BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CRAIG WINSTON, Claimant, v. BAKER CONSTRUCTION AND DEVELOPMENT, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2006-517543** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed August 28, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Sandpoint on December 9, 2011. Claimant was present and represented by Richard Whitehead of Coeur d'Alene. Kent W. Day of Boise represented Employer/Surety. Oral and documentary evidence was presented and there were no post-hearing depositions. The parties submitted post-hearing briefs, and this matter came under advisement on April 12, 2012.

ISSUES

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

1. Whether Claimant is medically stable; and, if so, the date thereof;

2. Whether Claimant is entitled to reasonable and necessary medical care pursuant to Idaho Code § 72-432(1);[1]

3. Whether Claimant is entitled to benefits for his psychological condition pursuant to Idaho Code § 72-451 and the extent thereof;

4. Whether Claimant is entitled to total temporary disability (TTD) benefits and the extent thereof;

5. Whether Claimant is entitled to permanent partial impairment (PPI) benefits and the extent thereof;

6. Whether Claimant is entitled to permanent partial disability benefits (PPD) and the extent thereof;

7. Whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise;

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

9. Whether Claimant is entitled to retraining benefits and the extent thereof;[2] and

10. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as the result of a combination of physical injuries received in his industrial accident and severe psychological problems developing therefrom. Contrary to Defendants' position that Claimant was declared medically stable from his physical injuries in 2007, he continues to suffer from Chronic Regional Pain Syndrome (CRPS), as well as other ailments, and is not yet medically stable. Defendants should be liable for all treatment, both psychological and physical, to the present and into the future until medical stability is reached.

---

[1] Claimant specifically requested at hearing that the issue of Claimant's entitlement to medical care received in California be reserved pending a finding regarding medical stability.

[2] Claimant has presented no retraining plan, and this issue is deemed abandoned at this time.

Defendants contend that Claimant suffered pre-existing psychological problems such as a learning disability, narcissistic personality disorder, borderline intellectual functioning, and dyslexia, and his current psychological state and perception of his disability flows from those pre-existing conditions. His treating physician declared Claimant at MMI in 2007 and benefits were appropriately paid (16% whole person PPI). Claimant has refused psychiatric treatment and, without such treatment, his prognosis is extremely poor. Further, Claimant has not proven his entitlement to benefits pursuant to Idaho Code § 72-451 by clear and convincing evidence. Finally, the only vocational evidence in the record is that of an ICRD consultant, who has indicated that there are jobs available to Claimant within his restrictions. However, Defendants concede that Claimant has incurred PPD of 30% inclusive of his PPI based solely on a wage rate comparison.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Claimant's retained psychologist, Carl D. Haugen, Ph.D., and Claimant's father (by phone), Harry Winston.

2. Joint Exhibits 1-35, admitted at the hearing.

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

FINDINGS OF FACT

1. Claimant was 33 years of age and resided in Sandpoint at the time of the hearing. He was 28 years of age at the time of the subject accident. Claimant attended school in California and was a "special needs" student throughout most of his schooling. He was diagnosed with dyslexia in 1989 and it was noted in 1996 that he was easily

frustrated, exhibited impulsive behavior, and was easily distracted. In any event, Claimant graduated from high school in California in 1997.

2. After high school, Claimant got a scholarship to a vocational auto body school where he became a certified welder. From a student, he eventually became a paid instructor at the school. It was evident at hearing that Claimant was very knowledgeable in this vocation and proud of his accomplishments with welding and fabrication work. He was making $12.37 an hour at the time he quit to move to Idaho.

3. Claimant moved to Sandpoint in 2003 to help renovate some property owned by his mother,[3] who still resided in California. Claimant, who never married and has no children, resided by himself while in Sandpoint except when his mother would visit during the summers. Claimant began working for Employer as a carpenter's helper on July 17, 2006, at $13.50 an hour. On July 20, 2006, Claimant was helping to place an interior wall in a daylight basement when a co-worker let go and Claimant was unable to hold the wall upright. According to Claimant's supervisor, the wall weighed between 100 and 150 pounds and measured nine feet tall by twelve feet long. The wall fell on Claimant, crushing his right foot and injuring his left knee and left elbow. Although Claimant testified he was unconscious for "hours," when he regained consciousness, he drove himself to Sandpoint Urgent Care for medical attention.

4. Claimant saw Mark Hernandez, M.D., who diagnosed non-displaced fractures of the 2nd-4th right metatarsal heads. Claimant's left knee showed some crepitation with range of motion of the patellofemoral joint, but no effusion or ligament

[3] Claimant's mother and father divorced when Claimant was a teenager; they both still live in California.

laxity. Dr. Hernandez provided Claimant with an orthotic boot and crutches. He took Claimant off work and advised him to return in one week.

5. Claimant was eventually referred to Michael R. DiBenedetto, M.D., an orthopedic surgeon practicing in Ponderay. Dr. DiBenedetto first saw Claimant on August 21, 2006, at which time Dr. DiBenedetto noted that Claimant was difficult to keep on task. Dr. DiBenedetto suspected CRPS or RSD. Therefore, Surety and Dr. DiBenedetto believed a referral to Scott Magnuson, M.D., a pain specialist, for evaluation and perhaps a sympathetic block was appropriate. Dr. DiBenedetto planned on seeing Claimant again after he was evaluated and treated by Dr. Magnuson.

6. Claimant first saw Dr. Magnuson on September 7, 2006. Upon examination, Dr. Magnuson noted that Claimant's right foot metatarsal fractures appeared to be healed, but Claimant was experiencing significant pain in any event. Dr. Magnuson concurred in the diagnosis of CRPS in Claimant's right lower extremity. Dr. Magnuson discussed with Claimant treatment options including physical therapy, pharmacological, and interventional modalities, as well as lumbar sympathetic blocks. Claimant denied being on any medications, stating "I love my body and I don't want to take any medications." Exhibit 9, P. 2. Claimant informed Dr. Magnuson that he was a welding technician and inspector, and had not worked since his industrial accident. Claimant declined a lumbar sympathetic block and chose to continue with his home exercise program. Dr. Magnuson encouraged Claimant to enroll in formal physical therapy and to return in the event he changed his mind regarding the sympathetic block.

