. Greenwald for evaluation on November 28, 2007. Claimant reported discomfort in his hips, right arm, and left lower extremity. He said that his back fatigued easily, and that he experienced a burning sensation when he urinated. Dr. Greenwald noted that Claimant exhibited "very pronounced pain behaviors" and that he moved "slowly with very labored movement." He determined that Claimant had reached maximum medical improvement and was ready for an impairment rating. Dr. Greenwald imposed a permanent lifting restriction of 75 pounds and prescribed a "work hardening" program, at the end of which Claimant would be ready for a full work release. Claimant returned to Mr. Griffeth for physical therapy and attended therapy sessions from November 28, 2007 through January 9, 2008.

13. Surety referred Claimant to David C. Simon, M.D. for an independent medical examination (IME). Dr. Simon is board-certified in physical medicine and rehabilitation. He reviewed Claimant's medical records and performed an examination of Claimant on January 4, 2008. Claimant complained of continued pain in his low back, which became more intense if he engaged in bending, lifting, or twisting. Claimant reported that his urinary problems had resolved. Dr. Simon recorded his impression that Claimant, while "pleasant and cooperative," appeared to be

depressed. He also seemed "uncomfortable, but displayed exaggerated pain behaviors," including moaning, groaning, and wincing. After performing the examination, Dr. Simon concluded that "nothing further can be done for the spine … at this time." Dr. Simon noted that Claimant suffered a significant injury and would likely have chronic difficulties with his back. However, Dr. Simon did not believe that all of Claimant's pain symptoms were "entirely credible."

14. Dr. Simon concluded that Claimant had reached maximum medical improvement. He opined that Claimant should not lift more than 35 pounds occasionally or 15 pounds regularly. Also, Claimant should avoid repetitive bending. Dr. Simon rated PPI at 23% of the whole person, based on the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment* [hereinafter *Guides*].

15. Following his evaluation by Dr. Simon, Claimant continued to work for Employer, though he could no longer perform his time-of-injury job due to his restrictions. Cornelio Munoz, a co-worker who acted as foreman of Claimant's work crew on the day of Claimant's accident, testified that Claimant had been visibly weakened and slowed by his injury. Claimant himself testified that he could not perform the same work; however, he worked full-time for Employer, at the same wage he had been earning at the time of his injury.

16. On June 12, 2008, Claimant returned to Dr. Greenwald with complaints of a burning sensation under the surgical incision, and a burning sensation in his left groin and discomfort when he moved his left leg. Dr. Greenwald believed these complaints were related to Claimant's industrial injury and ordered a myelogram/post-myelogram CT. The tests revealed no abnormalities.

17. In July 2008, Employer discharged Claimant, ostensibly for misuse of company equipment. While Claimant was driving a company truck, the engine "blew out." Mr. Briggs testified that it is company policy for employees to maintain the vehicles they drive. According

to Mr. Briggs, the engine was damaged because the truck was not properly maintained. Claimant disputes that he failed to maintain the truck. He testified that the truck was old and in poor shape. He argues that Employer was merely looking for a pretext to fire him, because Claimant's impairment had limited his capacity to work in a "labor intensive occupation." Since his discharge, Claimant has submitted several employment applications, but he has not been able to find work.

18. On August 22, 2008, Claimant was evaluated by Stewart Curtis, D.O., on behalf of Claimant. Dr. Curtis is board certified in preventive medicine with a specialty in occupational medicine. Dr. Curtis concluded that Claimant attained maximum medical improvement on November 28, 2007, though he opined that Claimant would probably need additional medical care in the future. Dr. Curtis recorded Claimant's current complaints as chronic low back pain, left leg numbness, "pins and needles" and burning sensations in his leg, weakness, bladder problems, chronic pain at the incision site, and difficulty working, doing chores, and dressing. Dr. Curtis rated Claimant's lumbar fracture at 28% of the whole person. Additionally, he rated Claimant for headaches and cervical strain (5%), corticospinal tract impairment (8%), and pain (3%). Using the combining tables, Dr. Curtis concluded that, as the result of the industrial accident, Claimant had sustained 39% PPI. Dr. Curtis, like Dr. Simon, relied on the Fifth Edition of the *Guides*. His recommended restrictions were similar to Dr. Simon's: Claimant could lift 75 pounds rarely, 35 pounds occasionally, and 15 pounds frequently. Additionally, Claimant should avoid ladders, unprotected heights, and unstable terrain.

19. At the request of Defendants, Mary Barros-Bailey, Ph.D., performed a disability evaluation of Claimant. Dr. Barros-Bailey is fluent in Spanish and was able to interview Claimant without an interpreter. In addition to interviewing Claimant, she reviewed his medical records. Dr. Barros-Bailey opined that in light of Dr. Simon's restrictions, Claimant had sustained permanent

partial disability of 59%, inclusive of PPI. However, Dr. Barros-Bailey noted that her assessment was hypothetical, based on the assumption that Claimant could legally access employment in a labor market of the United States.

