BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRY SUNDBERG, Claimant, vs. MANDERE CONSTRUCTION, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 07-021018** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**. February 22, 2011

On February 12, 2009, the Commission issued an Order, following a May 22, 2008 hearing, determining that lumbar fusion surgery constituted reasonable and necessary medical care for Claimant's workplace injury incurred on June 7, 2007. Thereafter, pursuant to Idaho Code § 72-506, the above entitled matter was assigned to Referee LaDawn Marsters, who conducted a second hearing on July 13, 2010, in Coeur d'Alene, Idaho. Claimant was present in person and was represented by Thomas B. Amberson. Defendants, Employer and Surety, were represented by E. Scott Harmon. Oral and documentary evidence was admitted, and post-hearing depositions were taken. The matter was briefed and came under advisement on January 25, 2011.

ISSUES

The parties stipulated at the hearing to the following issues to be decided:

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI);

2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD); and

3. Whether Claimant is entitled to attorney fees under Idaho Code § 72-804.

In addition, the issue of whether Claimant is entitled to retraining was raised. At the end of the hearing, the Referee granted Defendants' motion to strike the issue; however, upon reconsideration, she entered a *sua sponte* order on July 16, 2010 reinstating retraining as an issue to be decided. For whatever reason, Claimant does not mention retraining in his opening brief[1]. As a result, this issue is deemed abandoned and will not be decided herein, after all.

CONTENTIONS OF THE PARTIES

Claimant contends he suffered permanent partial impairment (PPI) of 20% of the whole person, plus permanent partial disability of 25%-40%, as a result of his June 7, 2007 industrial injury to his lumbar spine. He relies upon the opinion of Dr. McNulty to support his PPI rating request. Dr. McNulty ruled out Claimant's preexisting lumbar spine pathology as a factor contributing to his present PPI because he believed it had been asymptomatic for several years prior to 2007. Claimant asserts that an award of attorney fees is warranted because Defendants unreasonably denied coverage for his lumbar spine fusion surgery for 20 months.

Defendants rely upon the opinion of Dr. Larson, Claimant's treating orthopedic surgeon, to counter that Claimant has suffered only 9% PPI, with 5% apportioned to Claimant's preexisting lumbar spine conditions. They argue that they did not unreasonably deny coverage for 20 months because they properly relied upon the independent medical examination (IME) report of Drs. Almaraz and Holley, who opined that Claimant demonstrated no instability in his lumbar spine and, therefore, spinal fusion surgery did not constitute reasonable medical

[1] Claimant does not mention retraining in his reply brief either; however, this point is moot because his reply brief was stricken for untimeliness (see below).

treatment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file, specifically including:
    a. The testimony of Claimant taken at the May 22, 2008 hearing;
    b. Claimant's Exhibits 1 through 5 admitted at the May 22, 2008 hearing;
    c. Defendants' Exhibits A through N admitted at the May 22, 2008 hearing;
    d. The June 16, 2008 deposition testimony of Jeffrey J. Larson, M.D.;
    e. The September 23, 2008 deposition testimony of Lewis Almaraz, M.D;
2. Claimant's Exhibits 1 through 11 and 16 admitted at the July 13, 2010 hearing;
3. Defendants' Exhibits B-2, D-2, E-2, G-2, and N-2 through U-2, admitted at the July 13, 2010 hearing;
4. The testimony of Claimant taken at the July 13, 2010 hearing;
5. The post-hearing deposition testimony of John McNulty, M.D., taken July 28, 2010; and
6. The post-hearing deposition testimony of Jeffrey J. Larson, M.D., taken August 5, 2010.

OBJECTIONS

All pending objections are overruled. Defendants' Motion to Strike Claimant's Reply Brief, filed January 28, 2011, to which Claimant did not respond, is granted.