7. Dr. DiBenedetto saw Claimant in follow-up on September 18, 2006, at which time Dr. DiBenedetto noted that Claimant had seen Dr. Magnuson but had refused the

lumbar sympathetic block. Claimant wanted to know if he could just get by with Neurontin (apparently in contrast to his proclamation to Dr. Magnuson that he was against taking medications). Dr. DiBenedetto again explained to Claimant that a lumbar sympathetic block was diagnostic and the initiation of therapy in CRPS treatment. Dr. DiBenedetto was concerned that Claimant did not understand what he was telling him. As before, Dr. DiBenedetto told Claimant to return after having the block(s) and he would monitor the physical therapy aspect of his treatment. Claimant ". . . begrudgingly gave his consent to move forward." Exhibit 8, p. 4.

8. Claimant saw Craig Stevens, M.D., a physiatrist, at Surety's request on October 3, 2006 for a second opinion regarding his past and future medical treatment. After reviewing medical records and examining Claimant, Dr. Stevens reached the following conclusions:

> Metatarsal head fractures of the 2nd through 4th digits of the right foot which have subsequently healed, but complicated by the subsequent development of an RSD-type picture. This has been correctly interpreted by Dr. Magnuson as complex regional pain syndrome and the treatment being recommended is also appropriate; to include a desensitization program through physical therapy, neurolytic medications, and a lumbar sympathetic block for diagnostic and therapeutic purposes. If the block completely relieves his pain, it would likely be appropriate to convert to a permanent sympathetic block on the right by means of a sympathectomy.
>
> Unfortunately, this gentleman's case is complicated by a very strong psychological overlay, while he did not exhibit delusions I strongly suspect that there is an underlying psychiatric disturbance which is complicating his care.

Exhibit 19, p. 3.

9. Claimant returned to Dr. Magnuson on October 24, 2006, at which time a right lumbar sympathetic block was administered. Dr. Magnuson's records for that visit

reflect, "It should be noted that Mr. Winston is a very difficult historian to follow. He oftentimes will use words and phrases inappropriately." Exhibit 9, p. 4.

10. Claimant returned in follow-up to Dr. Magnuson on October 31, 2006 ostensibly for a second sympathetic block. Dr. Magnuson noted that Claimant was still not in formal physical therapy, although such had been prescribed. He further noted that it was hard to discern what improvement, if any, Claimant received from the first block, leading Dr. Magnuson to the conclusion that perhaps Claimant's pain was not sympathetically maintained. Instead of giving Claimant a second block, Dr. Magnuson increased Claimant's Lyrica and "strongly" recommended physical therapy and cognitive behavioral therapy to help Claimant accept his chronic pain. To the latter suggestion, Claimant refused saying, "I'm a big boy." *Id*., p. 5.

11. Claimant returned to Dr. DiBenedetto on November 13, 2006. Dr. DiBenedetto noted on that visit that Claimant had yet to receive a lumbar sympathetic block from Dr. Magnuson, even though Dr. Magnuson's records clearly indicate the opposite. It is not known why Claimant did not so inform Dr. DiBenedetto, or why the doctor was not receiving Dr. Magnuson's records.

12. Claimant returned to Dr. Magnuson on November 30, 2006. Claimant reported that his symptoms were the same or worse than when last seen. Claimant was enrolled in formal physical therapy. Dr. Magnuson again stressed the need for Claimant to seek counseling and cognitive therapy to reach the acceptance phase of his CRPS syndrome. Claimant repeated how "strong brained" he was, indicating his reluctance to pursue the recommended therapy.

13. Claimant next saw Dr. DiBenedetto on December 8, 2006. There is still no mention of Dr. Magnuson's first block, although Claimant did mention that Dr. Magnuson refused to administer a second block. Claimant was able to ambulate easier than in the past but attributed that to becoming "tougher," rather than any improvement in his CRPS. Dr. DiBenedetto continued Claimant's formal physical therapy program and agreed with Dr. Magnuson that Claimant needed a psychological evaluation and counseling, and noted that Claimant ". . . seemed very resistant to that recommendation. He reports that he is very strong willed and not likely to change his mind about that." Exhibit 8, p. 7.

14. Claimant last saw Dr. DiBenedetto on January 19, 2007, at which time it was noted that he was still having problems with his left knee and, to a greater extent, his right foot. Because Claimant had little positive response to physical therapy and a lumbar sympathetic block,[4] Dr. DiBenedetto declared Claimant at MMI from his industrial accident. Regarding psychological counseling, Claimant informed Dr. DiBenedetto that ". . . he was going to "be a man about it" and not seek counseling help." *Id*., p. 8. Dr. DiBenedetto explained to Claimant that it was this resistance to gaining an understanding and acceptance of his CRPS diagnosis until after the pain became ingrained that made it difficult to treat him, and he had nothing more to offer. He urged Claimant to follow-up with ICRD regarding retraining.

15. Utilizing the 5th Edition of the AMA *Guides to the Evaluation of Permanent Impairment*, Dr. DiBenedetto assigned Claimant a combined 16% whole person PPI rating for his left knee meniscal tear (1%) and CRPS (15%). He also assigned permanent

[4] This is the first mention in Dr. DiBenedetto's records regarding Claimant actually having the first block.

restrictions of no squatting, bending, or lifting/carrying more than 30 pounds. Claimant was also restricted from prolonged standing and walking of more than an hour at a time.

16. Even though declared at MMI by Dr. DiBenedetto, Claimant continued treating with other physicians. He returned to Dr. Magnuson on a number of occasions and eventually submitted to Dr. Magnuson's repeated request to see a counselor. He returned to his family physician, Robert Rust, Jr., M.D., on February 9, 2007. "Pt. was crying and screaming in pain." Ex. 10, p. 9. Dr. Rust's office had been informed that the day before, Claimant had presented to Kootenai Medical Center ER complaining that he has had back pain since his lumbar sympathetic block in October 2006 and, "He is very frustrated with the care he has been receiving and he is feeling ignored, despite what sounds like numerous evaluations." Exhibit 11, p. 1. In any event, Claimant told Dr. Rust that he injured his back while twisting a few days before (contrary to what he told the ER staff the day before). Claimant continued to insist that he was not being properly treated. Dr. Rust indicated that Claimant clearly had a personality disorder. He ordered a lumbar MRI and told Claimant to follow-up with Dr. DiBenedetto (who had already declared Claimant at MMI).

