3-9-2015

Green v. Green Clerk's Record v. 1 Dckt. 42782

Vol. 1 of 3

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROY GREEN,

Claimant/Respondent,

v.

ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety,

Defendants/Respondents,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendant/Appellant.

SUPREME COURT NO. 42782

AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorneys for Appellant (ISIF)

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680

Attorney for Claimant/Respondent

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

Attorney for Employer & Surety/Respondents

ERIC BAILEY
PO BOX 1007
BOISE ID 83701-1007

42782

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROY GREEN, Claimant/Respondent, v. ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, Defendants/Respondents, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Appellant.	**SUPREME COURT NO. 42782** **AGENCY'S RECORD**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorneys for Appellant (ISIF)

THOMAS W CALLERY
PO BOX 854
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ERIC BAILEY
PO BOX 1007
BOISE ID 83701-1007

ORIGINAL

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1. Claimant Roy Green's Opening Brief, filed December 10, 2012

2. Defendant Employer/Surety's Responsive Brief, filed January 17, 2013

3. Defendant ISIF Post-Hearing Brief, filed January 14, 2013

4. Defendant Employer/Surety's Notice of Withdrawal of Specific Argument and Correction to Responsive Brief

5. Claimant Roy Green's Reply Brief, filed March 20, 2013

6. Defendants' Post-Hearing Brief Re: Thoracic Impairment, filed October 20, 2014

7. ISIF Brief on Retained Jurisdiction, filed November 10, 2014

8. Response to ISIF's Brief on Retained Jurisdiction, filed November 17, 2014

WORKER'S COMPENSATION COMPLAINT
INDUSTRIAL COMMISSION NO:

Claimant: ROY GREEN 110 Highwood Drive St. Maries, ID 83861 **Telephone Number:** (208) 245-3010	**Claimant's Attorney:** STARR KELSO Attorney at Law PO Box 1312 Coeur d'Alene, ID 83816-1312
Employer's Name And Address (at time of injury): ST. JOE SALVAGE c/o Roy Green 110 Highwood Drive St. Maries, ID 83861	**Worker's Compensation Insurance Carrier's (Not Adjustor's) Name And Address:** TRAVELERS P.O. Box 7427 Boise, ID 83707-1427
CLAIMANT'S [redacted]	CLAIMANT'S [redacted]
STATE AND COUNTY IN WHICH INJURY OCCURRED: **Benewah, Idaho**	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: **$1,000** per day, PURSUANT TO §72-419, IDAHO CODE
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED): **Struck on the head by a tree.**	
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE: **Neck, back, and atrophied muscles as a result of denial of claim.**	
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME: **Medical; TTD's; Attorney fees and punitive costs.**	
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER: **7-03-06**	TO WHOM YOU GAVE NOTICE: **Self and then ALE**
HOW NOTICE WAS GIVEN: ORAL ___X__ WRITTEN __X___ OTHER, PLEASE SPECIFY _____	
ISSUE OR ISSUES INVOLVED: **Medical** **Causation** **TTD's** **Attorney fees and punitive costs.**	
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF YES, PLEASE STATE WHY: No.	

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Bret A. Dirks **Coeur d'Alene**	**Dr. Ludwig** **Coeur d'Alene**	**Dr. Horan** **Coeur d'Alene**	**Brian L. Norce, D.C.** **Appleway Chiropractic**	**Benewah Community Hospital** **St. Maries**

Dr. Katovich
Benewah Community Hospital

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?	Unknown
WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY?	Unknown
WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY?	Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ☐ YES ☒ NO

DATE: 10-27-06 | SIGNATURE OF CLAIMANT OR ATTORNEY: Stan Welsh

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT?	DATE OF DEATH:	RELATION OF DECEASED TO CLAIMANT:

WAS CLAIMANT DEPENDENT ON DECEASED:	DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT:
☐ YES ☐ NO	☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of October, 2006, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

ST. JOE SALVAGE
c/o Roy Green
110 Highwood Dr.
St. Maries, ID 83861

via: ☐ personal service of process
☑ regular U.S. Mail

SURETY'S NAME AND ADDRESS

TRAVELERS
PO Box 7427
Boise, ID 83707-1427

via: ☐ personal service of process
☑ regular U.S. Mail

☐ I HAVE NOT SERVED A COPY OF THE COMPLAINT ON ANYONE

Stan Welsh
Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, PO Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

ANSWER TO COMPLAINT

I.C. NO. 06-007698 INJURY DATE: 07/03/2006

X The above-named employer or employer/surety responds to Claimant's Complaint by stating:

☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
ROY GREEN 110 HIGHWOOD DRIVE ST. MARIES, ID 83861	STARR KELSO, ESQ. PO BOX 1312 COEUR D'ALENE, ID 83816-1312
EMPLOYER'S NAME AND ADDRESS ST. JOE SALVAGE 110 HIGHWOOD DRIVE PO BOX 309 ST. MARIES, ID 83861	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS TRAVELERS INDEMNITY COMPANY ST. PAUL TRAVELERS PO BOX 7427 BOISE, ID 83707
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) ERIC S. BAILEY (ISB #4408) BOWEN & BAILEY, L.L.P. 350 NORTH NINTH STREET, STE. 200 BOISE, IDAHO 83702	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

IT IS: (Check one)	
Admitted	Denied
X	
X	
X	
X	
N/A	N/A
X	
	X
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.

2. That the employer/employee relationship existed.

3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.

4. That the condition for which benefits are claimed was caused partly X entirely ☐ by an accident arising out of and in the course of Claimant's employment.

5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.

6. That the notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.

7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: $ under investigation.

8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?

SEE SECTION 10.

(Continued from front)

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

(1) WHETHER THE CONDITION FOR WHICH CLAIMANT SEEKS BENEFITS IS RELATED TO A JULY 3, 2006, INDUSTRIAL ACCIDENT;

(2) WHETHER CLAIMANT'S CONDITION IS THE RESULT OF PREEXISTING CONDITIONS AND/OR EVENTS;

(3) THE APPROPRIATENESS OF IDAHO CODE § 72-406 DEDUCTIONS;

(4) CLAIMANT'S ENTITLEMENT TO ADDITIONAL INCOME AND MEDICAL BENEFITS;

(5) WHETHER CLAIMANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES; AND

(6) DEFENDANTS ASSERT THERE EXISTS NO PROVISION UNDER TITLE 72 OF THE IDAHO CODE FOR PUNITIVE DAMAGES/COSTS.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. YES NO X

DEFENDANTS WILL NOTIFY THE COMMISSION IF AND WHEN MEDIATION IS APPROPRIATE

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

NO.

