BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID L. COLER, Claimant, v. THE HOME DEPOT U.S.A., INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2015-013957** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED JUL 07 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise on June 19, 2019, and continued on January 29, 2020. Claimant, David L. Coler, was present in person at the June 19, 2019 hearing; Justin Aylsworth, of Boise, represented him at both the hearing and continued hearing. W. Scott Wigle, of Boise, represented Defendant Employer, The Home Depot U.S.A., Inc., and Defendant Surety, New Hampshire Insurance Company. The parties presented oral and documentary evidence. A post-hearing deposition took place and the parties later submitted briefs. The matter came under advisement on April 25, 2023.

ISSUES

The issues to be decided by the Commission as the result of the hearing are as follows:

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

2. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.[1]

CONTENTIONS OF THE PARTIES

On May 21, 2015, while at work for Employer, Claimant had an accident in which a seventy-pound box of tiles fell on his left foot causing various injuries, which required amputation of one toe and other procedures. This was an accepted claim and Employer/Surety covered Claimant's medical expenses, temporary disability benefits, and permanent partial impairment (PPI). Claimant, having been released to return to work with permanent restrictions and declared to have reached maximum medical improvement (MMI), now seeks permanent partial disability (PPD) benefits in the minimum amount of at least 83.2% or, in the alternative, total and permanent disability because as a "matter of practicality," his case falls under the Odd Lot Doctrine.[2] Claimant also argued that Defendants unreasonably denied/delayed payment of PPD and engaged in other unreasonable conduct, thus he is entitled to recover attorney's fees and sanctions.

Claimant had previously been involved in an automobile accident in which he injured both his elbows and knees. Defendants point out that a doctor told Claimant that his days of moving appliances were "over" after that accident. Claimant also received Social Security Disability prior to and while working for Employer. Employer employed Claimant at time of hearing and he was making more wages than at his time of injury. His new position was selling appliances. Defendants did not see this as a "large disability" case, but rather that Claimant is entitled to only a modest

[1] The parties waived the noticed issues of medical care, temporary disability benefits, and permanent partial impairment at the hearing and in briefing. Furthermore, the issue of sanctions pursuant to J.R.P. §16 was not noticed but rather Claimant raised that issue for the first time in Claimant's Opening Brief at 28. Because appropriate notice and an opportunity to prepare was not afforded to Defendants, this issue will be disregarded. Similarly, the issue of Retention of Jurisdiction was not contained in Claimant's complaint or the notice of hearing nor was it raised at hearing. It was raised for the first time in Claimant's Opening Brief at 19. This issue will also be disregarded.

[2] The issue of total and permanent disability, by the Odd Lot Doctrine or otherwise, was neither pled in Claimant's complaint nor was it noticed for hearing. It was raised for the first time in Claimant's Opening Brief. *See Id.* at 19. Thus, this issue will also be disregarded below.

disability, if any. A 64% to 83% disability is simply not realistic. Defendants argued that they reasonably adjusted the claim, thus attorney fees and sanctions are not applicable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The parties' Joint Exhibits 1 through 26, admitted at the hearing;
3. Testimony taken at the hearing held on June 19, 2019 and January 29, 2020;
4. The deposition of Claimant taken on June 6, 2019;
5. The deposition of Sabrina May Larsen taken on June 6, 2019; and
6. The deposition of Delyn D. Porter, M.A., CRC, CIWCS taken on January 31, 2023.

All objections stated in the pre and post hearing depositions are overruled, with the exception of the objections stated in the Porter Dep., 37:1-6 *and* 44:23-24, which are sustained.

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

FINDINGS OF FACT

1. **Claimant**. Claimant was born on June 11, 1951 in Brush, Colorado. Tr., Vol. I, 49:14-17.[3] He was 68 years old at the time of the first hearing. He resided in Boise, Idaho, *Id.* at 49:7-11, with his wife Patti Coler. *Id.* at 35:19-21. At the time of the first hearing, having moved from Colorado, Claimant and his wife had lived in Idaho for approximately 40 years, and had been married for fifty years. Tr. Vol. I, 34:22-23; 35:17-18. Claimant's 89-year-old mother also resided with them; Claimant and his wife provided caretaking for his mother due to her blindness, multiple

[3] There were two dates for the hearing. The first on June 19, 2019 will be cited herein as "Vol. I." The second on January 29, 2020 will be cited herein as "Vol. II."

sclerosis, and leukemia. Tr., Vol. I, 35:22-36:7. Claimant also financially supported his wife, granddaughter, and great granddaughter, who was born with a congenital heart condition that required two surgeries. *Id.* at 36:22-37:11.

2. **Education and Military Service**. Claimant attended high school until the 12th grade but did not graduate. At age 18, he joined the Army, where he served for two years. He obtained a G.E.D. in 1970 while in the Army. He then served an additional four years in the Army Reserve. While in military service, Claimant attained the rank of Specialist 4 and worked in electronics. He received an honorable military discharge. He did not attend college or any trade schools but rather completed an on-the-job training, a two-year course in appliance repair. He did not complete any computer training and assessed his computer and typing skills as "poor." Upon completing his military service, he did not have any disabilities. *Id.* at 49:18-50:7; 51:23-53:19.

3. **Past Work History**. From 1980 through 2010, Claimant's career was concentrated in the appliance business. When asked what aspect of the business he worked in, Claimant replied as follows: "Appliance sales. Service. Parts. Delivery of appliances. Whatever." *Id.* at 53:20-54:10. Appliance businesses that he worked for in the Boise area included the following: Complete Appliance (family-owned business which Claimant managed in part) from 1980 to 1988; ASAP Cleanup and Repair (owned by Claimant) from 1989 to 1990; Western Appliance from 1990 to 1992; and All Brands Appliance from 1992 to 1993 and 2005 to 2010. *Id.* at 54:3-4; 55:15-18; Ex. 24:812 (Claimant's Discovery Responses); Ex. 24:352 (Delyn Porter Report); *and* Claimant's Dep., 10:13-23:22.[4]

[4] The record is incomplete, confusing, and contradictory on the subject of Claimant's past work history. This is due, at least in part, to Claimant's self-acknowledged memory problems. *See* Claimant's Dep. at 77:9-23. The above recitation of Claimant's prior work history represents the Referee's best efforts at reconstructing it from the record that is available.

4. **Past Medical History and Industrial Accidents**. Sometime in the "1980s," Claimant suffered a T3-4 compression fracture in an industrial accident while picking up an old freezer. He did not have surgery nor did he experience any lasting negative effects from that injury and accident. Tr. Vol. I, 57:3-13.

5. On March 10, 1995, Claimant sustained an elbow injury in an industrial accident. Ex. 2:3. Claimant did not recall the accident at hearing. There is no further record or testimony concerning this accident and injury or whether Claimant received any medical treatment because of it. *Id.* at 57:17-20; Ex. 2:3.

6. On March 14, 1998,[5] Claimant had an abdomen/groin injury in an industrial accident while working for All Brands Appliance. Claimant developed a hernia from the injury which required surgical intervention. There were complications from the surgery which necessitated a second surgery to repair the mesh used to treat hernias. Otherwise, there were no reported sequalae from the injury and Claimant recovered fully from it. Ex. 2:3 (Industrial Commission records); Tr., Vol. I, 57:21-58:18.

7. In or about 1998 or 1999,[6] Claimant was involved in an automobile accident in which he seriously injured both his elbows and knees. Claimant underwent three operations on his right elbow and one operation on his left elbow, which he deemed successful. There were no operations on his knees, however Claimant indicated that his knees were seriously affected by the accident and contributed to him leading a more sedentary life. *Id.* at 54:14-55:4; *see also*, Ex. 8 (2002 history of treatment of left and right elbows, including operations by Dr. Doerr). Both

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[5] This date conflicts with Claimant's counsel's statement at the hearing that the hernia injury occurred in March 1988. Tr., Vol. I, 57:22. The Referee has relied upon the Industrial Commission's record of the accident above.

[6] Again, the record is unclear, because elsewhere Claimant, at his counsel's prompting, recounted that the automobile accident occurred in 1995. *See* Claimant's Dep. at 20:10-14. Later, at hearing, however, Claimant testified that the automobile accident occurred in "1989 or 1999." *See* Tr., Vol. I, at 54:14-18.

Claimant's knees and elbows remained painful and limiting to him through at least the date of his deposition. *See*, Claimant's Dep., 33-36.

8. The automobile accident and injury ultimately resulted in Claimant applying for Social Security Disability (SSD). Tr., Vol. I, 54:14-55:4. Claimant also began needing the regular administration of narcotic pain medications after the automobile accident and injury, which he took through the date of hearing. *Id.* at 44:20-45:14. For three years following the automobile accident, Claimant went into a severe depressive state and was unable to participate in the labor market as a result. *Id.* at 55:9-14. Dr. Timothy Doerr, M.D., who performed Claimant's elbow surgeries, told him afterwards that "you are now basically done with the appliance work." *Id.* at 84:16-19. Dr. Doerr supported Claimant's application for SSD. *Id.* at 84:20-22.

9. Claimant claimed that he was an active individual, participating in vigorous pastimes, up until the time of his industrial accident with Employer in May 2015. *See*, *Id.*, 77:7-78:8. Nevertheless, the automobile accident in 1999 was the original event that foreclosed Claimant from active pursuits such as hunting, fishing, bowling, and walking. Claimant admitted upon cross examination as follows: "From the point of the auto accident my life as I knew it prior to that accident was it – it didn't happen. From the accident on all of those activities that are in the record I never did again. Could not walk and whatnot." *Id.* at 85:12-16.

10. On August 1, 2008, Claimant sought treatment from Dr. Stewart O. Jones, D.P.M, with Idaho Foot and Ankle. Claimant presented with a complaint of pain and swelling in his left foot through the arch and around the great toe. Dr. Jones diagnosed a bunion and performed a bunionectomy (osteotomy) on Claimant's left foot first metatarsal.[7] Claimant stated that his left foot returned to "normal function" thereafter. *Id.* at 56:9-57:2.

