BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL P. VAWTER, Claimant, v. UNITED PARCEL SERVICE, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-000114** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed September 28, 2012**

INTRODUCTION AND PROCEDURAL HISTORY

This matter came before the Industrial Commission for hearing on May 17, 2012. Appearing for Claimant was Rick Kallas, Esq. Appearing for Defendants United Parcel Service/Liberty Insurance Corporation was Susan Veltman, Esq. Appearing for the State of Idaho, Industrial Special Indemnity Fund (ISIF) was Paul Augustine, Esq. Per the Notice of Hearing filed March 7, 2012, the following matters are at issue:

1. Whether and to what extent Claimant is entitled to the following benefits:
    a. Permanent partial impairment (PPI);
    b. Permanent partial disability (PPD);

c. Mileage, per diem and lodging expenses incurred in connection with medical treatment related to Claimant's industrial injury;

2. Whether Claimant is totally and permanently disabled, either under the 100% method or according to the odd-lot doctrine;

3. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

4. Whether the ISIF is liable under Idaho Code § 72-332, and, if so, apportionment under the *Carey* formula;

5. Whether Employer and Surety are entitled to reimbursement for benefits paid pursuant to the Commission's May 17, 2011 decision, should that decision be reversed on appeal;

6. Whether Claimant is entitled to past-denied medical care benefits, or whether the issue of Claimant's entitlement to such benefits is precluded under the doctrine of res judicata;

7. Whether Claimant is entitled to attorney fees under Idaho Code § 72-804, or whether the issue of Claimant's entitlement to attorney fees is precluded under the doctrine of res judicata;

8. Whether Employer and Surety are liable for 100% of the invoiced amount of all past-denied medical care expenses incurred by Claimant in connection with his industrial injury;

9. Whether the Commission, in order to prevent a manifest injustice, should amend its May 17, 2011 decision to reflect that Employer and Surety are liable for 100% of the invoiced amount of all past-denied medical care expenses incurred by Claimant in connection with his industrial injury.

At hearing, the testimony of Claimant, Shaun Byrne, Greg Herzog, Barbara Nelson, and Nancy Collins was adduced. The testimony of Preston Wilkinson was taken by way of pre-

hearing deposition on May 8, 2012. The testimony of R. Tyler Frizzell, M.D., was taken by way of post-hearing deposition on June 4, 2012.

This matter has been the subject of prior proceedings before the Commission. At the request of Defendants, hearing on this case was bifurcated. Following a September 28, 2010 hearing, the Commission issued its May 17, 2011 decision finding that Claimant suffered a compensable work-related accident and was entitled to an award of TTD benefits, as well as certain medical benefits in the amount of $149,033.68. Claimant appealed the May 17, 2011 decision to the Idaho Supreme Court, which subsequently dismissed the appeal. Employer/Surety requested that the Commission stay the award pending resolution of the remaining issues in the case. By Order filed December 8, 2011, the Commission denied the request for stay and ordered the payment of the award made in the Commission's May 17, 2011 decision. Employer/Surety attempted to perfect a permissive appeal of the May 17, 2011 decision to the Idaho Supreme Court. That appeal was rejected as premature.

At the May 17, 2012 hearing, the Commission considered all testimony and exhibits offered in the connection with the earlier hearing. In addition, the Commission admitted into evidence Claimant's additional exhibits 1 - 24, Employer/Surety's additional exhibits 9 – 22, and ISIF's additional exhibits A – K.

Being fully advised in the law and the premises, the Commission issues this decision on the issues remaining in this bifurcated proceeding.

CONTENTIONS OF THE PARTIES

Claimant contends that on or about December 18, 2009, he suffered an accident arising out of and in the course of his employment, and as a consequence of which he is totally and permanently disabled under the odd-lot doctrine. Specifically, Claimant contends that his total

and permanent disability is solely the result of the compensable accident, and that responsibility for his total and permanent disability lies exclusively with Employer/Surety. Although Employer/Surety has filed a complaint against the ISIF, seeking to hold the ISIF responsible for a portion of Claimant's total and permanent disability, Claimant does not join with Employer/Surety in asserting that some portion of Claimant's total and permanent disability is the responsibility of the ISIF. Claimant acknowledges that although he has a number of preexisting physical impairments, none of these impairments are of the type that implicate ISIF liability. Specifically, Claimant denies that any of his preexisting physical impairments constituted a subjective hindrance to him on a pre-injury basis. Further, Claimant contends that none of these impairments combine with the work accident to cause permanent and total disability. Claimant acknowledges that he suffered a work related low back injury in 1990 for which he required medical treatment, and which resulted in time loss from work. Claimant contends that at the time of his closing evaluation for this injury, he was given neither an impairment rating, nor any physician imposed limitations/restrictions. Though Claimant acknowledges that he has suffered low back aches and pains over the years since 1990, he denies that he suffers from any preexisting low back condition which would have warranted the award of an impairment rating prior to the subject accident. Claimant contends that Employer/Surety, having benefitted from the finding of their evaluating physician in 1991 that Claimant suffered no impairment as a consequence of the 1990 accident, should not now be heard to assert that Claimant does have an impairment rating of 7% of the whole person referable to the 1990 accident.

Finally, Claimant asserts that the doctrine of res judicata does not operate as a bar to his demand for payment of additional medical bills, recently discovered, but incurred prior to the

date of the first hearing on this matter. Instead, Claimant contends that he is entitled to an award of attorney fees for Employer/Surety's failure to pay medical and other benefits related to Claimant's compensable injury.

Though acknowledging that Claimant is profoundly disabled, Employer/Surety contends that Claimant is not totally and permanently disabled under either of the routes to total and permanent disability recognized by Idaho law. Employer/Surety contends that in the event Claimant is found to be totally and permanently disabled, not all of the responsibility for Claimant's total and permanent disability should be borne by Employer/Surety. Employer/Surety contends that Claimant has preexisting permanent physical impairments involving several body parts, and that his preexisting permanent physical impairment for his low back condition meets all of the elements of ISIF liability. According to Employer/Surety, Claimant's current low back impairment is 19% of the whole person, with 7% assignable to Claimant's preexisting condition and 12% assignable to the subject accident. Employer/Surety contends that the doctrine of res judicata bars Claimant from adjudicating entitlement to additional medical bills incurred prior to the date of the first hearing, but only recently discovered.

The ISIF acknowledges that Claimant may be totally and permanently disabled, but contends that Dr. Frizzell's recent opinion apportioning Claimant's low back impairment between the subject accident and Claimant's preexisting condition must be rejected. ISIF argues that Claimant's total and permanent disability, if extant, is wholly the product of the subject accident, and that none of Claimant's preexisting impairments constituted a subjective hindrance to Claimant, nor did they combine with the subject accident to cause total and permanent disability.

FINDINGS OF FACT

1. Claimant was born on August 12, 1959, and was 52 years old as of the date of hearing. He and his family moved to Donnelly, Idaho when Claimant was 11 years old. With the exception of a brief stint in the Marine Corps, Claimant has resided in Donnelly ever since.

2. Claimant graduated at the bottom of his class from Donnelly High School. He got mostly Cs and Ds, with some Fs and Bs, during his tenure as a student. He did poorly at studies requiring reading and writing, but excelled at math.

3. Barbara Nelson confirmed that Claimant's academic performance in high school was poor. Ms. Nelson administered various academic tests, including the WRAT 4. This testing confirmed Claimant's testimony that he has severe deficiencies in reading, writing, and spelling, but tests at a high school graduate level in math. (Tr. 218/21 – 220/16). Nancy Collins, the vocational expert retained by Employer/Surety, expressed no disagreement with Ms. Nelson's observations concerning Claimant's academic performance and deficiencies.

4. Notwithstanding his deficits in reading, writing, and spelling, it is noted that Claimant is a cogent and articulate speaker. He had no difficulty understanding or responding to the questions that were put to him at hearing. In particular, he seems to be blessed with good recall.

5. Claimant has no other post-high school education, other than the training he received in the Marine Corps. He testified that he received training as a mechanic on vehicles peculiar to the Marine Corps, and which have no counterpart in the civilian world.

6. Though Claimant testified that he has taught himself to read, he still has difficulty with comprehension. He does not read the daily paper. He has attempted to read novels for enjoyment, but is frequently frustrated when encountering words that he does not understand.

He is capable of using a web browser to access websites that he likes to follow, mostly those providing fishing news or information on BSU football. He denied having any other computer skills whatsoever.

7. From approximately 1983 to 2004 Claimant worked as a volunteer EMT. He testified that he completed initial EMT training, then became ambulance certified and later obtained an EMT-A rating. When he finally resigned in 2003, he was serving as President of the local EMT board. (Tr. 166/21 – 167/8). Claimant resigned from his position as an EMT because of new rules that created potential liability for any EMT who inaccurately recorded medical information about a patient. Claimant testified that in view of his difficulties with reading, writing, and spelling, he had no desire to subject himself to this type of liability.