Amount of Compensation paid to date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
UNDER	INVESTIGATION		11/1/06	R. Daniel Bower for ERIC S. BAILEY (ISB #4408)

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2006, I caused to be served a true and correct copy of the foregoing Answer upon:

STARR KELSO, ESQ.
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE, ID 83816-1312
FAX: (208) 664-6261

via
- ☐ personal service of process
- ☒ regular U.S. mail
- ☐ facsimile

R. Daniel Bower for Eric S. Bailey

ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

WORKERS' COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)

CLAIMANT'S NAME AND ADDRESS	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS
Roy Green 110 Highwood Drive St. Maries, Idaho 83861	Starr Kelso Attorney at Law PO Box 1312 Coeur d'Alene, Idaho 83816
EMPLOYER'S NAME AND ADDRESS Roy Green dba St. Joes Salvage Logging c/o 110 Highwood Drive St. Maries, Idaho 83861	**EMPLOYER'S ATTORNEY'S NAME AND ADDRESS** Eric S. Bailey Bowen & Bailey, LLP PO Box 1007 Boise, Idaho 83701
I.C. NUMBER OF CURRENT CLAIM 2006-07698	**WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS** Travelers Indemnity Company St. Paul Travelers PO Box 7427 Boise, Idaho 83707
DATE OF INJURY 7/3/06	

NATURE AND CAUSE OF PHYSICAL IMPAIRMENT, PRE-EXISTING CURRENT INJURY OR OCCUPATIONAL DISEASE:
See medical records previously provided with the Notice of Intent to File Claim Against ISIF. T12/L1 fusion; AC separation of right shoulder; bilateral carpal tunnel syndrome; pre-existing multi-level cervical and lumbar disc disease and spinal degeneration.

STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:
Claimant asserts inability to work due to combination of medical factors.

DATE: November 6, 2008.

SIGNATURE OF PARTY OR ATTORNEY: _____
ERIC S. BAILEY

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of November, 2008, I caused to be served a true and correct copy of the foregoing Complaint upon:

Manager, ISIF Dept. of Administration	PO Box 83720 Boise, Idaho 83720-7901	via:	☐ personal service of process ☒ regular U.S. Mail
Claimant's Name	Roy Green c/o Starr Kelso PO Box 1312 Coeur d'Alene, Idaho 83816	via:	☐ personal service of process ☒ regular U.S. Mail
Employer's Name	Roy Green dba St. Joe Salvage Logging c/o 110 Highwood Drive St. Maries, Idaho 83861	via:	☐ personal service of process ☒ regular U.S. Mail
Surety's Name	Travelers Indemnity Company St. Paul Travelers PO Box 7427 Boise, Idaho 83707	via:	☐ personal service of process ☒ regular U.S. Mail

☐ I have not served a copy of the Complaint upon anyone.

NOTICE: Pursuant to the provisions of Idaho Code § 72-334, a notice of claim must first be filed with the Manager of ISIF not less than 60 days prior to the filing of a complaint against ISIF.

You must attach a copy of Form IC 1001 Workers' Compensation Complaint, to this document.

An Answer must be filed on Form IC 1003 within 21 days of service in order to avoid default.

WORKER'S COMPENSATION COMPLAINT
INDUSTRIAL COMMISSION NO:

Claimant: ROY GREEN 110 Highwood Drive St. Maries, ID 83861 **Telephone Number:** (208) 245-3010	**Claimant's Attorney:** STARR KELSO Attorney at Law PO Box 1312 Coeur d'Alene, ID 83816-1312
Employer's Name And Address (at time of injury): ST. JOE SALVAGE c/o Roy Green 110 Highwood Drive St. Maries, ID 83861	**Worker's Compensation Insurance Carrier's (Not Adjustor's) Name And Address:** TRAVELERS P.O. Box 7427 Boise, ID 83707-1427
CLAIMANT'S SS#: **519-88-0707** / CLAIMANT'S BIRTHDATE: **7-23-59**	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE: **7-03-06**
STATE AND COUNTY IN WHICH INJURY OCCURRED: **Benewah, Idaho**	WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: **$1,000** per day, PURSUANT TO §72-419, IDAHO CODE
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED): **Struck on the head by a tree.**	
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE: **Neck, back, and atrophied muscles as a result of denial of claim.**	
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME: **Medical; TTD's; Attorney fees and punitive costs.**	
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER: **7-03-06**	TO WHOM YOU GAVE NOTICE: **Self and then ALE**
HOW NOTICE WAS GIVEN: ORAL, __X__ WRITTEN __X__ OTHER, PLEASE SPECIFY _____	
ISSUE OR ISSUES INVOLVED: **Medical** **Causation** **TTD's** **Attorney fees and punitive costs.**	
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF YES, PLEASE STATE WHY: No.	

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED IN ACCORDANCE WITH IDAHO CODE §72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Bret A. Dirks **Coeur d'Alene**	**Dr. Ludwig** **Coeur d'Alene**	**Dr. Horan** **Coeur d'Alene**	**Brian L. Norce, D.C.** **Appleway Chiropractic**	**Benewah Community Hospital** **St. Maries**

Dr. Katovich
Benewah Community Hospital

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE?	Unknown
WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY?	Unknown
WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY?	Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ☐ YES ☒ NO

DATE: 10-27-06 SIGNATURE OF CLAIMANT OR ATTORNEY: Stan Welton

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT?	DATE OF DEATH:	RELATION OF DECEASED TO CLAIMANT:

WAS CLAIMANT DEPENDENT ON DECEASED:	DID CLAIMANT LIVE WITH DECEASED AT TIME OF ACCIDENT:
☐ YES ☐ NO	☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of October, 2006, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

ST. JOE SALVAGE
c/o Roy Green
110 Highwood Dr.
St. Maries, ID 83861

via: ☐ personal service of process
☒ regular U.S. Mail

SURETY'S NAME AND ADDRESS

TRAVELERS
PO Box 7427
Boise, ID 83707-1427

via: ☐ personal service of process
☐ regular U.S. Mail

☐ I HAVE NOT SERVED A COPY OF THE COMPLAINT ON ANYONE

Stan Welton
Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. *If no answer is filed, a Default Award may be entered!*

Further information may be obtained from: Industrial Commission, Judicial Division, PO Box 83720, Boise, Idaho 83720-0041 (208) 334-6000

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

Send Original to: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

ANSWER TO COMPLAINT

I.C. NO 06 - 07698 **INJURY DATE: 07/03/2006**

Claimant's Name and Address: *ROY GREEN* *110 HIGHWOOD DR* *ST. MARIES, ID 83861*	Claimant's Attorney's Name and Address: *STARR KELSO* *ATTORNEY AT LAW* *PO BOX 1312* *COEUR D'ALENE, ID 83816*
Employer's Name and Address: *ROY GREEN DBA ST. JOES SALVAGE LOGGING* *% 110 HIGHWOOD DR.* *ST. MARIES, ID 83861*	Worker's Compensation Insurance **Carrier's** (Not Adjuster's) Name and Address: *TRAVELERS INDEMNITY COMPANY* *ST. PAUL TRAVELERS* *PO BOX 7427* *BOISE, ID 83707*
Attorney Representing Employer or Employer/Surety (Name and Address) *ERIC S. BAILEY* *BOWEN & BAILEY, LLP* *PO BOX 1007* *BOISE, ID 83701*	Attorney Representing Industrial Special Indemnity Fund (Name and Address) *THOMAS W. CALLERY* *JONES, BROWER & CALLERY* *P O BOX 854* *LEWISTON ID 83501*