[7] At hearing, claimant stated his bunion was on his left foot and treated by Mr. Jones. Tr. 56:13-17, Records

11. Nevertheless, he returned to Dr. Jones after the surgery still complaining of left foot pain and swelling at the end of his workdays. Dr. Jones discussed the possibility of a second surgery with Claimant. Claimant stated that the purpose of a second surgery would have been to replace a "loose screw," but Claimant did not undergo a second surgery. Dr. Jones also noted an abnormality associated with Claimant's left foot second metatarsal. The last date that Dr. Jones saw Claimant in his office was October 14, 2009. Dr. Jones provided Claimant with conservative treatment, but Claimant deferred surgery to a later date, which apparently never occurred. Claimant's Dep., 41:14-42:15. *See also*, Ex. 3 (Dr. Jones's records).

12. Claimant consulted with Dr. James R. Jastifer, M.D., and Dr. Michael J. Coughlin, M.D., of the Coughlin Clinic at Saint Alphonsus in Boise on September 25, 2013. Claimant presented with left forefoot pain. They noted in pertinent part that Claimant had a "*longstanding forefoot pain on his left foot*, plantar aspect of the metatarsal heads…" [Emphasis added.] Based on X-rays, Dr. Jastifer and Dr. Coughlin suspected a plantar plate tear and sent Claimant for an MRI. Ex. 4:45-46. The MRI revealed a mild to moderate sprain of the lateral plantar plate at the third digit. *Id.* at 47-48. Claimant complained of pain of 7 out of 10. Claimant "drew a pain map on the bottom of his foot and he pointed to the base of his 3rd toe, which is where on MRI there is a strain of his plantar plate." *Id.* at 49. Dr. Coughlin advised Claimant that he likely had plantar plate tears in his left foot; Claimant chose conservative treatment first rather than surgery. *Id.* at 49-50. There are no further medical records indicating that Claimant sought additional treatment from the Coughlin Clinic during this time period. Claimant could not recall the office visit at

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from Idaho Foot and Ankle taken in 2008 indicate the bunion was on his right foot. JE 3:33. However, surgical records confirm it was on his left foot. JE 3:38.

hearing but further agreed with the statement that he did not have any "significant problems" with his left foot prior to May 31, 2015. Tr., Vol. I, 64:15-23.

13. **Social Security Disability**. Claimant received Social Security Disability (SSD) benefits from approximately 2010 through when he began working for Employer in 2013.[8] The basis of Claimant's SSD application, which represented that he was totally disabled according to SSA standards, were the injuries he sustained in the auto accident to his elbows and knees. Claimant incurred an overpayment of SSD due to the fact that his earnings were too high when he went on full-time work for Employer. Tr., Vol. I, 41:21-42:9; 59:7-60:8; Claimant's Dep., 24:8-14; *and* Ex. 13:352.

14. **Subject Employment**. Employer hired Claimant as a "hard side" flooring sales associate on April 5, 2013. During the application process, Claimant disclosed his SSD status to Employer, nevertheless Employer offered him the job. The position included the following duties: making flooring sales to customers; packing; loading; shipping products; stocking shelves; and maintaining inventory of hard flooring products, such as tile and laminate. The position required Claimant to lift, carry, and move flooring products and materials throughout the workday. Items that Claimant regularly lifted included 70 pound boxes of tiles and 50 pound bags of concrete. Upon hire, Claimant was capable of performing all of the duties of the job without accommodation, nor was he afforded any accommodation by Employer. Claimant could not recall having any troubles with his left foot at work or otherwise prior to the industrial accident. Tr., Vol. I, 61:3-64:14.

[8] The timeline is confusing as to the dates of Claimant's SSD eligibility and receipt. There are no Social Security records available in the record, however Claimant reported to his vocational expert that the time period was 2010 to 2013. *See* Ex. 13:352.

15. **Injury to Fingers**. On August 18, 2014, Claimant had an accident and injury to his fingers while in the employment of Employer. Ex. 2:3 (Industrial Commission records). Claimant did not recall the injury. Tr., Vol. I, 58:23-59:1. There is no further evidence of this incident in the record, nor is there any indication that Claimant received medical treatment for it.

16. **Industrial Accident**. Claimant sustained an industrial accident and injury to his left foot while in the employment of Employer on May 31, 2015. Claimant was assisting a customer with an order of tiles by retrieving 12 x 24 boxes of tiles, weighing approximately 70 pounds each, from the second shelf of the tile aisle and loading them onto the customer's handcart. In the process of doing this, and while Claimant was holding a box of tiles, one of the boxes slipped from the shelf and fell approximately three feet. The corner of the slipped box landed on Claimant's left foot. Claimant felt "excruciating pain" and felt like the box of tiles had "just flattened" his left foot. *Id.* at 64:24-67:2; Claimant's Dep., 47:4-11.

17. Claimant reported his accident to the manager on duty, Sean Leonardi, and then sought medical treatment. Claimant's Dep., 48:3-9.

18. **Medical Treatment Following Industrial Accident**. Claimant first sought treatment at Primary Health Urgent Care in Boise. Amber M. Vickers, PA-C, evaluated his injury. She noted first as follows: "63-year-old male presents with c/o Ankle/foot pain. Was at work today 5/31/15 at Home Depot and a 65 lb. box fell on his left foot. He has applied ice but it hurts to walk and bare [sic] weight. Patient states injury occurred an hour ago." PA Vickers, upon reviewing an X-ray, advised Claimant that he had a musculoskeletal contusion and should return to the clinic if there was no improvement in symptoms for 3 days. Ex. 5:54-55. She released Claimant to return to work with occasional weight bearing and no "high impact" restrictions, with a prescription for

Norco and a prohibition on operating dangerous machinery, forklifts, or heavy machinery while on prescribed medication. Ex.5:54-55.

19. The radiologist, Lorelai Smith, MD, who interpreted the X-ray, taken May 31, 2015, noted as follows: "Previous osteotomy and helix valgus deformity repair of the first left metatarsal shaft. 2 small Herbert screws are seen within the distal metatarsal shaft with healed postsurgical deformity. Mild degenerative changes noted at the first MTP joint. No acute fracture or dislocation. A small inferior calcaneal spur is incidentally noted." Dr. Smith further noted that there was no visible soft tissue swelling and no significant abnormalities. Ex.5:56.

20. On June 8, 2015, Claimant visited Primary Health Group where Dr. Stephen C. Martinez, M.D., evaluated him. Claimant reported "some improvement." Dr. Martinez gathered more information about Claimant's condition as follows: he developed pain, swelling, and bruising of the left foot midfoot/forefoot region. Claimant acquired a limp and more pain with prolonged walking. He had soreness in the lower leg region from limping. Dr. Martinez assessed Claimant's condition as a contusion of foot, continued Claimant's ibuprofen and Norco prescriptions, and recommended a cam boot for comfort. On a more probable than not basis, Dr. Martinez found Claimant's condition to be work-related. He gave Claimant work restrictions of lifting no more than 30 pounds, only occasional weight bearing on his left foot, and using ice and a cam boot. *Id.* at 60-63.

21. On June 22, 2015, Claimant followed up with Dr. Martinez. He reported continued left foot pain, stiffness and soreness in the lower leg region from limping. He also reported numbness in the 4th toe and pain in the great toe and second toe. Dr. Martinez continued the previous prescriptions and treatment with a cam boot, together with an identical return to work order. *Id.* at 64-67.

22. Claimant presented for follow-up to Dr. Martinez on July 6, 2015. He reported interval improvement with no swelling, bruising, or redness in his left foot. Claimant had discontinued using the cam boot. He walked with a slight limp at the end of his shifts. Dr. Martinez approved discontinuance of the cam boot and endorsed regular footwear. Claimant declined physical therapy (PT) and an MRI. Dr. Martinez noted that observation would continue as Claimant's symptomatology improved and activity level increased over time. He continued the same work restrictions, minus the cam boot. Ex. 5:68-71.

23. Claimant followed up again with Dr. Martinez on July 29, 2015. He reported continued moderate to severe left foot pain, localized in the forefoot region. Pain at the base of the great toe had now improved. Out of the cam boot, he walked with a limp and walked sparingly on the lateral aspect of his left foot. Claimant was tolerating light duty at work but had increased pain at the end of his shifts. Dr. Martinez continued modified work duties and dispensed a metatarsal pad for comfort. He also recommended new support orthotic shoes. Dr. Martinez convinced Claimant to accept an MRI referral due to his report of continued discomfort. *Id.* at 72-75.

24. The MRI, left foot without contrast, occurred at Intermountain Medical Imaging on August 14, 2015. The radiologist, Shane McGonegle, M.D., concluded that there was no marrow contusion or fracture, noted postsurgical changes of the first metatarsal osteotomy (bunionectomy) for hallux vulgus repair, and observed mild to moderate degenerative joint disease in the first MTP joint. The MRI further revealed a tiny nodular focus of soft tissue thickening and protruding from the plantar distal aspect of the second webspace, suspicious for perineural fibrosis and developing a tiny Morton's neuroma. *Id.* at 77.

25. Dr. Martinez reviewed the MRI and the "nagging problem" with Claimant at his next appointment on August 24, 2015. Claimant reported continued pain localized in the forefoot

at the base of second and third toes region, worse with prolonged standing and walking. Dr. Martinez continued modified work duty for Claimant and referred him to Dr. Travis Jay Kemp, M.D., an orthopedic surgeon, due to his continued symptomatology. The diagnosis was left foot contusion with developing neuroma. Ex. 5:78-84.

26. Claimant had his first consultation with Dr. Kemp on September 8, 2015. Dr. Kemp noted in part as follows: Claimant "initially was treated in a CAM boot and ultimately prescribed a metatarsal pad from Norco. He did not obtain this because Norco does not have this item. He presents today after an MRI revealed a neuroma in his left foot." Ex. 6:91. Claimant rated his pain as 7/10, localized in the left forefoot, made worse with activity but nevertheless constant. Dr. Kemp's diagnosis was left 2nd web space neuroma status post crush injury, an "acute and complicated problem." Dr. Kemp gave Claimant two options for treatment, first, a metatarsal pad, for which Dr. Kemp provided a prescription to another provider. Second, Dr. Kemp offered Claimant a steroid injection into the 2nd web space with the purpose of calming down the neuroma. Claimant opted for the steroid injection, and Dr. Kemp performed the procedure, which Claimant tolerated with no complications. *Id.* at 91-92.