FINDINGS OF FACT

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

1. **Preexisting degenerative disc disease (DDD).** Claimant sustained a prior back injury in 1991 that resulted in multi-level disc herniations and symptoms of right-sided radiculopathy, due to which he continued to experience occasional flare-ups of pain. Specifically, Claimant suffered mild congenital foraminal stenosis and DDD in his lumbar spine, as well as disc bulges and/or herniations at L2-3, L3-4, L4-5, and L5-S1, before he ever began working for Employer.

2. Every one or two years, his lumbar spine condition caused him excruciating pain and required him to resort to only light duty work until the pain resolved. Claimant confirmed that the onset of his left-sided pain from his 2007 industrial injury felt like the onset of the recurring right-sided pain he had been experiencing since the early 1990s.

3. On November 3, 1993, Vivian Moise, M.D., a physiatrist, evaluated Claimant following his 1991 industrial injury to his lumbar spine. She noted that Claimant's 1991 MRI demonstrated mild disc bulges to the right at L3-4 and L5-S1, and to the left at L4-5. She also noted the possibility of some slight right S1 nerve compression. Although she did not have a report of Claimant's 1993 MRI, she relied upon a note by a "Dr. Vincent" indicating no changes except that the left-sided L4-5 herniation had increased. On December 9, 1993, Dr. Moise's chart note indicates Claimant was still experiencing bilateral lumbar spasms, greater on the left. On March 1, 1994, she clarified that Claimant's symptoms were on the right, the opposite side of his spasms.

4. Based upon Claimant's failure to improve following his 1991 injury and some exaggerated pain behaviors, Dr. Moise opined he had developed a significant chronic pain syndrome (CPS) with a psychologic overlay related to depression and ongoing pain. She further opined that it would not be realistic to expect that Claimant's CPS would resolve after two-plus

years, although she did note some improvement by December 1993. With respect to his lumbar spine condition, she postulated that he would qualify for a Category I or II rating, leaning more toward a II. However, it is unclear which edition of the *AMA Guides to the Evaluation of Permanent Impairment* (hereinafter, *AMA Guides*) Dr. Moise referred to (if she used the *AMA Guides* at all) when rating Claimant. Regardless, it is clear that Dr. Moise thought Claimant was entitled to an impairment rating of some type of his low back condition in 1994.

5. Dr. Moise conducted an electromyography study (EMG) on June 8, 1994. She concluded Claimant demonstrated evidence of diffuse mild denervation in his lower extremities, but ruled out severe spinal stenosis because polyneuropathy could not be confirmed by nerve conduction studies. After ordering and reviewing a new MRI, Dr. Moise found Claimant's condition was stable and assessed permanent restrictions, including no lifting over 10-20 pounds, no sitting for more than an hour at a time, no standing for more than 30 minutes at a time and no repetitive bending. There is no evidence in the record that these restrictions were ever superseded by any physician before Claimant's 2007 industrial injury.

6. On November 9, 2007, prior to his 2009 lumbar spine fusion surgery, Claimant underwent an independent medical examination (IME) at Surety's request. Lewis Almaraz, M.D., a neurologist, and Keith Holley, M.D., an orthopedic surgeon, conducted the examination. They concluded, among other things, that Claimant's back condition, partially defined by a prior disc herniation at L4-5, lumbosacral DDD and mild congenital spinal stenosis, was, on a more-probable-than-not basis, aggravated by his 2007 industrial accident.

7. Based upon the *AMA Guides, 5th Edition,* Drs. Almaraz and Holley assessed a PPI rating of 5% of the whole person in consideration of Claimant's preexisting chronic low back pain and his pre-industrial injury MRI findings of DDD and L4-5 disc herniation. They relied

upon DRE Lumbar Category II in formulating their opinion.

8. As set forth more fully below, Claimant's treating neurosurgeon, Dr. Larson, also assessed PPI of 5% of the whole person attributable to Claimant's preexisting pathology, but his assessment is based on an evaluation conducted by reference to the 6th Edition of the *Guides*.

9. **New medical care and rehabilitation.** Following the previous hearing, Claimant underwent lumbar fusion surgery at L4-L5. Jeffrey J. Larson, M.D., a neurosurgeon, performed the surgery on March 6, 2009. Subsequently, Claimant was treated for significant shortness of breath related to the surgery. On discharge, Claimant was diagnosed with early chronic obstructive pulmonary disease (COPD), tobacco use disorder and DDD.