_____ The above-named employer or employer/surety responds to Claimant's Complaint by stating:

__X___ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)

ADMITTED	DENIED	
X		1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
X		2. That the employer/employee relationship existed.
X		3. That the parties were subject to the provisions of the Idaho Worker's Compensation Act.
	X	4. That the condition for which benefits are claimed was caused partly _____ or entirely _____ by an accident arising out of and in the course of Claimant's employment
	N/A	5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment
	UNKNOWN TO ISIF	6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
	N/A	7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
	UNKNOWN TO ISIF	8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419:
X		9. That the alleged employer was insured or permissibly self insured under the Idaho worker's Compensation Act.

10. What Benefits, if any, do you concede are due Claimant?

NONE FROM ISIF

8

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

PLEASE SEE EXHIBIT A ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE AS THOUGH SET FORTH IN FULL

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U. S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 111(D), Judicial Rules of Practice and Procedure under the Idaho Worker's Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C.1002.

I am interested in mediating this claim, if the other parties agree. _____ **Yes** _____**No**

Do you believe this Claim presents a new question of law or a complicated set of facts? If so, please state.

NO.

Amount of Compensation Paid to Date

PPD	TTD	Medical	Dated	Signature of Defendant or Attorney
				TW. Cy

Please Complete

I hereby certify that on the 18 day of November, 2008, I caused to be served a true and correct copy of the foregoing Answer upon:

Claimant's Name and Address:

ROY GREEN
% STARR KELSO
Attorney at Law
P.O. Box 1312
Coeur d'Alene, ID 83816

via: _____ Personal Service of Process
___X___ regular U. S. Mail

Employer and Surety's Name and Address

ERIC S. BAILEY
Bowen & Bailey
P O Box 1007
Boise, ID 83701

via: _____ Personal Service of Process
__X____ regular U. S. Mail

Industrial Special Indemnity Fund (If Applicable)

via: _____ Personal Service of Process
_____ regular U. S. Mail

TW. Cy
THOMAS W. CALLERY

EXHIBIT 'A'
AFFIRMATIVE DEFENSES

1. The Industrial Special Indemnity Fund recently received the Workers' Compensation Complaint against the Industrial Special Indemnity Fund and contemplates the initiation of formal discovery. The Fund has limited medical records available and is unable at this time to accurately either admit or deny portions of the Complaint and reserves the right to amend this Answer as necessary and warranted by subsequent discovery.

2. Claimant is not totally and permanently disabled.

3. Claimant did not suffer from a known manifest, pre-existing, permanent physical impairment within the meaning of Idaho Code Section 72-332(2).

4. Any permanent physical impairment suffered by the Claimant was not a hindrance or obstacle to Claimant's employment or re-employment.

5. If Claimant is totally disabled, it is not due to the aggravation and acceleration of a pre-existing condition nor due to the combined affects of pre and post injury conditions.

6. Claimant incurred no physical impairment from the alleged accident which gives rise to this action.

7. Claimant's disability, if any, is due to the natural progression of an underlying degenerative process and was not aggravated or accelerated by a work injury, and Claimant would be so disabled irrespective of the events of Claimant's employment.

STARR KELSO
Attorney at Law
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Green

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN Claimant,	:	Case No. I.C. 06-07698
vs.	:	CLAIMANT'S MOTION FOR SANCTIONS AGAINST THE ISIF PURSUANT TO ICJRP&P RULE 16
ROY GREEN DBA ST. JOE SALVAGE LOGGING, Employer,	:	
TRAVELERS INDEMNITY COMPANY, Surety, and	:	FILED MAY 20 2011 INDUSTRIAL COMMISSION
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	:	

COMES NOW Claimant by and through his attorney of record and pursuant to ICJRP&P Rule 16 moves the Industrial Commission for it's Order entering sanctions against the Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF).

The basis of this motion is as follows:

1. Claimant, in good faith, entered into settlement negotiations with the ISIF and accepted the offer of the ISIF to settle this matter as pertains to ISIF exposure;
2. Claimant, as a result of accepting the ISIF's offer of settlement, sought and obtained a the vacation of the hearing scheduled herein so that it could be determined before this claim proceeded to hearing against the employer/surety whether the settlement agreement would be approved by the Industrial Commission so that the potential of two hearings would be avoided;

3. That as documented by the exhibits attached to the Affidavit of Starr Kelso filed herewith the ISIF, with knowledge of the Idaho Supreme Court's decision in "Wernecke", required that a Lump Sum Settlement Agreement drafted by its counsel had to be used;
4. The ISIF's Lump Sum Settlement Agreement was used in its entirety and signed by the Claimant in a good faith effort to resolve this matter against the ISIF.
5. The only change to the ISIF's Lump Sum Settlement Agreement authorized by the ISIF was the insertion of language apportioning the lump sum offered to Claimant over a 25 year life expectancy.
6. On May 17, 2011 Claimant's counsel received an e-mail from Kim Tagaki of the Industrial Commission that stated that the Industrial Commission's Commissioners had declined to approve the submitted Lump Sum Settlement Agreement;
7. On May 17, 2011 Claimant's counsel e-mailed Kim Tagaki inquiring as to the reason for the Industrial Commission's Commissioners' action;
8. On May 17, 2011 Kim Tagaki telephoned Claimant's counsel and informed him that the submitted Lump Sum Settlement Agreement failed to come close to meeting the "Wernecke" requirements for an ISIF settlement;
9. That Claimant has been anxiously awaiting the decision of the Industrial Commission on the Lump Sum Settlement Agreement submitted in an effort to stop a pending foreclosure on his home;
10. That Claimant's counsel expended several hours of time working to craft an acceptable Lump Sum Agreement but his efforts were rejected by the ISIF which insisted on the form that its counsel prepared be utilized for submission to the Industrial Commission;
11. That Claimant's counsel expended substantial time obtaining, preparing, and faxing various medical records and rehabilitation reports to the Industrial Commission's staff at their request; and
12. The Industrial Commission's Commissioners, and the staff of the Industrial Commission, expended valuable time reviewing the Lump Sum Settlement Agreement required by the ISIF to be submitted, and then have to reject the same because of its failure to comply with the "Wernecke" requirements.

It is requested that the Industrial Commission enter its order:

a. Awarding Claimant reasonable attorney fees;

b. Awarding Claimant punitive costs/damages in a sum to be established at hearing upon testimony and evidence regarding the same by the Claimant;

c. Requiring the ISIF to pay the Industrial Commission a reasonable sum to compensate it for the lost time of the Commissioners and its staff in reviewing and considering the submitted Lump Sum Settlement Agreement.

