BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HEATHER SCHELL, Claimant, v. PAYLESS SHOE STORE, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2009-026363** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed November 8, 2013**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls on June 14, 2012. Claimant was present and represented by Michael R. McBride of Idaho Falls. Alan K. Hull of Boise represented Employer/Surety. Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. The parties submitted post-hearing briefs. This matter came under advisement on July 29, 2013 and is now ready for decision.

ISSUES

By agreement of the parties, the issues to be decided as the result of the hearing are:

1. The extent, if any, of the injuries Claimant received that arose out of and in the course of her employment with Employer;[1]

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

a. Medical;

b. Total Temporary Disability (TTD);

c. Permanent Partial Impairment (PPI);

d. Permanent Partial Disability (PPD); and

3. Attorney fees for Surety's unreasonable denial of a recommended physical therapy program.

CONTENTIONS OF THE PARTIES

Claimant contends that as manager of Employer's shoe store, she was required to lift up to 50 pounds frequently as well as bend, kneel, crawl, and climb ladders. On September 19, 2009, while reaching, Claimant felt a pop in her low back causing numbness and tingling down her right leg. Defendants accepted the claim. Although Claimant underwent an unrelated lumbar surgery in 2004, she had fully recovered by the time of her 2009 injury. She was diagnosed with a strain/sprain-type injury, as her treaters could not identify any disc pathology on MRI. Claimant was eventually released to restricted work.

Not satisfied, Claimant went to an orthopedic surgeon recommended by her counsel who identified a herniated disc at L4-L5 by CT myelogram. The surgeon found that the disc was not surgically treatable and released her to return to work with restrictions after about three months of no work. Claimant seeks TTD benefits for this period, as well as

[1] This issue will not be discussed separately, but will be discussed in connection with Claimant's request for further medical benefits.

reimbursement for the treatment she received on her own. She also seeks attorney fees for Surety's unreasonable denial of certain benefits.

Claimant was "let go" by Employer and had difficulty finding other work. She finally found a job as a salesperson at a printing firm. Claimant makes less money and is entitled to disability above impairment.

Defendants contend that after achieving MMI, Claimant was rated at 2% whole person impairment and returned to full-duty work. Claimant's counsel then sent Claimant to orthopedic surgeon Dr. Blair, who in turn sent her for electrical testing. Neither Dr. Blair, nor any physician to whom he referred Claimant, could locate the source of her complaints. As this was not reasonable and necessary treatment, Defendants should not have to pay for it.

Claimant is not entitled to attorney fees, as Surety did nothing unreasonable in handling this claim.

Claimant is now in a good paying job that she likes, so any permanent partial disability Claimant may have incurred is *de minimus*.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.

2. Joint Exhibits 1- 19, 22-28, and 30-32 admitted at the hearing.

3. Joint Exhibit 33 was admitted by stipulation post-hearing.

4. The post-hearing deposition of Gary Walker, M.D., taken by Defendants on February 21, 2013.

5. The post-hearing deposition of Robert Friedman, M.D., taken by Defendants on March 22, 2013.

6. The post-hearing deposition of William Jordan taken by Defendants on April 5, 2013.

All objections made during the taking of the above-mentioned post-hearing depositions are overruled with the exception of Defendants' continuing objection beginning at page 63, and their objection at page 88 of Mr. Jordan's deposition, which are sustained.

After having considered all the above evidence and 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. Claimant was 39 years of age and resided in Blackfoot at the time of the hearing. Since March 21, 2011, Claimant has been employed at Valley Office Systems in Idaho Falls where she is an inside sales customer services representative selling printers, copiers and accessories. Claimant is paid $8.00 an hour for a 40-hour week and gets a percentage of commission on certain sales. She also receives dental and health insurance and can accrue sick and vacation time. Claimant is content with her current employment situation, although she did apply without success for the position of store manager at a Payless store.

2. Claimant graduated from Firth High School in 1991. She then received an Associates Degree in communicative disorders from Ricks College (now BYU-Idaho) in 1992. Claimant is 36 hours shy of obtaining a bachelor's in human services/social work.

She has over a 3.6 GPA and would like to complete her education by returning to school part-time and continuing to work either part or full-time.

3. Claimant's work experience consists mainly of retail sales with certain odd jobs mixed in while she pursued her schooling. Claimant's non-industrial low back surgery in 2004 prevented her from continuing in school due to difficulty with sitting. She wanted a career in retail, so began working full-time for Payless in 2007. Employer provided health, dental, and vision insurance as well as sick leave and vacation time. She was also eligible for a 401(k) plan matched by a 5% Employer contribution.

4. Claimant went from a manager trainee to store manager within four months after she was hired. She went from an hourly to a straight-salaried employee earning about $32,000 a year (plus the above-referenced benefits) at the time of her 2009 industrial injury. Her goal with Employer was to become a district manager.

5. Claimant's duties as a store manger included customer service, cashiering, stacking shelves with shoe boxes, and otherwise processing inventory. Claimant lifted up to 40 pounds regularly and sometimes more than that. She was also required to climb ladders to stock shoe boxes on top shelves. Claimant also had to get on her hands and knees on occasion to clean under the shelving racks, clean the bathrooms, etc.

6. On September 19, 2009, Claimant felt a pop in her mid-back as she was putting freight on a top shelf from atop a ladder. On her lunch break, Claimant noticed she was getting charley horses in her legs. She informed Employer that she had injured herself and would not be back after her lunch break. Surety accepted her claim.