27. Claimant followed up with Dr. Kemp on September 29, 2015. Claimant reported transient relief from the steroid injection. His left forefoot was still tender to palpation. Dr. Kemp's diagnosis was as follows: 1. Left 2nd web space neuroma; and 2. More generalized left metatarsalgia [pain and discomfort of the metatarsals]. Dr. Kemp opined that he would not repeat the steroid injection "given its transient effects and side effects with multiple injections." Claimant's options were to live with the pain or to undergo surgery, a 2nd web space neuroma excision which "would relieve the neuroma pain but would not relieve his metatarsalgia." Dr. Kemp gave Claimant a month to think about his options. *Id.* at 95.

28. Claimant did not return to Dr. Kemp for approximately 14 months until November 8, 2016. Dr. Kemp noted in pertinent part as follows: "The presumptive diagnosis was a left 2nd web space neuroma. He failed a steroid injection and he continues to have pain and now his 2nd toe has drifted over the top of hallux [big toe]. His original injury was a work-related injury… Before that injury, he never had any trouble whatsoever with his forefoot and had no deformities.[9] Now he has developed this deformity with pain. He rates his pain as 6/10." Ex.6:96.

29. Dr. Kemp further noted in part as follows: "This is a chronic problem with moderate exacerbation that poses a threat to bodily function and would benefit from major elective surgery. David has a completely dislocated 2nd MTP joint at this point, which strongly suggests a ligamentous disruption from his work related injury back in 2015 versus a Morton's neuroma… Our best option for him is to disarticulate the 2nd toe to rid the source of the pain." Claimant elected to proceed with the surgery. *Id.* at 97.

30. Dr. Kemp next evaluated Claimant on January 3, 2017. There were no "interval changes" to Claimant's condition and he continued to consent to surgery. *Id.* at 100-101.

31. Dr. Kemp performed surgery on Claimant's left foot on January 11, 2017 at Treasure Valley Hospital in Boise. The two procedures were a left second metatarsophalangeal joint disarticulation [amputation] and an excision of the neuroma at the 2nd web interspace. Claimant tolerated the procedures well and there were no complications. *Id.* at 102-103.

32. Claimant visited Dr. Kemp on January 24, 2017 for his two-week follow-up to his surgery. Claimant was doing "well overall." "He has some hypersensitivity around his plantar and

[9] Dr. Kemp made this statement in spite of the fact that he also acknowledged in the same document that Claimant had had "left foot bunion repair," *See* Ex. 6:96. Dr. Kemp was also apparently unaware that Claimant visited the Coughlin Clinic on September 25, 2013, wherein he complained of "longstanding" left forefoot pain. *See* Ex. 4:45-46.

dorsal foot involving the 3rd and 4th toes." Dr. Kemp dispensed Medi Patches to decrease nerve sensitivity. Claimant was off work. *Id.* at 104.

33. At the three-week postoperative checkup, Dr. Kemp diagnosed a 3rd webspace neuroma. He noted in pertinent part as follows: "At this point, now that the patient is undergoing treatment for not only his postoperative period but a 3rd webspace neuroma, it is not out of the realm of possibility that a crush injury could have caused neuromas in both the 2nd and 3rd web spaces." Dr. Kemp recommended and performed a steroid injection into the 3rd web space of Claimant's left foot. Ex. 6:105.

34. On February 16, 2017, Dr. Kemp opined that Claimant would likely require a 3rd web space neuroma excision. He noted that it was unfortunate that they were unable to perform this at the same time as the 2nd web space neuroma excision, however the "3rd web space neuroma pain was being covered and masked by more significant pain in the 2nd toe and 2nd web space." The plan was to defer the surgery, however, because Dr. Kemp needed to allow the wound at the 2nd web space to heal fully first. Claimant was on light duty. *Id.* at 107.

35. At the consultation with Dr. Kemp on March 9, 2017, Claimant was "continuing to struggle." He was 2 months postoperative. He continued to have pain in the inner 3rd web space and plantarly. Claimant also had a new issue, a mass on the FHL tendon that was not previously there. It also hurt for Claimant to flex his big toe down, which was another new issue. Dr. Kemp ordered a new MRI to evaluate the mass on Claimant's FHL, and to look for a 3rd web space Morton's neuroma. *Id.* at 108.

36. Claimant returned to Dr. Kemp's office on March 23, 2017. The MRI, performed on March 15, 2017, revealed an intermediate signal mass in the 3rd web space, suspicious for Morton's neuroma. There was also evidence of a plantar fibroma on the plantar medial foot

adjacent to the FHL; this was due to a buildup of scar tissue and inflammation in the plantar foot. Dr. Kemp opined that both conditions were related to Claimant's crush injury. Dr. Kemp and Richard Trump, PA-C, recommended that Claimant would benefit from surgery to which Claimant consented. Ex. 6:112-114.

37. Dr. Kemp took Claimant to surgery again at Treasure Valley Hospital on April 12, 2017. The procedures he performed were excision of the left 3rd web space neuroma and excision of left plantar fibroma. Claimant tolerated the procedures well and there were no complications. *Id.* at 115-116.

38. Claimant saw Dr. Kemp on April 25, 2017 for his two-week postoperative checkup. His pain had increased to 7/10. Dr. Kemp recommended 2 weeks more off work because Claimant was "struggling" and required Percocet for pain control. *Id.* at 117.

39. Claimant returned to Dr. Kemp on May 9, 2017 for his four-week follow-up. He had had a "bit of a wound complication on the medial plantar incision," with the wound draining pus, for which Claimant had applied self-care. On exam, the wound "actually look[ed] pretty good." Dr. Kemp debrided eschar [dead tissue] from the margins of the wound and gave Claimant instructions on how to do so himself with alcohol at home. Claimant was put on sedentary light duty. *Id.* at 118.

40. Claimant came into Dr. Kemp's office on May 12, 2017, prior to his scheduled follow-up, with concerns about his incision, discharge and pain. Nurse Emonnot observed that the wound looked infected. She received instructions from PA Trump to start Claimant on Keflex, an antibiotic, and for Claimant to remain non-weight bearing until full closure of the wound. Claimant was taken off work for another week. *Id.* at 119-120.

41. Claimant followed-up with PA Trump about his left plantar foot wound on May 16, 2017. PA Trump noted that the discharge was stopped; there was no redness and no warmth. PA Trump recommended transition to weight bearing as tolerated on Claimant's postoperative shoe and continuance of the antibiotic. Claimant was kept off work for another week. Ex. 6:121-122.

42. At the next scheduled follow-up for Claimant's left foot on May 23, 2017, Dr. Kemp observed that Claimant presented with persistent wound purulent discharge; he concluded that the Keflex must not be working. Dr. Kemp prescribed Doxycycline in addition to the Keflex. He recommended that Claimant begin a period of non-weight bearing to rest his left foot and prescribed a knee scooter, for which he sought Surety's approval. Claimant was taken off work for a month. *Id.* at 123-125.

43. PA Trump and Dr. Kemp saw Claimant for follow-up on May 30, 2017. Claimant endorsed burning pain in the area of plantar incision, but he had no significant drainage or other indications of infection. Dr. Kemp and PA Trump recommended no surgical intervention to address the infection. Claimant received another note for one month off work. *Id.* at 126-127.

44. Claimant consulted with PA Trump and Dr. Kemp in a 2-month follow-up on June 13, 2017. PA Trump observed that Claimant "continues to struggle. He has numbness diffusely. He has swelling and pain about the plantar foot. He has a new issue with a callosity that has formed on the plantar foot under the 3rd metatarsal head." Nevertheless, his plantar wound appeared to be healed with no further complications. Dr. Kemp and PA Trump decided that they would "leave alone" the callosity. They wanted Claimant to be strictly non-weight bearing for at least three to four more weeks on his left foot. Because of complications from surgery, they decided that Claimant was not a good candidate for further surgery to address the callosity, or any other issue in the left foot. Dr. Kemp had a "frank conversation" with Claimant about possible retirement due

to the injury and possible complications from the severe crush injury. Claimant received a note for an additional 8 weeks off from work. *Id.* at 130-131.

45. On July 6, 2017, Claimant was 3 and a half months out from his last surgery on his left foot. Dr. Kemp observed that Claimant continued to struggle significantly and had pain in the ball of his foot. An IPK [intractable plantar keratosis] had formed under the 3rd metatarsal head. Dr. Kemp trimmed the IPK. Claimant received instructions to obtain round corn off-loader pads from the drug store. Claimant was also to obtain a second opinion from Dr. Coughlin. Claimant was kept off work until the next appointment on August 10, 2017. Ex. 6:132-133.

46. Claimant saw Dr. Coughlin of the Coughlin Clinic on August 2, 2017 for a second opinion. Dr. Coughlin noted of interest that he had seen Claimant before for an orthopedic consultation back in 2013. Dr. Coughlin reviewed some of the records that were sent over but did not have record of Claimant's visit with Dr. Kemp on July 6, 2017 or record of the second surgery. Claimant came into Dr. Coughlin's office having not returned to work and experiencing intractable pain. Dr. Coughlin's impressions were as follows: 1. Recurrent fibroma. 2. Status post-second toe disarticulation of the left foot. 3. Third metatarsal space neuroma was excised with some scar tissue. 4. A transfer lesion beneath the third metatarsal. Dr. Coughlin released Claimant to return to Dr. Kemp for continuing care. He recommended a custom orthotic that unweighed the area beneath Claimant's third metatarsal. He also recommended frequent trimmings of Claimant's callus. Dr. Coughlin further opined that Claimant may be a candidate in time for a plantar condylotomy but first Claimant must start weightbearing in a normal fashion. Dr. Coughlin referred Claimant to PT at STARS for 2 to 3 times per week for six weeks.[10] Ex. 4:51-53.

[10] There are no records of any PT by STARS and presumably Claimant did not follow through on this referral.

47. On August 10, 2017, Dr. Kemp wrote a "To Whom It May Concern" letter, which was apparently directed at Surety, concerning Claimant's left foot condition. The letter began with a long paragraph recounting Claimant's relevant medical history, which will not be repeated here as it is already covered adequately above. Ex. 6:184.