20. Subsequent to Dr. Barros-Bailey's report, Dr. Curtis issued a supplement to his report that included several new recommended restrictions. This supplement was issued almost two years after Dr. Curtis's original report, and it was not based on a new examination. In the supplement, Dr. Curtis recommended that Claimant: 1) alternate between standing and sitting every ten minutes; 2) refrain from walking more than thirty minutes at a time; 3) take a ten-minute stretch break for every fifty minutes of sitting; 4) avoid frequent bending and stooping; 5) avoid twisting and turning; 6) avoid reaching overhead, except rarely; 7) squat and crouch only as tolerated; 8) throw only as tolerated; 9) kneel or crawl rarely; 10) perform a work trial before operating any controls, and then operate controls only as tolerated; 11) perform a work trial before driving, and then avoid manual transmissions; and 12) perform day shift work only.

21. Douglas Crum performed a disability evaluation on behalf of Claimant. Mr. Crum conducted a records review but was unable to interview Claimant. Mr. Crum opined that, under Dr. Simon's restrictions, Claimant had sustained 50% PPD, having a 75% loss of labor market access and 20% reduction in wage earning capacity. If Dr. Curtis's restrictions, including the ones in his supplement, were applied, Mr. Crum opined that Claimant had no reasonable access to the Idaho Falls labor market and would thus be totally and permanently disabled. Mr. Crum did not classify his opinion as hypothetical. He opined that there is a "small, but real" labor market for undocumented workers in Idaho, and that Claimant's impairment has substantially reduced his access to that labor market.

22. At deposition, Dr. Barros-Bailey testified about the difficulty in evaluating the labor market for undocumented workers. She described the data about this market as "inferred."

To her knowledge, no government agency or similar body records statistics about undocumented workers' labor market access or their earning capacity. Thus, opinions on the matter are entirely "speculative."

23. Dr. Barros-Bailey was asked at deposition to opine on Claimant's permanent disability using Dr. Curtis's restrictions. Dr. Barros-Bailey concluded that under the original restrictions, Claimant's PPD would remain 59%, because Dr. Curtis's original restrictions were substantially the same as Dr. Simon's. However, if Dr. Curtis's supplemental restrictions were taken into account, Dr. Barros-Bailey agreed with Mr. Crum that Claimant would be totally and permanently disabled.

24. At hearing, Claimant testified that he has frequent pain and difficulty walking. The pain is worsening with time. He also has numbness in his left leg. His back and leg pain affect his ability to work around the house, and to cook, clean, and bathe. Prior to the accident, Claimant enjoyed playing soccer and basketball, but no longer engages in those activities.

25. Claimant's Utah driver's license has expired, and he no longer possesses his counterfeit Social Security card. He attributes his current inability to find work to the economy, his impairment, and his undocumented status.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

26. 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).

27. **Medical care**. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical treatment as required by the employee's physician. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

28. Defendants have paid for Claimant's surgery and follow-up treatment. Claimant asserts he returned to Dr. Greenwald for further treatment, but Defendants have denied payment. Claimant also argues that both Dr. Simon and Dr. Curtis have opined that Claimant might need additional medical care in the future. Claimant seeks an order compelling Defendants to "pay the benefits the law allows for [Claimant's] future medical treatment." Defendants respond that they have authorized and paid for all treatment in this case. They argue that Claimant has failed to cite specific care that Defendants have not covered. Defendants further argue that there is not, at present, any medical provider recommending specific treatment for Claimant.

29. Claimant has offered no evidence demonstrating that Defendants failed to pay for specific treatment already rendered. In the absence of such evidence, we cannot find that Defendants have failed to pay for such care.

30. Regarding future medical treatment, Claimant is certainly entitled to receive reasonable medical treatment related to his industrial injury. However, Claimant is not entitled to benefits simply because he *might* need future care. Whether the medical care in question has been rendered or not, Claimant must prove that a specific, proposed treatment is reasonable and required by his physician. As Claimant has provided no evidence that his physician has proposed additional treatment, let alone that such treatment would be reasonable, Claimant has failed to prove that he is presently entitled to additional medical care.

31. **Temporary disability benefits**. Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant attains medical stability, he is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001).

32. Defendants aver that they have paid TTD benefits from May 15, 2007 through August 27, 2007. Claimant returned to light duty work on August 28, 2007, and was found to be medically stable by Dr. Simon on January 4, 2008. Claimant does not argue that he is entitled to additional temporary disability benefits for the period from May 15, 2007 through January 4, 2008. Rather, Claimant argues that he is entitled to TTD benefits from the date Employer discharged him to the date of hearing and after.