Medical care

7. **Mark Weight, M.D**., a spine surgeon, saw Claimant on September 22, 2009 complaining of back pain with pain extending down the lower right extremity to the bottom of her right foot with numbness and tingling. Thoracic (normal) and lumbar x-rays were taken. The lumbar x-rays revealed a probable old chip fracture at L4 and degenerative disc disease at L5-S1. There was no abnormal spondylolisthesis.

8. Dr. Weight diagnosed: 1) Right lower extremity lumbosacral radiculopathy; 2) Lumbar spondylosis; 3) Lumbalgia; and 4) Degenerative disc disease. Dr. Weight prescribed pain, anti-inflammatory, and muscle relaxant medications and ordered a lumbar MRI.

9. The lumbar MRI revealed "…a small broad-based central to left paracentral protrusion, new from previously" at L4-L5. Exhibit 3, p. 11. The radiologist concluded: 1) Mild discogenic disease at L4-5 with a small central disc protrusion, resulting in minimal canal encroachment. 2) Discogenic disease at L5-S1 with slight disc bulging posteriorly without significant central canal stenosis. There is mild left neuroforaminal narrowing. *Id*., p. 12.

10. Claimant and Dr. Weight reviewed the results of the MRI on September 24, 2009. Dr. Weight noted that Claimant was still complaining of significant back and leg pain. She was even having difficulty performing light-duty work. Dr. Weight took Claimant off work and continued her restrictions[2] and medications. He was to set up an epidural injection[3] and Claimant was to return in two weeks.

[2] This notation is probably an error since Dr. Weight took her off work completely in the preceding sentence.

[3] The ESI was accomplished on October 2, 2009.

11. Claimant reported no relief from the ESI. In an October 8, 2009 follow-up Dr. Weight prescribed physical therapy, which Claimant commenced on October 14, 2009 and stopped on May 3, 2010. She saw no improvement with physical therapy.

12. In a November 3, 2009 office note, Dr. Weight mentioned that Claimant was in a car accident a week before that ". . . seemed to flare up her symptoms a bit." *Id*., p. 18. Dr. Weight expressed some concern regarding Claimant's lack of improvement with physical therapy and indicated that if her symptoms persisted, he would order another MRI. Even though doubtful of its efficacy, he nonetheless continued Claimant's physical therapy.

13. The above-mentioned MRI was accomplished on November 10, 2009. It showed:

> 1. Small central disc protrusion and/or extrusion at L4-5, new as compared with prior study of 2004.
>
> 2. While there are some postoperative changes at L5-S1, there is a broad-based central and left paramedian disc protrusion or extrusion, which extends into the left foramen, although it does not appear on this supine examination to be impinging upon the exiting left L5 nerve root.
>
> 3. There is some mild postoperative enhancement/fibrosis at the L5-S1 level. There are no significant right-sided abnormalities identified.

Id., p. 24.

14. On November 12, 2009, Dr. Weight noted that Claimant was making slight progress in physical therapy, but was becoming frustrated with her continuing pain and symptoms. Dr. Weight referred Claimant to Stephen Vincent, M.D., a neurologist, for nerve conduction and EMG studies.

15. Claimant saw Dr. Vincent on November 25, 2009. In a letter of that date to Dr. Weight, Dr. Vincent indicated that rather than do electrical studies, he instead would

order a T-spine MRI. He intended to do other studies to try to determine the cause of Claimant's tremors that he observed on examination, but these tests would not be work-related, according to Dr. Vincent.

16. Claimant returned to Dr. Weight after her visit with Dr. Vincent on November 25, 2009. Dr. Weight's office note for that date summarizes his thoughts on Claimant's situation this way:

> With regards to her lower extremity symptoms, I discussed with her that I do not see any findings on imaging studies, MRI scans, plain films, or laboratory work that would explain her symptoms. She does have some improvement with physical therapy. I discussed with her that she may continue with this. I would recommend for her an IME and a second opinion. I do not have any explanation for her etiology or explanation medically, physiologically, or anatomically for her symptoms of right lower extremity or lumbar spine [sic-pain].

Exhibit 3, p. 27.

17. An MRI conducted on December 1, 2009 revealed:

> 1. Tiny central disc protrusion at T9-10.
>
> 2. Moderate left paracentral disc protrusion at T10-11 that effaces the thecal sac and mildly compresses the ventral surface of the cord. No severe stenosis at any thoracic level.

Exhibit 4, p. 10.

Dr. Vincent indicated that Claimant had spine pain with no significant abnormalities on the MRIs that would require surgical intervention. He recommended continued conservative treatment.

18. **Gary Walker, M.D.,** a physiatrist, conducted an IME of Claimant at Surety's request on January 12, 2010. Dr. Walker reviewed Claimant's medical records including the two MRIs and examined and interviewed her. Dr. Walker saw no changes between the September 23, 2009 MRI and the November 10, 2009 MRI. The December 1,

2009 T-spine MRI revealed a left paracentral disc protrusion that was not impacting the spinal cord. Dr. Walker noted that Claimant walked with a prominent antalgic gait on the right.

19. Dr. Walker concluded that Claimant suffered a thoracolumbar strain in her September 2009 industrial accident. Her MRI does not show any right-sided lesion in her lumbar spine that would cause her symptoms. Claimant's small central disc protrusion at L4-L5 and the left foraminal protrusion at L5-S1, as well as the T10-T11 disc protrusion do not compress any nerve roots on the right.