DATED this 20 day of May, 2011.

Starr Kelso, Attorney for Claimant Mr. Green

CERTIFICATE OF SERVICE: A copy was faxed to Eric Bailey attorney for employer/surety 208-344-9670 and Thomas Callery attorney for ISIF 208-746-9553 on the 20 day of May, 2011.

Starr Kelso

STARR KELSO
Attorney at Law
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Green

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN Claimant,	:	Case No. I.C. 06-07698
vs.	:	AFFIDAVIT OF STARR KELSO IN SUPPORT OF MOTION FOR SANCTIONS PURSUANT TO ICJRP&P RULE 16
ROY GREEN DBA ST. JOE SALVAGE LOGGING, Employer,	:	
TRAVELERS INDEMNITY COMPANY, Surety, and	:	
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	:	

FILED
MAY 20 2011
INDUSTRIAL COMMISSION

STATE OF IDAHO)
ss.
COUNTY OF KOOTENAI)

STARR KELSO being first duly sworn upon oath hereby states as follows:

1. I am the attorney for the Claimant, Roy Green, over the age of 18 years, and make this affidavit based upon personal knowledge to which I will testify to if required to by the Industrial Commission;
2. I spent well in excess of three (3) hours negotiating with the Defendant State of Idaho, Industrial Special Indemnity Fund, (ISIF) counseling my client, and drafting proposed changes to the Lump Sum Settlement Agreement provided to me for review by the counsel for the ISIF;

3. That my regular hourly rate billed to clients is $200.00 per hour. That as a result of the Industrial Commission's Commissioners' action in declining the submitted Lump Sum Settlement Agreement I will have expended time in excess of three hours that would have been compensated for under the contingency fee agreement with Claimant but which now will not otherwise be compensated for because those efforts were strictly directed towards the submitted Lump Sum Settlement Agreement and are of no use towards proceeding with this matter to hearing;
4. Attached hereto as Exhibits A, B, and C, and D are the relevant contents of e-mails to and from the counsel for the ISIF and myself. They speak for themselves. At the time of the preparation of the Lump Sum Settlement Agreement by counsel for the ISIF the requirements of the Idaho Supreme Court in *Wernecke v. St. Maries Joint School Dist. No 401, 147 Idaho 277, 207 P. 3d 1008 (2009)* were public record;
5. The Lump Sum Settlement Agreement, with the ISIF'S knowledge of the *Wernecke* decision, was the one required by the ISIF to be submitted to the Industrial Commission;
6. Exhibit D documents the ISIF's withdrawal of the settlement offer, without even an attempt to resolve the Wernecke requirements.
7. One of the significant reasons that the Claimant agreed to enter into the Lump Sum Settlement Agreement required by the ISIF was that he was, and still is, facing a foreclosure on his home in St. Maries, Idaho. The foreclosure is as a result of his being unable to work, the termination of his temporary total disability benefits, and the refusal, by either Defendant, to pay him permanent total disability benefits or disability in excess of impairment benefits despite clear and overwhelming evidence that he has suffered, if not total and permanent disability, very significant disability.
8. Claimant was going to utilize the money from the Lump Sum Settlement Agreement to fund a payment plan for his home and/or to clear the title on another piece of property that he owns so that he could move his personal belongings and family to this other piece of property in the event that his home foreclosure proceeded to sale.
9. The foreclosure of the sale of Claimant's home was just last month stayed for about a month in order to see if a loan modification could be reached. That decision is pending.

10. The ISIF's requirement that its language be utilized in the Lump Sum Settlement Agreement, the several month wait for review, and the Industrial Commission's Commissioners' declining to approve the Lump Sum Settlement Agreement submitted has caused Claimant significant and substantial emotional distress and economic loss that should he should be compensated for by an award of sanctions against the ISIF by the Industrial Commission.

DATED this 20th day of May, 2011.

Starr Kelso

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public, this 20th day of May, 2011.

Pam Howard
NOTARY PUBLIC FOR IDAHO
Residing at Rathdrum
My Commission expires: 8/6/2016

PAM HOWARD NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE: A copy was faxed to Eric Bailey attorney for employer/surety 208-344-9670 and Thomas Callery attorney for ISIF 208-746-9553 on the 20 day of May, 2010.

Starr Kelso

RE: Try this one

December 22, 2010 4:57 PM

From: Tom Callery

To: "starr kelso" <starr.kelso@frontier.com>

...We have cases like this rejected by the Commission and then we are left with a stipulation that is used against us at hearing. Ever since the Werneke decision we have had the Commission exam our LSA with a fine tooth comb. Frankly there is a good chance this LSA will not be approved. I have been instructed to use the LSA I prepared. Tom Callery

Exhibit A

: Try this one

December 21, 2010 11:10 AM

From: Tom Callery

To: "starr kelso" <starr.kelso@frontier.com>

Cc: "James Kile" <James.Kile@adm.idaho.gov>

Starr I have reviewed your revised LSA with the ISIF. We are not in a position to modify the agreement as you have requested as we must reserve our ability to defend the case if the LSA is not approved. Our version of the LSA is what we are willing to do. If you and your client can sign our version we will submit to the Commission otherwise we will be unable to settle. Tom Callery

Exhibit B

± Font size –

RE: Green Lump Sum

From : Tom Callery <tcallery@lewiston.com> Fri, Jan 21, 2011 09:42 AM
Subject : RE: Green Lump Sum
To : starr kelso <starr.kelso@frontier.com>
Cc : 'James Klle' <James.Klle@adm.idaho.gov>

Starr go ahead and add the 25 years life expectancy. Send back signed copies to me. Tom Callery

-----Original Message-----
From: starr.kelso@frontier.com [mailto:starr.kelso@frontier.com]
Sent: Thursday, January 20, 2011 10:09 PM
To: Tom Callery
Subject: Green Lump Sum
Importance: High

Tom,

Please take a look at the modification of paragraph 13 below:

13. Claimant has requested that the $50,000 lump sum settlement be allocated to non-medical benefits, attorney fees, and costs advanced with the amount of said lump sum less the attorney fees and costs approved by the Commission being lifetime benefits for the Claimant to be a lump sum payment in full satisfaction of the potential future Fund liability for the payment of benefits to Claimant prorated into, and representing the total of, equal monthly payments over Claimant's life expectancy of 25 years. However, the parties acknowledge and

Let me know if you are in agreement. Roy will be here in the a.m on Friday.