33. Claimant is entitled to temporary disability benefits only while he is in the period of recovery. As of January 4, 2008, Claimant was no longer in the period of recovery. Dr. Greenwald, Dr. Simon, and Dr. Curtis have all opined that Claimant is medically stable, and Claimant has provided no proof that he is no longer medically stable. Claimant has failed to prove that he is entitled to additional temporary disability benefits.

34. **Permanent impairment**. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. The evaluation or rating of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living

postures, ambulation, elevation, traveling, and nonspecialized 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*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

35. Dr. Simon concluded that Claimant had sustained 23% PPI, and Defendants have paid benefits based on that rating. Claimant contends that he should be awarded additional PPI benefits based on Dr. Curtis's 39% rating.

36. Both Dr. Simon and Dr. Curtis relied on the Fifth Edition of the *Guides* in assessing permanent impairment, and both conducted physical examinations of Claimant. Dr. Simon rated Claimant's lumbar fracture at 23%, while Dr. Curtis rated it at 28%. They disagreed about the diagnostic category that Claimant belonged in. Dr. Simon believed that Claimant belonged in Category IV, which has an impairment range of 20-23%, while Dr. Curtis believed that Claimant belonged in Category V. The difference between the categories involves lower extremity impairment. Dr. Simon did not believe that Claimant exhibited significant lower extremity impairment, because such impairment was not objectively indicated by "atrophy or loss of reflexes or pain and sensory changes within an anatomic distribution." Dr. Curtis disagreed, testifying that Claimant displayed decreased sensation in his left lower extremity as opposed to his right. Dr. Curtis acknowledged that the tests he conducted were partly subjective, as he relied on Claimant to tell him how Claimant felt while the tests were being performed. Because Dr. Simon's opinion is based on objective observations, and not based in part on Claimant's subjective response, we find that Dr. Simon's PPI rating for the lumbar fracture is more persuasive.

37. In addition to the lumbar fracture rating, Dr. Curtis rated Claimant for headaches and cervical strain (5%), corticospinal tract impairment (8%), and pain (3%). There is little

evidence in the record to support a finding of impairment for a head or cervical injury. Though Claimant hit his head in the accident, the injury was minor, and Dr. Greenwald's notes do not indicate that Claimant suffered headaches or received treatment for headaches. Diagnostic tests taken on the day of Claimant's accident revealed that he had suffered no acute cervical injury, and Claimant does not appear to have subsequently received treatment for a cervical injury.

38. Likewise, there is little evidentiary support for corticospinal tract impairment. Dr. Curtis based this rating on his observation that Claimant appeared to have trouble walking and dressing himself. However, both Dr. Greenwald and Dr. Simon suspected that Claimant was displaying exaggerated pain behaviors when they examined him. Claimant even told Dr. Greenwald that he walked two to three miles every day, which Dr. Simon testified would be inconsistent with corticospinal tract impairment.

39. Finally, the evidence does not support finding a pain impairment rating. Dr. Simon testified that an impairment rating for pain is appropriate where pain is not factored into the existing impairment rating for a particular injury. Dr. Simon incorporated pain into his rating; thus, an additional rating for pain was not warranted. Dr. Curtis countered that a pain rating is appropriate where pain "seems to increase the burden of the individual's conditions slightly." This is logical; however, Dr. Curtis failed to adequately explain how Claimant's pain increased his burdens over and above his lumbar impairment. Dr. Curtis acknowledged that pain is difficult to rate.

40. Based on the substantial evidence in the record, we find that Claimant is entitled to 23% PPI. As Defendants have already paid benefits corresponding to this rating, Claimant is not entitled to any additional PPI.

41. **Permanent Disability**. 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. Idaho Code § 72-425. In determining the percentage of permanent disability, the Commission should take into account the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing injury, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors the Commission deems relevant. Idaho Code § 72-430(1). Claimant bears the burden of proving disability in excess of impairment. *McCabe v. JoAnn Stores, Inc.*, 145 Idaho 91, 175 P.3d 780 (2007). "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 non-medical factors, has reduced the claimant's capacity for gainful activity." *Graybill v. Swift & Co.*, 106 Idaho 293, 294, 766 P.2d 763, 764 (1988).

42. Diaz. On November 20, 2009, the Commission issued a decision in *Diaz v. Franklin Building Supply*, 2009 IIC 0652. In that case, the sole issue to be decided was the claimant's permanent disability in excess of impairment. The claimant was an undocumented worker. He argued that his employer had notice of his illegal status and continued his employment, thus ratifying his right to disability benefits. Furthermore, he argued that he was entitled to disability benefits pursuant to Idaho Code § 72-204(2), which provides that the workers' compensation statutes apply to persons whether lawfully or unlawfully employed. The defendants did not deny that the claimant was entitled to workers' compensation benefits.