20. Dr. Walker opined that the treatment Claimant had received was work-related. Dr. Walker gave additional physical therapy treatment instructions, while also finding that Claimant could return to medium-duty work:

> It is my opinion that her current need for treatment is likely related to her work injury rather than to any pre-existing degeneration. However, at this point she has gone through extensive physical therapy and I do not see that it has made substantial gains.
>
> At this time I think she has had more than adequate regular physical therapy with very minimal gains. There is nothing at all to suggest anything surgical. The only treatment consideration at this time would be actually to put her onto more of a work hardening or more aggressive strengthening program. I would recommend discontinuing all modalities, increase her lifting over the next two weeks and then release her.
>
> I anticipate her being at maximum medical improvement in two weeks following this aggressive increased exercise program in therapy.
>
> There is nothing at all objective on examination or on her imaging that would preclude her from doing any kind of work. I certainly would release her to full work with perhaps the limitation of 50 lbs. lifting while she finished physical therapy. However, she is certainly capable of going back to medium duty work at this time.

Exhibit. 5, p. 6.

21. At deposition, Dr. Walker explained that he anticipated Claimant returning to medium-duty work as of January 12, 2010, but that Claimant needed a two-week aggressive strengthening-type program. Dr. Walker Deposition, pp. 31-32. Dr. Walker was unaware whether Claimant actually received aggressive physical therapy or work hardening after the January 12, 2010 appointment.

22. On February 24, 2010, Surety asked Dr. Weight whether he concurred with Dr. Walker's report, including the treatment recommendations to progress Claimant to maximum medical improvement. Exhibit 3, p. 28. Dr. Weight wrote that he agreed with Dr. Walker's report and treatment recommendations.

23. On March 24, 2010, Surety asked Dr. Walker to give an impairment rating. Dr. Walker asked if Claimant had received the aggressive physical therapy; Surety did not respond. Even so, Dr. Walker issued an impairment rating. On March 24, 2010, Surety prepared and sent a Notice of Claim Status to Claimant indicating that her benefits would terminate effective February 18, 2010 based on Dr. Walker's IME report:

> Per the Independent Medical Examination report completed by Dr. Walker on 1/12/10 you were deemed at Maximum Medical Improvement after two weeks of physical therapy. In accordance with Dr. Walker's report physical therapy visits through 1/29/10 were authorized and paid by workers' compensation. Your treating physician, Dr. Weight, concurred with the treatment recommendations of this report declaring you at Maximum Medical Improvement by 1/25/10. Due to this report not being submitted and received until 2/17/10, temporary total disability benefits continued in good faith.

Exhibit 23, p. 1.

Treatment after releases from Drs. Weight and Walker

24. The record reflects that Claimant received several treatments at Madison Memorial Hospital from February 1, 2010 through February 26, 2010. Exhibit P, p. 25.

Claimant also received treatment from March 1, 2010 through April 16, 2010, marked as "physical therapy general." Exhibit O, p. 24.

25. **Benjamin Blair, M.D.**, an orthopedic surgeon practicing in Pocatello, saw Claimant at her counsel's request on March 19, 2010, at her own expense. Claimant was complaining of low back as well as right lower extremity radicular pain and weakness. Dr. Blair noted that Claimant had a successful discectomy without residuals in 2004. She was also complaining of thoracic pain, but her back and leg pain was worse. Claimant informed Dr. Blair that she began experiencing left lower extremity numbness, particularly when travelling. She had also developed a foot drop on the right.

26. Dr. Blair reviewed some x-rays and Claimant's two MRIs and concluded, "At this time, I am unsure of the exact etiology of this patient's symptoms. Certainly, her back is most likely secondary to a lumbar strain and we discussed this. I am unable to attribute her weakness in the lower extremity to her lumbar spine at this time." Exhibit 6, p. 9. Dr. Blair considered EMG studies and perhaps a brain MRI to see if a central nervous system process may be at play in causing Claimant's symptoms.

27. The EMG studies were performed on April 13, 2010 and revealed findings questionable for decreased recruitment pattern but was otherwise unremarkable. The brain MRI was accomplished on April 20, 2010 and was normal. Claimant returned to Dr. Blair to discuss the findings of the above testing on May 5, 2010. He was still unsure of the cause of Claimant's symptoms. Dr. Blair noted that Claimant has had intensive work-up and has no significant neurologic impingement. "The only thing I could offer would be a myelogram, post-myelogram CT scan to delineate the fact that there is a dynamic component to her symptoms." *Id.*, p. 14.

28. The myelogram and post-myelogram CT was performed on May 11, 2010 and other than revealing a small central disc herniation at L4-5, the study was unremarkable. On May 19, 2010, Claimant followed-up with Dr. Blair to discuss the above. "I could certainly attribute her back pain and leg pain to these symptoms; however, I am hard pressed to state her weakness is due to these symptoms." *Id*., p. 20. Dr. Blair discussed further evaluation by a neurologist and perhaps an epidural steroid injection. Claimant was to consider these options and return on a prn basis.

29. **Craig Lords, D.C.**, consulted with Claimant on June 10, 2010 at her attorney's suggestion. Dr. Lords reviewed Claimant's prior medical records including diagnostic MRI reports and examined her. Claimant was complaining of moderate to severe mid/low back pain made worse by lifting, bending, sitting, and standing that was present 95 % of the time. She experiences a right foot toe drag and numbness/tingling and occasional shooting pains down her right leg. About 30% of the time she has numbness/tingling in her left leg. Claimant also complains of right hand pain and tremors.