10. A March 9, 2009 MRI of Claimant's spine, revealed a mild disc bulge at L2-3 towards the left, a broad-based disc bulge at L3-L4 and, at L5-S1, mild vertebral spondylosis, mild bilateral foraminal stenosis, mild enhancing scar from Claimant's prior lumbar surgeries and a small disc bulge to the right without a definite effect on the nerve roots. Lumbar spine x-rays interpreted by Dr. Larson on April 22, 2009 and June 2, 2009 show a fusion at L4-L5 and normal alignment. Lumbar spine x-rays on August 25, 2009, also interpreted by Dr. Larson, identified the fusion instrumentation at L4-L5, normal alignment and DDD at L5-S1.

11. Claimant underwent a course of physical therapy from March 23, 2009 through July 10, 2009. At the end of this course, his physical therapist noted that at work his back "locked up", making it difficult to stand up straight after pulling up flooring all day. Claimant returned to work the following day and reported being "mostly okay" at his July 8 appointment.

12. **Claimant's perspective.** At the hearing, Claimant described his current condition and capabilities. Bending at the waist is the only posture that causes him pain. This is significant because he estimates that he spends 70% of a typical workday bending and stooping.

He also believed Dr. Larson had issued a permanent 50-pound lifting restriction. Claimant estimated that he spends 30% of a typical workday carrying materials; however, he was not clear about the weight of the materials he was required to carry.

13. Claimant has been unable to obtain employment in the construction field due to the poor economy, although he has made many contacts. He believes self-employment is not an option because he lacks the finances to meet the Washington State insurance and bonding requirements. He has not looked into Idaho self-employment requirements even though Coeur d'Alene is only a half hour away.

14. **Post-surgery PPI opinions.** Dr. Larson performed Claimant's previous two lumbar surgeries related to the June 2007 industrial injury. The first was a discectomy to alleviate a herniated disc at L4-5; the second involved emergency laminectomies at L4 and L5 and a foraminotomy at L4-5 to relieve cauda equina syndrome caused by the discectomy. As a result of these surgeries, Claimant lost a significant portion of his L4 and L5 vertebrae, as well as disc and other tissue from L4-5. His third surgery was performed to restore spinal stability at L4-5.

15. Dr. Larson initially predicted Claimant would reach maximum medical improvement (MMI) by July 6, 2009. On July 10, 2009, in a written response to Surety, he predicted Claimant would achieve MMI by August 25, 2009 and that his condition would warrant a PPI rating of 9% of the whole person, with 4% attributable to the industrial accident and 5% attributable to preexisting pathology. In an August 25, 2009 chart note, Dr. Larson confirmed that Claimant had reached MMI and added that he believed the post-surgery locking sensation Claimant experienced was most likely related to his facet joints at L5-S1 and, apparently, not to his industrial injury. Dr. Larson arrived at this rating by utilizing the 6th

Edition of the *AMA Guides*, explaining that he believes it appropriate to use the most current edition to rate impairments.

16. On June 10, 2009, John McNulty, M.D., an orthopedic surgeon hired by Claimant to prepare an independent medical examination (IME) report, assessed permanent restrictions limiting Claimant to occasional lifting of up to 50 pounds and occasional bending, stooping, kneeling and crouching. As a result, based upon Claimant's JSE, he further opined that Claimant would not be able to return to his pre-injury position as a framer carpenter. He anticipated Claimant would reach MMI within six weeks, although some patients take up to one year to stabilize.

17. Dr. McNulty did not find it necessary to wait until Claimant reached MMI to assess his PPI. He believed Claimant's symptom complex fits best into DRE (diagnosis-related estimate) Lumbar Category IV of the *AMA Guides, 5th Edition*, which provides a range of 20-23%:

> Loss of motion segment integrity defined from flexion and extension radiographs as at least 4.5 mm of translation of one vertebra on another or angular motion greater than 15° at L1-2, L2-3, and L3-4, greater than 20° at L4-5, and greater than 25° at L5-S1; may have complete or near complete loss of motion of a motion segment due to developmental fusion, or successful or unsuccessful attempt at surgical arthrodesis.