8. Claimant was discharged from the Marines in 1980 because of what he described as a "defective attitude." Nevertheless, Claimant received an honorable discharge. He returned to the Donnelly area, and was first employed by Petrolane. There, he worked as a driver for about a year before landing another job at Roland Brothers. He worked there for approximately 2½ years, first as a mechanic's apprentice, and then as a snow plow operator and cement truck driver. He left Roland Brothers in order to take a job with UPS in 1983. He was employed as a package driver, and worked in this position for the duration of his employment by UPS. However, until 1990 he evidently drove a "feeder route" in which position he transported packages from Boise to McCall and back. In approximately 1990, he bid on a package driver job in Cascade so that he would be able to spend more time following his school age children's sporting and school activities. Against the suggestion that the Cascade job was physically less demanding than the feeder route job, Claimant testified that it was, in fact, a more demanding position. Claimant described his job duties as follows:

> A. Well, there is – in the big city like Boise they have – they have pre-loaders and unloaders and all of that stuff. In a rural area, McCall, they have – I think there is four guys that work in the building in McCall that unload the feeder truck and load their package cars. It's the drivers that do it. But where I was at down in Cascade I was the only one. So, I unloaded the trailer into the truck and loaded the truck and placed the boxes – we put anything from a pound to – I think the heaviest one I ever carried was 232 pounds. You know, I have had 247 on the box. But we weighed it when I got to the mill, but – so, you know, I did all that and, then, at the end of the – you go out and make your deliveries and you have a predetermined time that you have to do your pickups and you do your pickups during the afternoon and, then, finish your deliveries and get done at the end of the day, you unload your truck of the packages you didn't get delivered and also all your pickup stuff into the trailer and, then, you do your end of day stuff where you just – your DIAD, you have already done your signature for your COD count and all that stuff and you punch out.

Tr. 33/2-22.

9. Following the subject accident and related low back surgeries, Claimant was declared medically stable by Dr. Frizzell in November 2010. Thereafter, he was given certain permanent limitations/restrictions by Dr. Frizzell. He attempted to identify a means by which he could return to work for UPS, and continue with his Employer until he could retire. He worked closely with UPS to identify a suitable position, and even offered to take a job outside of Valley County if the company could identify a position consistent with his limitations/restrictions. UPS was unable to identify work for Claimant consistent with his limitations/restrictions, and in the end, he resigned so that he could access his 401K to have something to live on.

10. Claimant applied for Social Security disability benefits, and was eventually found eligible for Social Security disability benefits retroactive to December 24, 2009. He did not, however, begin receiving Social Security disability until December 2011. As of the date hearing, Claimant receives $2,260.00 or $2,290.00 per month in Social Security disability benefits. In addition, Claimant receives a monthly payment from the Western Conference Pension Plan in the amount of $2,108.00.

11. Claimant testified to his understanding that he can earn monthly income of either $920.00 or $970.00 per month without endangering his right to monthly Social Security disability income. His union pension imposes some restrictions on the type of work he can do without jeopardizing those monthly benefits.

12. In a letter dated June 27, 2011, Dr. Frizzell addressed Claimant's permanent limitations/restrictions following a functional capacities evaluation administered by Peggy Wilson:

> My permanent physical restrictions are in line with the ones that I had made based on the recommendations of Ms. Connie Crogh on December 6, 2010. Ms. Wilson has come to similar restrictions. Mr. Vawter had a valid Key Functional Capacity Assessment on June 20, 2011. He is able to work at a light work level. Specifically, he may stand for 2 hours a day, 20 minutes duration. He may walk 4 hours a day with frequent, moderate distances. He may lift 20 pounds occasionally and 10 lbs. frequently. He may carry 20 lbs. occasionally and 10 lbs. frequently. He may torque 10 lbs. occasionally and 5 lbs. frequently. He may push 20 lbs. occasionally and 10 lbs frequently. He may pull 20 lbs occasionally and 10 lbs. frequently. He may sit 2 hours a day; 15 minutes duration. He may bend minimally, occasionally. He may stoop minimally and occasionally. He may crouch minimally, occasionally. He may kneel occasionally. He may crawl occasionally. He may climb stairs frequently. He should not work from unprotected heights. He should avoid constant, low frequency vibration.

C. 5.17.12 Ex. 1, pp. 001108-001109.

13. In a follow-up letter of March 15, 2012, Dr. Frizzell amended these restrictions with the following correction:

> I have the reviewed the corrected copy provided by Ms. Wilson. She notes work day of four hours with sitting to standing one to two hours, standing one to two hours, and walking one to three hours.
>
> Ms. Wilson also notes that Mr. Vawters' key functional capacity assessment is valid.
>
> Therefore, I agree with her conclusions. . .

C. 5.17.12 Ex. 1, p. 001122.

14. Claimant expressed a good understanding of his physician imposed permanent limitations/restrictions. See Tr. 52/23 – 54/9. As a lifelong resident of the Donnelly area, and as a UPS driver, Claimant testified that he had a peculiar, and possibly unique, understanding of his local labor market. His work as a UPS driver took him to almost every area business at one time or another, and afforded him a glimpse of how local businesses were fairing in the down economy:

> By Mr. Kallas
> Q. And you delivered packages as a package car driver for UPS in Valley county for approximately 26 years?
>
> A. Yeah. Real close to 27 years. Yeah.
>
> Q. So, how familiar are you with the businesses that exist in Valley county right now?
>
> A. I would say especially on the south and, because that's where I spent my last 13 years, 14 years. On the south end I know every person, every dog, every car that everybody drives. You could tell – UPS was a great barometer for how a business is doing. You know when a business starts getting their stuff COD it's not long before the door is going to be closing. So, yeah, I got a real good feeling. Like I say, most of them I have known since I was a little kid. I ran around in Cascade when I was a kid.

Tr. 79/8-22.

15. With assistance from Shaun Byrne and Greg Herzog of the Industrial Commission Rehabilitation Division, Claimant applied for work at a number of Valley County businesses including Long Valley Farm Service, V-1, the Trading Post, Donnelly Country Store, Harpo's, Howdy's, Cascade Auto, Jug Mountain, WorldMart, Rite-Aid, Quick Lube, and an area fitness center. Tr. 70/1-16. Claimant testified that though he applied for these jobs, and in many cases, knew the owners of the businesses, he was unsuccessful in obtaining employment, either because he was not possessed of the skills to perform the job or the job was beyond the limitations/restrictions imposed by Dr. Frizzell.

16. As a consequence of the subject accident, Claimant underwent two low back surgeries, both performed by Dr. Frizzell. After reaching medical stability in November 2010, Dr. Frizzell eventually awarded Claimant a 19% PPI rating, along with the aforementioned limitations/restrictions. As developed *infra*, the parties dispute whether, or to what extent, this 19% PPI rating, and the attendant limitations/restrictions, should be apportioned between the subject accident and a preexisting condition.

17. Claimant's workers' compensation history is significant for a number of reported accidents predating the subject December 18, 2009 accident. All of these accidents occurred during Claimant's long employment with UPS.

18. On or about March 24, 1988, Claimant suffered a right thumb injury for which he was eventually given a 9% whole person PPI rating.

19. On or about October 22, 1990, Claimant suffered an injury to his low back at the L4-5 level. Patrick Cindrich, M.D., considered Claimant to be a candidate for a percutaneous discectomy at L4-5 to treat the left-sided paracentral disc protrusion demonstrated by the radiological studies. However, Claimant did not undergo surgery, and was eventually declared medically stable on or about April 2, 1991, following evaluation by Richard Knoebel, M.D., an evaluating physician retained by UPS and its then surety, Liberty Northwest Insurance. Following his examination of Claimant, Dr. Knoebel opined that Claimant was capable of returning to work without restriction, and without any permanent physical impairment. (*See* D. 5.17.12 Ex. 10, p. 27). The summary of payments reflects that Claimant missed approximately 22 weeks of work as a result of the 1990 accident for which he received TTD benefits.

20. On or about September 16, 1999, Claimant suffered another low back injury when he slipped while carrying a package. Claimant complained of low back pain and bilateral lower

extremity radicular symptoms following this accident. An MRI scan performed on September 27, 1999 was read as showing mild canal stenosis at L4-5 due to a broad diffuse disk bulge and very mild bilateral facet osteoarthritis. (*See* D. 5.17.12 Ex. 21, p. 236). Claimant missed four weeks from work as a result of this accident, for which he received time loss benefits. Neither impairment nor restrictions were awarded to Claimant as a consequence of the 1999 accident.

21. On or about September 19, 1990, Claimant suffered a left shoulder injury when he slipped, catching himself with his left arm. MRI evaluation of Claimant's left shoulder showed a severely degenerative AC joint with probable accident caused injury superimposed on chronic deterioration of the joint. He underwent arthroscopic decompression of the left shoulder and was pronounced stable by Dr. Rudd on or about January 23, 2002. At that time, he was also given an impairment rating equal to 7% of the whole person. (*See* D. 5.17.12 Ex. 12, p. 56). In terms of Claimant's return to work, Dr. Rudd stated: "We will release him to do his normal duties for UPS, although overhead lifting will be awkward for him."