17. Claimant finally saw Patty Bullick, MSW, LCSW, for a psychological evaluation on April 6, 2007. Ms. Bullick acknowledged Claimant's CRPS diagnosis and noted that he was having anxiety and anger over the lack of treatment he was getting "in his eyes." Ms. Bullick reported no mental health history, but Claimant was currently depressed. Ms. Bullick noted, "The only barriers to his treatment are that he is angry and that he does not accept his diagnosis. He is calling everybody wanting more MRIs which

may or may not be warranted." Exhibit 12, p. 1. Ms. Bullick was to contact Surety and request authorization of at least 10 visits.[5]

18. On April 20, 2007, Claimant presented to Roger Dunteman, M.D., an orthopedic surgeon, complaining of right foot, left knee, and left elbow pain. Claimant informed Dr. Dunteman that he had been diagnosed with RSD (CRPS). X-rays of Claimant's left knee, left elbow, and right foot were all within normal limits. Dr. Dunteman ordered MRIs of Claimant's right foot and left knee.

19. On August 2, 2007, Dr. Dunteman performed a left ACL reconstruction on an out-patient basis. No complications were reported. Dr. Dunteman prescribed a course of physical therapy. Interestingly, Dr. Dunteman related Claimant's left knee injury to his industrial accident, but attributed 100% of any resultant PPI to a pre-existing condition.

20. Claimant moved to California in the fall of 2007 to be near his parents, as he was convalescing from his knee surgery. Claimant saw many physicians and had many diagnostic tests performed for a variety of ailments. Because the issue of whether Surety is liable for medical care Claimant received while in California is reserved, his course of treatment there will not be further discussed herein.

21. On December 4, 2008, Claimant saw licensed psychologist Robert Calhoun, Ph.D., at his nurse case manager's request.[6] Dr. Calhoun interviewed Claimant, tested him, and prepared a report containing, *inter alia*, a comprehensive records review. He noted that school records indicate that Claimant had a pre-existing verbal learning disability and

[5] The only record in evidence of Ms. Bullick is for the April 6, 2007 visit. However, Defendants attached to their responsive brief Ms. Bullick's notes for visits on June 12 and 21, 2007.

[6] Dr. Calhoun's evaluation was also requested in conjunction with Claimant's suitability for the Work Star program.

behavioral problems. Claimant informed Dr. Calhoun that he has dyslexia. Claimant was an exceptional needs student that required an individualized education program.

22. Claimant reported that his doctors as well as Surety have treated him poorly. Dr. Calhoun found Claimant to be very difficult to interview as he was more comfortable talking about his complaints than anything else. While Claimant had a litany of complaints, he was vague when describing his symptoms. Dr. Calhoun wrote the following regarding Claimant's approach to psychological testing:

> Mr. Winston was asked to do psychological testing. He was put in a room with a comfortable chair. He was given a pillow for his back. He then told the staff he was unable to do the testing because of his dyslexia. He then stated he did not want to do them and felt as though he was being forced to do them by the insurance company. He then started to focus on a headache and stated he had not eaten in 4 days and wanted to leave. My staff offered him a number of solutions, all of which he declined. The solutions included using an audiocassette tape version of the psychological testing, [and] offering him food and water. He was then told by my office manager that he was free to leave if he wished. Mr. Winston was very verbal in expressing his pain. He was moaning and groaning almost all the time. My staff did eventually read him the questions of the psychological testing. Testing was drawn out over 5 hours with two separate staff members serving his needs. Mr. Winston did eat some crackers when offered. He did at times become angry, tearful, [and] frustrated. He did appear to be seeking pity for his ongoing complaints. Mr. Winston did request copies of all of his testing and records.

Exhibit 13, p. 12.

23. Dr. Calhoun reached the following "clinical synthesis":

> At this time, there continue to be significant psychological and behavioral factors impacting his pain problem and level of physical debilitation. Most notable is Mr. Winston's heightened somatic focus. He is very diffuse in his pain complaints and very focused on them. When asked any questions regarding his history or his life in general, he immediately comes back to his pain complaints. He is a very allusive [sic], tangential, and vague person. Structured personality testing paired with clinical observations suggests somatoform pain disorder in this individual as well as possible somatic delusions. He is at risk for chronic low-grade depression, narcissistic, schizoid, and antisocial personality trends. His job history and

> earning capacity are very disfunction [*sic*] and at poverty level at best. He is very vague when it comes to discussing family and social history. It appears he has been a loner most of his life.
>
> Behaviorally, Mr. Winston does function from a pain contingent activity level. He does see pain as a signal to stop activity. He is very dramatic in his display of pain behaviors, evidenced by his elaborate descriptions of pain, wearing of a cervical collar, using a crutch, as well as a CAM boot. He does do his best to elicit help from others around him while at the same time expressing his physical pain and misery. He certainly does do everything he can to avoid truly participating in psychological evaluations and treatment. Moreover, he does avoid taking responsibility for making himself more functional and moving forward in life. Mr. Winston does describe sleep disturbance. His pain problem does provide him with time-out from work stress and responsibility.
>
> Cognitively, Mr. Winston lacks insight into how emotional distress can exacerbate his pain. He is very concrete and rigid as far as truly accepting feedback from others as it does not patch [*sic*] his perceptions of what he feels is occurring physically in his body. He does have a very cynical and paranoid mindset. He does ruminate angrily and cynically about his ongoing medical complaints and past experience with his healthcare providers and insurance company.

Id., pp. 13-14.