Starr

Exhibit C

± Font size ±

RE: Lump Sum settlement on Roy Green v. ISIF DOI: 7-3-06 Employer: Roy Green dba St. Joe Salvage

From : Tom Callery <tcallery@lewiston.com> Tue, May 17, 2011 03:55 PM

Subject : RE: Lump Sum settlement on Roy Green v. ISIF DOI: 7-3-06 Employer: Roy Green dba St. Joe Salvage

To : starr kelso <starr.kelso@frontier.com>

Cc : 'Verlene Wise' <Verlene.Wise@adm.idaho.gov>, 'James Kile' <James.Kile@adm.idaho.gov>

Starr since the Lump has been rejected the ISIF has instructed me to request calendaring and proceed to hearing. The language we used was based on my analysis of the case and the substantial evidence Green had no pre-existing restrictions prior to the last accident based on his own deposition testimony and the video you provided. In addition we believe there is evidence that Green can return to light duty type work. We agreed to settle because of the allegation by Bailey and the surety that there is a combined with. As a result the ISIF settlement offer of 50k is withdrawn and the case will have to be tried. Tom Callery

-----Original Message-----
From: starr.kelso@frontier.com [mailto:starr.kelso@frontier.com]
Sent: Tuesday, May 17, 2011 2:42 PM
To: Tom Callery
Subject: Re: Lump Sum settlement on Roy Green v. ISIF DOI: 7-3-06 Employer: Roy Green dba St. Joe Salvage

Yes, I received it. I called and asked why. She said it didn't comply with Wernecke. I guess I am confused as it is essentially the form that the ISIF required to be used.

----- Original Message -----
From: "Tom Callery" <tcallery@lewiston.com>
To: "starr kelso" <starr.kelso@frontier.com>
Sent: Tuesday, May 17, 2011 10:58:15 AM
Subject: FW: Lump Sum settlement on Roy Green v. ISIF DOI: 7-3-06 Employer: Roy Green dba St. Joe Salvage

Starr this came thru just minutes ago. Tom Callery

From: Takagi, Kim [mailto:KTakagi@iic.idaho.gov]
Sent: Tuesday, May 17, 2011 10:17 AM
To: tcallery@lewiston.com
Subject: Lump Sum settlement on Roy Green v. ISIF DOI: 7-3-06 Employer: Roy Green dba St. Joe Salvage

Hi Thomas,

The Commission declined to approve this settlement agreement. If you would like a hearing with the Commissioners to discuss this settlement, you can send a request for hearing to the Commission legal department.

Thanks.

Exhibit D

Thomas W. Callery, ISBN 2292
JONES, BROWER & CALLERY, P.L.L.C.
1304 Idaho Street
P. O. Box 854
Lewiston, Idaho 83501
(208) 743-3591
Facsimile: (208) 746-9553
tcallery@lewiston.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, vs. ROY GREEN dba ST. JOE SALVAGE LOGGING, Employer, TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	Case No.: I. C. 06-07698 **DEFENDANT ISIF RESPONSE TO CLAIMANT'S MOTION FOR SANCTIONS AGAINST THE ISIF**

Comes now the Defendant, STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, by and through its attorney of record, Thomas W. Callery of Jones, Brower & Callery, PLLC, and hereby responds to the Claimant's motion for sanctions against the ISIF as follows:

1. Claimant ROY GREEN filed a complaint for benefits on or about October 30, 2006 against the Employer, St. Joe Salvage Logging, and Surety, Traveler's Indemnity Co.

2. The Defendant ISIF was served a complaint by the Employer and Surety alleging ISIF liability on or about November 6, 2008.

Thomas W. Callery, ISBN 2292
JONES, BROWER & CALLERY, P.L.L.C.
1304 Idaho Street
P. O. Box 854
Lewiston, Idaho 83501
(208) 743-3591
Facsimile: (208) 746-9553
tcallery@lewiston.com

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, vs. ROY GREEN dba ST. JOE SALVAGE LOGGING, Employer, TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	Case No.: I. C. 06-07698 **DEFENDANT ISIF RESPONSE TO CLAIMANT'S MOTION FOR SANCTIONS AGAINST THE ISIF**

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1. Claimant ROY GREEN filed a complaint for benefits on or about October 30, 2006 against the Employer, St. Joe Salvage Logging, and Surety, Traveler's Indemnity Co.

2. The Defendant ISIF was served a complaint by the Employer and Surety alleging ISIF liability on or about November 6, 2008.

3. At the request of counsel for the Surety and mediator Dennis Burks, the ISIF attended mediation in Coeur d'Alene on September 29, 2009. A settlement offer was made on that date to the Claimant and his counsel. Said offer of settlement was neither accepted nor rejected at the conclusion of the mediation.

4. Counsel sent the Claimant and his attorney a lump sum agreement for review on February 24, 2010. Said proposed lump sum agreement was never signed by Claimant.

5. Eventually, the Claimant rejected said lump sum agreement and on March 10, 2010 filed a request for calendaring.

6. The case was rescheduled for hearing on December 14, 2010.

7. On December 3, 2010, shortly before hearing, the Claimant, through his legal counsel, accepted the ISIF offer made at the mediation fourteen months prior.

8. The acceptance of the offer by Claimant contained the following conditional language (see Exhibit A attached hereto):

> "I want to also emphasis that this acceptance by Mr. Green is not an admission, or concession, of any nature or kind, that the ISIF has any liability regarding Mr. Green's industrial accident and injury of July 3, 2006. I want to specifically reference the fact that Mr. Green did not "join" the ISIF in this matter, that Mr. Green's deposition testimony documents that he did not believe that his physical condition prior to the accident and injury was a hindrance or obstacle to his ability to obtain employment, that his current total permanent disability is solely caused by his said July 3, 2006 accident."

9. In addition, Claimant's counsel was clearly aware that, under the facts of the case, approval of the lump sum agreement was not assured, and Claimant's counsel himself acknowledged this in his December 3, 2010 letter (see Exhibit A attached hereto):

> "It is my understanding from our discussions that the Industrial Commission has been cautious in approving settlements involving the ISIF. Thus, of course, if the Commission determines not to approve the settlement agreement the offer and Mr. Green's acceptance will be null and void and we will proceed to hearing."

10. The Claimant and his legal counsel were well aware that any lump sum agreement would have to be approved by the Idaho Industrial Commission and were clearly advised that approval was not a certainty in light of the *Wernecke* decision.

11. The lump sum agreement drafted by the ISIF was based upon the facts of the case and the very specific letter addressed to counsel for the ISIF dated December 3, 2010 by Mr. Kelso. In said letter, the Claimant and his legal counsel reiterated Mr. Green's position that the ISIF has no liability in this case and that the total and permanent disability of the Claimant was caused solely by the accident of July 3, 2006.

12. Counsel for the ISIF drafted a lump sum agreement based upon the facts of the case and the information provided to it by the Claimant and his legal counsel. The lump sum agreement presented to the Commission accurately reflected the positions of the respective parties and the medical evidence. The ISIF did not prepare a lump sum agreement that was inaccurate, incomplete or made false representations to the Commission concerning the facts of the case in order to obtain approval by the Commission and satisfy the *Wernecke* requirements.

