BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROGER TEVIS, Claimant, v. JENNIFER SOLLIE, d.b.a. TEVIS CONSTRUCTION, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2022-025827** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED FEBRUARY 4, 2025 IDAHO INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a bifurcated hearing in Coeur d'Alene, Idaho, on June 27, 2024. Claimant represented himself, *pro se*. W. Scott Wigle represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. No post-hearing depositions were taken. The matter came under advisement on January 21, 2025.

ISSUES

The parties agreed to the following bifurcated issues for this adjudication:

1. Whether and to what extent Claimant is entitled to additional medical care; and,

2. Whether the income benefits Claimant would normally be entitled to should be denied pursuant to Idaho Code § 72-208.

CONTENTIONS OF THE PARTIES

On September 21, 2022, while working within the scope of his duties for Employer, Claimant fell from a ladder on which he was working when he leaned too far from its center and it began to slide. He broke his right ankle as the result of the fall. Claimant required two surgeries to repair his ankle. Claimant was taken off work for a period of time after his injury. Ultimately, he was released from medical care to full work on August 10, 2023.

As of December 29, 2022, Surety ceased making temporary disability payments to Claimant, relying on Idaho Code § 72-208 as authority for the decision. By that time, Claimant's long-standing methamphetamine and cannabis usage was well known to his medical treaters, and Claimant's surgeon had responded to a "check-the-box" letter from Surety wherein he acknowledged his belief that Claimant's use of methamphetamine and/or marijuana was the "possible/likely" cause of Claimant's accident.

Claimant disputes the Surety's rationale for discontinuing his temporary disability benefits. Instead, he argues that Defendants owe him such benefits from the time they were prematurely curtailed until he reached maximum medical improvement on August 10, 2023.

Claimant also argues he was denied needed physical therapy treatment, which prolonged his recovery. He seeks this denied medical treatment.

Defendants acknowledge Claimant suffered a work accident as described by Claimant. They also concede they terminated his TTD benefits while he was still in a period of recovery, but cite to Idaho Code § 72-208, coupled with "check-the-box" letters from Claimant's physician and Employer to support their position. Defendants feel the issue of physical therapy is moot. Defendants request inappropriate statements in Claimant's brief be stricken/ignored by the Commission.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Claimant's exhibit (CE) A, admitted at hearing, and

3. Defendant's exhibits (DE) 1 through 8 admitted at hearing[1].

FINDINGS OF FACT

1. Claimant was working for Employer, a company ostensibly owned by the girlfriend of Claimant's son, Curtis Tevis. The girlfriend, Jennifer Sollie, did not work in the construction field, but Curtis did, and was working at the same job site as Claimant when the accident, described below, occurred.

2. On September 21, 2022, while working as a framer for Employer, Claimant fell when the ladder on which he was working slid when Claimant reached out to grab a saw. As he leaned to his right to get the saw he leaned too far from the center of the ladder, and it slid out from under him. Claimant fell to the ground and broke his ankle as a result.

3. Ultimately, Claimant underwent two or three surgeries (depending on what is counted as a surgery) to implant and subsequently remove hardware from his ankle. He testified at hearing that his right leg is still not back to baseline, and he is unable to perform all duties of his trade.

4. To the best of his understanding, Claimant's medical bills have been paid by Surety. He has not had all the physical therapy he deems necessary, as his therapy was discontinued,

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[1] Defendants, through a clerical oversight, failed to include their proposed exhibit 8 with the binder of exhibits proffered at hearing. Subsequently, they moved to augment the record to include the one-page document. Their motion was granted, and the exhibit will be considered.

apparently by Surety, after Claimant missed two therapy sessions. He testified he and his physician[2] attempted to have additional therapy sessions authorized by Surety but to no avail.

5. Claimant's temporary disability benefits were discontinued by Surety on December 29, 2022, while Claimant was in a state of recovery and unable to work. Surety made the decision to stop such benefits based on evidence it felt was sufficient to invoke Idaho Code § 72-208.

6. Claimant, on August 10, 2023, was declared to have reached maximum medical improvement (MMI) and released to work full duty with instructions to return to his physician as needed.[3]

DISCUSSION AND FURTHER FINDINGS

7. Claimant bears the burden of proving his entitlement to the benefits at issue, *Duncan v. Navajo Trucking,* 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000), which are at this time limited to additional physical therapy and past temporary disability.

CLAIMANT'S CREDIBILITY

8. Claimant has used/abused methamphetamine and marijuana for approximately forty years. While Claimant appeared to get agitated at times during cross examination, he testified in a forthright manner. This Referee did not observe anything in his demeanor which would call into question the truthfulness of Claimant's testimony, to the best of his ability. Likewise, his testimony was, for the most part, consistent with the medical

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[2] When the term "his physician" or "physician" is used herein, it is referring to Robert Blease, M.D., the orthopedic surgeon who cared for Claimant's right ankle.