22. On or about July 6, 2004, Claimant suffered a right shoulder injury while loading packages on to the top shelf of his vehicle. He was evaluated by Robert Walker, M.D., and diagnosed as suffering from a partial thickness right rotator cuff tear and a right AC joint injury. Claimant underwent arthroscopic subacromial decompression of the right shoulder and excision of the right AC joint. On or about December 1, 2004, Claimant was declared medically stable and was given a 10% whole person rating by Dr. Walker. On December 1, 2004, Dr. Walker offered the following comments concerning Claimant's ability to return to work:

> I would expect that he will continue to strengthen over time but it may take several months before he has maximal improvement. At this point, he will continue with activities as tolerated and may continue to work, progressing to an unrestricted basis.

D. 5.17.12 Ex. 19, p. 218.

23. With respect to the prior claims referenced above, Claimant testified that none of the injuries he suffered permanently impacted his ability to engage in gainful activity. Without exception, Claimant testified that he recovered from these injuries, and returned to his usual occupation as a UPS driver. He required no accommodation, and none was offered to him by UPS. He testified that prior to the subject December 18, 2009 accident, he felt that he could perform any type of manual labor available in Valley County; he felt himself "invincible." (Tr. 141/12-25).

24. The record supports Claimant's assertions in this regard, at least with respect to the 1988 thumb injury, 2000 left shoulder injury, and 2004 right shoulder injury. As noted, Claimant was released without physician imposed restriction following each of these accidents and there is neither medical, nor other evidence, which would suggest that these prognostications concerning Claimant's functional ability were inaccurate. Claimant made the same averments with respect to his 1990 low back injury, but in this case, the record does contain significant evidence contradicting Claimant's testimony.

25. First, as noted above, Dr. Knoebel did not feel that Claimant was entitled to an impairment rating for his low back condition following the 1990 accident. Absent the issuance of an impairment rating, the 1990 accident would be insignificant for purposes of Idaho Code § 72-406 apportionment in a less than total case, and Idaho Code § 72-332 apportionment between the employer and the ISIF in a total and permanent disability case. However, Dr. Knoebel's is not the only opinion of record concerning whether Claimant is entitled to an impairment rating for the 1990 accident. A review of the records and testimony of Dr. Frizzell reveals that after a good deal of back and forth between he, Claimant's counsel and counsel for Employer/Surety, Dr. Frizzell committed himself to the proposition that Claimant's 19% PPI rating should be

apportioned 7% to the 1990 accident, and 12% to the subject December 18, 2009 accident. Dr. Frizzell also testified that limitations/restrictions against lifting more than 75 pounds would accompany the 7% PPI rating awarded to Claimant for the 1990 accident.

26. Explaining his original disinclination to assign either impairment or limitations to the 1990 accident, Dr. Frizzell stated that because Dr. Knoebel had issued neither impairment nor limitations for that accident, Dr. Frizzell had labored under the belief that this somehow precluded revisiting the issue. (Frizzell Depo., 39/10-21). When asked to simply ignore the fact that Dr. Knoebel had previously opined on these issues, Dr. Frizzell expressed his opinion that apportionment of both impairment and restrictions was appropriate.

27. This did not end Claimant's criticism of Dr. Frizzell's new opinion. In arriving at his decision to apportion Claimant's PPI rating between the 1990 accident and the 2009 accident, Dr. Frizzell relied upon the *AMA Medical Association Guide to the Evaluation of Permanent Impairment* (5th Edition). He believed that it was appropriate to assign some portion of Claimant's impairment to the 1990 accident because the three criteria for apportioning impairment identified in the Guides had been met:

1) There is documentation of a prior factor.

2) The current permanent impairment is greater as a result of the prior factor (ie, prior impairment, prior injury, or illness).

3) There is evidence that the prior factor caused or contributed to the impairment, based on a reasonable probability (>50% likelihood).

AMA Medical Association Guide to the Evaluation of Permanent Impairment (5th Edition), p. 11.

28. Dr. Frizzell testified that the L4-5 injury documented in connection with the 1990 accident satisfied all three criteria, thus making apportionment appropriate. (Frizzell Depo.,

15/4-16/5). However, on cross-examination by Claimant's counsel, Dr. Frizzell offered the following cryptic response concerning criteria number 2:

> By Mr. Kallas
> Q. Okay. And on step 2, it asks whether the current permanent impairment is greater as a result of the prior factor. And in this case, I assume the prior factor that we're talking about is the 7 percent PPI rating that you issued for Mr. Vawter's preexisting L4-5 disk protrusion, correct?
>
> A. Yes.
>
> Q. Can you explain to me how this current impairment rating would be greater as a result of the prior factor?
>
> A. No, I can't confirm that.

Frizzell Depo., 22/18-23/4.

Even so, at the end of the day, Dr. Frizzell concluded the discussion by expressing his view that based on the medical and other records he reviewed in connection with Claimant's preexisting condition, it was still appropriate to assign 7% of the 19% PPI rating to the 1990 accident, and to restrict Claimant from lifting over 75 pounds as a consequence of that accident.

29. Independent evidence in the record tends to support Dr. Frizzell's ultimate conclusion that apportionment of both impairment and limitations is appropriate in this case.

30. On August 5, 2009, Claimant was seen for a DOT physical by Jim Dardis, M.D., of the Payette Lakes Medical Center. In connection with that physical, Dr. Dardis recorded the following history and findings:

> REVIEW OF SYMPTOMS: The patient has complaints of right thumb pain from where he lost the tip of his thumb in a conveyor belt, severe upper back pain, very sore with spasms, chronic low back pain from lifting boxes and carrying which he's been doing for almost 28 years with UPS He has complaints in both knees with heat and swelling which, by the end of the day, just stepping out of this truck gives shooting pains with his left knee and causes a hot, swollen, painful, aching like a toothache in his right knee by the end of each day of work.

1. Normal DOT physical, cleared for two years.
2. Diabetes mellitus.
3. Dyslipidemia.
4. Bilateral knee pain.
5. Chronic low back pain.
6. Current upper back pain.

D. 9.28.10 Ex. 5, pp. 75-76.

31. From time to time, Claimant was evaluated by his supervisors, who rode along with him on his route to assess his performance and compliance with UPS policy. Among other things, UPS required its employees to avoid "excessive backing" when accessing the driveways or parking lots of its customers. Evidently, this policy was intended to avoid damage to persons or property for which the company might be held liable. On a ride along evaluation of July 29, 2008, the individual who was evaluating Claimant recorded the following: "Excessive backing due to protectiveness of sore back." (*See* D. 5.17.12 Ex. 15, p. 124).

32. Claimant attempted to explain these entries and square them with his testimony that he was altogether unimpaired prior to the December 18, 2009 accident. The Commission finds these explanations unconvincing, and concludes that the record provides substantial and competent evidence supporting the conclusion that Claimant suffered from symptomatic low back complaints prior to December 18, 2009, complaints which were severe enough to cause Claimant to modify the manner in which he performed his work.

33. As noted above, after being declared medically stable, Claimant unsuccessfully looked for work in Valley County. In this he was aided by both Shaun Byrne and Greg Herzog, however, per Claimant, only Greg Herzog offered specific leads to Claimant for follow-up. None of the jobs suggested by Mr. Herzog proved appropriate for Claimant. In addition to the work they did on Claimant's case, both Mr. Byrne and Mr. Herzog also offered their views on Claimant's residual employability following the December 18, 2009 accident. Mr. Byrne noted

that Claimant's transferable job skills include good customer service skills, but little else. He proposed that lacking significant transferable job skills, Claimant's employability could be improved with retraining. However, Claimant's deficiencies in reading, writing, and spelling make successful retraining doubtful.

34. Mr. Byrne testified that Claimant was diligent and highly motivated to either return to UPS or other employment in Valley County. Based on Claimant's relevant nonmedical factors and the limitations/restrictions imposed by Dr. Frizzell, Mr. Byrne ultimately concluded that Claimant is unemployable in Valley County absent the assistance of a sympathetic employer. (Tr. 193/22 – 194/12; 197/5 – 16).

35. Concerning the job leads that he provided to Claimant, Mr. Herzog acknowledged that although these jobs might be consistent with Claimant's physical limitations, Claimant was otherwise unequipped with the skills necessary to perform the work in question. (Tr. 209/8 – 211/3).

36. Delyn Porter, a private vocation rehabilitation expert was retained by Aetna Disability and Benefits Management, Claimant's non-occupational disability insurance provider, to perform an assessment of Claimant's employability in Valley County. This assessment was requested by Aetna in order to assist it in making its own determination as to whether Claimant was entitled to the disability benefits available under that policy and/or whether Claimant was a candidate for Social Security disability benefits, a status which would reduce Atena's exposure for the payment of private disability benefits. Mr. Porter reached conclusions very similar to those reached by Shaun Byrne:

> Given his age a formal training program to prepare to return to work would be an option, but he would likely have to travel outside of his labor market area in order to participate in a training program. He also struggled with high school and notes that he was not a good student. When considering his residual functional capacity

> and permanent work restrictions with the need to travel to participate and past struggles in school this may not be a viable option. Career exploration services could assist him in identifying training goals and options that he may choose to consider.
>
> The most likely route for Mr. Vawter to return to work would be to work for a friend, relative, or sympathetic employer that is willing to overlook and work around the multiple factors indentified in this report. He was born and raised in the Donnelly area and is well known and respected in the community.