However, the defendants argued that because the claimant's illegal status precluded him from the entire U.S. labor market, he had not lost labor market access due to his disability.

43. The Commission, in a 2-1 decision, agreed with the defendants. The Commission observed that, on occasion, it "encounters circumstances where a claimant suffers permanent impairment from an industrial accident, but the impairment does not cause any actual reduced earning capacity." In other words, the claimant's decreased ability or inability to find gainful activity is due, not to his impairment, but to another, more limiting factor. To illustrate the principle, the Commission cited cases in which physical conditions unrelated to industrial injuries excluded claimants from the same positions that the injury-related restrictions excluded them from; thus, the injury-related impairment was eclipsed by the equally limiting or more limiting non-injury condition. *See Casper v. Idaho Falls Care Center*, 2006 IIC 0683, and *Colby v. WalMart Stores*, 2007 IIC 0065.

44. The Commission then held that Mr. Diaz's illegal status *was a more limiting factor that entirely eclipsed his injury-related impairment*. It is important to note that this is the actual holding of *Diaz*. At no point in the decision did the Commission hold that Mr. Diaz was not entitled to permanent disability benefits simply because he was an undocumented worker. Rather, Mr. Diaz was not entitled to permanent disability benefits because another factor, which happened to be illegal working status, "overshadowed and essentially rendered moot" his impairment.

45. Mr. Diaz had requested that the Commission analyze his disability as if he had access to the U.S. labor market. This, the Commission refused to do, observing that it would not "presume … illegal access":

> The foundational assumption implicit in all of the Commission's permanent disability determinations is that future earning capacity is evaluated according to a claimant's ability to engage in lawful

> — rather than unlawful — gainful activity. Past Commission decisions do not discuss any claimant's earning capacity by means of shop-lifting, drug trafficking, identity theft, illicit gambling, internet fraud, poaching, Ponzi schemes, or similarly illegal but potentially gainful activities — all of which the Commission recognizes exist. The Commission does not evaluate permanent disability based on presumptions of future illegal conduct. To do otherwise would offend justice, condone illegal activity, and dramatically alter the meaning and evaluation of disability.

46. Thus, *Diaz* had a two-part holding. First, the claimant's illegal status eclipsed his impairment; thus, the claimant had sustained no disability in excess of impairment. Second, when conducting a disability analysis, the Commission would not take into account the potential for illegal conduct.

47. Commissioner Baskin dissented, arguing that there is a difference between lack of *legal* access to the labor market and lack of *actual* access. While Commissioner Baskin agreed that the Commission is not required to consider illegal gainful activity in a disability analysis, he posited that he would "distinguish the hiring of illegal aliens for otherwise lawful work, from the other illegal activities discussed in the majority opinion. These 'employments' are illegal due to the nature of the activity involved." He proposed that a claimant's status as an undocumented worker be treated as a relevant non-medical factor in the disability analysis, acknowledging that illegal status certainly limited some of a worker's access to the labor market, but not all of it. According to the dissent, an undocumented claimant's labor market consists of those jobs that he is capable of performing, and "which he might … obtain from employers who either do not care about [his] immigration status or who can be fooled" by false documentation. "The difference in size of [a claimant's] pre-injury labor market, as compared to his post-injury labor market, equals his loss of labor market access reasonably attributable to the work injury." Thus, the entire Commission agrees that a claimant's illegal status is a relevant factor in analyzing disability. The

disagreement concerns whether this factor is a non-medical factor acting *in conjunction* with the impairment to increase disability, or whether this factor is so extensive as to render any impairment moot.

48. The present case. Claimant contends that he is totally and permanently disabled pursuant to the odd-lot doctrine. In the absence of a finding of total and permanent disability, Claimant states that he is still entitled to PPD benefits. He specifically notes that, under Idaho Code § 72-204, he is subject to the workers' compensation statutes, regardless of whether he is lawfully employed. Claimant argues that illegal status should be treated as a relevant non-medical factor in a disability analysis, as advocated by the dissent in *Diaz*. He also argues that his case is distinguishable from *Diaz*, because he was more seriously injured than Mr. Diaz, because Employer knew it was hiring illegal workers and "did nothing about it,"[2] because Claimant, unlike Mr. Diaz, "vigorously sought work after he lost his job," and because both Mr. Crum and Dr. Barros-Bailey considered Claimant's immigration status in forming their opinions. Further, Claimant argues that precluding undocumented workers from receiving disability benefits is "patently unfair" and against the policy of the workers' compensation law. Finally, Claimant argues that the *Diaz* holding "upsets the balance in the workers' compensation system," in that it favors employers and sureties over claimants, and he asserts that the holding violates his constitutional right to equal protection.[3] Defendants respond that the *Diaz* holding applies to Claimant, and, as such, Claimant is not entitled to any permanent disability.