48. Dr. Kemp opined in the letter in pertinent part as follows: "His active diagnoses now are recurrent plantar fibroma, recurrent 3rd web space neuroma, and transfer lesion/intractable plantar keratosis 3rd metatarsal head. He has reached **maximum medical improvement**." [Emphasis added.] *Id.*

49. Dr. Kemp proceeded to record a permanent impairment rating, as follows: For Claimant's intractable plantar keratosis under the 3rd metatarsal head, he opined a 1% lower extremity impairment. For the recurrent 3rd web space neuroma, Dr. Kemp opined a 2% lower extremity impairment. For the 2nd toe disarticulation, Dr. Kemp applied a 2% lower extremity impairment. These three lower extremity impairments added up to a 5% total lower extremity impairment, which converted to a whole person impairment of 2%. *Id.* at 184-185.

50. Dr. Kemp next stated the following work restrictions for Claimant:

> He can stand for 30 minutes at a time followed by a 5-minute break. He cannot climb ladders or be exposed to heights. He is unable to bend, stoop, kneel or crouch. He has a lifting restriction of 40 pounds and a push or pull restriction of 80 pounds. He can work a fulltime shift if these restrictions are adhered to.

Id. at 185.

51. Finally, Dr. Kemp stated the following opinions as to Claimant's future medical needs:

> The patient will require custom orthotics in order to normalize the pressure point in the foot, specifically to address the 3rd metatarsal head transfer lesion. In addition, the patient may benefit from physical therapy in the future, but at this point has deferred the treatment. In addition, the patient may benefit from future surgical intervention including, but not limited to, plantar fibroma excision or excision of

> the planta fascia and possible 3rd webspace neuroma revision excision. He may also benefit from a plantar condylectomy of the 3rd metatarsal head. At this point, the patient is deferring any further surgical intervention and I am in agreement with that decision.
>
> The patient would like to obtain his custom orthotic. He would like to defer PT and surgical intervention.

Ex. 6:185. Dr. Kemp returned Claimant to work pending the impairment rating. *Id.* at 186.

52. **Return to Work with Employer**. Claimant was not in a financial position to retire, as Dr. Kemp had suggested, at the conclusion of Dr. Kemp's treatment of Claimant's left foot. Tr., Vol. I, 69:23-70:12. His granddaughter required further heart surgery and Claimant helped to support her as well as care for his mother and wife. *Id.*

53. Claimant did not return to work at Employer as a hard floors sales associate because he "physically couldn't do it." *Id.* at 70:17-21. Rather, he returned to work in appliance sales as a specialist, a lighter position and one which Employer had modified to comply with his work restrictions as outlined in Dr. Kemp's report. Employer considered the transfer to be a promotion. *Id.* at 70:22-71:2.

54. Leif Thompson, the store manager for Employer for the store where Claimant worked, Tr., Vol. II, 121:12-20, stated in pertinent part regarding the hiring of Claimant for the appliances position:

> Q. Well, what's the difference between the [hard floor] sales associate and [appliances] sales specialist in the case of Mr. Coler?
>
> A. Well, with Mr. Coler in particular I mean this is a promotion. This is something we interviewed for, we don't just promote people. So, he put in for the position and he was the best candidate, so he received the promotion and his background was a factor. He has a background in appliances. He's always been excellent with customers and because of his interview and his background he received a promotion to be a sales specialist in appliances where he is able to take care of customers relative to their needs in the appliance department... He's very effective at it and he does a great job.

Id. at 129:13-130:3.

55. Claimant returned to work for Employer in the appliance department in the summer of 2017. Tr., Vol. II, 162:3-8. Claimant was still working full-time for Employer as of the date of the continued hearing. *Id.* at 130:4-7. He indicated that he intended to continue working for Employer as long as he was physically able to do so. Tr., Vol. I, 90-91.

56. Claimant described his duties in this new "modified appliance specialist position" as follows: "Well, I – obviously, sell appliances. Sometimes you have to – if we have it in stock you have to find it, find an equipment operator to pull it down. Find a cart to put it on. Once you have done all of that, then, you have got to bring the cart back up to the customer or towards the loading area and that's that." *Id.* at 71:16-22.

57. Claimant recounted that Employer asks him regularly to work outside of his assigned work department in other departments. He explained as follows: "Sale – our specialists are in – supposed to be in our department, but if there is nobody in flooring, I go to flooring. If plumbing needs help, I go to plumbing. It's just indiscriminately – something comes up and they don't have anybody, so they come and get me." So in addition to his position as an appliance specialist, Claimant agreed that he was a "troubleshooter and fill-in." Furthermore, he contended that he regularly, on a daily basis, worked outside of his work restrictions assigned by Dr. Kemp. *Id.* at 72:4-20.

58. Claimant and Defendants' counsel had the following relevant dialog concerning Claimant's assigned work restrictions and how they applied in practice in his modified appliances position:

> Q. Okay. As I understand your restrictions now, Dr. Friedman at least doesn't want you lifting any more than 50 pounds.
> A. Correct.

Q. You're not supposed to be lifting any more than 50 pounds anyway, are you? Even under the Home Depot's general policies.
A. I don't remember exactly what the policy is as far as weight. I think I have always been – in guidelines.
Q. Okay. What's the issue with your restrictions? Is it being on your feet?
A. Which – I'm not sure I understand.
Q. You made a – you made essentially a claim that not a day goes by when you aren't violating your work restrictions. What restrictions?
A. Weight. Pulling. Walking. Standing.
Q. Are you – are you lifting over 50 pounds by yourself?
A. Sometimes you have to.
Q. Why?
A. Because there is no one there to do it.

Tr., Vol. I, 95:13-96:9.

59. Mr. Thompson stated that Employer was following Claimant's work restrictions as given by his medical providers. Tr., Vol. II, 131:1-3. He further stated that Claimant was able to work effectively with these restrictions in place. *Id.* at 131:17-19. Mr. Thompson recounted that he had had several discussions with Claimant about complying with his restrictions, as follows:

> I have had conversations with Dave formally regarding his restrictions and we have talked about his concerns where he feels that he is being asked – but specifically by customers, and sometimes he says, without any specifics, by department supervisors, and what we have discussed formally is that the expectation from me is no one can ask him to exceed his restrictions and if they do he needs to tell them that he cannot do what is being asked and if they could find someone else or call a manager to make sure that whatever being asked gets taken care of. Usually it's a customer service situation and he feels pressure. It's hard for him to tell a customer no, that's not something he wants to do, but I have made it very clear to him formally that he is required to do just that.

Id. at 132:13-133:2.

60. During the accommodations process, Claimant told Mr. Thompson that he would likely continue to work until age 72. *Id.* at 135:14-16.

61. **Right Foot Treatment**. On January 30, 2016, Dr. Jack Trainer, DO, with St. Luke's Medical Center emergency department in Meridian, diagnosed Claimant with cellulitis of the second toe of the right foot. Claimant had noticed that he had rubbed the skin of the right

second toe and an infection developed with pain. Dr. Trainer prescribed Augmentin, an antibiotic, and Norco, and recommended that Claimant follow-up with his family physician. X-rays showed no evidence of osteomyelitis [inflammation of the bone marrow and adjacent bone]. Ex. 7:146-151.

62. Claimant returned to Dr. Kemp's office on October 9, 2018. He was complaining of inflammation of his right 5th toe. Claimant had formed a callus on the lateral aspect of the toe. Both his general practitioner and a dermatologist had seen him and prescribed Keflex, an antibiotic, with no resolution. Examination of the right foot revealed dactylitis [inflammation of one or more digits], both redness and swelling. Dr. Kemp switched Claimant from Keflex to Doxycycline. Dr. Kemp further noted that "I do not believe that this is any way related to his work injury to his contralateral foot." Ex. 6:137.

63. At the follow-up appointment on October 18, 2018, Claimant was complaining of increased pain, however Dr. Kemp observed "a little less redness." Dr. Kemp prescribed a third antibiotic, Levaquin. *Id.* at 139.

64. On October 25, 2018, Claimant continued to have pain, swelling, and redness on his 5th right toe. The diagnosis was presumed infection with callus and cellulitis. Claimant requested amputation, however Dr. Kemp thought that such treatment was premature and ordered an MRI and continued the Levaquin. *Id.* at 140.

65. On October 30, 2018, Dr. Kemp noted that he ordered the MRI to screen Claimant for osteomyelitis, but the MRI ruled it out. Dr. Kemp recommended nonsurgical management of the condition and gave him a referral to podiatry. *Id.* at 144.

66. **Claimant's Experience of Pain**. Claimant testified in pertinent part as follows regarding his subjective experience of pain following the industrial accident and placement in his accommodated appliance position:

> Q. Could you, please, tell the Commission what, if any, left foot symptoms you experience on a daily basis while working at the Home Depot?
> A. If my foot sets down wrong… pain shoots up through it. The nerves burn. And my foot – it's just an ongoing set of pain or burn.
> Q. Does you[r] [sic] foot swell up during -- ?
> A. Yes.
> Q. -- during your work shift?
> A. Usually – well, like yesterday, I undid -- I expanded the laces three different times because my foot swelled.
> ***
> A. Well, I do walk with a limp and… the left foot is higher, the right foot is shorter, so you have a tendency to limp and, yeah, it irritates the hips and foot.
> Q. Okay. Do these left foot symptoms increase as the workday progresses?
> A. Yes.
> Q. Do these left foot symptoms ever completely go away even if you take prescription pain medicine?
> A. No.
> Q. Does the neuroma on your left foot continue to grow?
> A. Absolutely.
> ***
> Q. Since starting the accommodating appliance sales position… [has] your left foot symptoms gotten better or worse or stayed the same?
> A. Worse.

Tr., Vol. I, 78:9-79:18; 74:21-75:5.

67. **Vocational Evaluation Report**. Claimant commissioned Delyn D. Porter, M.A., CRC, CIWCS, to complete a vocational evaluation report. Mr. Porter delivered his report on November 8, 2017. Ex. 13:345. Mr. Porter's credentials are well known to the Commission.

68. To prepare the report, Mr. Porter interviewed Claimant on October 18, 2017. He also reviewed relevant medical records, excluding records pertaining to Claimant's pre-industrial accident conditions and injuries and Claimant's right foot. He further reviewed and resourced additional reference materials, including but not limited to the Dictionary of Occupational Titles,

Idaho Career Information System, Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, and similar sources. *Id.* at 345-350.