C. 5.17.12 Ex. 7, p. 007011.

37. Claimant retained the services of Barbara Nelson to provide an opinion on Claimant's residual employability following the subject accident. In performing her evaluation, Ms. Nelson assumed that the final limitations/restrictions identified by Dr. Frizzell accurately identify Claimant's current exertional limitations. Conversely, she chose to reject Dr. Frizzell's opinion that Claimant should have observed a 75 pound maximum lifting restricting even before the December 18, 2009 accident. Ms. Nelson assumed that all of Claimant's limitations/restrictions are referable to the December 18, 2009 accident. These limitations, in conjunction with Claimant's lack of transferable job skills and his severe academic limitations, led Ms. Nelson to conclude that Claimant has suffered a profound disability and is, in fact, unemployable in Valley County. (Tr. 222/8 – 224/21).

38. On examination by the Commission, Ms. Nelson conceded that if Dr. Frizzell is correct in his conclusion that Claimant should have observed a 75 pound lifting restriction as a consequence of the 1990 low back injury, then he has suffered a 10-15% loss of access to the labor market as a consequence of the 1990 accident.

39. Nancy Collins, Ph.D., was retained by Employer/Surety to perform a forensic analysis of Claimant's residual employability and to consider whether the 1990 accident contributed to Claimant's current disability.

40. Dr. Collins did not denigrate Claimant's diligence in attempting to obtain employment following his date of medical stability. However, she noted that at the present time, Claimant does not have a great deal of financial incentive to pursue employment consistent with his limitations. Claimant is receiving monthly payments from both the Social Security Administration and his union pension plan. Additionally, Social Security offset provisions would apply were Claimant's monthly income from employment to exceed $890.00.

41. In her report, Dr. Collins proposed that Claimant's disability from all causes is in the range of 70-80%. However, this opinion was reached without the benefit of Dr. Frizzell's complete opinion on Claimant's current limitations/restrictions. In view of Dr. Frizzell's belief that Claimant should be restricted from working more than four hours per day, Dr. Collins opined that Claimant's current disability from all causes is in the range of 80%. Although she testified that it is not pointless for Claimant to search for part-time work as a cashier or hotel clerk, she concedes that Claimant may be an odd-lot worker, and that Claimant's reading, writing, and spelling deficiencies would make it difficult for Claimant to succeed in any job that requires reading and writing.

42. Dr. Collins did not dismiss Dr. Frizzell's opinions on the apportionment of impairment and restrictions to the 1990 low back injury. Per Dr. Collins, the 75 pound restriction imposed by Dr. Frizzell for the 1990 injury would result in loss of labor market access in the range of 10-15% and wage loss in the range of 50-60%. Considering these factors, she proposed that Claimant suffered disability in the range of 35% as a consequence of the 1990 accident.

43. The Commission finds Claimant to be intelligent, articulate, loquacious, and generally credible in his testimony—the only exception being Claimant's unconvincing

insistence that prior to December 18, 2009, he had no symptomatic low back complaints, and that he did not self-limit his activities in order to protect his back.

44. At the time of the September 28, 2010 hearing, Claimant put on proof that as of the date of that hearing, he was aware of medical bills totaling $149,033.68. In briefing, he cautioned that he had presented only those bills of which he was aware, and that further research might reveal the existence of additional medical bills for treatment rendered prior to the date of the September 2010 hearing. He asked the Commission to order Employer/Surety to pay those bills of which he was aware as of the date of hearing.

45. Since the September 28, 2010 hearing, Claimant has discovered additional medical bills for services rendered prior to the date of the Commission's May 17, 2011 decision on compensability. Those bills total $24,627.80. Employer/Surety does not challenge the compensability of that care. Rather, Employer/Surety contends that Claimant's entitlement to recover these additional expenses incurred prior to the September 28, 2010 hearing is barred by the doctrine of res judicata.

DICUSSION AND FURTHER FINDINGS

Total and Permanent Disability

46. Under Idaho Code §§ 72-423, 72-425, and 72-430, permanent disability is a measure of claimant's present and probable future ability to engage in gainful activity as that ability is affected by the claimant's permanent physical impairment, and the relevant nonmedical factors identified at Idaho Code § 72-430. The date upon which this disability evaluation must be made is the date of hearing. *Brown v. The Home Depot*, WL 718795 (March 7, 2012). Here, Claimant contends that he is totally and permanently disabled, and the ISIF concedes this point. Only Employer/Surety contends that Claimant's disability is less than total.

47. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total permanent disability:

> First, a claimant may prove total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See*, *Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd-lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho, at 281, 939 P.2d at 857.

When a claimant cannot make the showing required for 100% disability, then a second methodology is available: the odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), *citing Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work; they are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part. *Id.*, 136 Idaho at 584, 38 P.3d at 622.

48. An employee may prove total disability under the odd-lot doctrine in one of three ways:

> (1) by showing that [he or she] has attempted other types of employment without success;
>
> (2) by showing that [he or she] or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or;

(3) by showing that any efforts to find suitable employment would be futile.

Boley v. State, Indus. Special Indem. Fund, *supra*.

49. Here, Claimant's impairments total 45% (9% thumb, 7% left shoulder, 10% right shoulder, 19% low back). No vocational expert has proposed that Claimant is totally and permanently disabled by virtue of having 100% disability, and on the record before the Commission, the Commission is unable to conclude that Claimant was 100% disabled as a matter of law as of the date of hearing. There remains for consideration the question of whether Claimant is, nevertheless, totally and permanently disabled under the odd-lot doctrine.

50. Claimant's permanent limitations/restrictions were established by Dr. Frizzell, and are not in dispute. These limitations would profoundly limit anyone's ability to engage in gainful activity, but have an even greater impact on a worker whose lack of transferable job skills leave him suited to manual labor only. Such is Claimant's situation. His academic performance in high school was poor, which may be explained by the existence of a learning disability, as suggested by the testing performed at Ms. Nelson's instance. Claimant has a great deal of difficulty with reading, writing, and spelling. Although his math skills are good, it is difficult to imagine what type of part-time sedentary job exists in Valley County that does not require the ability to read, write, or operate a computer. Although Claimant presents as articulate and personable, these qualities alone do not significantly expand the labor market of someone who is as academically challenged as Claimant. Although it was suggested that Claimant might improve his employability with unspecified retraining of some type, it was also pointed out that retraining would be problematic in view of Claimant's reading and writing deficiencies. Moreover, retraining has not been offered, and Claimant's entitlement to retraining benefits under Idaho Code § 72-450 is not among the issues noticed for hearing.

51. Valley County has one of the highest unemployment rates in the state, but because he has lived in Valley County since 1971, and has a peculiar knowledge of the Valley County labor market by virtue of his long employment with UPS, Claimant is particularly well suited to ferret out employment opportunities in his labor market. Although it is probably true that Claimant is less motivated now to look for suitable employment since qualifying for Social Security Disability and his private pension, the record establishes that Claimant was diligent in his work search after being declared medically stable by Dr. Frizzell. He was exhaustive in his efforts to return to work for his time of injury employer. When that effort failed to produce a job opportunity for him with UPS, he made a reasonably diligent effort to identify suitable employment in the Valley County labor market. Shaun Byrne of the ICRD confirmed that Claimant made a good effort to find work consistent with his limitations. Although Mr. Byrne recognized that Claimant had better access to job leads than the ICRD, Greg Herzog actually did provide Claimant with two or three job leads. Although Claimant did contact these employers, Mr. Herzog acknowledged that the positions required skills which Claimant did not possess. (Tr. 209/8-210/15). In fact, Mr. Herzog was unable to identify any job openings in the Valley County labor market which were consistent with Claimant's physical limitations and skills. (Tr. 211/4-11).

52. Similarly, Shaun Byrne was unable to identify suitable employment for Claimant in Valley County. Mr. Byrne testified that the only employment that might be reasonable for Claimant was part-time employment in some type of service job such as a retail sales clerk/cashier. He believed that Claimant could perform this type of work for the "right employer." Explaining this comment, Mr. Byrne testified that Claimant is probably only employable by a sympathetic employer. Mr. Byrne's gestalt is that an individual with

Claimant's limitations and lack of transferrable job skills is essentially unemployable in the Valley County labor market. (Tr. 197/5-16).

53. As noted above, Barbara Nelson testified that she chose not consider Dr. Frizzell's opinion on apportionment of impairment and limitations to Claimant's preexisting low back condition because she did not find his assessment to be "credible." (Tr. 222/10-224/21). Although she could be criticized for accepting only those opinions of Dr. Frizzell favorable to Claimant's claim, this potential shortcoming does nothing to denigrate her conclusion that Claimant is totally and permanently disabled. Taking into account the permanent limitations/restrictions given to Claimant following his November 2010 date of medical stability, as well as the Claimant's relevant nonmedical factors, including, most importantly, his reading and writing deficiencies, Ms. Nelson has credibly explained that Claimant is essentially unemployable in the Valley County labor market.