[2] This argument was also made by the claimant in *Diaz*.

[3] The equal protection argument is mentioned in the conclusion of Claimant's Opening Post-Hearing Brief and again in Claimant's Reply Brief. Constitutional analysis is outside the Commission's purview, and we will not engage in it here. However, we note that every disability analysis requires consideration of a claimant's personal circumstances, and such circumstances can have a profound effect on the impact of a claimant's impairment. See, again, the *Casper* and *Colby* decisions, in which the personal circumstances of the claimants rendered their accident-related impairment moot. Here, Claimant is not being treated differently because of his illegal status. Rather, his illegal status is a relevant factor in evaluating disability, which Claimant himself acknowledges.

49. Under the precedent set in *Diaz*, it is irrelevant whether Employer knew about Claimant's illegal status. What matters is whether a personal factor, in this case, Claimant's illegal status, so limits Claimant's ability to engage in gainful activity that Claimant's accident-related impairment is essentially rendered moot. We find that such a factor exists. Before the accident, Claimant had no access to the labor market. The same is true after the accident. In effect, the accident, while it did affect Claimant's physical capacities, has not affected his ability to engage in gainful activity in his relevant labor market.[4] He did not possess that ability in the first place. Thus, Claimant is not entitled to benefits for permanent disability, whether total or less than total.

50. Claimant agrees with the *Diaz* dissent that there is a difference between legal access to the labor market and actual access. We find this distinction unpersuasive. Drug trafficking and theft are actual, if not lawful, gainful activities; Claimant does not argue that we should consider these. Claimant also argues that the Commission should adopt the *Diaz* dissent's distinction between illegally working in jobs that are otherwise legal, and performing activities, such as drug trafficking, that are by their nature illegal. Again, we find this distinction unpersuasive. Illegally working in the United States is also, by its nature, illegal, regardless of whether Claimant's job *duties* are permitted under the law.

51. Even if we agreed that we should conduct the analysis that Claimant advocates — i.e., consider Claimant's "actual" access to the labor market, and how that has been reduced by his impairment — we could not do so with the evidence that has been presented. The approach might be reasonable in theory, but it is impracticable in fact. Claimant has offered no evidence that would allow us to determine the size of Claimant's pre- and post-accident labor markets; it is therefore impossible to calculate the difference between the two. Claimant has failed to cite any

[4] Claimant does not dispute that the Idaho Falls area constitutes his relevant labor market.

credible statistics establishing that, for example, 20% of jobs in the Idaho Falls area are available to undocumented workers; that, pre-accident, Claimant was able to access 75% of these jobs, and that, post-accident, Claimant could access 5% or fewer of these jobs. According to Dr. Barros-Bailey, such evidence does not exist, because no entity records statistics on the subject. It is certainly true that undocumented workers, including Claimant, have obtained work in the United States. This is common knowledge. However, it is not enough to rely on common knowledge to prove permanent disability. Claimant must quantify the extent of the reduction in his ability to engage in gainful activity. To do so, he must present credible evidence on the matter. He has not done so.[5]

52. Aside from the lack of evidence, the approach proposed by Claimant is unpalatable to the Commission on policy grounds. If this approach were adopted, it is conceivable that undocumented workers would qualify for more benefits than legal workers with similar skill sets and injuries. Consider, for example, two employees, one legal, one illegal, who possess similar skill sets, and who suffered the exact same impairment and injury. Because the legal employee's status would give him greater access to the labor market, both pre- and post-injury, his permanent disability might very well be less than that of his undocumented counterpart, who, lacking legal status, was able to access only a small portion of the market to begin with, and whose impairment has shut him out from most of the jobs previously available to him. A claimant should not be entitled to a disproportionate share of benefits because he has engaged in illegal conduct. Such a finding would be unfair to all the employees who work legally

[5] Mr. Crum's disability evaluation is not persuasive on this matter, because it is conclusory. Mr. Crum stated that Claimant had a "small but real" labor market in Idaho, but he did not offer statistics or even a research-based estimate on the actual size of the market for undocumented workers. Nor did he offer a research-based estimate as to the percentage of this market that Claimant could access pre-accident. Thus, we cannot accept his opinion on the reduction in the size of Claimant's labor market access due to his injury, because we do not know what the actual access was either pre- or post-accident.

in this state.

53. **Attorney fees**. Claimant argues that he is entitled to attorney fees pursuant to Idaho Code § 72-804, because Defendants have unreasonably denied additional medical care and temporary disability benefits. However, as stated above, Claimant has failed to prove that he is entitled to additional benefits. Therefore, there has been no unreasonable denial. Claimant is not entitled to attorney fees.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has failed to prove that he is entitled to additional medical care.