Id. at p. 384, (reference omitted). Dr. McNulty assessed a PPI rating of 20% of the whole person in consideration of Claimant's L4-5 arthrodesis. He relied upon the *AMA Guides, 5th Edition* because the *6th Edition* was new and riddled with errors when it was first published, and he did not receive the revised version until sometime in 2009.

18. Dr. McNulty was aware of Claimant's preexisting lumbar spine injury, but there is no indication that he reviewed Claimant's medical records from that period or that he was

aware that Claimant had regularly suffered excruciating pain, preventing him from working, due to his lumbar spine condition. In any event, Dr. McNulty did not apportion any of his PPI rating to Claimant's preexisting condition.

19. Both Dr. Larson and Dr. McNulty are qualified to render a PPI rating, and the facts of a particular case, may admit the application of more than one Edition of the *AMA Guides* to rate a claimant's impairment. However, because various editions of the *Guides* use different rating methodologies, it is important to understand which Edition a particular physician relied on in rendering an opinion on impairment. The Commission must be particularly cognizant of these differences when comparing the opinions of physicians who have rendered competing opinions on impairment.

20. **New vocational evidence.** Claimant admitted that he was untruthful at the prior hearing when he testified that he received a diploma from Trend Business College, where he studied sales and marketing. Instead, the institution went out of business before he finished, so he did not matriculate.

21. On March 18, 2009, Claimant's file at the Industrial Commission Rehabilitation Division was reopened at the request of Teresa Nolen, claims adjustor for Surety. Roy Murdock, consultant, was assigned to the case. He interviewed Claimant on March 25, 2009, noting in Claimant's vocational history that he has primarily worked in the construction field as a framer carpenter, supervisor and estimator, and that he was earning $17 per hour at the time of his industrial accident.

22. Mr. Murdock obtained a letter from Dr. Larson on April 29, 2009 in which Dr. Larson assessed temporary work restrictions of occasional lifting up to 20 pounds, frequent sitting and standing and no bending, stooping, kneeling or crouching until May 4, 2009. He

predicted that Claimant would be able to return to his pre-injury position as a framing carpenter by July 6, 2009.

23. Mr. Murdock contacted Employer about rehiring Claimant. Although it declined to do so, it did provide a letter of recommendation.

24. Claimant advised that, according to Dr. Larson, once his x-rays showed a solid fusion, he would be able to lift upon to 50 pounds regularly. Claimant made plans to go into business with an associate, doing light remodel and construction jobs. On or about June 12, 2009, Claimant stated he was ready to start working regardless of what his permanent restrictions turned out to be. At this point, Claimant was motivated to return to work and had already been helping a friend install siding on his house.

25. On June 23, 2009, Claimant reported he was working within Dr. McNulty's restrictions and earning $12 per hour.

26. Prior to closing Claimant's file on June 25, 2009, Mr. Murdock completed an assessment of Claimant's transferable skills to determine other occupations he could perform. Occupations and wage ranges within Claimant's skills and abilities in the Spokane Metropolitan area include: customer service representative ($11.94-$14.99/hour), dispatch coordinator ($11.67-$17.71/hour), order entry specialist ($12.12-$18.89/hour), assemblyperson ($9.63-$16.45/hour) and call center intake representative ($8.61-$18.07/hour). Occupations and wage ranges for which Claimant possesses a basic skill set that would require 60-90 days of on-the-job training include: housekeeping and janitorial worker supervisor ($11.12-$20.57/hour), loss prevention manager (security) ($12.33-$29.54/hour) and property manager ($17.71-$40.41/hour). Mr. Murdock did not believe formal retraining would enhance Claimant's ability to obtain long-term employment because Claimant is capable of recapturing his time time-of-

injury wage without it.