69. Claimant reported to Mr. Porter that his "pre-injury hobbies included fishing and sight-seeing." Ex. 13:351.

70. Claimant further reported to Mr. Porter that he did not receive a referral to the Industrial Commission Rehabilitation Division (ICRD), nor did he seek services from the Idaho Division of Vocational Rehabilitation. *Id.*

71. While he reported his hernia and T3-4 compression fracture to Mr. Porter, Claimant apparently did not disclose his automobile accident in which he seriously injured his elbows and knees, nor did he disclose any other conditions/injuries, including the pre-industrial accident treatment of his left foot. *Id.* at 351.

72. Mr. Porter noted in pertinent part as follows regarding Claimant's permanent restrictions: "The time of injury employer is aware of Mr. Coler's permanent restrictions and allows him to work within his restrictions. He has co-workers available to perform work that falls outside of his permanent work restrictions." *Id.* at 352.

73. Claimant reported to Mr. Porter that he had been on SSD from 2010 to 2013. *Id.*

74. Mr. Porter observed as follows: "Mr. Coler was noted to be a good historian. The information that he shared correlated closely with the vocational and medical records reviewed as part of this vocational report." *Id.* at 353.

75. Claimant reported to Mr. Porter the following pertinent information concerning residual functional capacity: was able to stand for 10 minutes; had difficulty walking; was able to lift a maximum of 40 pounds; was able to push/pull a maximum of 80 pounds; avoided bending, stooping and squatting; had to use a stationary item to get up and down from a kneeling position

and was able to kneel for only 5 minutes; had difficulty with stairs and ladders; and had chronic pain of 4-8/10. *Id.* at 353-354.

76. Mr. Porter listed the following relevant job titles for Claimant's work history from the Dictionary of Occupational Titles: electrical appliance services/appliance service representative; sales representative, household appliances; salesperson, parts/counter clerk/parts clerk; sales attendant, self-service store; and sales attendant, building materials/yard salesperson. Ex. 13:354-356.

77. For specific vocational preparation (SVP), Mr. Porter noted that Claimant had spent the majority of his working career in skilled appliance repair, sales and service. His past work history encompassed jobs with an SVP ratings of level 1, unskilled, to level 7, skilled (over 2 years and including up to 4 years). Mr. Porter deemed Claimant qualified to work in occupations ranging from an SVP level 1 through level 7. *Id.* at 356-357.

78. Mr. Porter concluded that the "assigned permanent work restrictions from Dr. Kemp include exertional and positional restrictions. Mr. Coler is restricted to LIMITED-MEDIUM physical demand work capacity post injury." *Id.* at 358.

79. Noting that Claimant dropped out of school after the 11th grade but completed a GED in 1970, Mr. Porter considered it the equivalent of a high school graduation with less demanding curriculum. This placed Claimant at a level 3 GED level (general education development) out of 6 levels. Based upon Claimant's work history, Mr. Porter placed his overall experience at an experience level 4, successful work experience in an organized technology. *Id.* at 359.

80. Mr. Porter observed that Claimant's time of injury job was a heavy physical demand occupation according to the Dictionary of Occupational Titles. It required occasional

lifting up to 100 pounds and also frequent bending, stooping, crouching, squatting, etc. Because the permanent work restrictions assigned by Dr. Kemp include exertional and positional restrictions, Claimant was restricted to a no more than limited medium physical demand work capacity, post injury, thus preventing him from performing his time of injury job. Claimant's modified appliance sales position was classified as a light physical demand job, and thus was compatible with his permanent work restrictions. Ex. 13:360.

81. Mr. Porter identified Claimant's labor market as comprising a 50-mile radius from his residence in Boise. *Id.*

82. Despite the fact that Claimant was "fortunate" to have had the time of injury employer offer him a permanent modified job within his restrictions, nevertheless Mr. Porter opined that Claimant had still "sustained a significant loss of labor market access as a result of his industrial accident." *Id.* at 361. Claimant's pre-injury labor market included approximately 23,680 total jobs. Based upon assigned permanent work restrictions, Claimant's post-injury labor market was reduced to a total of 6,250 jobs. According to this analysis, Mr. Porter opined that Claimant had sustained a 73.6% labor market loss as a result of his industrial accident. *Id.* at 362.

83. Because Claimant was earning $12.00 per hour at a 40 hour work week prior to his industrial accident, and earned $12.70 per hour[11], still full-time, after in his modified appliance sales position, Mr. Porter opined that Claimant had sustained a 0% post-injury wage earning capacity loss. *Id.* at 363.

84. Mr. Porter concluded that averaging Claimant's labor market access loss equally with wage earning capacity loss would "result in an undercalculation of the actual permanent partial disability (PPD) sustained by Mr. Coler as a result of his industrial accident. Because of

[11] Claimant's wage would later rise to $13.40 as reported in Mr. Porter's 2019 addendum. Ex. 13:382.

this rationale, I have calculated permanent partial disability (PPD) weighing loss of labor market access heavier than lost wage-earning capacity." *Id.* at 364. By weighing labor market access loss heavier, Mr. Porter further concluded as follows: "**In my professional opinion, using the medical opinions of Dr. Kemp, Mr. Coler has sustained permanent partial disability (PPD) of 61.1% inclusive of impairment.**" Ex. 13:364. [Emphasis in original.][12]

85. **Independent Medical Examination**. Dr. Robert H. Friedman, M.D., a physiatrist, conducted an independent medical examination (IME) of Claimant on March 13, 2019, at the request of Claimant's counsel. Dr. Friedman submitted his report on the same date. His qualifications are known to the Industrial Commission. Ex. 9.

86. Claimant told Dr. Friedman that he had had "three surgeries" on his left foot by Dr. Kemp, following the industrial accident.[13] *Id.* at 290. Claimant further reported in pertinent part that, "getting the same pay,"[14] he continued to work for Employer, because he could not afford to retire. *Id.* at 291. Included in his medical history, Claimant reported that he had "left bunion surgery in 1996."[15] *Id.*

87. Dr. Friedman concluded that Claimant "sustained trauma to the dorsum of his left foot, permanently aggravating his preexisting metatarsalgia and metatarsal joint difficulties. In addition, he developed #2 and #3 Morton's neuroma, requiring surgical intervention as a direct result of his 05/31/15 injury." *Id.* at 293. Dr. Friedman opined that Claimant was at MMI. *Id.* He

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[12] Mr. Porter did not disclose in his report what the factor was that he weighed loss of labor access more heavily, however under questioning in his deposition he stated as follows: "I weighed labor market access at 1.66 percent." Porter Dep., 64:18. This yields the following calculation: 73.6% [labor market access loss] x 1.66% [weighting factor] = 122.176% + 0.00% [wage capacity loss) = 122.176% ÷ 2 = 61.1% [PPD].

[13] The record actually shows that he had two surgeries by Dr. Kemp, which included several different procedures. *See* Ex. 6: 102-103;115-116.

[14] The record shows that Claimant received a pay increase when he transferred to the specialist position in appliances. *See* Tr., Vol. I, 26:24-27:1.

[15] The record shows that the left bunion surgery occurred in 2008. *See* Tr., Vol. I, 56:9-57:2.

concurred with Dr. Kemp's formulation of permanent impairment; Dr. Friedman noted that apportionment was "not indicated," although Claimant "did have previous injuries in 2013." *Id.* at 294.

88. Dr. Friedman opined in pertinent part as follows regarding Claimant's permanent restrictions:

> As a result of his 05/31/15 injury and surgical intervention, he now requires custom foot orthotics with large metatarsal pads to address his foot deformities and off weight his distal metatarsals with standing. He should be provided with medium work restrictions, i.e., 50 pounds occasional and 25 pounds repetitive. He should not be ambulating on uneven surfaces. Walking or standing is limited to 50 minutes. No ladder or climbing. These are permanent in nature.
>
> In addition, he has significant knee degenerative disease, and should do no kneeling, squatting, crawling, and rare stair and ladder climbing.

Ex. 9:294.

89. Asked to opine on how long Claimant could physically maintain his appliance sales position, Dr. Friedman stated as follows: "David's present condition is tolerable for an anticipated two years, assuming he gets the appropriate footwear, foot orthotics, and maintains his medications. The normal natural history of his degenerative disease is to slowly progress. This includes weight bearing both at work and at home." *Id.*

90. Asked to comment whether Claimant's current knee, right foot, and low back conditions were aggravated by the industrial injury, Dr. Friedman replied as follows:

> Mr. Coler was not complaining of low back pain at the time of today's exam. His knee pain has slowly progressed. This is a combination of the normal natural history and progression of his preexisting arthritic condition superimposed on the pain in his feet. He does walk with his foot inverted on the outside of his left foot for pain management. This is not apparent when he is using his custom orthotics. Based on this and the [sic, "it is"] unclear whether the knee arthritis has had an acceleration in the normal natural history and expected progressive degenerative disease.

Id. at 294-295.

91. As part of the IME process, Dr. Friedman reviewed medical records encompassing the dates 5/31/2015 through 3/15/2017. *Id.* at 296-298.

92. After the IME, Claimant's counsel asked Dr. Friedman to comment whether certain surveillance video disclosed by Defendants affected any of his opinions. Dr. Friedman replied on March 25, 2019 in pertinent part that "there is no evidence for discrepancy on the video compared to the medical care history, and treatment provided. The video is consistent with the examination I provided on 03/13/19." Ex. 9:313.

93. **Custom Orthotics**. Rosendahl Foot and Shoe Center fitted Claimant with custom orthotics on 3/15/2017, 8/25/2017, and 1/15/2018. *See*, Ex. 10.

94. **Functional Capacity Evaluation**. Brian Wright, PT, DPT, Cert. MDT, OCS, of Wright Physical Therapy in Twin Falls, conducted a functional capacity examination (FCE) of Claimant, at his counsel's request, on November 27, 2018. Ex. 11:324. Mr. Wright's credentials are known to the Commission.

95. PT Wright observed that Claimant gave maximum effort during the evaluation process. He observed further in pertinent part as follows: "Reported discomfort in the foot was part of the reason for limitations with walking, standing and low-level activities. Objective signs coincided with the client's reports of discomfort." *Id.* at 325.