2. Claimant has failed to prove that he is entitled to additional temporary disability benefits.

3. Claimant is entitled to PPI rated at 23% of the whole person.

4. Claimant has failed to prove that he suffered disability in excess of impairment.

5. Claimant has failed to prove that he is entitled to attorney fees.

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

DATED this _12th_____ day of August, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

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

ATTEST:

_/s/_____
Assistant Commission Secretary

Dissenting Opinion of Commissioner Thomas P. Baskin

I respectfully disagree with the Commission's treatment of this difficult issue:

More pointedly than the facts before the Commission in *Diaz v. Franklin Building Supply*, 2009 IIC 0652 (2009), this case presents the Commission with the question of whether or not Claimant's status as an undocumented worker altogether forecloses consideration of the extent and degree to which Claimant has suffered disability as the result of his compensable accident. *Diaz* establishes that pursuant to I.C. § 72-204, an undocumented worker who is unlawfully employed in the State of Idaho is nevertheless entitled to certain benefits under the workers' compensation laws of this state. (*See, Diaz v. Franklin Building Supply*, *supra*, copy attached as Appendix A, hereto). I parted ways with the majority, however, when it came to the treatment of Claimant's status as an undocumented worker in connection with the issue of disability over and above impairment. Adopting the recommendation of Referee Taylor, the *Diaz* majority held that since Claimant had no legal labor market in the United States, it followed that he could not have suffered any disability as a consequence of the work accident. In this regard, the Commission reasoned as follows:

> 22. The foundational assumption implicit in all of the Commission's permanent disability determinations is that future earning capacity is evaluated according to a claimant's ability to engage in lawful—rather than unlawful—gainful activity. Past Commission decisions do not discuss any claimant's earning capacity by means of shop-lifting, drug trafficking, identity theft, illicit gambling, internet fraud, poaching, Ponzi schemes, or similarly illegal but potentially gainful activities—all of which the Commission recognizes exist. The Commission does not evaluate permanent disability based upon presumptions of

> future illegal conduct. To do otherwise would offend justice, condone illegal activity, and dramatically alter the meaning and evaluation of disability.
>
> 23. Claimant argues that Defendants are rewarded for hiring undocumented workers and effectively obtain a windfall if permanent disability is denied. However, allowing permanent disability in these circumstances effectively rewards Claimant's illegal conduct based upon the presumption of his continued illegal conduct and perhaps the illegal conduct of future employers.
>
> *Diaz* majority opinion, ¶¶ 22 and 23.

I argued that since our law is clearly intended to extend the protections of workers' compensation to those who are unlawfully employed, and since common knowledge informs us of the existence of a labor market of some size for undocumented workers, we must treat Claimant's status as an undocumented worker as one of the non-medical factors we are obligated to consider under the provisions of I.C. § 72-425 and I.C. § 72-430 in arriving at our synthesis of Claimant's disability in excess of impairment. Doing otherwise imperils our obligation to fairly administer the workers' compensation laws. Moreover, to allow employers to avoid responsibility for the payment of disability benefits to the class of undocumented workers admits the opportunity for a good deal of mischief that our system is better off without. I was unpersuaded that because we do not typically consider the professions of dope peddling or prostitution to be components of a worker's labor market, this means that we must ignore the fact that a sizable labor market exists in this state for undocumented workers.

In this case, the majority has expanded its explanation of the holding in *Diaz*, but ultimately ends up in the same spot:

> What matters is whether a personal factor, in this case, Claimant's illegal status, so limits Claimant's ability to engage in gainful activity that Claimant's accident-related impairment is essentially rendered moot. We find that such a factor exists. Before the accident, Claimant had no access to the labor market. The same is true after the accident. In effect, the accident, while it did affect Claimant's physical capacities, has not affected his ability to engage in gainful activity in his relevant

> labor market. (footnote omitted). He did not possess that ability in the first place. Thus, Claimant is not entitled to benefits for permanent disability, whether total or less than total.
>
> *Otero*, pp. 18-19.

This is the same reasoning employed in *Diaz*, and I would answer with the same criticism. The majority's decision depends on the fiction that Claimant had no Idaho labor market on a pre-injury basis, and therefore, the effect of his impairment and limitations are meaningless. Without a pre-injury labor market (the argument goes), it matters little whether the accident has minimally or profoundly impacted Claimant's physical ability to work. If Claimant had no access to a national labor market on a pre-injury basis, then the work accident cannot have diminished his access to the labor market.