[3] Claimant testified at hearing that he asked his physician to release him at that time, in spite of the fact that Claimant was not back to baseline regarding his right ankle. Claimant testified he attempted to return to work thereafter, but he found his right leg was too weak to allow him to safely do his job.

records. Even when Defendants inaccurately paraphrased the medical records, *e.g.*, using the word "addicted to" when the records stated "abused," or claiming the records noted Claimant used methamphetamines "daily" for forty years,[4] when they generally did not say any such thing, (and in fact the records more than once noted Claimant's assertion that he had not used methamphetamine for "72 hours" before the accident, as acknowledged by Surety in a letter dated October 18, 2022, DE 5, p. 325), Claimant's testimony remained consistent and basically in line with medical records.

9. Claimant was a credible witness. Having said that, his brother's testimony will not be considered in any regard, nor will Claimant's statements prior to administration of the oath. Statements made in his post-hearing briefing which are not contained in the record will also not be considered.[5]

10. It should be noted that in briefing, Defendants set up a "straw man" in an attempt to cast Claimant in a false light. In briefing, Defendants argued Claimant denied telling his care providers about his methamphetamine use and had no explanation as to how the reference to his drug use got in the record. D's brief, p. 8. In reality, Claimant credibly testified at hearing that he told the doctors about his drug use, but never said that

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[4] There is one notation, found at DE 2, p. 3, which states, "Patient also has a reported history of daily methamphetamine and marijuana use." This reference obviously refers to some other reporting and is a paraphrasing of that other report. It is the only time "daily" use of methamphetamine is noted, and it is mentioned in conjunction with marijuana use. It does not reference forty years. Claimant admitted to daily marijuana use but denied daily methamphetamine usage. Instead, he described his methamphetamine use as occurring when it was available and he had the money to purchase it, which was not every day. Also, the balance of medical records does not support daily methamphetamine use by Claimant but does support his hearing testimony that he had ingested no methamphetamine within 2 or 3 days prior to the accident.

[5] Additionally, Defendants' invitation to consider materials not included in the record or exhibits, such as outside articles not included in their exhibits, or arguments which stray from the record will likewise not be considered as substantive evidence.

he used meth "every day and have for the past 40 years." A review of the hearing transcript at pages 51 and 52, compared to Defendants' brief at page 8 will highlight the differences between what Claimant testified to at hearing and how Defendants portrayed that testimony in briefing. Their briefing is misleading, and Claimant's credibility is intact.

MEDICAL CARE

11. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment as may be reasonably required by the employee's physician or needed immediately after an injury, and for a reasonable time thereafter. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

12. Claimant argues Defendants refused to cover additional physical therapy sessions after he missed two appointments. He testified he missed the second appointment due to the death of his eldest son in Oklahoma. As soon as he learned of his son's death, he began making arrangements to leave for Oklahoma as soon as possible. He missed an appointment (his second) while travelling to lay his son to rest.

13. Claimant testified he informed Surety of his situation when he returned and even had his physician attempt to schedule an additional six sessions, but Surety was steadfast in its denial of such additional therapy sessions.[6] The record does not allow the undersigned to determine who, (Surety or physical therapist) cut off Claimant's access to therapy, but it is not disputed by Defendants that Claimant did not receive the full course of treatment anticipated by the therapist at the outset. Claimant did not seek physical therapy using his own funds. In fact, he testified he lacks the funds for such treatment.

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[6] The records from the physical therapist anticipated a 12-week therapy regimen, with a once-to-twice-weekly frequency. DE 4, p. 318 *et seq*. Claimant had received less than six sessions when he left for Oklahoma.

14. Claimant appears to argue that he should be allowed to return to physical therapy at this time and Defendants should be responsible for the associated costs. However, no physician has opined that Claimant is currently in need of additional physical therapy as of the date of the hearing. In fact, his physician released Claimant to full time work in August of 2023.

15. While there is no blanket prohibition against receiving physical therapy after reaching MMI, Claimant has the burden of proving, *with medical evidence,* that physical therapy at this point is reasonable, necessary, and related to his industrial accident. It requires an opinion of a medical provider, either in oral testimony, written letter, or medical record, stating that such treatment is required to treat Claimant's work injury. It is not enough for Claimant to testify that he needs such treatment. As stated in *Hart v. Kaman Bearing & Supply,* 130 Idaho 296, 939 P.2d 1375 (1997), a claimant must establish this proof [need for therapy] by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability.