54. Nancy Collins, Ph.D., originally concluded that Claimant's disability is in the range of 70-80%. However, her opinion in this regard assumed that Claimant is capable of working an eight hour day. She candidly agreed that if Claimant is not capable of working more than four hours per day, his disability is more likely to be at the high end of that range, i.e. 80%. Dr. Collins still felt that Claimant might be able to find employment as a part-time cashier or hotel clerk. She did not feel it pointless for Claimant to attempt retraining, because he was evidently good enough at classroom work to advance in his EMT training over the years. However, she conceded that Claimant's reading, writing, and spelling deficiencies would make it difficult for Claimant to succeed in any job requiring reading or writing. Most telling, though arguing that Claimant's disability is in the range of 80%, she candidly acknowledged that Claimant may, nevertheless, be an odd-lot worker.

55. Based on the testimony of Mr. Byrne, Mr. Herzog and Ms. Nelson, the Commission believes that Dr. Collins has underestimated the significance of Claimant's restriction against working more than four hours per day, but that she has, nevertheless, correctly observed that in the Valley County labor market, an individual with Claimant's profound limitations and lack of skills is likely to be an odd-lot worker.

56. Based on the foregoing, the Commission concludes that Claimant has satisfied his burden of proving that he is an odd-lot worker by at least two of the recognized methods of proving odd-lot status. We find that Claimant has been diligent in his attempts to obtain employment, but that even with his intuitive grasp of the Valley County labor market, he has been unsuccessful in finding work. As well, the vocational rehabilitation experts who have provided testimony in this case are almost uniform in their agreement that Claimant is unemployable in Valley County. Based on the foregoing, we conclude that Claimant is totally and permanently disabled under the odd-lot doctrine.

ISIF Liability

57. Idaho Code § 72-332 provides:

> PAYMENT FOR SECOND INJURIES FROM INDUSTRIAL SPECIAL INDEMNITY ACCOUNT. (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such

> seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

Accordingly, once an injured worker has been judged to be permanently and totally disabled under either of the methods discussed above, the ISIF may be held responsible for some portion of that total and permanent disability if the following elements of ISIF liability are satisfied:

1) It must be demonstrated that claimant suffered from a preexisting physical impairment;

2) It must be shown that the impairment was manifest;

3) It must be shown that the impairment constituted a subjective hindrance to employment; and

4) It must be shown that the impairment combined with the industrial accident to cause total and permanent disability.

See Dumaw v. J.L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990).

Preexisting Physical Impairment

58. With one exception, there is agreement between the parties concerning the nature and extent of Claimant's preexisting physical impairments. The parties are in agreement that Claimant suffered the following preexisting physical impairments:

March 24, 1988	right thumb injury	9% of the whole person
September 19, 1990	left shoulder injury	7% of the whole person
July 6, 2004	right shoulder injury	10% of the whole person

59. The parties do dispute the extent and degree to which Claimant suffered a permanent physical impairment as a consequence of the October 22, 1990 low back injury. As developed above, Dr. Knoebel saw Claimant at the instance of Employer in April 1991, at which time he pronounced Claimant medically stable, but not entitled to an impairment rating. The record contains only fragments of Dr. Knoebel's report; the record does not reveal anything about the history upon which he relied, or Claimant's physical findings on exam. The foundation for Dr. Knoebel's ultimate opinion on the extent and degree of Claimant's entitlement to an impairment rating in 1991 is unclear.

60. However, though it is difficult to test the underpinnings of Dr. Knoebel's opinion at this remove, there are also things in the musings of Dr. Frizzell that are troublesome. Dr. Frizzell vacillated a good deal in his opinion on whether Claimant was entitled to an impairment rating for the 1990 low back injury before finally settling on a 7% PPI rating for the 1990 accident. Even though Dr. Frizzell adopted this as his final opinion, it is still somewhat problematic that he was unable to explain to Claimant's counsel how the "prior factor," i.e. the 1990 accident, caused Claimant's current impairment to be greater. However, balancing Dr. Frizzell's testimony and reports against the conclusions of Dr. Knoebel, nevertheless, leads the Commission to conclude that Dr. Frizzell credibly established that Claimant's 1990 low back injury entitled him to a 7% PPI rating. In reaching this conclusion, we are also guided by our finding that Claimant did not credibly testify that his low back was symptom free in the years prior to the December 18, 2009 accident. The record establishes that Claimant suffered from symptomatic low back complaints prior to the subject accident, and that these complaints were of such significance to cause him to self-modify the manner in which he performed his work.

These findings lend credence to the testimony of Dr. Frizzell that Claimant's preinjury low back condition was of such significance as to warrant the award of a permanent physical impairment rating.

Manifestation

61. All of Claimant's preexisting impairments were manifest. "Manifest" means that either the employer or the employee is aware of the condition so that the condition can be established as existing prior the injury. *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P.2d 746 (1982). Here, all of the impairments referenced above, including Claimant's preexisting low back condition, were known to Claimant prior to the date of the subject accident.

Subjective Hinderance

62. The subjective hindrance component of the test is found at Idaho Code § 72-332(2). That section provides:

> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

63. Therefore, in order to qualify for ISIF liability, a preexisting permanent impairment must be of such seriousness as to constitute a hindrance or obstacle to obtaining employment, or to obtaining reemployment should a claimant become unemployed. Further, this assessment must be made subjectively as to the particular employee involved. That an injured worker may be employed at the time of a subsequent work injury does not create a presumption that a preexisting physical impairment did not constitute an obstacle to obtaining employment.

The case of *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990) makes it clear that an injured worker's attitude toward a preexisting condition is but one factor to be considered by the Commission in determining whether the preexisting physical impairment constituted a subjective hindrance. After *Archer*, the Commission is required to weigh a wide variety of medical and non-medical factors, and expert and lay testimony in making the determination as to whether or not a preexisting condition constituted a hindrance or obstacle to employment for the particular claimant. Here, there is neither testimony from Claimant, evaluating physicians, or vocational rehabilitation specialists which would support the proposition that the 1988 thumb impairment, 1990 left shoulder impairment, or 2004 right shoulder impairment constituted an obstacle to Claimant's employment or reemployment. The fact that no physician gave Claimant permanent limitations/restrictions for these injuries is a significant factor informing the Commission's decision that these preexisting physical impairments did not constitute a subjective hindrance to Claimant prior to the subject accident.

64. With respect to the 1990 low back injury, in addition to determining that Claimant is entitled to a 7% PPI rating for that injury, Dr. Frizzell felt it appropriate that following that injury Claimant should have observed certain limitations/restrictions in order to protect his back from further injury. He proposed that Claimant should avoid maximum lifting of over 75 pounds. The sensibility of this recommendation is well borne out by Claimant's subsequent history. Although Claimant returned to unrestricted work following the 1990 low back injury, he did not stay symptom free. Another low back injury in 1999 took him off work for a period of weeks. In the years immediately preceding the subject accident, medical and employment records reflect that Claimant continued to be troubled with symptomatic low back complaints.

65. Finally, Dr. Collins persuasively testified that the pre-injury limitations/restrictions given by Dr. Frizzell would reasonably have limited Claimant's access to the labor market in Valley County had he lost his job at UPS.

66. For these reasons, the Commission concludes that Claimant's 7% preexisting physical impairment resulting from his 1990 low back injury reasonably constituted a subjective hindrance to Claimant prior to the subject accident.

Combining With

67. There remains for consideration the question of whether or not the Claimant's preexisting physical impairment for his low back condition combined with the effects of the subject accident to cause total and permanent disability. For the reasons set for below, we believe that this question must be answered in the affirmative.

68. Following the 1990 low back injury, Claimant underwent MRI and CT studies. Per Dr. Cindrich, the MRI was thought to reveal a small focal left paracentral disc herniation at L4-5. (*See* D. 5.17.12 Ex. 10, p. 34). A December 10, 1990 CT scan of the lumbar spine was read as follows: "There is a left sided disc herination at L4-5 with effacement of the anterior and left side of the thecal sac." (*See* D. 5.17.12 Ex. 10, p. 36).

69. Following the 1999 low back injury, Claimant's low back was again studied. A September 27, 1999 MRI was read as follows concerning findings at the L4-5 level:

> At L4-5, there is a diffuse anular (sic) bulge and mild osteophyte formation evident. Facets are slightly hypertrophic, but the ligamentum flavum is not thickened. There is mild canal stenosis at this level. Neural foramina are adequate. Exiting nerve roots are surrounded by adequate perineural fat.

D. 5.17.12 Ex. 21, p. 236.

70. Following the subject 2009 accident, Claimant underwent MRI study on January 11, 2010. That study was read as follows concerning the L4-5 level:

> Loss of hydration signal in the disc consistent with degenerative disc disease. Moderate-sized posterior focal disk protrusion causing moderate central spinal stenosis, severe left lateral recess stenosis and a moderate right lateral recess stenosis. No significant foraminal stenosis.

See D. 5.17.12 Ex. 21, p. 247.