24. Dr. Calhoun did not find Claimant to be a suitable candidate for the Work Star work-hardening program. He labeled Claimant's psychiatric disorder as "severe." Claimant's somatoform pain disorder places him at high risk for his medical complaints being out of proportion to objective medical findings, as well as experiencing somatic delusions. Per Dr. Calhoun, "Mr. Winston's only hope for functional improvement is to go into an inpatient psychiatric setting." *Id*., p. 14. Dr. Calhoun was unable to conclude that Claimant's industrial injuries are the predominant factor above all other causes in causing his complex psychiatric illness and presentation. Therefore, any psychiatric treatment Claimant receives should be his responsibility.

25. Dr. Calhoun concludes his report by offering this opinion concerning Claimant's prognosis: "Mr. Winston's prognosis is extremely poor given the complexity of

his personality disorder, lack of insight into how psychological factors are contributing to his current state of debilitation, as well as his ongoing belief he is not in need of psychological and/or psychiatric care." *Id*., p. 15.

26. In a December 5, 2008 Work Hardening Initial Report (Work Star), it was noted that Claimant was not a candidate for that program, due to his mental illness and lack of any vocational goals.

IMEs

Dr. McNulty:

27. Claimant saw John McNulty, M.D., an orthopedic surgeon, on September 14, 2011, at his attorney's request, for an IME. He examined Claimant, reviewed pertinent medical records, and generated a report. Dr. McNulty noted that Claimant injured his left knee, left elbow and right foot in his July 20, 2006 industrial accident. He further noted that Claimant's nondisplaced fractures to his right foot metatarsal heads had developed into CRPS. Claimant had an ACL repair to his left knee in August 2007. Dr. McNulty stated that Claimant's recovery was hindered by pre-existing psychiatric features and referenced Dr. Calhoun's report. Claimant's mother accompanied Claimant to the interview portion of Dr. McNulty's evaluation, and gave Dr. McNulty a "before/after" picture of Claimant's activity level.

28. Dr. McNulty noted Claimant's current complaints to be:

> Mr. Winston has multiple complaints involving his neck, back, and upper and lower extremities as well as inability to walk. He describes numbness which extends from the neck down into his arms. He states his legs feel heavy. He has constant pain in his neck and his back. He states he is trying to get better. He describes extreme weakness in both upper and lower extremities. He describes radicular pain involving all of his upper extremities.

Exhibit 1, p. 2.

29. Dr. McNulty reported that Claimant's focus on questions was poor. He had a rapid flight of ideas and poor comprehension regarding requests for him to move his lower or upper extremities. Dr McNulty reached the following diagnoses:

1. Complex regional pain syndrome, right foot, with fixed contractures right foot and ankle.

2. Psychological factors severely limiting rehabilitation.

3. Status post left knee ACL reconstruction and partial medial and lateral meniscectomies.

30. Dr. McNulty discussed Claimant's symptoms and his findings with Dr. Haugen (see below). He agreed with Dr. Haugen that Claimant's psychological state is the main barrier to recovery. Dr. McNulty observed atrophy in both of Claimant's lower extremities indicating that he was reluctant to perform any active movements. Claimant had what appeared to be fixed contractures of the toes of his right foot due to his CRPS and the limitation by Claimant of passive and active movement of the toes. These contractures could only be relieved by surgical intervention. Dr. McNulty could find no physiological basis for loss of function in Claimant's cervical and lumbar spine, or his left knee.

31. Dr. McNulty found determining a PPI rating to be "challenging" as, "[t]he psychological factors are the main causative factors in his current lack of function in both lower extremities." *Id*., p. 7. In any event, Dr. McNulty utilized the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment (*Guides*), and placed Claimant in Class IV with a 70% lower extremity default in value for very severe CRPS in his right lower extremity. Regarding Claimant's left lower extremity, Dr. McNulty would, ". . .

arbitrarily place the loss of left lower extremity function as 50% since contractures do not appear to be present there." *Id*. He did not believe that psychological factors were the main reason for Claimant's left lower extremity dysfunction, but that such dysfunction was ". . . consistent with longstanding disuse indicating that Mr. Winston's perceived disability is longstanding and based on clear and convincing evidence." *Id*.

32. Dr. McNulty concluded his report as follows:

> In summary, the above-noted impairment ratings for both lower extremities are affected by psychological factors, permanently aggravated as a result of his work-related injury on 07/20/2006. Mr. Winston's physical injuries sustained as a result of his injury on 07/20/2006 are the predominant cause that led to psychological diagnoses, which have not been adequately treated and addressed.

Id., p. 7-8.

DISCUSSION AND FURTHER FINDINGS

Medical Stability/Medical Benefits:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are

causally related. *Paulson v. Idaho Forest Industries, Inc*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

33. Dr. DiBenedetto declared Claimant to be at MMI as of January 19, 2007 regarding his right foot and left knee and assigned a PPI rating. Based on this opinion, Surety denied any further medical treatment. Claimant argues that the fact that Dr. Dunteman performed a complex left knee surgery on August 3, 2007 demonstrates that Claimant was not at MMI in January, contrary to Dr. DiBenedetto's opinion. The Referee agrees. Claimant continued to complain of left knee pain up to the time of his surgery after conservative treatment failed. There is no evidence that Claimant suffered any new injury to his left knee between the time of his accident and his surgery. Dr. Dunteman has related Claimant's left knee injury to his industrial accident, yet attributed any or all PPI to an unidentified pre-existing condition. *See*, Exhibit 5, pp. 8-9.

34. The Referee finds that Defendants are liable for Claimant's left knee surgery and for any pre-post surgery visits[7] related to treatment for Claimant's left knee and are to be given credit for any amount already paid.

Compensability of Claimant's Psychological Condition:

Idaho Code § 72-451 provides:

> **Psychological accidents and injuries. - -** Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:

[7] Defendants assert in their post-hearing brief that they have paid for Claimant's left knee surgery but no TTD benefits associated therewith, because no physician took Claimant off work. *See*, Defendant Employer/Surety's Responsive Brief, p. 23.