16. The fact that during Claimant's period of recovery recommended physical therapy was not provided does not give Claimant the right to demand such therapy at any point in time. *See, generally, Sweeney v. Nissha Medical International, Inc.,* IIC 2020-020910 (Sept 3, 2024). Once Claimant reached MMI, treatment which might have been reasonable during his period of recovery may cease to be reasonable. Unless a physician opines that Claimant is in need of further medical care, including physical therapy, Claimant is not eligible for such treatment. Claimant bears the burden of proving his entitlement to such treatment with medical evidence by way of a doctor's current opinion.

17. The mere fact Dr. Blease may have requested additional therapy when Claimant returned from Oklahoma, and was still in a period of recovery, does not establish proof that

Dr. Blease is still of the opinion Claimant needs more therapy as of the date of hearing. After all, Dr. Blease declared Claimant at MMI in August of 2023.

18. Absent such opinion from a medical provider, Defendants have no obligation to provide additional medical care, including therapy, as of the date of hearing.

19. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to further medical treatment at the present time.

TEMPORARY DISABILITY and THE APPLICATION OF IDAHO CODE § 72-208

20. Idaho Code § 72-208 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on Claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability.

21. As noted by Defendants, Claimant received total temporary disability payments until December 29, 2022, when Surety decided to invoke the provisions of Idaho Code § 72-208(2).

22. Idaho Code § 72-208 deals with disallowance of income benefits in certain instances when the worker's intoxication is a *reasonable and substantial cause* of an injury. The statute provides in relevant part;

> (2) If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated.
>
> (3) "Intoxication" as used in this section means being under the influence of alcohol or of controlled substances ....

23. For Idaho Code § 72-208 to apply, three factors must be proven. First, the claimant must be under the influence of an intoxicating substance at the time of

the accident. Second, the intoxication must be both a reasonable and a substantial cause of the injury. Third, the intoxicant cannot either be supplied by the employer, or a situation where the employer or his supervising agent knows the claimant is intoxicated and yet allows the claimant to remain at work.[7]

24. There is no direct evidence Claimant was intoxicated, as defined above, at the time of the accident. Claimant was not drug tested by medical providers after the accident. Instead, Defendants, for their proof of Idaho Code § 72-208, rely in part on the fact that Claimant admitted to being a chronic user of methamphetamines and marijuana, dating back several decades. They point to the results of a web search inquiry entitled "Does long term usage of methamphetamine cause problems with the user's balance, equilibrium and/or ability to work at heights?" The search yielded the response that "yes, due to the neurological effects of chronic methamphetamine abuse on the brain and central nervous system" long-term use can cause such problems. DE 6, p. 327. Additionally, an article from the National Institute on Drug Abuse pointed out that people who use methamphetamine long term may exhibit symptoms including anxiety, confusion, insomnia, mood disturbances, and violent behavior. Other effects could include thinking and/or motor skill deficits, increased distractibility, or dental issues. *Id* at 329-332.

25. While the articles highlight the potential effects of long-term meth usage, they do nothing to address the issue at hand. In order to apply Idaho Code § 72-208, Defendants must prove Claimant was, as defense counsel noted, acutely intoxicated when the ladder slipped and he fell. It is not enough to show that Claimant might (or might not) have been

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[7] While an argument could be made that Claimant's son Curtis Tevis (for whom the employer's business, Tevis Construction, was named), was the *de facto* supervising agent, and was aware of Claimant's chronic drug use; however, based on the analysis herein, analysis on this third prong is unnecessary.

less steady on his feet, more prone to being distracted, had thinking deficits, etc. by his long-term meth use.

26. Defendants were aware of this fact and attempted to establish acute intoxication at the time of the accident by suggesting, without any proof, that the only way medical personnel would have noted Claimant's methamphetamine use in his record is because they knew through training and experience how to recognize someone high on methamphetamine and therefore asked him about drug use. As Defendants state in briefing, "Claimant must have appeared to be under the influence of methamphetamine when he presented at the hospital, otherwise there would be no reason to inquire about his drug use." They go on to elaborate on their theory in an effort to convince the undersigned that somehow their unsubstantiated theory equates to proof. D's. brief, p. 9.

27. Defendants need proof, not theory. Nowhere in the record does it state that Claimant was obviously under the influence of anything, or any other similar observations. Speculative theories are a poor substitute for evidence. Defendant's theory carries no weight.

28. Not only have Defendants failed to establish the fact that Claimant was actually intoxicated at the time of his accident, their arguments on the second prong of Idaho Code § 72-208 are also lacking, as shown below.

29. Defendants argue that when Dr. Blease responded to Surety's check-the-box letter, his responses constituted proof that Claimant's (unproven) intoxication was a reasonable and substantial cause of his accident.