96. As for quality of movement, PT Wright noted that Claimant "demonstrated smooth and coordinated movement patterns throughout FCE testing." *Id.*

97. PT Wright listed the following abilities/strengths and limitations for Claimant:

Abilities/Strengths
1. Hand coordination and grip activities.
2. Sitting activity.

Limitations

1. Standing and walking / stair activities for prolonged periods as mentioned in the FCE grid.
2. Elevated activity and low level activity that is related to the above.
3. Lifting and lift/carry activities demonstrate specific limitations in the FCE grid.

Ex. 11:325.

98. Summarizing his recommendations, PT Wright stated as follows:

> These projections are for 8 hours a day 5 days a week at the levels indicated in the FCE grid. I recognize that the most significant limitations related to impairments of the (L) foot are walking, standing, lifting, and lift/carry. The type of work the employee is currently engaged in includes hard surfaces and prolonged positions in standing/walking activities. This combination can provide a unique set of challenges for client to complete work as related to the FCE grid and recommendations. I would expect progressive dysfunction if requirements at work were to exceed the recommendations made here.

Id. at 325.

99. For lifting strength(s), PT Wright determined that Claimant was limited to no more than 45 pounds 5% of the workday, and no more than 25 pounds no more than 20% of a workday in waist to floor lifting. He further determined that for waist to crown lifting, Claimant should not perform more than 35 pounds more than 5% of a workday, and no more than 15 pounds more than 20% of a workday. For front carry lifting, he concluded that Claimant should be limited to 50 pounds no more than 5% of a workday, and 35 pounds no more than 15% of a workday. *Id.* at 325.

100. PT Wright found that Claimant had some limitations in performing elevated work, forward bending-standing, standing work, crouching, kneeling/half-kneeling, climbing stairs, and walking. The only category that Claimant had no restriction was in sitting. *Id.* at 327-328.

101. PT Wright summarized the evaluation with the following observation: "Client demonstrates physical impairments related to the subjective medical history reported. In essence there are impairments with (L) hip and foot strength as reported as well as balance deficiencies with dynamic aspects of balance that would incorporate single leg stance." *Id.* at 332.

102. **Addendum to Vocational Evaluation Report**. Mr. Porter prepared an addendum to his vocational evaluation report dated March 31, 2019. Ex. 13:368. He had "been provided supplemental and updated information for review," including, but not limited to, the IME of Dr. Friedman and the FCE of PT Wright. Ex. 13:368.

103. Mr. Porter conducted a second interview with Claimant on March 26, 2019, in which Claimant confirmed that he received SSD from 2010 to 2013 based upon the injuries to his elbows and knees sustained in an automobile accident in approximately "1995." Ex. 13:370. Mr. Porter assumed that, based upon the information presented and the SSA criteria for disability, Claimant was totally and permanently disabled from 2010 through 2013, nevertheless despite his limitations, he was "able to seek and secure competitive employment with the time of injury employer." *Id.* at 371.

104. After reviewing Dr. Friedman's report, Mr. Porter concluded that the "assigned restrictions from Dr. Friedman are very similar to the industrial restrictions imposed by Dr. Kemp. The restrictions assigned by Dr. Kemp and Dr. Friedman both place Mr. Coler in a **LIGHT-MEDIUM** physical demand work capacity." [Emphasis in original.] *Id.* at 377.

105. Claimant told Mr. Porter that Employer accommodated him in the appliances position despite his lack of computer skills. "Additionally, he indicates that he is only loading appliances on a truck with the assistance of another associate (not a customer). When not assisting customers or working outside of the appliance area he is allowed to sit as part of his permanently modified job." *Id.*

106. Mr. Porter observed that although Claimant "is working in a permanently modified position, there are still parts of his current reported tasks that are difficult for him to perform and

that exceed the walking and standing restrictions identified by Dr. Kemp and Dr. Friedman." *Id.* at 378.

107. Mr. Porter performed a revised version of his pre and post injury labor market access analysis as it pertained to Dr. Friedman's restrictions and the limitations identified in the Wright FCE. This time he used labor market data for the Boise area obtained from the 2017 (released May 2018) Idaho Department of Labor Employment & Wage Release Report. Based upon that, he determined that Claimant qualified for the following occupations pre-injury: cashiers; parts salespersons; retail salespersons; stock clerks and order fillers; first line supervisors of mechanics, installers, and repairers; home appliance repairers; and maintenance and repair workers, general, totaling 25,400 positions. He added, however, as follows: "It should be noted contingent upon the particular physical duties of each individual job, some of these positions will undoubtedly require job accommodations and modifications. The same applies for computer skills. I conservatively estimate a 25% reduction in total employment for these factors." Ex. 13:380.

108. Based upon the medium-level work restrictions identified by Dr. Friedman, Mr. Porter concluded that Claimant's access to the job market had been reduced to 5,690 positions. According to this analysis, Mr. Porter further concluded that Claimant had sustained a 77.6% loss of labor market access, using the work restrictions from Dr. Friedman. *Id.* at 381.

109. Based upon the work restrictions identified in the Wright FCE, Mr. Porter concluded that Claimant's access to the job market had been reduced to 6,405 jobs. According to this analysis, Mr. Porter further concluded that Claimant had sustained a 74.8% loss of labor market access, using the work restrictions from the FCE. *Id.*

110. For a pre and post injury wage capacity loss analysis, Mr. Porter assumed the same conclusion that he drew in his original report, that Claimant had sustained 0% wage capacity loss

in the case of both Dr. Friedman and the Wright FCE. This was based on the fact that Claimant had earned $12.00 an hour in his pre-injury hard floor sales position and earned $12.70 an hour, later raised to $13.40 an hour, in his post-injury modified appliance sales position. Nevertheless, Mr. Porter added the following observation:

> Based upon a straight mathematical comparison of wages at the time of injury and now, I have concluded that there was no wage-earning loss, however, if you consider the opinions of *Boldner v. Bennett* and the pertinent non-medical factors in this case, one can reasonably conclude that Mr. Coler has certainly sustained *some wage-earning capacity loss* when you consider his overall inability to return to work as an appliance repairman or other competitive employment as well as his limited working life-span according to Dr. Friedman.[16] [Emphasis added.]

Ex. 13:382.

111. Justifying weighing labor market access loss more heavily than wage capacity loss, Mr. Porter observed as follows: "In this case, a simple average of labor market access and lost wage-earning capacity would result in permanent partial disability of ONLY 38.8%." [using Dr. Friedman's restrictions] [Emphasis in original.] *Id.* at 383.

112. Mr. Porter concluded his addendum report as follows:

> In my professional opinion, using the medical opinion of Dr. Friedman, Mr. Coler has sustained permanent partial disability (PPD) of 67.9% inclusive of impairment. Based on the results of the FCE, Mr. Coler has sustained permanent partial disability (PPD) of 65.5%.
> Based on this new information, I have also recalculated the permanent partial disability (PPD) based upon the opinions of Dr. Kemp. Using the opinions of Dr. Kemp, Mr. Coler has sustained permanent partial disability (PPD) of 64.4%.

Id. at 383-384.

113. **Porter Deposition**. Claimant took the deposition of Mr. Porter on January 31, 2023. Porter Dep., 2:1-3.

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[16] Mr. Porter did not identify a number for what "some wage earning capacity loss" was.

114. The following discussion occurred on the record concerning a second method of calculating wage earning capacity loss that Mr. Porter did not disclose in either his original report or addendum:

> [Mr. Porter] Taking into consideration other factors, certainly, in my opinion, there would be some wage earning capacity loss; but for some reason, I didn't calculate the second way of looking at wage earning capacity analysis in this report.
>
> Q. And what would that second method have consisted of? Or what does it consist of?
>
> A. Basically, looking at the wages that an individual would be capable of earning based upon their vocational profile.
>
> Q. And have you had a chance to crunch those numbers?
>
> A. I have.
>
> Q. And what were your conclusions?
>
> A. So, looking –
>
> MR. WIGLE: I'm going to enter an objection to this.
> There's no foundation as to when this opinion was reached. And given the time delay,[17] it may very well be following the hearing. It's certainly nothing that's been produced.
> Anyway, the objection's for the record.
>
> Q. [BY MR. AYLSWORTH] Scott makes a good point. When did you realize that you – for lack of a better term or phraseology I guess – omitted the second wage loss calculation method.
>
> A. As I was reviewing everything in preparation for the deposition, I realized I had not included that.
>
> Q. So, in terms of days?
>
> A. Yesterday.
>
> Q. Yesterday. Okay.

[17] The original hearing was held on June 19, 2019, whereas this deposition was held on January 31, 2023, the last date set by the Referee for depositions to be held.

MR. WIGLE: Okay.

Q. [By Mr. Aylsworth] Did you tell me yesterday about this omission?

A. No.

Q. Okay.

A. All right.

MR. WIGLE: So it's a surprise to everybody.

Porter Dep., 36:11-38:2. Defense counsel's objection to the unexpected introduction of the second wage loss method for surprise and lack of foundation is sustained.

115. The following additional colloquy occurred between Defendants' counsel and Mr. Porter:

> Q. At the time that you prepared your initial report, did you add any pre-injury medical records for Mr. Coler?
>
> A. No. The records that I have are outlined in the medical record review section.
>
> Q. And all of those records are for treatment following the industrial accident; and not treatment before it. Correct?
>
> A. Yes. Correct.
>
> Q. So, how did you acquire information, if you did, about Mr. Coler's physical condition at the time of the industrial accident and before it?
>
> A. Just based upon my interview with him, he indicated that he did not have any preexisting permanent work restrictions.
>
> ...
>
> Q. Well, the fact of the matter is this gentleman in the 1990s had pretty much a life-changing automobile accident, correct?
>
> A. Sure.
>
> Q. Did you learn of that when you interviewed him in 2017?

A. He indicated that he had been involved in a motor vehicle accident, yes.

Q. When you interviewed him in 2017?

A. I'm assuming it would have come up in the 2017 interview.

Q. Did you omit it from your report then?

A. I don't see it mentioned in the report.

Q. Why wouldn't it be?

A. It should have been.

Porter Dep., 50:4-18; 51:8-22.