(1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by an accident and physical injury as defined in section 72-102(18)(a) through 18(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and

(2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

(3) Such accident and injury must be the predominate cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; and

(4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho workers' compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment in rendered, and

(6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury.

This section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994.

35. There is little doubt that Claimant, at least at the time of the hearing, was suffering from a severe psychological condition or conditions. The only question is whether Claimant's accident and injuries were the predominant cause as compared to all

other causes combined in causing Claimant's mental problems. Two psychologists, in addition to Dr. Calhoun, have weighed in on this issue and their opinions are set out below.

Dr. Klein:

36. On April 17, 2007, Claimant met with clinical psychologist Ronald Klein, Ph.D., at Surety's request, to determine if Claimant suffered any psychological injuries or limitations from his industrial accident. Dr. Klein reviewed medical and vocational records, and at least attempted to perform certain psychological testing. Claimant was not cooperative with this interview: "His behavior was bizarre from the moment he arrived until the moment he left . . . it became clear that he was simply being resistant, obstinate, and manipulative, and that he was really being uncooperative right from the beginning of the session." Exhibit 31, p. 5.

37. Claimant informed Dr. Klein that a psychological evaluation was unnecessary and a ". . . ridiculous thing to request." *Id*. Claimant again expressed his belief that physicians were not listening to him. Dr. Klein viewed Claimant's concerns in that regard as ". . . is translated as the insurance adjuster is not doing what I want to do and I expect people to do what I want them to do." *Id*., p. 6. Claimant expected Dr. Klein to read all 567 items on the MMPI to him, apparently due to his dyslexia. However, Dr. Klein pointed out to Claimant that he had previously indicated he read at the 11th grade level and the questions were written at the 6th grade level. Dr. Klein refused Claimant's request and Claimant left without even beginning the MMPI.

38. In any event, Dr. Klein reached the following clinical impressions:

> **Axis I: Clinical syndrome:**
>
> Pain disorder associated with psychological factors.
> Severe adjustment disorder, with depressed mood.

Axis II: Personality disorder:

Primary narcissistic personality disorder, but with strong antisocial traits as well.

Axis III: Medical disorders:

Foot fracture, low back pain, and knee pain.

Axis IV: Psychosocial stressors:

Severe interpersonal disorganization and unclear level of vocational achievement.

Axis V: Highest level of adaptive functioning during last year:

Current GAF: 40.

39. Dr. Klein attributes Claimant's psychological problems to preexisting factors:

> Mr. Winston's psychological problems are obviously not causally related to his foot injury or any other aspect of his work injury. These are longstanding psychological abnormalities, and his reaction to his injury is grossly out of proportion to the specific injury.
>
> * * *
>
> Psychologically he is as capable of working as he was before his injury, though I understand that reacting to his pain is not an easy task for a man with limited psychological resources. However, there has been no new psychological injury sustained as a result of the foot injury of July 2006. Thus there are no work restrictions specific to his psychological state, or at least nothing beyond what would have been his restriction prior to July 20, 2006, to put up with his behaviors before that July 2006 injury and so are certainly not going to tolerate him now. Besides which he does not have the concept of adapting to the workplace, but rather feels it is the responsibility of other people to accommodate him. This child-like attitude was not caused by a foot injury at work.
>
> There is no psychological treatment required regarding the work injury since there were no psychological injuries caused by the work injury. This man's need for psychological rehabilitation is the same as it was long before his work injury.

Exhibit 31, pp. 13-14.

Dr. Haugen:

40. Claimant saw Carl D. Haugen, Ph.D., a licensed psychologist practicing in Sandpoint, at his attorney's request on September 15, 2011 for a psychological evaluation. Dr. Haugen practiced psychology in Minnesota for 25 years before moving to Sandpoint in 2003. Dr. Haugen interviewed Claimant and his mother, reviewed pertinent records, prepared a report, and testified at the hearing.

41. Dr. Haugen noted that Claimant was diagnosed with dyslexia while in school but has never been in counseling, had a psychiatric history, or been prescribed psychotropic drugs. Claimant has no legal history or alcohol or illicit drug problems. Dr. Haugen administered the Wechsler Adult Intelligence Scale Fourth Edition (WAIS IV). Dr. Haugen reported that the results of the testing[8] indicated that Claimant's overall cognitive ability is as follows:

> His overall cognitive ability, as evaluated by the WAIS-IV, cannot be easily summarized because his nonverbal reasoning abilities are much better developed than his verbal reasoning abilities. Craig's reasoning abilities on verbal tasks are generally in the borderline range (CVI = 70), while his nonverbal reasoning abilities are significantly higher and in the average range (PRI = 98). Craig's ability to sustain attention, concentrate, and exert mental control is in the borderline range (WMI = 74). Craig's ability in processing simple or routine visual material without making errors is in the extremely low range when compared to his peers (PSI = 68). His Full Scale IQ is 74, in the borderline range.

Exhibit 2, p. 6.

42. Dr. Haugen testified that he did not administer any psychological testing other than the WAIS IV because, for instance, the MMPI administered by Dr. Calhoun only reflects symptoms existing at the time of the testing, not his psychological condition pre-

[8] There is no evidence that Claimant was recalcitrant or resistant to taking this test, unlike his attitude toward taking tests administered by Defendants' examiners.

existing his accident. Dr. Haugen saw no need to repeat the MMPI, as he opined the results would be similar to the results obtained by Dr. Calhoun. Regarding Claimant's dyslexia, Dr. Haugen testified that dyslexia is a medical versus mental condition and is not listed in the DSM-IV. The only pre-existing psychological condition of which Dr. Haugen is aware is Claimant's learning disability.

43. Dr. Haugen was aware of a March 1, 2005 (more than 16 months pre-accident) Bonner General Hospital ER History and Physical prepared in connection with Claimant's visit for a food poisoning issue some weeks prior. Claimant was upset with the restaurant owner for having no respect for him. The attending physician, Dr. Gramyk, informed Claimant that it was unlikely that food allergies would produce symptoms so long after the exposing event. Clamant disagreed and stated that he has had symptoms lasting up to four months in the past. Dr. Gramyk explained to Claimant that he would order some blood tests, but Claimant refused and wanted Dr. Gramyk to explain again the reasons for the testing. He also wanted to take the oxygen tank on the wall home with him because he needed oxygen from time to time. Dr. Gramyk recommended at least one voluntary evaluation at a mental health clinic for any chemical imbalance, mental illness, or disorder. Dr. Gramyk doubted that Claimant would do so. Dr. Gramyk noted multiple somatic complaints and suspected early mental illness.