30. Dr. Lords diagnosed Claimant with multi-level disc herniations which he believed was causing the majority of her pain. Dr. Lords had no explanation for Claimant's foot drop, although he does not doubt that the condition exists. Dr. Lords released Claimant to medium work with limited standing and sitting and no heavy lifting or climbing.

31. Claimant consulted with **Elizabeth Gerard, M.D**., a neurologist, on August 17, 2010 in an attempt to determine the cause of her lower extremity weakness. Dr. Gerard noted that over the last few months, Claimant began experiencing left leg numbness as well as tingling in both hands. Dr. Gerard found her work-up to be "unrevealing." Exhibit 10,

p. 2. Dr. Gerard recommended a repeat EMG study to evaluate for denervation in Claimant's right leg. "If this is unremarkable, further imaging of the cervical spine is indicated to rule out central pathology."

32. On September 10, 2010, Dr. Gerard wrote a letter to Dr. Blair returning Claimant's care to him:

> We have done a thorough workup, including MRIs of the brain and cervical spine as well as bilateral lower extremity EMG nerve conduction studies. I find no abnormalities to explain her symptoms. Her EMG study is not remarkable for radiculopathy. I cannot find any other reason other than lumbosacral pathology to explain her symptoms. I have asked that she return to you for followup.

Exhibit 10, p. 7.

33. Claimant returned to Dr. Blair on October 7, 2010. Dr. Blair noted that Dr. Gerard was unable to identify any central abnormalities of her symptomatology. Dr. Blair continued to believe a lumbosacral etiology was the reason for her symptomatology. He continued to treat Claimant conservatively and ordered a Functional Capacity Evaluation (FCE) to assist him in recommending permanent restrictions.

34. Claimant returned to Dr. Blair on November 11, 2010 to discuss the results of the FCE. He declared Claimant at MMI and assigned permanent restrictions of no lifting over 10 pounds continually, over 20 pounds occasionally, and 50 pounds rarely.

35. Employer terminated Claimant in June 2010, as she had exhausted all of her medical leave and Employer could not accommodate her work restrictions. See Exhibit 24.

36. At the June 2012 hearing, Claimant testified that her condition was about the same or "slightly improved" since she last saw Dr. Blair in November 2011. Hearing Transcript, p. 85. The only thing that currently helps her pain is ibuprofen.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). 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). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide medical testimony. *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

Need for Further Medical Care

37. Claimant seeks medical benefits for treatment she received after being declared at MMI by Drs. Weight and Walker. The Idaho Supreme Court set out guidelines

to determine the reasonableness of medical care in *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 722-723, 779 P.2d 395, 597-398 (1989). There, the Court held that treatment is reasonable if: 1) a claimant made gradual improvement from the treatment received; 2) the treatment was required by the claimant's physician; and 3) the treatment received was within the physician's standard of practice the charges for which were fair, reasonable and similar to charges in the same profession.

38. The first issue to be resolved regarding further medical treatment is whether Surety is responsible for the payment of Claimant's medical care by Drs. Blair, Lords, Gerard, and Kennedy.

Expert deposition testimony

39. **Gary Walker, M.D.**, testified by deposition taken on February 21, 2013. Dr. Walker has been practicing in Idaho Falls for almost 20 years. He is board certified in Physical Medicine and Rehabilitation as well as in Electrodiagnostic Medicine and has testified many times before the Industrial Commission.

40. Dr. Walker saw Claimant on January 12, 2010 and, at the time of his deposition, thought Surety had requested an IME. He was informed that it was actually Dr. Weight who had requested the IME through Surety. Dr. Walker reviewed certain medical records and imaging studies; he summarizes his review of medical records on pages one to four of his January 12, 2010 report. See Exhibit 5. Dr. Walker met with Claimant in-person for the IME.

41. Claimant informed Dr. Walker that her symptoms creating the need for her 2004 lumbar surgery had completely resolved with no residuals. Claimant described her September 19, 2009 accident and injury and told Dr. Walker that the treatment she received

from the time of that accident/injury was only minimally beneficial.[4] An epidural steroid injection performed by Dr. Weight provided no relief in Claimant's symptoms. Dr. Walker testified that he saw no changes between the September and November MRIs and while the December 2009 MRI revealed a disc protrusion, it was not impacting the spinal cord.

42. At the time Dr. Walker saw Claimant, she was complaining of the following:

> At the time I saw her, she described minimal pain in the leg, mostly the numbness and tingling as we just talked about, the constant lighter numbness and then occasional heavy numbness. She would have charley horses about once a week in the leg.
>
> She had pain that worsened with sitting, stating that sitting to complete paperwork in my exam waiting room was quite painful after fifteen or twenty minutes, that after an about an hour she would typically have to adjust and shift.
>
> She explained that walking tolerance is at about thirty to forty-five minutes. At that time her average back pain, thought, was still on about the order of an eight out of ten.

Dr. Walker Deposition, pp. 21-22.

43. Dr. Walker reviewed the various imaging studies and offered this comment:

> Well, at L4-5 there was a very small focal disc protrusion and some desiccation which represents dehydration of the disc, and then at L5-S1 there were the post-surgical changes and scarring and a bit of leftward residual disc protrusion.
>
> Again, her symptoms were on the right and there was nothing at all seen on MRI that was lateralizing towards the right side.
>
> I reviewed, again, both the September 23, 2009, MRI as well as the November 10, 2009, MRI and I did not see any changes in either of these.
>
> There was a comment in a report that a comparison was made to [sic – the] August 26, 2004, MRI, but I did not have the 2004 MRI myself to review.