116. The following discussion concerned Claimant's receipt of SSD:

Q. [by Mr. Wigle] And you had knowledge, did you not, that Mr. Mr. [sic] Coler was found totally and permanently disabled by the Social Security Administration prior to his coming to work at the Home Depot, correct?

A. Yes.

Q. And you knew that at the time of your initial report because it's mentioned in there.

A. Yes.

Q. Did you ask him why he was totally and permanently disabled?

A. I'm sure I did, but I didn't write it down, for some reason.

Q. Did you ask him why he was not working as an appliance repair person?

A. He mentioned that he was on Social Security Disability for that time period.

Q. Well, in your most recent calculations done today or yesterday, you've used the earnings for an appliance repair person as part of your calculations, correct?

A. Yes.

Q. Assuming that Mr. Coler had lost the ability to work as an appliance repair person, correct?

A. As we sit here today, yes.

Q. Well, the fact of the matter is he lost that well before the accident at Home Depot; isn't that true?

A. I didn't have any records that identified anything.

Q. Did you ever ask him about it?

A. I asked him if he had been on Social Security, and he indicated he had.

Q. But you didn't acquire [sic].

A. I didn't get into details with him, no.

Porter Dep., 54:8-55:16.

117. Mr. Porter assumed that Claimant had no problems with his left foot prior to the industrial accident. *Id.* at 58:6-9.

118. Mr. Porter used a weighting factor of 1.66 for labor market access loss in his PPD calculations.[18] *Id.* at 64:18. He explained his reason for doing so was, "to avoid an unjust result," that "it's appropriate to weigh when there is a substantial difference between those two factors," i.e., labor market access and wage capacity loss. *Id.* at 65:12-13.

119. Mr. Porter further explained that he used the methodology of determining wage capacity loss based on "the best compensation for the individual." Porter Dep., 66:18-21.

120. **Adjustment of the Claim**. Sabrina May Larsen was a Senior Claims Specialist with Liberty Mutual Insurance. Larsen Dep., 10:22-23; 11:10-12. Her job was to "adjust and handle workers' compensation claims." *Id.* at 12:17-18. Liberty Mutual Insurance had "an arm of the company called Helmsman Management Services," which acted as a "third-party

[18] The weighting factor was not disclosed in his report. *See* Ex. 13.

administrator… for companies that are not Liberty Mutual companies, such as New Hampshire Insurance Company" . *Id.* at 13:11-20.

121. Ms. Larsen served as the claims adjuster for Claimant's claim beginning in or about June 2015. *Id.* at 18:3-18. She described her role as Claimant's claims adjuster as follows: "Well, the claim was assigned to me and I just started handling his medical treatment. So make sure the bills get paid, make sure the treatment's related, authorizing treatment, determining any, you know, wage loss benefits." Larsen Dep., 20:15-19.

122. Counsel for Defendants asked Ms. Larsen in pertinent part as follows:

> Q. As you sit here, are you aware of any requested benefit owed to Mr. Coler that has not been paid?
>
> A. Any benefit regards to medical or indemnity?
>
> Q. Right.
>
> A. No.
>
> Q. Now, clearly he's got a contention that he's entitled to disability benefits and that's why we're here?
>
> A. Correct. Yes.
>
> Q. But in terms of medical or his temporary disability benefits, are you aware of anything unpaid?
>
> A. No.
>
> Q. Are you aware of any delays in the payment…
>
> A. No.
>
> Q. … other than the usual things that happen in the course of processing?
>
> A. No.

Id. at 53:25-54:16.

123. Ms. Larsen also ensured that Claimant's lower left extremity impairment of 5% was paid. *Id.* at 44:3-4.

124. Counsel for Claimant inquired of Ms. Larsen in pertinent part as follows:

> Q. But after… so after paying this 5 percent disability, did you – did you perform any further investigation into whether Dave actually experienced further disability in excess of impairment?
>
> A. I – no.
>
> Q. I guess what I'm asking is –
>
> A. Yeah.
>
> Q. -- was it your assumption that, hey, he went back to work for the date of injury employer, it looks like he was making as much, if not more, than the – you were done with the case.
>
> A. That's –
>
> Q. Is that close?
>
> A. Yeah.
>
> Q. Okay.
>
> A. That's correct.
>
> Q. So is that – is that the approach you generally take, the cases that if an injured worker gets impairment and then goes back to work for the date of injury employer, there's really no disability waiting out there for him, other than his impairment?
>
> A. Yeah. It's case by case. I mean, obviously if they go back – if their permanent restrictions are lesser hours or they're earning less wages, then, yeah, I do explore that. We would owe PPD in addition to PPI.
>
> Q. And –
>
> A. But in his case I didn't see that.

Larsen Dep., 65:24-25:25

125. **Credibility**. Claimant testified at times both credibly and non-credibly in his deposition and at hearing; his acknowledged memory problems inhibited reliance upon some of his statements, which were contradictory at times, for example he testified both that he suffered loss of active pastimes and pursuits before the industrial accident and after it. Wherever Claimant's assertions diverged from the written record or the testimony of other witnesses, the latter has been relied upon instead.

126. Claimant's wife Patti Coler testified credibly.

127. Leif Thompson testified credibly.

128. Sabrina May Larsen testified credibly.

DISCUSSION AND FURTHER FINDINGS

129. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

I. Permanent Disability

130. **Disability.** "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 permanent impairment and by "pertinent nonmedical factors provided in Idaho Code § 72-430." Idaho Code § 72-425.

131. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced 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 Claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

132. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Industries,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

A. Claimant's Permanent Disability From All Causes

133. Permanent impairment is part of the calculation for disability. *See, e.g.. Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 52, 438 P.2d 291 (2019). Without impairment (PPI), there can be no permanent partial disability (PPD). *Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989). Here, Claimant has met the *Urry* bar. Dr. Kemp determined that Claimant had incurred a 5% lower extremity impairment (2% whole person impairment), and Dr. Friedman concurred. Thus, Claimant is eligible for consideration of disability in excess of impairment.

134. Professionals in the field of vocational rehabilitation frequently calculate disability

by averaging the loss of earning capacity and the loss of labor market access, a process which Mr. Porter applied in this case. This convention is generally seen as providing accurate analysis as well as uniformity and predictability. However, in cases where **the loss of labor market access is extremely high and the wage loss negligible**, the Commission has been critical of this methodology.

> The averaging method itself is not without conceptual and actual limitations. *As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability.* For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% ([99% + 0%] ÷ 2) even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent. [Emphasis added.]

Deon v. H&J, Inc., IIC 2007-005950, IIC 2008-032836 (2013).

135. Here, Claimant suffered no loss of earning capacity as a result of the accident. He earned $12.00 before the accident, and $12.70 after the accident. As regards labor market loss, Mr. Porter's analysis ranged from 73.6% to 74.8% to 76.3%, depending upon whether Dr. Kemp's, Dr. Friedman's, or the Wright FCE's restrictions were used. There is minimal disparity between the restrictions from Mr. Wright, Dr. Kemp and Dr. Friedman, indicating little genuine disagreement as to Claimant's physical capacity. Given that Mr. Wright's functional restrictions are the most detailed of the three different estimates provided and relate to his specific expertise, his analysis is found most reliable for the purpose of conducting an evaluation of labor market access loss. The only expert opinion provided to estimate disability in the present matter is from DeLynn Porter. Using the Wright FCE results, Mr. Porter estimates a 74.8% labor market loss. Applying a straight averaging method on these two components, Claimant has total disability from all causes of 37.4%.

136. A 37.4% total permanent disability estimate is supported by factors related to Claimant's medical impairment, age, all injuries and conditions, his use of narcotic pain medication to treat both his non-industrial and industrial pain-caused conditions, his personal family circumstances that induced him to keep working rather than retire, the injuries to his left foot sustained in the industrial accident, use of orthotic shoes to ameliorate his left foot discomfort, his apparent working outside of his doctor's specified work restrictions, his bilateral feet problems which included his right foot condition, his subjective experience of pain based upon both his industrial and non-industrial conditions following the industrial accident, his limited educational background and experience with computers, his receipt of SSD, and his foreclosed opportunities for working again in heavy occupations such as appliance repair, and his restrictions to medium/light work. Therefore, Claimant suffers a 37.4% disability based upon both pre-existing and industrial causes, using the work restrictions from the FCE.

137. In making this finding, Mr. Porter's final estimate of total permanent partial disability of 61.1% is rejected. As the only expert in this case, Mr. Porter's estimate would be entitled to considerable weight if deemed credible and consistent. However, the opinions of vocational experts are not controlling on the Commission. The evidence of vocational experts, like the opinions of medical experts, should be entitled to the weight that they deserve, and are not definitive *per se*. *See, e.g.*, *Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

138. Here, Mr. Porter's final disability estimate is not persuasive. The ultimate problem is that Mr. Porter applied *Deon* to weight Claimant's labor market access loss more heavily than his earning capacity loss, rather than using a straight average. However, the facts of *Deon* are not those of the instant matter. . In *Deon*, the claimant suffered a 99% loss of labor market access.

Deon v. H&J, Inc., IIC 2007-005950, IIC 2008-032836 (2013). Access to the remaining sector was extremely competitive given claimant's medical restrictions and the number of other unemployed persons in the workforce. *Id.* at 60. In contrast, at 74.8%, Claimant's loss of labor market access is not comparable to the 99% loss of labor market presented in *Deon*. Furthermore, Claimant competitively applied for his post-accident position and received this position based upon his significant background in the appliance industry and excellent customer service skills. Claimant is able to compete and has access to a significantly larger portion of his labor market than the claimant in *Deon*. Weighting does not accurately reflect Claimant's market access or abilities.

139. Further, Mr. Porter's deposition testimony did not inspire confidence. At his deposition, Mr. Porter opined for the first time that Claimant had "some wage capacity loss" based upon an analysis and calculation that was not previously disclosed in either his report or addendum. Mr. Porter had opined in both his report and addendum that Claimant had a 0% wage loss; nevertheless he speculated that Claimant had "some wage capacity loss" without specifying what that loss was. Porter Dep. at 34-35.[19]

140. Finally, in evaluating disability Mr. Porter failed to consider whether Claimant suffered from any pre-existing limitations or restrictions, notwithstanding that he eventually discovered that Claimant had been on social security disability for a number of years prior to his employment with Employer. Porter's failure to further investigate and consider pre-injury restrictions has the potential to inflate the labor market access loss he says is attributable to the subject accident. While the issue of apportionment is not properly presented for consideration, (see

[19] Defendants' counsel objected to that testimony, which objection has been sustained.

below) Mr. Porter's complete failure to consider Claimant's pre-injury medical history leaves the Commission skeptical of the thoroughness of his analysis.