However, as I argued in *Diaz*, and as we all know full well, an actual labor market does exist for Claimant, and others like him, notwithstanding that such employments are unlawful. Undocumented workers are employed, knowingly or not, by Idaho employers. Insurance premiums are paid by employers and collected by sureties who insure the employers' workers compensation risk. Undocumented workers suffer injuries arising out of and in the course of their employment, as do the legally employed. It seems strange to me that an undocumented worker can be denied access to the same benefits as those legally employed, based on the fantastic assertion that an undocumented worker cannot suffer disability because he has no labor market in Idaho.

Turning to the facts of the instant matter, I would evaluate Claimant's disability as follows:

At the time of the accident giving rise to this claim, Claimant was a 33 year old Mexican national possessing no English language skills. He completed the equivalent of seventh or eighth

grade in Mexico, and worked there in manual labor jobs until unlawfully entering the United States in 2002. Using false documentation, Claimant obtained employment at Action Landscaping, where he worked as a laborer between 2002 and 2003. There, his starting salary was $6.50 per hour, and his ending salary was $7.50 per hour. Thereafter, Claimant went to work for Express Services, a temporary services provider. While so employed, he appears to have been assigned to a potato packaging plant. His starting wage was $6.50, and his ending wage was $8.50 per hour. In 2005, Claimant commenced his employment with Briggs Roofing. There he was employed as a laborer, with a starting wage was $8 per hour, and an ending wage of $10 per hour. Following the May 14, 2007, industrial accident, Claimant returned to work for Employer in a light duty capacity in August 2007. He appears to have been pronounced medically stable from his injuries on or about January 4, 2008 and returned to full-duty work with Employer. Claimant worked for Employer from August 2007 until his termination on or about July 9, 2008. At the time of his termination, he was being paid his time-of-injury wage of $10 per hour.

Records of the Industrial Commission Rehabilitation Division (I.C.R.D.) reflect that Claimant provided the following information concerning his annual income between 2002 and 2006, inclusive: 2002 - $10,074; 2003 - $9,992; 2004 - $8,681; 2005 - $17,857; 2006 - $18,354.

Thus, in the last full year of employment prior to the industrial injury, Claimant earned his highest annual wage of $18,354. Assuming a 2080 hour work year, Claimant's annualized hourly wage for 2006 was $8.82 per hour. Possibly, the discrepancy between Claimant's time-of-injury wage of $10 per hour, and the average annualized wage set forth above may be explained by the fact that roofing is, in some respects, a seasonal occupation.

From the information contained in the I.C.R.D. records, it is clear from Claimant's work history, his educational background, and his lack of English language skills, that he has no

significant transferable job skills, and can probably compete for only the meanest type of unskilled employment. Indeed, this is the conclusion reached by both vocational rehabilitation specialists retained to render forensic opinions in this matter.

Mary Barros-Bailey, who evaluated Claimant's disability at the behest of Employer, ultimately opined that given the limitations/restrictions imposed by Dr. Simon, Claimant had suffered disability inclusive of impairment in the range of 59% of the whole person.[6]

Douglas Crum, the vocational expert retained by Claimant, testified that given Dr. Simon's opinion, Claimant had most likely suffered disability inclusive of impairment in the range of 50% of the whole person. As between these two experts, only the opinion rendered by Mr. Crum warrants further consideration. Inexplicably, Ms. Barros-Bailey evaluated Claimant's disability without consideration of the impact of Claimant's status as an undocumented worker. Her failure to consider this important non-medical factor renders her opinion unpersuasive.

Mr. Crum, on the other hand, did make some effort to include the impact of Claimant's status as an undocumented worker on his ability to engage in gainful activity. His approach to assessing disability involves first attempting to quantify the nature and extent of Claimant's wage loss, and then evaluating Claimant's loss of access to his local labor market.

Mr. Crum recognized that Claimant's time-of-injury wage was $10 per hour. He concluded that following his date of medical stability, Claimant could reasonably expect to earn no more than about $8 per hour in the limited number of jobs for which he could still compete. Therefore, per Mr. Crum, Claimant's wage loss following the industrial accident is in the range of 20%. Having reviewed Mr. Crum's deposition testimony, I believe that he has overstated the

[6] I agree with the majority that the opinions on impairment and limitations arrived at by Dr. Simon most accurately describe Claimant's residual functional abilities.

extent of Claimant's wage loss. First, and perhaps most noteworthy, is the fact that Claimant was actually successfully employed by his time-of-injury Employer, at his time-of-injury wage, for over six months following his date of medical stability. I agree with the Referee that there is no evidence that Claimant's termination was the result of his physical inability to perform the demands of his time-of-injury job. Therefore, Claimant has a demonstrated ability to earn $10 per hour on a post-injury basis.