Id., pp. 22-23.

[4] Claimant indicated that her pain was initially a 9 or 10 out of 10, and with time and treatment had gone down to a 7 or 8 out of 10.

44. Because Claimant did not experience any lower extremity radiculopathy during the straight leg test, Dr. Walker concluded that Claimant's previous range of motion measurements may be invalid.

45. Dr. Walker concluded that Claimant suffered from a thoracolumbar strain because the MRIs did not show any right-sided disc herniation or protrusion that would explain her symptoms. She did have a small central disc at L4-5 and a leftward disc at L5-S1, her old surgery site, but, again, nothing on the right that would explain her right-sided symptoms. "So really, in the end, my diagnosis was that of a strain without any significant abnormalities seen objectively on MRI or examination to explain her ongoing symptoms." *Id.*, p. 30.

46. Dr. Walker further opined that Claimant's severe limp was not caused by a central nervous system cord injury.

47. Regarding further medical treatment for the thoracolumbar strain Claimant sustained in her accident, Dr. Walker testified:

> She had gone to extensive physical therapy and didn't think there was need for any – any – necessarily anymore. She had really not made gains unless she were to go to therapy and not be involved in a passive modality program of heat and ice and east end [sic], but rather see if she could cooperate and move ahead with an aggressive strengthening-type program.

Id., p. 31.

48. Dr. Walker indicated that Claimant would be at MMI following this aggressive therapy. He limited her to a 50-pound lifting restriction during her physical therapy. Dr. Walker believed Claimant could return to medium work at the time of the IME, although he doubted that he conveyed this information to Claimant.

49. On cross-examination, Dr. Walker testified that he does not know precisely how many IMEs he performs in a year, but that he charges generally between fifteen hundred to two thousand dollars apiece for them, and about ninety percent of them are for the defense. He spends about ninety-five percent of his time during a week seeing and treating patients.

50. With the exception of physical therapy treatment, discussed below, the Referee finds that Claimant has failed to prove the medical care she received after being deemed at MMI by Dr. Weight was reasonable and/or necessary. None of the treatment Claimant received from Dr. Blair or the diagnostic testing ordered by him resulted in any better understanding of the etiology of her complaints than the treatment and testing she received from Dr. Weight. Her condition did not improve as a result of any treatment received by Drs. Blair and Lords. The ESI administered by Dr. Weight did not help. The diagnostic testing ordered by both Drs. Weight and Blair failed to demonstrate any significant pathology. The Referee agrees with Defendants' assertion that Dr. Blair, *et. al.,* did nothing more than prove Drs. Weight and Walker correct when they declared Claimant at MMI.

51. However, Drs. Weight and Walker concurred that two weeks of "aggressive increased exercise program" was the recommended treatment. Again, Dr. Walker did not recall giving Claimant this treatment instruction, and Surety did not authorize the recommended treatment. On March 24, 2010, Dr. Walker asked Surety if Claimant ever completed any of the recommended aggressive physical therapy, but without receiving an answer on whether Claimant had received such treatment, gave Claimant an impairment rating. That same day, Claimant received a notice of claim status which denied her

physical therapy session after January 29, 2010. At that point, Claimant had already continued physical therapy under the understanding that such was covered treatment. *See* Exhibits O, P. Claimant attended additional physical therapy sessions through May 2010 at her own expense. In any case, the physical therapy sessions attended by Claimant from October 2009 to May 2010 did not help reduce Claimant's complaints.

52. The Referee is aware that the Commission has recently held that *Sprague* is not to be interpreted too broadly:

> Here, it is argued by Defendants that the care that Claimant received subsequent to Dr. Friedman's closing evaluation has done nothing to improve her condition. Therefore, Defendants argue that Claimant is not entitled to payment for this care. While we acknowledge that this is a correct reading of the criteria considered by the Court under the facts before it in *Sprague*, we decline to rule that simply because Claimant has not enjoyed relief from her symptoms as the result of treatment she has sought on her own she should be denied reimbursement for these expenses. The physicians with whom Claimant consulted tried various modalities to deal with her intractable pain. Simply because aggressive physical therapy was not successful in one instance, does not mean that Claimant should forever be barred from physical therapy thereafter. Were we to conclude, in every case, that unless a medical treatment is successful in providing relief an injured worker is not entitled to payment for the same, a significant fraction of our workers' compensation population would be denied care which it was reasonably thought would offer some relief. We are not prepared to read *Sprague* that broadly.

See, *Brooks v. Gooding County EMS,* IC 2009-025823 at page 39, filed September 12, 2013.

53. *Brooks* is distinguishable from the case at bar. First, *Sprague*'s application is generally fact specific, i.e., it is applied on a case-by-case basis. Second, *Sprague's* application is tailored around expert medical opinion testimony. While further medical treatment may be reasonable if supported by medical opinion in one case, it may not be warranted in another. To the extent that *Brooks* stands for the proposition that a claimant need not necessarily experience improvement from the care for which reimbursement is

sought, it is instructive. However, regardless of whether a claimant improved (or not) from the treatment received, he or she must still provide the appropriate nexus between the treatment requested and the injuries received in the underlying industrial accident. Where medical evidence conflicts in this regard, the Commission is tasked with the obligation of weighing that conflicting evidence on a case-by-case basis.