13. It is the duty of the Commission to review the lump sum agreement and the underlying facts of the case to determine if the elements of ISIF liability have been satisfied based on *Wernecke v. St. Maries Joint School District*, 147 Idaho 277 (2009). The Commission exercised its discretion in this case and determined that the elements of ISIF liability were not satisfied, and that the lump sum agreement could not be approved.

14. The actions of the ISIF in this matter do not warrant sanctions and have been perfectly appropriate as to the Claimant and to the Idaho Industrial Commission. The motion for sanctions filed by the Claimant is frivolous.

DATED this 27th day of May, 2011.

JONES, BROWER & CALLERY, P.L.L.C.

THOMAS W. CALLERY
Attorney for Defendant ISIF

CERTIFICATE OF SERVICE

I certify that on the 27th day of May, 2011, a true and correct copy of the foregoing was served by the method indicated below and addressed upon each of the following:

STARR KELSO ATTORNEY AT LAW P.O. BOX 1312 COEUR D'ALENE, ID 83816	☒ ☐ ☐ ☒	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to: 208-664-6261
ERIC S. BAILEY BOWEN & BAILEY, LLP P.O. BOX 1007 BOISE, ID 83701	☒ ☐ ☐ ☒	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to: 208-344-9670

THOMAS W. CALLERY

KELSO LAW OFFICE

1621 N. THIRD STREET, SUITE 600
POST OFFICE BOX 1312
COEUR D' ALENE, ID 83816-1312
Telephone :(208)765-3260
Facsimile :(208)664-6261
E-Mail kelsolawoffice@gmail.com

STARR KELSO
Attorney at Law

Stephanie Goward
Office Manager

Matt Kelso
Sr. Claims Investigator

≈

"There are evil men, and they are to be feared. However, the greatest evil we all face today is the indifference of good men!"

December 3, 2010

Thomas W. Callery
Attorney at Law

Via fax: 208-746-9553

RE: **Green v. St. Joe Salvage, Travelers Indemnity Co., and ISIF**

Dear Tom:

Mr. Green has authorized me to accept the $50,000.00 full and final lump sum settlement offer of your client, the ISIF, in the above matter. Mr. Green's acceptance of the ISIF's offer is not a waiver of any claim against the employer/surety in this matter. Mr. Green reserves the right to provide appropriate language regarding the apportionment of the settlement over his remaining life expectancy. It has not yet been determined whether or not Mr. Green is willing to accept the surety's offer. This offer and acceptance is only a settlement of the contingent liability of the ISIF regardless of whether the Industrial Commission, if the matter proceeds to hearing against the surety, determines that the ISIF actually has no liability or some liability regardless of the extent. I want to also emphasis that this acceptance by Mr. Green is not an admission, or concession, of any nature or kind, that the ISIF has any liability regarding Mr. Green's industrial accident and injury of July 3, 2006. I want to specifically reference the fact that Mr. Green did not "join" the ISIF in this matter, that Mr. Green's deposition testimony documents that he did not believe that his physical condition prior to the accident and injury was a hindrance or obstacle to his ability to obtain employment, that his current total permanent disability is solely caused by his said July 3, 2006 accident. The fact that the surety chose to join the ISIF and the fact that the ISIF has chosen to offer a full and final settlement to Mr. Green, based upon their respective independent decisions, in no way influence or compromise Mr. Green's belief that the ISIF has, and had, no liability in his claim arising out of his accident and injury. It is my understanding from our discussions that the Industrial Commission has been cautious in approving settlements involving the ISIF. Thus, of course, if the Commission determines to not approve the settlement agreement the offer and Mr. Green's acceptance will be null and void and we will have to proceed to hearing.

Very truly yours,

Starr Kelso
Attorney at Law

EXHIBIT A

STARR KELSO
Attorney at Law
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Green

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN Claimant,	:	Case No. I.C. 06-07698
vs.	:	CLAIMANT'S REPLY TO ISIF'S RESPONSE TO MOTION FOR SANCTIONS
ROY GREEN DBA ST. JOE SALVAGE LOGGING, Employer,	:	
TRAVELERS INDEMNITY COMPANY, Surety, and	:	FILED JUN - 7 2011
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	:	INDUSTRIAL COMMISSION
_____	:	

COMES NOW the Claimant and hereby files this Reply to the ISIF's Response to Claimant's Motion for Sanctions.

FACTS

The ISIF mischaracterizes the basis of Claimant's Motion for Sanctions. The Claimant's Motion is based upon the following:

1. The Claimant was placed in the position of needing to resolve any claim against the ISIF because of the pending foreclosure on his home.
2. The Idaho Supreme Court entered its decision in *Wernecke v. St. Maries Joint School District. No. 401, 147 Idaho 277, 207 P. 3d 1008* on April 14, 2009.
3. As reflected by Exhibit A to the Affidavit of Starr Kelso in Support of Motion for Sanctions the ISIF was well aware of the Supreme Court's decision. The e-mail

specifically states that "Ever since the *Wernecke* decision we have had the Commission exam our LSA with a fine tooth comb."

4. The ISIF, if it had intended to settle their liability in good faith for the sum of $50,000.00, had to recognize that the known evidence supported findings of fact that the Claimant was totally and permanently disabled under the odd-lot category and that the ISIF had liability exposure.
5. The ISIF offered the settlement to Claimant on September 29, 2009 at mediation. On December 3, 2010, the Claimant accepted the offer of the ISIF. Both of these dates are well after the Idaho Supreme Court's decision in *Wernecke*.
6. Any offer by the ISIF to settle the claim for the $50,000.00 in September 2009, that was left open to be accepted until it was accepted on December 3, 2010, necessarily included an implied agreement that the lump sum settlement agreement would meet, and be consistent in its language with the Idaho Supreme Court's decision in *Wernecke*. Any offer that did not intend for the lump sum agreement to be in full compliance with *Wernecke* could not have been made in good faith.
7. Claimant's counsel was certainly aware of the fact that the Industrial Commission would review any lump sum settlement in light of *Wernecke*. Claimant's counsel acknowledged that fact in his letter of December 3, 2010 attached to the ISIF's Response filed with the Industrial Commission.
8. When the settlement offer was accepted by the Claimant it was certainly done so with the good faith belief that the agreement that the ISIF would prepare would meet the *Wernecke* test.
9. The Claimant gave valuable consideration in accepting the offer of the ISIF. The Claimant agreed to vacating and rescheduling the hearing and settled any liabilityof the ISIF in this matter. The Claimant knowing the Industrial Commission would closely review the lump sum agreement had to reason to believe that a lump sum agreement that on its face did not meet the *Wernecke* test would be required to be signed.
10. It is one thing to submit a lump sum settlement agreement that appears to meet the *Wernecke* test and have it declined by the Industrial Commission. It is a vastly different thing to be required, because of the change in status of the hearing and the

pressing financial needs faced by Claimant, to be forced to sign a lump sum settlement agreement that did not even come close to meeting the *Wernecke* test.