71. The most significant findings in Claimant's low back since the original injury of 1990 are at the L4-5 level. However, the findings at that level have progressively worsened with the passage of time, and with the occurrence of subsequent industrial accidents. The Commission has found that Claimant is entitled to an impairment rating following his original industrial accident, and that he should have observed certain limitations on his activities following that accident in order to protect his back from further injury. That he continued to experience low back discomfort and objective worsening of his condition may be explained by the fact that he did not, by his testimony, moderate his activities subsequent to the 1990 injury. However, evidence which the Commission has found persuasive establishes that Claimant was not symptom free in the years immediately preceding the subject accident. Indeed, he attempted to find ways to do his job which would ease the demands placed on his back. Finally, Claimant suffered a severe worsening of his condition while engaged in the trivial exercise of bending over to tie his shoes, tending to corroborate the radiological studies referenced above, which demonstrate that Claimant had significant and progressive problems at L4-5 in the years preceding the subject accident. Absent Claimant's significant preexisting condition at L4-5, it seems likely that the activities of December 18, 2009 would not have resulted in damage to Claimant's lumbar spine. At any rate, the medical evidence establishes that Claimant's preexisting condition was significantly worsened as a result of the subject accident, and that it is impossible to ignore Claimant's preexisting low back condition at L4-5 in describing Claimant's current impairment and limitations. Claimant's preexisting low back condition clearly set the

stage for Claimant's accident of December 18, 2009, and in that sense combines with the accident of December 18, 2009 to cause Claimant's total and permanent disability.

Carey Apportionment

72. Having found that the elements of ISIF liability have been met with respect to Claimant's preexisting physical impairment of 7% following the 1990 low back injury, it is next necessary to apply the rule of *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984) to the facts of this case. For purposes of *Carey* apportionment, Claimant's impairments total 19%, 7% of which is attributable to the preexisting condition and 12% of which is attributable to the subject accident. The remaining disability to be apportioned between Employer and the ISIF equals 81% (100% - 19%). Employer's liability for Claimant's total and permanent disability is calculated as follows: 12/19 x 81% = 51.19 + 12 = 63.19%. The ISIF's responsibility for Claimant's total and permanent disability is calculated as follows: 7/19 x 81% = 29.8 + 7 = 36.8%.

73. A 63% disability equals $110,187.00 at 2009 rates. Ordinarily, this would represent the exposure of Employer/Surety after *Carey* apportionment. A 63% disability equates to 315 weeks. Therefore, ISIF liability would commence 315 weeks subsequent to Claimant's date of medical stability in November 2010.

Application of Quasi-Estoppel

74. In briefing, Claimant argued that Employer/Surety should be estopped to assert an impairment rating for the 1990 low back injury different than the 0% impairment originally given by Dr. Knoebel in 1991. This argument would only be relevant to Claimant's prosecution of his claim were Claimant found to be profoundly, but not totally and permanently, disabled. However, since Claimant has been found to be totally and permanently disabled, Claimant will

receive total and permanent disability benefits regardless of whether or not Employer/Surety is estopped from asserting that Claimant has a 7% PPI rating from the 1990 injury; Claimant will receive total and permanent disability benefits from either Employer alone, or from Employer and the ISIF. Since the Commission has found Claimant to be totally and permanently disabled, whether Employer/Surety should be estopped as requested is no longer relevant to Claimant's receipt of benefits.

75. However, the ISIF, which was brought into this case by Employer/Surety, has also alleged that Employer/Surety should not now be heard to assert a position on Claimant's 1990 low back impairment different than the position it advocated back in 1991.

76. The doctrine of "quasi-estoppel" has received considerable treatment in Idaho case law. In *Tommerup v. Albertson's, Inc.*, 101 Idaho 1, 607 P.2d 1055 (1980), the doctrine was described as follows:

> To constitute quasi estoppel, the person against whom the estoppel is sought must have gained some advantage for himself, produced some disadvantage to the person seeking the estoppel, or induced such party to change his position; in addition it must be unconscionable to allow the person against whom the estoppel is sought to maintain a position which is inconsistent with the one in which he accepted a benefit.

See also City of Sandpoint v. Sandpoint Ind. Hwy Dist., 126 Idaho 145, 879 P.2d 1078 (1994); *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002). Of the doctrine it has also been said:

> The doctrine classified as quasi-estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit.
>
> *KTVB v. Boise City*, 94 Idaho 279, 486 P.2d 992 (1971).

Quasi-estoppel, unlike equitable estoppel does not require misrepresentation by one party or actual reliance by the other. It is often described as a broadly remedial doctrine, applied on an *ad hoc* basis to specific fact patterns.

77. It will be recalled that following the 1990 accident, Claimant was diagnosed as suffering an L4-5 disc injury of such significance that one of his physicians considered Claimant to be a possible candidate for surgical intervention. In 1991, UPS engaged the services of Richard Knoebel, M.D., for the purpose of performing an Idaho Code § 72-433 exam. The record does not reflect what instructions UPS gave to Dr. Knoebel, what records it supplied, or what questions it asked. However, the record does reflect that after completing his examination of Claimant, Dr. Knoebel proposed that Claimant had not suffered any permanent physical impairment as a consequence of the 1990 accident, and neither was he entitled to any permanent limitations/restrictions. The 1990 claim was not litigated, and there was no finding made by the Commission as to whether or not Dr. Knoebel was correct in rendering his judgment on Claimant's impairment. However, UPS assuredly benefitted from Dr. Knoebel's opinion and acquiesced in the same, since the Commission's records reflect that the claims file was eventually retired without the payment of any impairment rating by UPS or its then surety. In 1991, at the time Dr. Knoebel rendered his rating, it was to the advantage of UPS and its then surety to minimize their exposure by obtaining a favorable opinion on Claimant's impairment/limitations. This they did.

78. Now, of course, the occurrence of the subject accident of December 18, 2009 has made it advantageous to UPS and its current surety to argue that some portion of Claimant's impairment must predate the subject accident. As developed above, the Commission has found that 7% of Claimant's 19% impairment rating should be assigned to the 1990 accident, and that

because this 7% impairment rating meets the other elements of ISIF liability, a portion of UPS's responsibility for total and permanent disability benefits can be shifted to the ISIF.

79. It seems clear that UPS is now asserting a position inconsistent with one it acquiesced in and benefitted from in 1991. Further, we believe that it would be unconscionable to allow UPS, after having accepted the benefit of the 0% PPI rating rendered by Dr. Knoebel, to now assert a contrary position to the disadvantage of the ISIF.

80. We conclude that the doctrine of quasi-estoppel is applicable to the facts of this case. Therefore, Employer/Surety is estopped from asserting that Claimant has a 7% PPI rating referable to the 1990 accident. The Commission is aware of the irony of applying the doctrine to these facts; the Commission has concluded that Dr. Frizzell correctly identified a 7% PPI rating which should attach to the permanent effects of the 1990 accident, while the application of the doctrine of quasi-estoppel binds UPS/Surety to Dr. Knoebel's 0% rating, a rating which we were not persuaded to adopt.

81. Since Employer/Surety is estopped to deny the 0% rating, this leaves no other preexisting impairments which satisfy the other requirements of ISIF liability. Therefore, Employer/Surety cannot meet its *prima facie* case against the ISIF and Employer/Surety bears responsibility for 100% of Claimant's total and permanent disability commencing with Claimant's date of medical stability in November 2010.

Medical expenses and the Doctrine of Res Judicata

82. In connection with the initial hearing of September 28, 2010, Claimant put on proof of medical bills incurred by him to the date of hearing. These bills totaled $149,033.68. Claimant asked the Commission for an award in this amount, though he cautioned that this sum might not represent the totality of bills incurred to the date of hearing. The bills at issue at the

time of the initial hearing were not contested by Employer/Surety, and the Commission eventually entered an order awarding Claimant the sum of $149,033.68, representing 100% of the invoiced amount of bills presented at the original hearing.

83. Since that time, Claimant has identified additional bills incurred between the date of injury and May 17, 2011, the date of the Commission's decision on the compensability of the claim. Some of these bills were incurred prior to the September 28, 2010 hearing, and some were incurred between the date of that hearing and the date of the Commission's May 17, 2011 decision. These additional bills, at 100% of the invoiced amount, total $24,627.80. Again, Employer/Surety does not dispute the compensability of these bills pursuant to Idaho Code § 72-432. Rather, Employer/Surety alleges that the doctrine of res judicata bars Claimant from making a claim for these additional bills. Employer/Surety argues that Claimant asked for a sum certain representing medical bills incurred in connection with his treatment, and that the Commission's award of that sum certain is res judicata of any claim for additional medical bills for services rendered prior to the date of the September 28, 2010 hearing. Employer/Surety does not assert that any of the bills contained at Claimant's 5.17.12 Exhibit 14 were among those for which claim was made at the time of the original hearing. In other words, the parties seem to be in agreement that the additional bills claimed by Claimant are actually bills for different services than those covered in the bills which were the subject of the previous award.