44. Dr. Haugen responded at hearing as follows regarding the significance of the above chart note:

> Q. (By Mr. Whitehead): You have been provided with a 2005 emergency room report where Craig was presenting complaining of food poisoning. Have you had an opportunity to review that?
>
> A. Yes.

> Q. What do you think the significance of that report is where it appears the doctor has identified some issues that Craig had mentally that day?
>
> A. Well, I think it's the same that is going on with Craig now, that there was a - - back then it was a situational issue. He though that he, as I recall, was having an allergic reaction. He was very concerned. He went to the doctor. He didn't feel like - - so maybe he didn't feel like he was being listened to. He came up with a cause on his own, was very distraught about it and, in fact, so distraught that the doctor noted that there was possible mental illness or mental health issues and wanted him to follow through on that. Apparently the medical issue was resolved and Craig went back to normal functioning.

Hearing Transcript, p. 30.

45. Dr. Haugen opined that Claimant's injuries from his industrial accident are the predominant cause of his current psychological diagnoses and, without appropriate psychological treatment, he is totally and permanently disabled:

> It is my opinion that there is clear and convincing evidence that his current psychological condition meets the criteria set for [sic – forth] in the DSM Fourth Edition of Pain Disorder Associated with Both Psychological Factors and General Medical Condition, Chronic, that the physical injuries were the predominant cause as compared to all other causes given the reported pre-injury level of functioning[9] and lack of known physical limitations, that the injuries clearly were sustained in a wall landing on top of him which resulted in verified right foot fractures and a surgical left knee injury, and the combination of the pre-existing dyslexia, the complex regional pain syndrome diagnosed by the orthopedic surgeons as a result of the physical injuries and now the chronic pain have rendered him totally and permanently disabled.

Exhibit 2, p. 6.

46. Dr. Haugen did not apportion the "combination," nor did he assign a PPI rating for Claimant's psychological condition.

[9] Dr. Haugen had not had the opportunity to review the March 2005 ER note at the time he authored his report.

Dr. Calhoun's response to Dr. Haugen's report:

47. At Surety's request, Dr. Calhoun reviewed Dr. Haugen's September 15, 2011 psychological evaluation and expressed his thoughts thereon in a November 28, 2011 letter to Surety. Dr. Calhoun continued to adhere to his original opinion that there were multiple non-industrial related factors that were causing Claimant's chronic pain and debilitation. His specific criticism of Dr. Haugen's approach and report is as follows:

> Unfortunately, Dr. Haugen did not perform a behavioral analysis of Mr. Winston's pain problem or do formal psychological testing such as the Minnesota Multiphasic Personality Inventory II, or Pain and Impairment Relationship Scale, which is customarily done in a psychological pain evaluation. Thus, I am not sure how Dr. Haugen concluded that the industrial injury was the predominant factor above all other's [sic] combined which resulted in the patient having chronic pain syndrome and resulted in Mr. Winston being totally and permanently disabled.

Exhibit 13, p. 19.

Dr. Klein's response to Dr. Haugen's report:

48. At Surety's request, Dr. Klein reviewed Dr. Haugen's September 15, 2011 psychological evaluation and expressed his thoughts thereon in a December 5, 2011 letter to Surety. Dr. Klein indicated that he disagreed with Dr. Haugen's conclusions and found his analysis and reasoning flawed. He did, however, note that Dr. Haugen was disadvantaged in that he was not provided with Dr. Klein's report, including his observations of Claimant's behavior during his evaluation, before preparing his own report. In any event, Dr. Klein, like Dr. Calhoun, questioned why Dr. Haugen did not administer at least the MMPI or the PAI psychological tests, or explain why he did not because those two tests, at a minimum, are standard in cases such as this.[10] While Dr. Klein "appreciated"

[10] Dr. Haugen testified that he did not administer the MMPI because such a test only reflects symptoms and not causes. An MMPI would not show how Claimant was on 2005, only how he was when the test was administered.

Dr. Haugen's administration of the WAIS test, intellectual functioning is not the key variable here and Dr. Klein could not determine if the testing results were valid, as nothing was reported regarding effort/validity.

49. Dr. Klein adheres to the opinions expressed in his initial report and concludes:

> I was also struck by Dr. Haugen's observation that Mr. Winston's "presentation has led [previous] interviewers to assume that he has significant mental health problems" followed by Dr. Haugen's own observations that Mr. Winston's "thought processes are slowed and very disorganized as well as tangential." Those sound like perfectly reasonable signs of mental health problems. Later, Dr. Haugen tries to fashion an excuse for such behaviors. He fails to persuade.
>
> Furthermore, Dr. Haugen fails to provide meaningful explanation as to why Mr. Winston has so little progress since 07/20/2006, why he's still literally living in a barn, or how those factors may be tied to his mental illness status.

Exhibit 31, pp. 15-16.

50. The Referee is more impressed by the opinions expressed by Drs. Klein and Calhoun over those of Dr. Haugen. Dr. McNulty also expressed a rather confusing opinion on causation, stating Claimant's underlying psychological condition was permanently aggravated by his industrial accident and then stating that his industrial injuries were the predominant cause leading to psychological diagnoses. However, Dr. McNulty's opinion in that regard is given no weight, as no foundation was laid that he is qualified and/or competent as an orthopedic surgeon to render such an opinion.