54. Here, the only evidence provided by Claimant that the treatment she received after being released by Drs. Weight and Walker was reasonable is a "yes" answer in a letter to the following question: "To a reasonable degree of medical probability, Heather Schell's current back symptoms including pain, foot drop and lack of mobility, are a direct result of her industrial accident of September 19, 2009." Exhibit 6, p. 39. Dr. Blair in no way explains the reasoning behind his "opinion." Further, his own medical records discussed above appear to be inconsistent with his "yes" answer.

55. On the other hand, Drs. Weight and Walker provided foundation for their respective opinions and they are given more weight than that expressed by Dr. Blair. Claimant argues that she was not yet stable when Dr. Walker provided the PPI rating because she was denied the opportunity to participate in the program recommended by him. However, because Dr. Walker went ahead with his PPI rating, he deemed her to be at MMI on the date of his response to Surety, or March 24, 2010.

TTD Benefits

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion 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, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

56. Claimant seeks TTD benefits from the time she began treating with Dr. Blair on April 12, 2010 through November 11, 2010 when he declared her at MMI. Defendants do not directly address this contention. Having decided that Claimant's treatment with Dr. Blair was not compensable, it follows that TTD benefits sought for treatment during that period is also not reasonable and, therefore, not compensable.

PPI Benefits

"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 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 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 Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

57. Three physicians have provided three different PPI ratings in this matter. On March 24, 2010, Dr. Walker utilized *The Guides to the Evaluation of Physical Impairment,*

Sixth Edition (*The Guides,* 6th Edition) to assign a 2% whole person PPI rating without apportionment. Dr. Walker assigned this rating not knowing whether or not Claimant had completed the aggressive physical therapy he had recommended; she had not because Surety did not authorize it.

58. On June 10, 2010, in spite of Claimant's many complaints, Dr. Lords found her at MMI and assigned a 14% whole person impairment rating using the *AMA Guides to the Evaluation of Permanent Impairment,* Fifth Edition (*The Guides*, 5th Edition). Dr. Lords declined to apportion any of that impairment to her 2004 accident and subsequent surgery. He reasoned as follows regarding his PPI rating:

> This impairment rating evaluation was performed in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. I am placing Ms. Schell in the Lumbar DRE Category II due to unverifiable radicular symptoms, herniated disc and examination findings consistent with a specific injury. I am also placing her into the Thoracic DRE category II for the same reasons. I am assigning a whole person impairment value of 7% for each category. Using the Combined Values Chart on page 604 of the guide book, a **Whole Person Impairment Value of 14% is given.**

Exhibit 8, p. 5. Emphasis in original.

59. **Robert H. Friedman, M.D.**, a physiatrist, performed a records review for Surety on July 16, 2010. Dr. Friedman reviewed relevant medical records but did not examine Claimant. He noted a discrepancy between Dr. Walker's whole person PPI rating of 2% using *The Guides*, 6th Edition, and Dr. Lords' 14% using *The Guides*, 5th Edition. Dr. Friedman posited that it is his medical opinion that the most current edition of *The Guides* should be used in determining permanent impairment. He agrees with Dr. Walker's 2% PPI rating and disagrees with Dr. Lords' 14 % because:

> Ms. Schell had a previous lumbar surgery at L4-5. This would provide for a medium work restriction. This surgery occurred in 2004. Dr. Lords provided a medium work restriction, i.e. no lifting greater than 50

> pounds. This impairment is not different than the impairment that should have been provided as a result of her previous lumbare [sic] surgery. There are no additional restrictions or limitations as a result of her injury of 9/19/09.

Exhibit 9, p. 1.

60. On November 11, 2010, Dr. Blair released Claimant to graduated light-duty work and added the need for Claimant to alternate sitting and standing effective November 29th. He assigned a 12% whole person PPI rating by filling in a blank on a one-page questionnaire that indicated he was to use *The Guides*, 5th Edition. A reasonable inference may be made that Claimant's counsel prepared the questionnaire as Surety would have no reason to.

61. Dr. Friedman reviewed Dr. Walker's IME report and concurred with his diagnosis of thoracolumbar strain. He also agreed with Dr. Walker's PPI rating of 2% utilizing the *Guides,* 6th Edition, and agreed with Dr. Walker's methodology in arriving at that rating. Dr. Friedman testified why he uses the *Guides,* 6th Edition over the 5th Edition:

> Well, I used the 6th Edition.
>
> I have been using the AMA Guides to do my ratings since the 3rd Edition came out. Each time that a new edition comes out, it has been an advancement.
>
> The Sixth Edition has a paragraph on page 2 under Chapter 1, 11.2, "New Directions" and it states, "The Guide is revised to reflect the latest scientific rating of severity with text describing whether it's single level, multiple level relating to ongoing radiculopathies or clinical exams."
>
> Then within that class group you then default to a middle grade or what they call "Grade C" and adjust on the Grade C using the net adjustment formula.
>
> Specifically, you adjust for the clinical studies and their severity related to the class selected, and their clinical exam related to the class selected.

Dr. Friedman Deposition, pp. 19-20.

62. The Referee finds that the PPI rating of 2% whole person assigned by Dr. Walker and agreed to by Dr. Friedman well-articulated and persuasive. The foundation and methodology utilized by Dr. Blair is unknown. Dr. Lords assigned a PPI rating based on his erroneous understanding that Claimant had suffered multiple disc herniations. Drs. Friedman and Walker utilized the most current edition of the *Guides* because each new edition is an improvement over the last.