84. Although the doctrine of res judicata applies to decisions of the Industrial Commission, it is res judicata of a peculiar sort. In workers' compensation cases res judicata only bars re-litigation of claims that were actually adjudicated:

> However, Idaho Code § 72-718 varies the doctrine of res judicata as applied to workers' compensation cases. *See Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). Decisions by the Commission are conclusive only to matters actually adjudicated, not as to all matters which could have been adjudicated.

Wernecke v. St. Marie's Joint School Dist. No. 401, 147 Idaho 277, 207 P.3d 1008 (2009).

85. Here, every medical bill that was submitted by Claimant to Surety for payment represents a distinct claim for a benefit payable under the workers' compensation laws. Every bill that was submitted could have been the subject of any number of defenses to payment raised by Employer/Surety. Employer/Surety could have argued that one or more of the bills were incurred outside the chain of referral. Employer/Surety could have argued that the care was not required by Claimant's physician. Employer/Surety could have argued to the Commission that it should have found the care represented by a particular bill to be unreasonable. The point is that every bill for medical services represents a discrete claim for workers' compensation benefits. Accordingly, since it is clear that the bills totaling $24,627.80 are new bills, Claimant's entitlement to that which was not adjudicated at the prior hearing, the doctrine of res judicata does not bar Claimant's litigation of those bills at this time, notwithstanding that most of those bills are for services rendered prior to the date of the September 28, 2010 hearing. Aside from the res judicata defense, no other defenses to these bills have been raised by Employer/Surety. Accordingly, and per *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), Claimant is entitled to 100% of the invoiced amount of the bills set forth at Claimant's 5.17.12 Exhibit 14.

86. In addition to the bills referenced above, Claimant has identified additional medical bills totaling $674.00, as set forth at Claimant's 5.17.12 Exhibit 15. These bills appear to represent charges for for services rendered subsequent to the Commission's May 17, 2011 order finding the claim compensable. These bills have not been paid, but do not appear to be disputed by Employer/Surety. Per *Neel, supra*, Claimant is entitled to payment of these bills

under the applicable Industrial Commission fee schedule, since they were incurred subsequent to the finding of compensability.

87. Finally, Claimant has claimed entitlement to the sum of $1,684.71, representing travel expenses incurred in connection with the medical care, $264.75 representing per diem expenses associated with medical care, and $200.01 representing lodging expenses incurred in connection with medical treatment. (*See* C. 5.17.12 Ex. 16). Some of these expenses were incurred prior to the September 28, 2010 hearing, and some were incurred subsequent thereto. Claimant contends, and Employer/Surety does not dispute, that these expenses are otherwise compensable as medical and related expenses under Idaho Code § 72-432. However, Employer/Surety asserts that those expenses incurred prior to the September 28, 2010 hearing are barred by the doctrine of res judicata. As with the claim for additional medical bills, the claims for travel, lodging, and per diem expenses were not adjudicated at the time of the initial hearing. Therefore, these claims are not barred by the doctrine of res judicata, and since they are not otherwise contested by Employer/Surety, Claimant is entitled to be reimbursed for these expenses as well.

Is Claimant Entitled to Ruling on Reimbursement in Advance of Supreme Court Review of this Decision?

88. Employer/Surety has signaled that the Commission's original decision on the compensability of the subject accident will be appealed to the Idaho Supreme Court once the Commission has decided all of the issues in the case. Indeed, Employer/Surety attempted an appeal of the threshold compensability issue after that decision was issued by the Commission on May 17, 2011. Against the chance that the Court's review might result in a reversal of the Commission's threshold finding of compensability, Employer/Surety urges the Commission to enter an order advising Claimant that if the Supreme Court does reverse the threshold

compensability finding, the Commission will order Claimant to reimburse all monies paid to Claimant subsequent to the May 17, 2011 decision on compensability. The Commission appreciates this dilemma, but would note, as it did in connection with the order denying stay, that the decision to bifurcate a case comes with a set of possible consequences that bear close scrutiny before electing to proceed. One might well suppose that the Commission would be strongly inclined to entertain a request for a reimbursement should the Supreme Court rule that the Commission erred in finding the claim compensable. However, that matter is not before us at this juncture, and Claimant is correct that there is no actual controversy before us that we can address. Accordingly, the request of Employer/Surety to order reimbursement contingent upon something that may or may not happen is denied.

Attorney Fees

89. As noted above, this matter was bifurcated at the request of Employer/Surety to obtain the Commission's ruling on the threshold issue of the compensability of the subject accident. At the request of Employer/Surety, other issues, including those addressed in this decision, were reserved for subsequent determination. Employer/Surety hoped to obtain a favorable ruling on the issue of compensability, and thus resolve the case without the necessity of visiting the remaining issues. Presumably, Employer/Surety was also aware that the issue of compensability might be decided in Claimant's favor, thus necessitating hearing on the remaining issues.

90. In its decision of May 17, 2011, the Industrial Commission found the subject accident to be compensable under the workers' compensation laws of this state. In addition, the Commission found that Claimant was entitled to certain medical and TTD benefits, entitlement to which was litigated at the September 28, 2010 hearing.

91. The May 17, 2011 decision addressed Claimant's entitlement to a limited class of workers' compensation benefits because those were the only benefits that Claimant requested at the time of the threshold determination of the issue of compensability. However, the Commission's finding of compensability implicitly required that Employer/Surety pay to Claimant, or on his behalf, those additional workers' compensation benefits to which Claimant was entitled as the result of having suffered a compensable accident/injury.

92. Employer/Surety appealed the Commission's May 17, 2011 decision to the Idaho Supreme Court. The Court dismissed the appeal without comment, but later referred the parties to the Court's opinion in *Jensen v. Pillsbury Company*, 121 Idaho 127, 823 P.2d 161 (1992). In that case, the Court held that a decision of the Commission which does not finally dispose of all the Claimant's claims is not a final decision subject to appeal pursuant to I.A.R. 11(d). Following the Court's dismissal of the appeal, Employer/Surety petitioned the Industrial Commission for its order staying execution of the May 17, 2011 order pending resolution of the issues remaining before the Industrial Commission and the perfection of an appeal of the Commission's final decision to the Supreme Court. Employer's concern was that it should not be required to pay an award to Claimant when the Supreme Court might overturn the Industrial Commission's decision and rule that the subject accident is not a compensable accident/injury under the Idaho workers' compensation laws. In this scenario, Employer/Surety could find itself unable to recoup the monies that it had been erroneously directed to pay to Claimant.

93. The Industrial Commission considered these and other arguments, and in an order dated December 8, 2011, denied Claimant's motion for stay, noting, *inter alia*, that any decision to bifurcate a case carries with it the downside illustrated by these facts. However, if parties were not expected by abide by a Commission order on a bifurcated case, there would be no

reason to bifurcate. The order denying the request for stay specified that the May 17, 2011 decision is final and conclusive as to all matters adjudicated therein pursuant to Idaho Code § 72-718. The order further directed Claimant to pay to Employer/Surety those benefits that were awarded incidental to the Commission's finding on compensability. The order did not specify that during the pendency of hearing on the issues addressed in this decision Employer/Surety's only obligation was to pay the benefits awarded incidental to the finding of compensability made in the May 17, 2011 decision. As noted above, the Commission's final order on the issue of compensability brings with it an obligation to pay to Claimant those workers' compensation benefits to which he would normally be entitled as a result of having suffered a compensable accident/injury.

94. Claimant sought permission to appeal the Commission's order denying the stay to the Idaho Supreme Court, and the Commission supported this request for permissive appeal. In an order dated January 30, 2012, the Court denied the motion for permissive appeal and directed that the remaining issues in this case be litigated without further delay.

95. Contemporaneous with the legal maneuvering that took place between the date of the May 17, 2011 decision and the Idaho Supreme Court's January 30, 2012 denial of the motion for appeal by permission, Claimant peppered Employer/Surety with letters demanding payment of various workers' compensation benefits, including benefits that were the subject of the May 17, 2011 order, as well as additional workers' compensation benefits to which Claimant felt he was entitled as a result of having suffered an compensable accident.

96. It is the conclusion of the Commission that the efforts of Employer/Surety to perfect an appeal of the Commission decision to the Idaho Supreme Court, and, failing that, a permissive appeal to the Court of the Commission's order denying the motion for stay, were

made in good faith, and in connection with complex legal issues on which reasonable minds may disagree. Specifically, we conclude that Employer's refusal to pay the award made in the May 17, 2011 order, or any other benefits to which Claimant might be entitled, was not unreasonable to January 30, 2012, the date of the Idaho Supreme Court's denial of the motion for appeal by permission.

97. By letter dated January 31, 2012, counsel for Claimant reiterated his demand for payment of the benefits awarded in the May 17, 2011 order, plus interest thereon, totaling $184,458.38. (*See* C. 5.17.12 Ex. 17, p. 017015). As reflected in defense counsel's letter of February 14, 2012, following the Court's dismissal of the motion for permissive appeal, Employer/Surety issued its check to Claimant in the amount of $184,172.38, the difference from Claimant's demand to be found in the interest calculation.