51. Claimant has a confirmed psychological pre-existing condition as evidenced by his school records and buttressed by his Bonner General Emergency Room visit in 2005. An Individualized Education Program (IEP) dated March 23, 1988, indicates that Claimant was doing poorly academically and was frustrated, especially in group settings. He was

also diagnosed with dyslexia in 1988. An IEP summary of present levels of performance report dated October 9, 1996 regarding Claimant's auto body classes indicated that Claimant was significantly below his peers in all academic areas, but he was making steady progress. He worked best when alone in a quiet place with no distractions. Claimant was extremely motivated, but his behavior was impulsive and he was easily frustrated. A "Priority Category" used to determine eligibility for California rehabilitation services dated November 6, 1996 categorizes Claimant's learning disability as "Most Severe," the highest level of disability available for selection. See Exhibit 25, p. 39.

52. Clearly, Claimant's personality disorder pre-dated his industrial accident and such accident was not the predominant cause, above all other causes combined, of that disorder. There is no doubt that Claimant's pre-existing mental difficulties have hindered his treatment for chronic pain, in that he has never accepted his CRPS diagnosis and has resisted all attempts to gain the insight necessary to increase his function. However, it cannot be found by clear and convincing evidence that Claimant's psychological state arose out of and in the course of his employment. As Dr. Haugen testified regarding Claimant's 2005 ER visit: "Well, I think it's the same that's going on with Craig now. . ." Hearing Transcript, p. 30. While Claimant was at least getting by before his accident, it was not without difficulty. He worked for Employer for less than three days before his accident, so his ability to perform his job duties did not have much of a chance to be tested. His success in the auto-body/welding program and eventual employment there could not have occurred without accommodation, in that he was allowed to work alone and set his own pace. The same applies to his proficiency at performing certain welding tasks and building

a fountain for his father. It is highly doubtful that he would have succeeded in either of these endeavors in a regular, competitive working environment.

53. The Referee finds that Claimant has failed to prove by clear and convincing evidence that his industrial accident/injuries were the predominant cause, as compared to all other causes combined, of Claimant's current psychological condition.

TTD Benefits:

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986).

Under *Maleug v. Pierson Enterprises*, 111 Idaho 789 (1986), once a claimant establishes by medical evidence that he is within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery or that (2) there is employment available in the general labor market which claimant has reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release. Likewise, once the claimant reaches medical stability, the claimant's

entitlement to temporary total or temporary partial disability benefits comes to an end. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 38 P. 3d 617 (2001).

54. Claimant seeks TTD benefits associated with his left knee surgery. Claimant argues that Surety failed to provide appropriate medical treatment by not providing medical care for his left knee, by not seeking a new PPI rating, and by not investigating Claimant's cervical complaints. Surety initiated PPI payments on July 2, 2007, citing Dr. DiBenedetto's finding of medical stability on January 19, 2007.[11]

For reasons discussed above, the Referee finds Claimant's August 2007 left knee arthroscopy compensable. Claimant had an outpatient left knee surgery with Dr. Dunteman on August 2, 2007, with good results. While Defendants are correct that Claimant has not produced a specific off-work release from Dr. Dunteman for his left knee surgery, common knowledge leads the Referee to find that Claimant was in a period of recovery per Maleug following the August 2007 surgery. Indeed, Dr. Dunteman's pre-operative report predicted that Claimant would require post-operation crutches for 11/2 to 2 weeks while gradually increasing weight bearing, followed by a brace for a minimum of 3 to 4 weeks, and physical therapy.

[11] Defendants did not raise Idaho Code § 72-434 as a defense. Per this section, an injured worker may forfeit compensation during the time the injured worker is refusing and/or obstructing medical examination by a physician selected by the Commission or the employer. Defendants previously scheduled IME appointments with Drs. Kline and Lamb for March 7th and March 20th, respectively, but Claimant canceled. Defendants accommodated Claimant's various rescheduling requests and advanced travel funds. Still, Claimant's participation was lackluster. Claimant appeared before Dr. Kline, but failed to complete the MMPI. Claimant was late to Dr. Lamb's office, and so argumentative that Dr. Lamb refused to see him. Ex. 30, p. 5. The medical record has well-documented Claimant's reticence and skepticism toward medical providers who disagree with Claimant's desired course of treatment. Defendants paid TTDs until April 19, 2007, after Claimant's appointment with Dr. Lamb. Ex. 32.

Defendants have not shown that Employer made a reasonable and legitimate offer of employment or evidence of employment available in the general labor market which Claimant has a reasonable opportunity to secure. Still, Claimant is not entitled to TTDs for an indefinite period of time; Claimant is only entitled to TTD benefits while in a period of recovery. The question thus presented is when did Claimant reach a point of medical stability following the August 2007 surgery? Defendants bear the burden of proving that their obligation to pay time loss should be curtailed by Claimant's medical stability. Following his left knee surgery, Claimant attended physical therapy, and made significant gains in his range of motion by August 16, 2007. Shortly thereafter, Claimant moved back to California to recuperate near family. Claimant's California medical treatment is reserved as an issue for another hearing; however, Claimant did not have physical therapy for his left knee at that time. Claimant returned to Idaho that fall, seeking additional medical care for a litany of complaints with emphasis on his low back--not his left knee. On October, 2, 2007, Dr. Dunteman opined on causation, impairment, and apportionment, indicating that 100% of Claimant's impairment for his ACL and meniscus tears is related to Claimant's pre-existing condition. The Commission finds it unlikely that Dr. Dunteman would be able to address this issue absent Claimant's arrival at a point of medical stability. Ex. 5, p. 9. As the treating surgeon, Dr. Dunteman's letter is sufficient to show that Claimant has reached medical stability from his left knee surgery. The Referee finds that October 2, 2007, is the date when Claimant was medically stable from his compensable knee surgery, per Dr. Dunteman's letter and Claimant's treatment history.

The Referee finds that Claimant is entitled to TTD benefits until October 2, 2007, but not thereafter.