63. The Referee finds that Claimant has incurred a 2% whole person impairment as a result of her thoracolumbar strain.

PPD Benefits

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease. Consideration should be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic

circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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 employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

64. Claimant seeks an award of permanent partial disability based on both a loss of access to the labor market as well as a loss of earning capacity. She asserts that her job at Payless was the best job she ever had before she was terminated. She expected to earn $60,000 a year plus benefits as a District Manager within 10 years of her employment. Claimant received health, dental, vision benefits and a 401(k) plan with a 5% matching employer contribution.

65. Claimant's time-of-hearing employer, Valley Office Systems, pays $8.00 an hour plus some sales commissions with no 401(k) plan; however, it does offer health, dental, sick leave, and vacation benefits.

66. **William C. Jordan, MA, CRC, CDMS,** was retained by Defendants to address vocational issues in this matter. Mr. Jordan's credentials are well known to the Commission and need not be repeated here. He was provided medical records to review which he summarized on pages 22-25 of his Employability Report dated September 8, 2010

(Exhibit 20). Mr. Jordan attended Claimant's deposition wherein she was asked questions pertinent to his vocational evaluation. Mr. Jordan then contacted Claimant's treating physician, Dr. Weight, regarding a job description for Payless; Dr. Weight directed Mr. Jordan to Dr. Walker, as he had performed an IME of Claimant and had all of her permanent restrictions. Mr. Jordan then submitted the job description that he prepared to Dr. Walker, who approved the same with the caveat that Claimant should use a mat to stand on.

67. Mr. Jordan understood that Dr. Walker released Claimant to medium work with a 50-pound lifting restriction while she finished physical therapy. In a meeting with Dr. Friedman, Mr. Jordan understood his restrictions for Claimant to be no different than the restrictions that would have reasonably been imposed following her 2004 back surgery allowing for medium-level work.[5] Based on the above restrictions of Drs. Walker and Friedman, Mr. Jordan prepared a list of jobs available in the Idaho Falls area labor market for Dr. Friedman to review. Dr. Friedman approved the job description for Payless as did Dr. Walker.

68. Upon his review of the job descriptions, Dr. Friedman approved the following jobs: jewelry sales associate at Walmart; customer services representative at Convergy's, a telephone systems company; gas station attendant at Walmart; deli clerk at Winco; cashier/customer service at Walmart; apparel sales associate at Walmart; greeter at Walmart; fitting room associate at Walmart; lingerie customer service at JC Penney; hotel/motel clerk; teacher's aide; department manager/supervisor in retail trade; manager, fast-food services; and convenience store manager.

[5] Dr. Honeycutt did not impose restrictions for Claimant's 2004 non-industrial injury and surgery because Claimant never returned to him for that purpose.

69. Mr. Jordan testified as to his understanding of the restrictions placed on Claimant by Dr. Lords:

> Dr. Lords indicated that the claimant could stand from zero to two hours at a time a total of four to six hours a day; sit zero to two hours at a time a total of four to six hours a day; walk zero to two hours at a time a total of six to eight hours a day.
>
> He said that she could not use her feet for repetitive raising and lowering and pushing or operating foot controls - - I should say lowering and pushing and operating foot controls.
>
> He suggested that she do occasional bending, squatting, kneeling, no climbing, and occasional reaching overhead. He released her to medium duty with no heavy lifting and no climbing.

Mr. Jordan Deposition, pp. 46-47.

70. Mr. Jordan testified as to his understanding of Dr. Blair's restrictions: "His restrictions were alternate standing and walking, no lifting greater than 10 pounds continually, 20 pounds occasionally, and 50 pounds rarely." Mr. Jordan Deposition, p. 48.

71. In his Employability Report, Mr. Jordan summarized his opinions:

> In summary, considering the medical and non-medical factors outlined above, I would suggest there are two scenarios concerning PPD in this case. Considering Dr. Walker's and Dr. Friedman's opinions regarding restrictions, as well as the FCE, there would not be any disability over and above the 2% PPI. Dr. Walker gave the Claimant a full work release, and Dr. Friedman indicated that the Claimant had the same restrictions post 09/19/09 injury at Payless as she had prior to the injury. The second scenario considers Dr. Lord's and Dr. Blair's opinions concerning restrictions, and the suggested PPD is 26% (inclusive of 14% PPI).

Exhibit 20, p. 21.

72. The evaluation of Claimant's disability is an exercise distinct from a determination of whether that disability should be apportioned between an accident and some other condition. See, *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). Here, Mr. Jordan gave expert testimony on Claimant's accident-produced

disability, rather than providing Claimant's total disability and then apportioning her disability between her industrial accident and any pre-existing conditions.

73. With respect to Claimant's disability from all causes combined, it is likely that the medium-duty restrictions imposed by Drs. Walker and Weight do limit Claimant's access to certain segments of the labor market. Therefore, it seems likely that Claimant may well have some disability from all causes in excess of the 2% PPI rating. However, Mr. Jordan did not quantify that disability, concluding only that because Claimant's restrictions are entirely referable to the 2004 back injury, she does not have any disability referable to the 2009 accident. Although Mr. Jordan did not follow the methodology outlined in *Page*, *supra*, the Referee does not believe that this warrants rejection of his opinion under the peculiar facts of this case. Regardless of what Claimant's disability might be from all causes combined, none of that disability is referable to the subject accident because Claimant's current restrictions are no greater than those that she was given as a result of the 2004 back injury.