98. By letter dated February 10, 2012, counsel for Claimant made demand upon Employer/Surety for additional workers' compensation benefits, i.e. not benefits which were the subject of the May 17, 2011 Industrial Commission order, but other benefits to which Claimant was entitled as the result of his compensable accident. These benefits included PPI benefits as awarded by Dr. Frizzell, additional medical expenses and travel, lodging, and per diem reimbursements for expenses incurred in the course of obtaining medical case. In response to these requests, counsel for Employer/Surety provided the following response:

> Your most recent correspondence demands payment for additional medical expenses, travel expenses, per diem/lodging expenses and PPI benefits. Entitlement to such benefits has not been determined by the Industrial Commission and remains in dispute. As discussed during the most recent telephone conference with the Commission, these issues will be litigated at the hearing scheduled for May 17, 2012. Further, entitlement to additional benefits is contingent on the compensability determination made in the May 17, 2011 decision. The Commission has indicated such decision is final as to the issues adjudicated. However, the Idaho Supreme Court has determined that the decision is not final for purposes of appeal. A genuine legal dispute continues to exist as

> to both compensability and payment issues. Although the Court declined to address the issues through interlocutory appeal, it has not considered the merits of the disputed issues.

C. 5.17.12 Ex. 17, p. 017022.

99. Counsel for Claimant persevered, reiterating his demand for payment of additional workers' compensation benefits to which he believed his client was entitled. In a February 22, 2012 response, counsel for Employer/Surety reiterated her disinclination to make any of these payments:

> It is my understanding that the multiple issues to be resolved at the May 17, 2012 hearing include whether and to what extent Mr. Vawter is entitled to PPI benefits and whether there has been an unreasonable denial or delay of benefits. I look forward to prompt resolution of these issues and maintain there continues to be a legal dispute regarding payment obligations, particularly with regard to benefits beyond those granted by the Industrial Commission's May 17, 2011 decision, for which payment has already been issued.

C. 5.17.12 Ex. 17, p. 017029.

100. Finally, in a letter dated April 5, 2012, counsel for Employer/Surety affirmed that no payment of additional benefits would be made until those matters were litigated in connection with the May 17, 2012 hearing:

> I have also taken another look at the order dismissing my permissive appeal and do not find anything to indicate that PPI benefits are due and payable. Rather, I see instructions to litigate the remaining issues without further delay.
>
> Nothing has changed since your previous requests for payment and I refer you to my responses as previously stated in my letters identified above, as well as the documents filed with the Industrial Commission and Idaho Supreme Court on the issue of payment obligations. It is abundantly clear that we disagree as to what payments are reasonably due. As you know, issues regarding entitlement to additional benefits, including attorney fees for unreasonable denial or delay of benefits, are scheduled to be addressed at the hearing of May 17, 2012.

C. 5.17.12 Ex. 17, p. 017034.

101. From the foregoing, it is clear that the position of Employer/Surety was that since

it had paid the benefits that were specifically addressed in the Commission's order of May 17, 2011, it had no obligation to pay benefits that were not addressed in that order. What Employer/Surety has failed to understand, however, is that the Commission's finding that the subject accident is compensable carries with it an obligation on the part of Employer/Surety to pay to Claimant those workers' compensation benefits to which he is entitled as a result of the accident. We find nothing in the correspondence going back and forth between Claimant's counsel and Defense counsel which suggests that Employer/Surety at any time disputed the claims for additional benefits to which Claimant believed he was entitled. The only basis for denial was the aforementioned belief that Employer/Surety had no obligation under the May 17, 2011 order to pay anything except those benefits which were specifically addressed in that order.

102. As explained in more detail in our December 8, 2011 order denying Employer's motion for stay, it is the expectation of the Industrial Commission that its final order on compensability binds the parties to act accordingly during the pendency of this bifurcated matter. It is no defense to Claimant's manifold requests to simply say that Claimant's entitlement to the benefits at issue will be decided in connection with the May 17, 2012 hearing. Absent a good faith dispute over Claimant's entitlement to a particular benefit, Employer/Surety had an obligation to timely pay the same once this claim had been found to be compensable under the workers' compensation laws of this state. (*See* Idaho Code § 72-305).

103. The res judicata defense is only raised by Employer/Surety to medical and related expenses incurred by Claimant prior to the September 28, 2010 hearing. Although we have found that doctrine of res judicata does not apply to the additional bills for which claim is made, we do not believe that it was unreasonable for Employer/Surety to essay this defense. However, with respect to the claims for medical and attendant expenses incurred subsequent to September

28, 2010, and the PPI award made by Dr. Frizzell in November 2010, the only defense that has been raised by Employer/Surety is that the finding of compensability is not "final" and that, in any event, the May 17, 2011 order only required Employer/Surety to pay certain specific bills. As developed above, we find Employer/Surety's reliance on these defenses to payment to be unreasonable. The Commission's May 17, 2011 order is final and conclusive as to all matters adjudicated therein. (*See* Idaho Code § 72-718). As developed in the Commission's December 8, 2011 order denying the request for stay, the Commission expects parties to abide by final and conclusive orders during the pendency of any bifurcated proceeding. Again, to do otherwise would rob bifurcation of its purpose. Idaho Code § 72-804 provides for an award of attorney fees against any Employer/Surety who contests a claim for compensation without reasonable grounds. Here, we find that subsequent to January 30, 2012, Employer/Surety contested without reasonable grounds Claimant's repeated demands for payment of the following benefits:

a) Medical expenses incurred subsequent to September 28, 2010;

b) Mileage, per diem, and lodging expenses incurred by Claimant subsequent to September 28, 2010;

c) The PPI award given by Dr. Frizzell following Claimant's date of medical stability in November 2010.

Claimant is therefore entitled to an award of attorney fees under Idaho Code § 72-804 for the failure of Employer/Surety to timely pay these benefits.

Whether Medical Bills Should be Paid at 100% of the Invoiced Amount

104. Though raised as an issue by Employer/Surety, a challenge to the Supreme Court's decision in *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), was not addressed by Employer/Surety in post-hearing briefing. In the original May 17, 2011 order,

Claimant presented medical bills in the total invoiced amount of $149,033.68. The Commission ordered the payment of the same at 100% of the invoiced amount per *Neel, supra*. As explained by the Industrial Commission in the recent case of *Aspiazu v. Homedale Tire Service*, I.C. No. 1984-477235 (filed February 18, 2012), we believe that the Court was fully aware that certain contractual adjustments made by third party payors may well leave an injured worker responsible for less than 100% of the invoiced amount of a medical bill. Nevertheless, the Court's ruling specifically applies to all medical bills incurred during a period of denial regardless of whether the bills were incurred by an uninsured individual, or an individual with non-occupational group insurance. We are bound to apply the Supreme Court's unambiguous direction set forth in *Neel, supra*, and therefore, order the payment of all medical bills incurred by Claimant in connection with treatment of his compensable injury to be paid at 100% of the invoiced amount up to the date of the Commission's order of May 17, 2011 in which the claim was found to be compensable. Thereafter, all medical bills incurred by Claimant in connection with his compensable injury shall be paid per the applicable fee schedule.

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CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Claimant is totally and permanently disabled under the odd-lot doctrine;

2. Claimant has preexisting physical impairments as follows: 9% whole person, right thumb; 7% whole person, low back; 7% whole person, left shoulder; 10% whole person, right shoulder;

3. Claimant has accident produced impairment of 12% of the whole person;

4. Only Claimant's 7% low back impairment meets all elements of ISIF liability, and would otherwise result in *Carey* apportionment as follows: Employer's liability: ((12/19) x 81%) = 51.19 + 12 = 63.19%. ISIF liability: ((7/19) x 81%) = 29.8 + 7% = 36.8%.

a) However, Employer/Surety is estopped from asserting any position on Claimant's preexisting physical impairment inconsistent with the 0% PPI rating assessed by Dr. Knoebel in 1991;

b) Therefore, the ISIF is not liable for any portion of Claimant's total and permanent disability, leaving Employer/Surety wholly liable for the payment of total and permanent disability benefits to which Claimant is entitled subsequent to his November 2010 date of medical stability;

5. Employer/Surety is liable for the payment of 100% of the invoiced amount of all medical bills referenced herein which were incurred by Claimant in connection with the subject accident prior to the Commission's May 17, 2011 decision, with credit for amounts previously paid;

6. Employer/Surety is liable for the payment of medical bills referenced herein which were incurred by Claimant subsequent to the May 17, 2011 decision per the applicable fee schedule, with credit for amounts paid to date;

7. Employer/Surety is liable for the payment of mileage, per diem, and lodging expenses identified at C. 5.17.12 Ex.16;

8. Claimant is entitled to an award of attorney fees under Idaho Code § 72-804 for Employer/Surety's unreasonable denial of benefits subsequent to January 30, 2012. Claimant shall file within (20) twenty days, an affidavit and/or brief in support of his request for attorney fees, with appropriate elaboration on *Hogaboom v. Economy Mattress*, 107 Idaho 13 (1984);

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

DATED this _28th___ day of _September_____, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _28th___ day of _September_____, 2012 a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS AND ORDER** was served by regular United States mail upon each of the following:

RICK D KALLAS
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ma _/s/_____