PPI Benefits:

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

55. Dr. DiBenedetto assigned a 1% whole person PPI rating for Claimant's left knee and 15% for the CRPS before Dr. Dunteman performed Claimant's left knee surgery. Dr. Dunteman did not assign a PPI rating but indicated that any PPI associated with Claimant's left knee would be 100% attributable to a pre-existing condition. Dr. McNulty assigned a 70% right lower extremity PPI rating and a 50% left lower extremity. However, he noted, "The psychological factors are the main causative factor in his current lack of function in both lower extremities." Exhibit 1, p. 7. Dr. McNulty fails to articulate what portion of the 70% and 50% lower extremity PPI is related to psychological versus physical factors. Consistent with the finding above regarding the non-compensability of Claimant's psychological condition, the Referee finds that Claimant has incurred a 16% whole person PPI for the physical injuries he received in his industrial accident.

PPD Benefits:

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

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764

(1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

56. The only vocational expert offering an opinion regarding Claimant's PPD is ICRD consultant Richard Hunter, who opened his file at Surety's request on August 3, 2006.[12] Mr. Hunter utilized Dr. DiBenedetto's work restrictions of no lifting greater than 30 pounds, restricted kneeling and squatting, and no standing more than two hours a day.[13] Claimant did not accept those restrictions, stating he hoped to get better soon. Claimant would not consider any employment other than welding or custom metal work. Because Claimant was refusing ICRD's services as he thought he was medically unable to work, Mr. Hunter closed his file on May 22, 2007.

57. Mr. Hunter offered the following opinion regarding Claimant's employability:

> Based on the claimant's education, the claimant's customary labor market, age, transferability of skills, claimant's restrictions, and physician's recommendations, I believe the claimant is employable in occupations that include, but are not limited to the following: I know of no position that claimant could do that would be within his restrictions, experience, and education. Any new position would need to be modified due to the restriction of no standing more than two hours a day.

Exhibit 30, p. 8.

[12] Mr. Hunter opened his file before Claimant's left knee surgery and before the various psychological workups (other than Dr. Klein's initial report), so his opinions are taken in that context.

[13] It is unknown where Mr. Hunter obtained the two-hour standing restriction. Dr. DiBenedetto's handwritten "fill in the blank" response to a letter from Surety indicates that Claimant was restricted from walking and standing for more than <u>one</u> hour at a time. *See,* Exhibit 8, p. 9.

58. There is scant evidence in this matter to allow for much meaningful analysis regarding the extent of Claimant's PPD. The restrictions relied upon by Mr. Hunter were erroneous in the sense that the restrictions on Claimant's standing and walking due to his left knee and right foot injuries were more onerous than Mr. Hunter understood them to be. Further, the accuracy of those restrictions are undermined by the fact that the surgeon performing Claimant's left knee surgery apparently did not impose any restrictions and, curiously, attributed 100% of any PPI resulting from his left knee injury to pre-existing conditions.[14] Claimant argues that he is totally and permanently disabled. Defendants argue that Claimant has incurred PPD of 30% based on a "Baldner"[15] analysis and Claimant's CRPS and impairment. Neither position is supported by substantial and competent evidence.

59. The Referee finds that Claimant has failed to prove his entitlement to PPD above his impairment. Having found that Claimant's psychological condition is unrelated to his industrial accident and injuries, the challenge is to separate out the psychological condition from his CRPS and left knee condition. It is not possible to determine the contribution of Claimant's mental status to his disability versus the contribution of his left knee condition, whatever that might be, and his CRPS. While the Referee is aware that expert testimony is not required to prove disability above impairment, nonetheless the evidence must support a finding of disability. Such evidence has not been presented in this case.

Apportionment

[14] Claimant's subjective complaints regarding his left knee and right foot CRPS are given no weight, as they are influenced by his unrelated psychological condition.

[15] *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

60. Given the finding above regarding PPD, the issue of apportionment pursuant to Idaho Code § 72-406 is moot.

Attorney Fees:

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

61. Claimant seeks attorney fees for Defendants' failure to accept Claimant's claim for psychological injury benefits, thus impeding Claimant's recovery from his physical injuries. The Referee is unable to find that Surety acted unreasonably in this case. Surety ultimately prevailed on the issue of the compensability of Claimant's psychological claim and, given Claimant's resistance to counseling; it would be mere speculation that, had Surety accepted that claim, Claimant's recovery, or lack thereof, would have been any different.

62. The Referee finds that Claimant has failed to prove his entitlement to attorney fees.

CONCLUSIONS OF LAW

1. Defendants are liable for Claimant's left knee surgery and are to be given credit for any amounts already paid in that regard.

2. Claimant has failed to prove his entitlement to benefits for his psychological condition pursuant to Idaho Code § 72-451.

3. Claimant is entitled to TTD benefits through October 2, 2007, but not thereafter.

4. Claimant has incurred whole person PPI of 16%.

5. Claimant has failed to prove his entitlement to PPD above his PPI.

6. The issue of Idaho Code § 72-406 apportionment is moot.

7. Claimant has failed to prove his entitlement to attorney fees.

RECOMMENDATION

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

DATED this __27th___ day of July, 2012.

INDUSTRIAL COMMISSION

__/s/_____
Michael E. Powers, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __28th___ day of ___August____, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD
PO BOX 1319
COEUR D'ALENE ID 83816-1319

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

ge Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CRAIG WINSTON, Claimant, v. BAKER CONSTRUCTION AND DEVELOPMENT, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2006-517543** **ORDER** Filed August 28, 2012

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

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

1. Defendants are liable for Claimant's left knee surgery and are to be given credit for any amounts already paid in that regard.

2. Claimant has failed to prove his entitlement to benefits for his psychological condition pursuant to Idaho Code § 72-451.

3. Claimant is entitled to TTD benefits through October 2, 2007, but not thereafter.

4. Claimant has incurred whole person permanent partial impairment (PPI) of 16%.

5. Claimant has failed to prove his entitlement to permanent partial disability (PPD) benefits above his PPI.

6. The issue of Idaho Code § 72-406 apportionment is moot.

7. Claimant has failed to prove his entitlement to attorney fees.

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

DATED this __28th___ day of ___August____, 2012.

INDUSTRIAL COMMISSION

___/s/_____
Thomas E. Limbaugh, Chairman

___/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __28th____ day of __August____ 2012, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

RICHARD WHITEHEAD
PO BOX 1319
COEUR D'ALENE ID 83816-1319

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

ge __/s/_____