27. **Claimant's tax returns.** Only two of Claimant's tax returns appear in the record. His 2004 federal return indicates an adjusted gross income of $13,493 and his 2007 federal return shows $16,552. Other tax documents in the record establish income of $8,299 in 2003 and $8,587.50 in 2009.

28. **Claimant's credibility.** A claimant's credibility is generally at issue in a workers' compensation proceeding. Here, the scrutiny is heightened because the record indicates that Claimant may have been inconsistent in reporting his preexisting recurrent lumbar spine pain to physicians, most notably Dr. McNulty, and that he may have given poor effort and exaggerated his symptoms during his examination by Drs. Almaraz and Holley. Further, Claimant admitted he was untruthful in his first hearing when he testified he earned a diploma from Trend Business College. The Referee finds inadequate evidence to establish that Claimant was intentionally untruthful with his physicians or this tribunal about any topic other than whether he matriculated from business school, and does not find that prevarication sufficient to find him generally not credible. However, the Referee does find Claimant's overstatement of his educational credentials demonstrates a comfort level with communicating an untrue statement that must be taken into consideration when weighing Claimant's testimony against contradictory evidence. Further, where Claimant's testimony as to the date on which a relevant event occurred conflicts with information in an otherwise reliable contemporaneously made document, the Referee will adopt the date referenced in the document as being more reliable.

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, 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).

Legal Authority

"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 on specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 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).

Permanent disability is defined and evaluated by statute. Idaho Code § 72-423 and 72-425 *et. seq*. Permanent disability is a question of fact, in which the Commission considers all

relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v, Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. Seese v. Idaho of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986).

Idaho Code § 72-406 provides for apportionment of benefits where a Claimant's industrial injury was worsened by a preexisting or subsequent condition.

PPI/Apportionment

29. Dr. Larson's opinion as to when Claimant reached MMI is persuasive; the Referee finds that Claimant reached MMI on August 25, 2009.

30. Claimant's only complaints following his three lumbar surgeries are related to pain and limited flexibility on bending.

31. Previously, Claimant had excruciating back pain every year or two from multiple lumbar herniations. Pathology was identified by MRI in the early 1990s at four lumbar levels, including L2-3, L3-4, L4-5 and L5-S1. Although it is not clear from the record exactly which levels were symptomatic prior to Claimant's 2007 injury, there is no evidence that, after his surgeries, he still experienced the recurrent pain he had previously experienced. As a result, the Referee finds Claimant's L4-5 and L5-S1 pathology was the primary cause of his preexisting impairment.

32. In 1994, Dr. Moise opined that Claimant had suffered an impairment unquantifiable based upon the evidence in the record. Drs. Almaraz and Holley assessed 5% PPI of the whole person to Claimant's preexisting conditions, under the *AMA Guides, 5th Edition*.

Dr. Larson gave Claimant a 5% impairment, as well, for his preexisting condition, but calculated under the *AMA Guides, 6th Edition*.

33. As to Claimant's present PPI, which is at least partially inclusive of his preexisting PPI, Dr. Larson opined that 4% of the whole person is due to his 2007 injury. According to Dr. Larson, Claimant's residual pain on bending is a result of his DDD and/or facet joints at L5-S1 as opposed to his industrial injury. Dr. Larson exhibited flippancy and irritation at his deposition at times when his considered responses to questions would have assisted the Referee in following his analysis and understanding how he calculated his PPI rating. As it is, the record lacks any clear roadmap through the *AMA Guides, Sixth Edition* to illustrate what factors Dr. Larson considered, or rejected, in arriving at his PPI calculation.

34. Dr. McNulty focused on Claimant's capabilities in light of the impact of the mechanics of his surgeries. He opined that repetitive bending and stooping would concentrate forces on Claimant's L5-S1 disc. As a result, he restricted Claimant to only occasional bending in order to reduce wear and tear on that disc. Likewise, Dr. McNulty recommended a permanent lifting restriction of 50-pounds, occasionally, to prolong the time before Claimant's L5-S1 disc wears out. He did not predict when the disc would require surgery, but he did explain that the fusion at the adjacent level above creates a stress riser that will shorten that time and, therefore, the restriction is appropriate. Dr. McNulty assessed a PPI rating of 20% of the whole person, with no apportionment.