11. Certainly the ISIF would not have offered to settle the case for $50,000.00 if the ISIF believed that it had pre-existing hindrance or obstacle liability exposure and/or that it had no exposure that the Claimant was not totally and permanently disabled under the odd-lot doctrine.

12. Based upon the opinion of Dan Brownell, vocational rehabilitation expert, and the St. Maries, Idaho labor market, the Claimant has a solid belief that the evidence will support that he is totally and permanently disabled under the odd-lot doctrine.

13. The Claimant, in good faith does not subjectively believe that his total and permanent disability is the result of the combination of a pre-existing hindrance or obstacle to work and the industrial accident that led to this claim being filed. However, the resolution of this matter is based upon what must have implicitly been a good faith belief by the ISIF that Claimant's pre-existing condition was a hindrance or obstacle. Certainly the ISIF is not going to offer to settle a case, especially for $50,000, when it does not feel that it has substantial exposure to an extent of at least $50,000.

14. The ISIF refused all attempts by the Claimant to correctly word the lump sum to accurately and correctly reflect that the opinion of Nancy Collins Ph.D, which the ISIF was also utilizing in defense of Claimant's claim, was based on an erroneous assumption that a video tape that she reviewed was taken *after* the accident of July 3, 2006. In fact the video that Nancy Collins, Ph.D. based her opinion on employability was taken prior to the industrial accident and injury of July 3, 2006. That fact is even confirmed on the video tape. The ISIF had a copy of the tape, and it also knew that her opinion was erroneous because the tape was taken prior to the July 3, 2006 industrial accident.

15. The ISIF, after supposedly making a good faith offer to settle for $50,000.00 (not an insignificant sum of money from the ISIF) ultimately demanded that the Claimant must sign the lump sum settlement agreement that it prepared. As reflected in the e-mail dated December 21, 2010 (see copy attached as Exhibit A) the ISIF, after making the

offer, and after the offer was accepted, demanded that the language in the agreement "must preserve our ability to defend the case if the LSA is not approved."

16. In essence what this means that the ISIF by submitting language in the agreement that would "preserve our ability to defend the case if the LSA is not approved" knew, that the insertion of the "defense" language would render the lump sum settlement agreement unacceptable to the Industrial Commission under *Wernecke*.
17. The fundamental bad faith of the ISIF is that it made an offer to settle and then, after the offer was accepted, inserted language that it knew would not comply *Wernecke* and demanded that it, and only it, be submitted to the Industrial Commission.
18. The Claimant accepted the offer of the ISIF based upon the knowledge that the Wernecke test must be met and was justified in believing when he accepted the offer of settlement that the ISIF would not make such an offer if it did not believe that it could agree to the facts required under the *Wernecke* test.
19. When it came time to put pen to paper and agree to the actual language the ISIF, with full knowledge of the *Wernecke*. unilaterally demanded that a lump sum agreement that it knew, or should have known, did not meet the *Werneck* test be signed.
20. Claimant, having accepted the offer, and having agreed to vacate and reschedule the hearing so that the pending lump sum agreement could be prepared and submitted for approval of the Industrial Commission, was in literally no position because of his financial status to say "Oh, never mind, lets just reschedule the hearing." No, Claimant had to try and ride the storm out on the 'horse' that he, in good faith, had agreed to ride, after learning that the horse he was forced to ride turned out to be a nag.

LEGAL ARGUMENT

When the parties to a legal controversy, in good faith enter into a contract compromising and settling their adverse claims, such agreement is binding upon the parties and is enforceable at law or in equity according to the nature of the case. *Wilson v. Bogert, 81 Idaho 535, 347 P. 2d 341 (Idaho 1959).* Such a contract stands on the same stands on the same footing as any other contract and is governed by the same rules and principles as are applicable to contracts generally. *Id* at 542. In an action to enforce an agreement of compromise and settlement, made in good faith, the court will not inquire into the merits or validity of the original claim. *Id* at 542.

The Claimant and the ISIF entered into an oral agreement to settle all ISIF liability to Claimant in this matter for the sum of $50,000.00.

A contract consists not only of the agreements which the parties have expressed in words, but also of the obligations which are reasonably implied. *Black v. Baker Oil Tools, Inc., 107 F. 3d 1457 (10th Cir. 1997).* What is plainly implied in an agreement is as much a part of the agreement as if expressly stated. *see Wright v. Fidelity & Deposit Co. of Md., 176 Okla. 274, 54 P. 2d 1084 (Okla. 1935)* citing *Kirke La Shelle Co. v. Paul Armstron Co., 263 N.Y. 79, 188 N.E. 163, 164* and *Draper v. Nelson, 254 Mich. 380, 236 N.W. 808.*

It has long been the law in Idaho that "Good faith and fair dealing are implied obligations of every contract." *Idaho First Nat. Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P. 2d 841 (Idaho 1991).* Any action by either party which vilates, nullifies or significantly impairs any benefit of the contract is a violation of the implied-in-law covenant of good faith and fair dealing. *Id.*

The Claimant accepted the offer of the ISIF on December 3, 2010. The Idaho Supreme Court's case in *Wernecke*, at that time, was well known to ISIF and it well knew that "the Commission (would) exam our LSA with a fine tooth comb." Exhibit A to Affidavit of Starr Kelso in Support of Motion for Sanctions. It can not be argued, in good faith, that compliance with *Wernecke* in any lump sum agreement document was reasonably implied in the offer and acceptance. For the ISIF to argue otherwise is bad faith of the type that should be sanctioned.

The unilateral demand of the ISIF, after it had offered to settle for $50,000.00 and the Claimant had accepted said offer, that the lump sum settlement agreement that it prepared and contained language that "reserve(d) our ability to defend the case if the LSA is not approved", and which language made the lump sum agreement unacceptable to the Industrial Commission because of Wernecke, was a violation of the covenant of good faith and fair dealing implied in the oral agreement, and written agreement attached as Exhibit A to ISIF's Response, to settle its liability to Claimant.