The second criticism that could be leveled against Mr. Crum's wage loss analysis is that he relies on a snapshot of Claimant's $10 per hour time-of-injury wage to establish Claimant's pre-injury wage, when a more realistic assessment of Claimant's pre-injury wage would seem to demand consideration of longer history of earnings. This history is well documented in the I.C.R.D. records. Because roofing and landscaping work are somewhat seasonal in nature, I believe that consideration of Claimant's annual income provides a more accurate picture of his pre-injury wages. Giving Claimant the benefit of the doubt, and considering only his last full year of employment prior to the 2007 industrial accident, yields an annualized hourly wage of $8.82 per hour. A pre-injury wage of $8.82 per hour, yields only a 9% wage reduction, if one accepts Mr. Crum's opinion that following the industrial injury, the best hourly wage Claimant can hope for is in the range of $8 per hour.

For the reasons set forth above, I am not persuaded that the evidence establishes that Claimant suffered any measureable wage loss as a consequence of the subject accident.

As Mr. Crum has noted, consideration of Claimant's wage loss is but one of the various measures he used to evaluate the loss of earning capacity. Another factor that is frequently considered in conjunction with wage loss is loss of access to the labor market. Though he, like Ms. Barros-Bailey, was hampered by a lack of information concerning the size of the Idaho labor

market for undocumented workers, he reasoned that Claimant's labor market consisted of unskilled manual labor jobs from employers who did not care, or who could be fooled, about Claimant's status as an undocumented worker. The majority argues that because the number of jobs in Claimant's pre-injury labor market is not known, the evidence before the Commission is insufficient to allow the Commission to draw any conclusions concerning the extent and degree of Claimant's loss of access to the labor market. I disagree. Even though the number of jobs comprising Claimant's pre-injury labor market is unknown, and perhaps unknowable, Mr. Crum did convincingly testify to the type of work that comprised that labor market. Moreover, he convincingly testified that because of his limitations/restrictions, Claimant can now only perform a certain percentage of the jobs comprising his pre-injury labor market. Therefore, although it may be impossible to know the number of jobs in Claimant's pre-injury labor market, it is entirely possible to make some judgment, as Mr. Crum did, on the question of how the work injury has impacted Claimant's ability to perform that class of jobs which comprised his pre-injury labor market.

The permanent limitations/restrictions imposed by Dr. Simon have a significant impact on Claimant's ability to compete for employment in his pre-injury labor market. Because the majority of those jobs require the ability to perform physical labor in excess of his permanent limitations/restrictions, Mr. Crum proposed that Claimant has lost access to approximately 75% of his pre-injury labor market. Following his date of medical stability, Claimant's labor market consists of those employers who don't care, or who can be fooled about Claimant's immigration status, and who can provide him with unskilled work which does not exceed the limitations imposed by Dr. Simon.

Because of the peculiar nature of Claimant's pre-injury labor market, which includes consideration of his status as an undocumented laborer, the permanent nature of Claimant's injuries has had a devastating impact, an impact which would probably not be as severe to a similarly situated individual who happened to legally reside in the United States.

To illustrate, suppose that at the time of injury giving rise to this claim, Claimant's immigration status was such that he could legally work in the United States. His pre-injury labor market would still largely consist of unskilled manual labor jobs, but without the constraint of undocumented immigration status Claimant would also have had access to some lighter duty jobs which could only be accessed by legal workers. Also, the impact of Claimant's limitations could be ameliorated, and his post-accident labor market enlarged, by minimal retraining or other vocational assistance, assistance that is unavailable to him as an undocumented laborer.

In summary, it seems likely that Claimant's status as an undocumented worker is a factor which results in a higher percentage loss of access to his pre-injury labor market than would be the case for a similarly situated legal worker. It is hard to escape the conclusion that one of the consequences of treating immigration status the way I have is there may be cases in which undocumented workers may be adjudged as having suffered greater loss of access to the labor market, and hence greater disability, than similarly situated individuals who are legally employed in the State. It is not the province of the Industrial Commission to make the policy judgment on whether this outcome is desirable. However, I do believe that this outcome is the result of the correct application of the law governing awards for disability, and is attentive to the true facts of this case.

The formulaic approach taken by Mr. Crum, is but one of several methods that could be employed to measure loss of earning capacity. However, I believe his approach comes closest to

accurately measuring Claimant's disability under the peculiar facts of this case. As modified with what I think is a more accurate assessment of wage loss, I believe that Claimant's disability is more accurately stated to be in the range of 35% of the whole person (75% + 0% = 75%÷2).

For the reasons stated above, I believe that Idaho law requires inclusion of Claimant's immigration status among the non-medical factors to be considered by the Industrial Commission when evaluating disability. I do not believe that current law supports foreclosure of a claim for disability by an injured worker whose employment in the State of Idaho is unlawful.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __12th____ day of August, 2011, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

PAUL T CURTIS
598 N CAPITAL AVE
IDAHO FALLS ID 83402

KIMBERLY A DOYLE
PO BOX 6358
BOISE ID 83707-6358

eb _/s/_____