35. The integrity and, therefore, credibility, of any given PPI rater's analysis in any given case will depend upon the completeness and accuracy of the facts upon which that analysis is based, as well as the applicability of the authority on which the rater chose to base his or her opinion.

36. The Referee agrees that apportionment is appropriate in this case. The records of Drs. Moise, Almaraz, Holley and Larson clearly articulate a factual basis to support the conclusion that Claimant suffered from a preexisting physical impairment. However, arriving at an appropriate apportionment scheme becomes more difficult in view of the fact that the impairment ratings, and recommended apportionment between accident caused and preexisting conditions, are based on different editions of the *AMA Guides*. Dr. McNulty provided the most coherent and articulate analysis of how he arrived at an impairment rating for Claimant under the *AMA Guides, 5th Edition.* However, Dr. McNulty's opinion on apportionment is rejected because he was unaware of the nature of Claimant's symptoms prior to 2007, and did not have the opportunity to review any of Claimant's pre-injury medical records. Dr. Larson has a more complete knowledge of Claimant's physical condition during the period in which he treated Claimant, and rendered a credible opinion that Claimant's impairment should be apportioned between the effects of the accident and his preexisting condition. However, Dr. Larson's testimony does not reflect how he arrived at a 9% impairment rating for Claimant under the *AMA Guides, 6th Edition*. To arrive at a decision that fairly rates Claimant's accident caused impairment, it is not possible to merely adopt Dr. McNulty's opinion on Claimant's current impairment, and to it, apply Dr. Larson's opinion on apportionment. In this regard, it is important to remember that Dr. Larson conducted his evaluation using the *AMA Guides, 6th Edition*, while Dr. McNulty conducted his evaluation using the *AMA Guides, 5th Edition*, and it is manifest that each of the *Editions* under consideration measure impairment in a unique fashion. The problem is solvable by recognizing that Drs. Almaraz and Holley have also provided an opinion on impairment attributable to the preexisting condition. Those physicians have opined that under the *AMA Guides, 5th Edition*, Claimant is entitled to a 5% PPI rating for his

preexisting condition. Therefore, employing the more credible opinion of Dr. McNulty on the issue of Claimant's current impairment, and the equally credible recommendation of Drs. Almaraz and Holley that some part of Claimant's impairment predates the subject accident, the Commission concludes that Claimant is entitled to a 20% PPI rating, inclusive of a 5% PPI rating referable to a preexisting condition. Employer is responsible for the payment of an impairment of 15% of the whole person, with credit for PPI paid to date.

PPD

37. Every year or two following his 1991 lumbar spine industrial injury, Claimant was required to do light-duty work until the pain subsided.

38. In 1994, Claimant was assessed permanent restrictions, including no bending and no lifting over 10-20 pounds, in addition to standing and sitting restrictions. These restrictions were never released by a physician and Claimant's medical records, including MRI reports, demonstrate that his underlying lumbar spine condition never resolved. Nevertheless, in 2002 or so Claimant began doing landscaping, then construction work, the latter of which required him to work outside of his lifting and bending restrictions. He was working outside these restrictions, lifting lumber, when he suffered his industrial injury in 2007.

39. Claimant's lumbar spine conditions did not significantly improve from 1994 through the time of his industrial accident in 2007, and there is inadequate evidence in the record from which to determine that Dr. Moise's 1994 permanent restrictions had been superseded. Following Claimant's three surgeries, Dr. McNulty is the only physician who recommended post-surgical permanent restrictions[2], and these allow Claimant greater capabilities than he had

2 Dr. McNulty recommended occasional bending and occasional lifting up to 50 pounds.

under Dr. Moise's pre-2007 permanent restrictions. Claimant's access to suitable work, based upon his physician-assessed restrictions and abilities, is broader now than in 1994.