30. The letter in question came from Surety, addressed to Dr. Blease, dated October 18, 2022. Therein, the Surety, after rendering their synopsis of the injury and treatment

to date, posited the following questions to the doctor, albeit in the reverse order from how they are set out herein;

> 1. Was lab work performed that documented Mr. Tevis was under the influence of illegal drugs?

To which Dr. Blease answered "no." In the margin, the doctor, or someone, wrote, "No need to test if patient admits to using."

> 2. In your medical opinion do you feel Mr. Tevis [sic] admitted use of methamphetamine/marijuana use [sic] were possibly/likely the cause of his accident?

To which Dr. Blease answered "yes."[8]

31. The first problem for Defendants is the fact that the inquiry did not require Dr. Blease to respond to the accurate condition precedent to application of Idaho Code § 72-208. The burden of proof requires proof that Claimant's intoxication, even if proven, was a reasonable and substantial cause of his injury. Dr. Blease was never asked to opine on that standard. Instead, he was asked if he felt Claimant's admitted use of methamphetamine was a "possible" or "likely" cause of his accident.

32. While one could argue that a physician's opinion that Claimant's methamphetamine use was a likely cause of the accident, might, with the proper foundation, satisfy the requirement for "substantial" cause, the term "possible" falls well short of the burden of proof required to invoke the statute. Since the question at issue could be answered "yes" with either an opinion that Claimant's drug use was a *likely* cause of his injury, or merely a *possible* cause, there is no way to tell which of those levels Dr. Blease

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[8] Claimant testified at hearing that in a conversation with Dr. Blease, the doctor supposedly wanted to walk back his responses, but such testimony is hearsay and will not be considered. However, the extent of the doctor's conviction with his check-the-box responses is not an issue on which this decision will turn.

had in mind when he checked the "yes" box. As such, the check-the-box response from Dr. Blease does not satisfy Defendants' burden of proof.

33. Even if the "possible" option was eliminated, Dr. Blease's conclusory opinion, without any foundation on relevant information, such as when Claimant last used, or the methodology he used to arrive at his conclusion, his opinion would still carry no weight. *See, Baker v. Finke Logging Co, Inc.,* IIC 2017-016189 (March 20, 2020). A statement is conclusory if it does not contain supporting evidence for its assertion. *Dulaney*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2001).

34. Admitting to drug use over time is not the equivalent of admitting to being intoxicated at a different point in time. And without some insight into the rationale of the opinion, a conclusory statement from a physician need not be afforded weight. "While a court may not exclude testimony simply because it disagrees with an expert's conclusions, it must distinguish between "the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs," and genuine experts employing methodologies recognized as valid within their respective fields. *Coombs v. Curnow*, 148 Idaho 129, 140–41, 219 P.3d 453, 464–65 (2009)." Also, "[t]he opinion of an expert is not binding on the trial court, and, as long as it does not act arbitrarily, the trial court may reject expert testimony even when it is uncontradicted." *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). Finally, "[t]he credibility of an expert is not simply whether the expert is expressing an honest opinion. The Commission can take into consideration 'whether or not the opinion takes into consideration all relevant facts.'" *Waters v. All Phase Constr.*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

35. Defendants have failed to establish a right to deny Claimant temporary disability payments from when they were curtailed on December 29, 2022, until he was pronounced at MMI on August 10, 2023.

36. Claimant testified that he was unable to work during the period of his recovery, and beyond. He further testified there were no light duty jobs in construction available to him during this timeframe, and beyond. No contrary evidence was introduced.

37. When the totality of the record is considered, Claimant has proven by a preponderance of the evidence that he is entitled to total temporary benefits from December 29, 2022 through August 10, 2023.

38. Issues of permanent partial impairment, permanent disability, and attorney fees should Claimant engage the services of an attorney, are reserved for future resolution.

CONCLUSIONS OF LAW

1. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to further medical treatment at the present time.

2. When the totality of the record is considered, Claimant has proven by a preponderance of the evidence that he is entitled to total temporary benefits from December 29, 2022 through August 10, 2023.

3. All other issues are reserved.

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RECOMMENDATION

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

DATED this 27th day of January, 2025.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2025, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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[redacted]

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROGER TEVIS, Claimant, v. JENNIFER SOLLIE, d.b.a. TEVIS CONSTRUCTION, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Surety, Defendants.	**IC 2022-025827** **ORDER** FILED FEBRUARY 4, 2025 IDAHO INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

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, IT IS HEREBY ORDERED that:

1. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to further medical treatment at the present time.

2. When the totality of the record is considered, Claimant has proven by a preponderance of the evidence that he is entitled to total temporary benefits from December 29, 2022 through August 10, 2023.

3. All other issues are reserved.

IT IS SO ORDERED.

DATED this the 4th day of February, 2025.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White, Commissioner

Thomas E. Limbaugh

Thomas E. Limbaugh, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2025, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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[redacted]

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