74. The Referee finds that Claimant has failed to prove her entitlement to PPD above her 2% PPI based on the well-articulated and persuasive opinions of Drs. Weight, Walker, and Friedman regarding restrictions. Mr. Jordan considered Claimant's education, prior employment, current job openings, as well as her current employment situation. His analysis of Claimant's employability was thorough and persuasive and has not been rebutted.

Attorney Fees

75. Claimant seeks an award of attorney fees for Surety's unreasonable denial of the work hardening/aggressive physical therapy program as recommended by Dr. Walker in

his IME and agreed to by Dr. Weight. Dr. Walker recommended that Claimant be put into ". . . more of a work hardening or more aggressive strengthening program. I anticipate her being at maximum medical improvement in two weeks following this increased exercise program in therapy." Exhibit 5, p. 6. Neither Surety nor Dr. Walker relayed this recommendation to Claimant. Claimant also seeks attorney fees because Surety did not pay for the physical therapy ordered by Dr. Weight on October 8, 2009 at Foot Hills Physical Therapy. She seeks reimbursement in the amount of $3,524.41 pursuant to the billings contained within Exhibit 21, subparts O and P. The Referee is unable to determine from that Exhibit exactly what amount was charged for those services.

76. Surety did not authorize any further physical therapy. Surety did not notify Claimant that her physical therapy sessions after January 29, 2010 were denied, until March 24, 2010. Exhibit 23, p. 1.

77. On March 24, 2010, the same date that they sent the letter to Dr. Walker requesting a PPI rating, Surety sent a Notice of Claims Status to Claimant. Therein, it stated in pertinent part:

> Per the Independent Medical Examination Report completed by Dr. Walker on 1/12/10 you were deemed at Maximum Medical Improvement after two weeks of physical therapy . In accordance with Dr. Walker's report physical therapy visits through 1/29/10 were authorized and paid under workers' compensation.
>
> * * *
>
> Due to your completion of the treatment recommendations of Dr. Walker and Dr. Weight you have reached medical stability. Your benefit payments were discontinued effective 2/18/10.
>
> In addition, no physical therapy sessions after 1/29/10 have been authorized under your claim for workers' compensation.

Exhibit 23, p. 1.

78. Surety's March 24, 2010 denial of physical therapy treatment, *after the fact* and without prior communication to Claimant, or even Dr. Walker, is unacceptable. Understandably, Claimant continued her course of physical therapy treatment, as Surety did not give Claimant prompt notice that it contested the treatment. While it is unorthodox to find a claimant stable while recommending additional, non-palliative therapy, the Referee still considers Drs. Walkers and Weight more persuasive as a whole, and does not wish to discard their opinions solely for this inconsistency. Dr. Walker's January 12, 2010 IME showed great confidence in Claimant's ability to return to medium-duty work, and he felt certain enough to provide Claimant with an impairment rating on March 24, 2010. In any case, Claimant fortunately received more than two weeks of physical therapy after Dr. Walker's January 12, 2010 IME.

79. The Referee finds that Surety unreasonably denied payment for the physical therapy recommended by Dr. Walker on January 12, 2010. While Claimant was involved in physical therapy prior to that date, Dr. Walker ordered a more aggressive program. Surety was unreasonable in denying that program without medical evidence to the contrary and without contacting Dr. Walker and allowing him to clarify his recommendation as deemed necessary.

80. The Referee also finds that Surety is liable to Claimant for the physical therapy Claimant received through March 24, 2010. The parties are encouraged to agree on the appropriate amount for such services.

CONCLUSIONS OF LAW

1. Claimant has failed to prove that the medical care she received after being declared at MMI on March 24, 2010 by Dr. Walker was reasonable.

2. Claimant has failed to prove her entitlement to total temporary disability (TTD) benefits.

3. Claimant is entitled to 2% whole person permanent partial impairment (PPI).

4. Claimant has failed to prove she is entitled to permanent partial disability (PPD) above her permanent partial impairment (PPI).

5. Claimant is entitled to an award of attorney fees for Surety's failure to authorize the physical therapy recommended by Dr. Walker.

6. Claimant is entitled to reimbursement for any physical therapy ordered by Drs. Weight, Walker, and Blair that was not paid by Surety.

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 __10th___ day of October, 2013.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __8th___ day of __November___, 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH ST
IDAHO FALLS ID 83404

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HEATHER SCHELL, Claimant, v. PAYLESS SHOE STORE, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Surety, Defendants.	**IC 2009-026363** **ORDER** **Filed November 8, 2013**

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

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

1. Claimant has failed to prove that the medical care she received after being declared at MMI on March 24, 2010, by Dr. Walker was reasonable.

2. Claimant has failed to prove her entitlement to total temporary disability (TTD) benefits.

3. Claimant is entitled to 2% whole person permanent partial impairment (PPI).

4. Claimant has failed to prove she is entitled to permanent partial disability (PPD) above her permanent partial impairment (PPI).

5. Claimant is entitled to an award of attorney fees, as provided for by Idaho Code § 72-804, for Surety's failure to authorize the physical therapy recommended by Dr. Walker. 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, with appropriate elaboration on *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984). 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 files 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.

6. Claimant is entitled to reimbursement for any physical therapy ordered by Drs. Weight, Walker, and Blair that was not paid by Surety.

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

DATED this __8th__ day of ___November___, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

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

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __8th__ day of __November___ 2013, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

MICHAEL R MCBRIDE
1495 EAST 17TH ST
IDAHO FALLS ID 83404

ALAN K HULL
PO BOX 7426
BOISE ID 83707-7426

ge __/s/_____