141. Mr. Porter's decision to give greater weight to Claimant's labor market access loss is rejected. Per Mr. Porter's original calculation using straight averaging without weighting labor market loss and the other supporting evidence in this case, Claimant's total disability is 37.4%,

B. Claimant Has Failed To Meet His Burden Of Proving Odd-Lot Status

142. In addition to the estimate of disability by Mr. Porter, Claimant has argued that he is under a "substantial, if not 'Odd-Lot' total permanent disability" by virtue of his employment in a modified appliance specialist position after the injury up until the time of hearing. Claimant's Post-Hearing Reply Brief, at 5. Claimant relies on the case of *Rodriguez v. Consolidated Farms, LLC*, 161 Idaho 735, 390 P3d 396 (2017).

143. However, odd-lot disability is not at issue in this case. *See* Claimant's Request for Calendaring 9/26/2018, Notice of Hearing 10/4/2018. Under JRP 8C(1)(b), a request for a hearing is to include a "[c]lear and concise statement of the factual and legal issue or issues which the party desires the Commission to hear and decide." In interpreting what constitutes sufficient notice of an issue, "[p]rocess and procedure under the Workmen's Compensation Act are designed to be as summary and simple as is reasonably possible." *Hattenburg v. Blanks*, 567 P.2d 829, 830, 98 Idaho 485 (Idaho 1977). Here, the issues noticed for hearing include the extent of permanent partial disability and attorney's fees. Total permanent disability is a distinct issue from permanent partial disability, and implicates a different path forward for both Claimant and Defendants. For example, an employer who is alerted to a claim for total and permanent disability will be prepared to overcome a prima facie showing of total and permanent disability by proof of an actual job that is regularly available in Claimant's labor market and which Claimant is qualified to perform.

Defendants are entitled to prior notice of a claim of total and permanent disability in order to assemble a defense to such claim. The issue of odd-lot status is not properly before the Commission.

144. Moreover, it is not even clear that a claim for total and permanent disability is seriously asserted; the references to total and permanent disability seem more like an attempt to bolster the claim for permanent partial disability.

145. Assuming, arguendo, that the issue of total and permanent disability via the odd-lot doctrine is before us, Claimant has not met his burden of proving a prima facie case of total and permanent disability.

146. An employee is disabled under the odd-lot doctrine if he proves that, while he is physically able to perform some work, he is so handicapped that he would not be employed regularly in any well-known branch of the labor market absent a business boom, sympathy of a particular employer or friends, temporary good luck, or superhuman effort on his part. *Hamilton v. Ted Beamis Logging & Const.*, 899 P.2d 434, 436-37, 127 Idaho 221, 223-24 (Idaho 1995). A claimant must first make a prima facie showing of odd-lot status. "A prima facie case may be made by establishing: (1) A claimant has attempted other types of employment without success; or (2) A claimant or vocational counselors or employment agencies have searched for other work and other work is unavailable; or (3) That it would be futile to attempt to find suitable work." *Smith v. State*, 165 Idaho 164, 443 P.3d 178 (2019). Here, Claimant's argument would only relate to the path of futility, which requires a showing that any efforts to find suitable work would be futile. *Dehlbom v. ISIF*, 129 Idaho 579, 582, 930 P.2d 1021, 1024 (1997). If a prima facie case is made, an employer is required to overcome the presumption by showing "some kind of suitable work is regularly and continuously available to the claimant." *Carey v. Clearwater County Road Dept.*,

107 Idaho 109, 686 P.2d 54 (1984). A single job, offered by an employer who has a previous relationship with a claimant, is of limited relevance in this context because it is unlikely to be representative of a 'branch of the labor market.'" *Rodriguez v. Consol. Farms, LLC,* 390 P.3d 856, 161 Idaho 735 (2017).

147. Here, Claimant has not made a prima facie case for futility. Claimant's entire argument rests on the proposition that the position his employer offered after the accident is a "make-work" position that is not found in the ordinary market. However, the appliance specialist position that Claimant transferred to after his industrial accident existed prior to his accident. Claimant competitively applied for and received this position based upon his significant background in the appliance industry and excellent customer service skills. Claimant interviewed for the job, received it, and then Employer accommodated his restrictions. *See* Tr., Vol. II, 129:13-130:3 (Leif Thompson testimony.) It is reasonable to conclude that if Claimant's modified position ceased to exist, he could find similar modified employment in appliance sales elsewhere. Claimant has not presented any evidence regarding an inability to find other jobs or that his accommodations are extraordinary. Defendants are correct to point out that Claimant's modified appliance specialist position "should be viewed as a success story – an example of how the workers' compensation system should function to promote an injured worker's return to productive work for the time of injury employer." Defendants' Responsive Brief at 12. As such, Claimant has not shown odd-lot disability and this analysis would not be persuasive in making a greater finding of partial permanent disability.

148. Claimant has argued that his situation is comparable to *Rodriguez*, but review of that case reveals it to be factually dissimilar. Most notably, in *Rodriguez*, the claimant was found

to be an odd-lot worker. The question was whether employer had met its burden of overcoming the presumption of total and permanent disability by identifying a job it thought the claimant could perform for employer. Here, Claimant has failed to prove that he is an odd-lot worker by any of the three methods. Therefore, the inquiry that was at issue in *Rodriguez* is not reached.

C. Apportionment Was Not Noticed For Hearing & Will Not Be Considered

149. In their briefing, Defendants argue that apportionment of Claimant's disability between the subject accident and the permanent effects of Claimant's 1998 or 1999 automobile accident is warranted by the facts of this case pursuant to I.C. § 72-406. *See* Defendant's Brief at 13, 16-17. However, apportionment is not among the issues noticed for hearing. At hearing, there was some discussion about whether the issues before the Commission should include apportionment of physical impairment for Claimant's foot injury between the work accident and claimants previous bunionectomy, but no discussion of the apportionment issue as articulated in Defendants' brief. In the course of the discussion as to whether I.C. § 72-406 might be at issue, Claimant objected to the inclusion of apportionment as an issue. Defendants conceded that they did not intend to put on proof of apportionment and had not raised apportionment as a defense in their answer. Tr. at 8:18-10:25. The matter was taken under advisement.

150. Pursuant to I.C. § 72-713, the parties are entitled to at least ten days' notice of the issues to be heard. In *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982), disability was a noticed issue. Apportionment of disability was neither raised by the parties, nor considered by the Commission. However, on appeal, employer argued that the Commission erred in not apportioning Claimant's 44% disability between the accident and a pre-existing impairment. In declining to entertain the issue on appeal the *Baldner* court stated:

> The burden to raise the issue of apportionment is upon defendants-appellants and that failure to raise the issue before the Commission renders inappropriate any

> review by this Court. Issues not raised below and presented for the first time on appeal will not be considered or reviewed. *Silver Syndicate, Inc. v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979); *Frasier v. Carter*, 92 Idaho 79, 437 P.2d 32 (1968).

Therefore, the issue of apportionment is an issue separate from the larger issue of disability, and Claimant is entitled to appropriate notice that it will be an issue considered by the Commission. Here, Claimant did not have such notice, and made a timely objection to the consideration of the issue of apportionment by the Commission. Regardless of what precisely might be the subject of an apportionment argument, i.e. apportionment of impairment for the foot injury, or apportionment of disability between the auto accident and the subject accident, the issue of apportionment under I.C. § 72-406 is not properly before the Commission and will not be considered.

II. Claimant is Not Entitled to Attorney's Fees

151. **Attorney's Fees.** Attorney fees are not granted as a matter of right under the Idaho Workers Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804 which provides:

> 72-804. ATTORNEY'S FEES — PUNITIVE COSTS IN CERTAIN CASES. If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding attorney fees is a factual determination which rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). It is axiomatic that a surety has a duty to investigate a claim to make a well-founded

decision regarding accepting or denying the same. *Akers v. Circle A Construction, Inc.*, IIC 1998-007887 (Issued May 26, 1999). Defendants' grounds for denying a claim must be reasonable both at the time of the denial and in hindsight. *Bostock v. GBR Restaurants*, IIC 2018-008125 (2020).

152. Claimant made a vigorous argument in favor of attorney fees on the basis that somehow Surety unreasonably adjusted the claim, particularly by failing to consider whether to award Claimant PPD. *See, e.g.*, Claimant's Opening Brief at 24-30.

153. The record demonstrates that Surety reasonably and in good faith adjusted the claim. There is no dispute that Surety promptly accepted Claimant's claim, paid all medical benefits and appropriate time loss benefits without delay, and also promptly paid Claimant's PPI rating of 5% lower extremity (2% whole person impairment). There was no nefarious plot designed to deprive Claimant of benefits to which he was entitled, as Claimant suggested. Given Claimant's post-accident status as fully employed in a position making a higher wage than the time of injury job, Surety had no duty to determine Claimant's entitlement to PPD but rather had a right to leave that determination to the discretion of the Commission.

154. Claimant is not entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant is entitled to permanent partial disability (PPD) in the amount of 37.4%, inclusive of impairment.

2. Claimant is not entitled to an award of 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 __4TH____ day of May, 2023.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST: M. McMenomey

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the __7th____ day of July, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID L. COLER, Claimant, v. THE HOME DEPOT U.S.A., INC., Employer, And NEW HAMPSHIRE INSURANCE COMPANY, Surety, Defendants.	**IC 2015-013957** **ORDER** FILED JUL 07 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee John C. Hummel 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 recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

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

1. Claimant is entitled to permanent partial disability (PPD) in the amount of 37.4%, inclusive of impairment.

2. Claimant is not entitled to an award of attorney fees.

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

DATED this 6th day of July, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Christina Nelson
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2023, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail and Electronic Mail upon each of the following:

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