40. The record establishes that Claimant likely suffered a loss of access to gainful employment as a result of his 1991 lumbar spine industrial injury. However, he has suffered no additional loss of access as a result of his 2007 lumbar spine industrial injury. In addition, Claimant's skills, education and experience, even considering his limitations, avail him to jobs that could replace his pre-injury wages, though not necessarily in construction. Finally, Claimant's inability to obtain suitable employment is most likely due to the poor economy; however, there is no expert testimony or other evidence in the record quantifying the impact of this non-economic factor.

41. The Referee finds Claimant has failed to prove he is entitled to PPD benefits as a result of his 2007 industrial injury.

Attorney Fees

42. Idaho Code § 72-804 provides that if the Commission determines that the employer contests a claim for compensation made by an injured employee without reasonable ground or the employer neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee the compensation provided by law or without reasonable ground discontinued compensation as provided by law, the employer shall pay reasonable attorney fees in addition to the compensation provided by law.

43. Claimant argues that Defendants unreasonably contested his claim based on the fact that Surety denied coverage for his lumbar spine fusion surgery for 20 months. He asserts Surety unreasonably relied upon the IME report of Drs. Almaraz and Holley because Claimant had obvious spinal instability at the time of their examination. Surety was subsequently ordered

to pay for Claimant's fusion surgery. In addition, Surety paid Claimant PPI benefits consistent with Dr. Larson's opinion that he had suffered PPI of 9% with 4% attributable to the industrial injury.

44. The Referee finds that Defendants did not act unreasonably when they relied upon the IME report of Drs. Almaraz and Holley. Claimant has introduced no evidence to discredit these physicians other than to point out that they were paid to produce an IME, something Claimant's own expert, Dr. McNulty, was paid to do. Defendants acted within their right to investigate the claim to determine whether they were liable for coverage by sending Claimant for an IME when, and to whom, they did. Defendants were not required to provide medical care on the authority of Dr. Larson once Drs. Almaraz and Holley opined no further surgery related to the industrial accident was warranted.

45. The evidence presented does not establish that Defendants acted unreasonably. There is no basis for an award of attorney fees in this case.

CONCLUSIONS OF LAW

1. Claimant has proven that he is entitled to PPI in the amount of 20% of the whole person, with 5% apportioned on account of his preexisting lumbar spine conditions at L4-5 and L5-S1.

2. Claimant has failed to prove he is entitled to PPD benefits for his June 7, 2007 lumbar spine industrial injury.

3. Claimant has failed to prove he is entitled to attorney fees under Idaho Code § 72-804.

4. All other issues are moot.

RECOMMENDATION

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

DATED in Boise, Idaho, on ___15_____ day of _February_____, 2011.

INDUSTRIAL COMMISSION

_/s/_____
LaDawn Marsters, Referee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

TERRY SUNDBERG, Claimant, v. MANDERE CONSTRUCTION, INC., Employer, LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	**IC 2007-021018** **ORDER** February 22, 2011

Pursuant to Idaho Code § 72-717, Referee LaDawn Marsters submitted the record in the above-entitled matter, together with her proposed findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations 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 proven that he is entitled to PPI in the amount of 20% of the whole person, with 5% apportioned on account of his preexisting lumbar spine conditions at L4-5 and L5-S1.

2. Claimant has failed to prove he is entitled to PPD benefits for his June 7, 2007 lumbar spine industrial injury.

3. Claimant has failed to prove he is entitled to attorney fees under Idaho Code § 72-804.

4. All other issues are moot.

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

DATED this _22____ day of __February_____, 2011.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __22___ day of __February_____, 2011, a true and correct copy of the foregoing **Order** was served by regular United States Mail upon each of the following persons:

THOMAS B AMBERSON
P O BOX 1319
COEUR D'ALENE ID 83816-1319

E SCOTT HARMON
LAW OFFICES OF HARMON & DAY
P O BOX 6358
BOISE ID 83707-6358

jkc _/s/_____