The agreement to settle between Claimant and the ISIF in this case is not the same as in *Wernecke.* Prior to the *Wernecke* decision neither Claimants nor the ISIF were aware of the standard expressed by the Idaho Supreme Court applicable to lump sum agreements involving the ISIF. In this present case, both the ISIF and the Claimant were aware of the *Wernecke*

standards established by the Idaho Supreme Court, and any good faith offer to settle made by the ISIF obviously included the implied obligation of the ISIF to submit to Claimant an agreement that complied with *Wernecke*. The ISIF submitted a lump sum agreement that the Industrial Commission found woefully lacking in meeting the *Wernecke* standards and demanded that it, and only it, be signed and submitted to the Industrial Commission. At the time that the offer of the ISIF was made and accepted by the Claimant, there was no statement, or indication, made in the offer that the lump sum settlement agreement would have to contain wording that "reserve(d) our (ISIF's) ability to defend the case if the LSA is not approved." Indeed once the offer was accepted the agreement superceded the liability exposure of the ISIF, and the Industrial Commission was "not in a position to inquire into the merits or validity of the original claim" against the ISIF. *Wilson v. Bogert,* supra. at 542. The issue upon offer and acceptance has become one of contract. The Industrial Commission has exclusive jurisdiction of all questions arising under the worker's compensation law. This agreement, and the actions of the ISIF, clearly "arise under the worker's compensation law" and the Industrial Commission is the only entity with jurisdiction to decide this issue. *Van Tine v. Idaho State Ins. Fund, 126 Idaho 688, 889 P. 2d 717 (Idaho 1994).*

CONCLUSION

The Industrial Commission should enter its Order requiring the ISIF to submit to Claimant a lump sum settlement agreement that complies with the standards expressed in *Wernecke*. Once the offer was made and accepted the merits of any liability claim against the ISIF in favor of Claimant were superceded by the accepted offer. It is not the province of the ISIF to demand that terminology be inserted into the lump sum settlement agreement that "reserve our ability to defend the case if the LSA is not approved." The underlying liability has been compromised and it is the obligation of the ISIF to prepare for submittal a lump sum settlement agreement that complies with *Wernecke*. The ISIF has no liability after the offer and acceptance other than to prepare and present an agreement for submission to the Industrial Commission that complies with *Wernecke,* and then upon approval by the Industrial Commission pay the Claimant $50,000.00.

If the Industrial Commission does not enter its Order requiring the ISIF to prepare and submit such an agreement, the Industrial Commission should hold that the ISIF acted in bad faith

in the offering of such settlement to the Claimant and schedule a hearing at which the Industrial Commission will receive evidence on the nature and extent of damages suffered by the Claimant as a result of the ISIF's bad faith actions in demanding the insertion of language in the written lump sum agreement submitted to the Industrial Commission that does not comply with *Wernecke*.

Respectfully submitted this 6th day of June, 2011.

Starr Kelso, Attorney for Claimant

CERTIFICATE OF SERVICE: A copy was faxed to Eric Bailey attorney for employer/surety 208-344-9670 and Thomas Callery attorney for ISIF 208-746-9553 on the 6th day of June, 2011.

Starr Kelso

RE: Try this one

From : Tom Callery <tcallery@lewiston.com> Tue, Dec 21, 2010 11:10 AM

Subject : RE: Try this one

To : starr kelso <starr.kelso@frontier.com>

Cc : 'James Kile' <James.Kile@adm.idaho.gov>

Starr I have reviewed your revised LSA with the ISIF. We are not in a position to modify the agreement as you have requested as we must reserve our ability to defend the case if the LSA is not approved. Our version of the LSA is what we are willing to do. If you and your client can sign our version we will submit to the Commission otherwise we will be unable to settle. Tom Callery

-----Original Message-----
From: starr.kelso@frontier.com [mailto:starr.kelso@frontier.com]
Sent: Saturday, December 18, 2010 9:15 AM
To: Tom Callery
Subject: Try this one

Tom,
Take a gander at the attached draft and see what you think. I reference Nancy Collins based upon her opinion prior to her last opinion that incorrectly assumed that the video was post surgery from the July 3, 2006 accident. I think that it is a fair statement. I think I have highlighted all of the changes, but I may have missed a word here and there. Also on the deleted portions I just indicate "OUT".

Let me know.
Starr

Exhibit A

STARR KELSO
Attorney at Law
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Green

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN Claimant,	:	Case No. I.C. 06-07698
vs.	:	***SUPPLEMENTAL*** AFFIDAVIT OF STARR KELSO IN SUPPORT OF MOTION FOR SANCTIONS PURSUANT TO ICJRP&P RULE 16
ROY GREEN DBA ST. JOE SALVAGE LOGGING, Employer,	:	
TRAVELERS INDEMNITY COMPANY, Surety, and	:	
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	:	

STATE OF IDAHO)
ss.
COUNTY OF KOOTENAI)

STARR KELSO being first duly sworn upon oath hereby states as follows:

1. I am the attorney for the Claimant, Roy Green, over the age of 18 years, and make this affidavit based upon personal knowledge to which I will testify to if required to by the Industrial Commission;
2. Attached hereto as Exhibit A is a copy of the Trustee's Deed issued as a result of the foreclosure sale of Claimant's home on June 16, 2011.
3. Attached hereto as Exhibit B is a copy of the Affidavit of Publication regarding the sale of Claimant's home. It reflects that commencing January 1, 2009 Claimant was in default of monthly payments of $1,765.42.

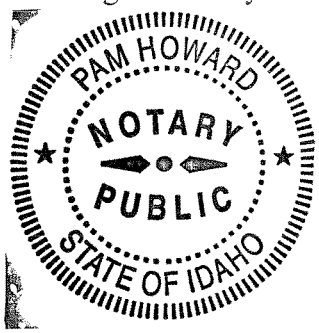
4. Attached hereto as Exhibit C is a copy of the Affidavit of Compliance regarding the sale of Claimant's home reflecting the change in the sale date from April 21, 2011 to May 19, 2011, to ultimately June 16, 2011.
5. That had the $50,000.00 settlement been approved and paid on or before June 1, 2011 that amount would have been sufficient to allow Claimant to avoid the foreclosure sale.

DATED this 22nd day of June, 2011.

Starr Kelso

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public, this 22nd day of June, 2011.

NOTARY PUBLIC FOR IDAHO
Residing at Kathdrum
My Commission expires: 8/16/16



CERTIFICATE OF SERVICE: A copy was faxed to Eric Bailey attorney for employer/surety 208-344-9670 and Thomas Callery attorney for ISIF 208-746-9553 on the 22 day of May, 2010.

Starr Kelso

302184-SM

260233

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2011 JUN 17 PM 3 48
BENEWAH COUNTY
J. MICHELE REYNOLDS, CLERK

Order No.: TS0901094A
CHF No. 1786087507/Green/302184-SM

TRUSTEE'S DEED

TitleOne Corporation, an Idaho corporation (herein called Trustee) as successor trustee under the Deed of Trust hereinafter particularly described, does hereby Bargain, Sell and Convey, without warranty, to Chase Home Finance LLC whose address is 3415 Vision Drive, Columbus, OH 43219, (herein called Grantee), all of the real property situated in the County of Benewah County, State of Idaho, described as follows:

A parcel of land, which is a portion of Tracts 13 and 14 of Cherry Creek Tracts, in the Northwest Quarter of the Southwest Quarter of Section 21, Township 46 North, Range 2 West of the Boise Meridian, Benewah County, Idaho described as follows:
Beginning at the Southwest corner of said Tract 13; thence along the south line of Tract 13 N 89° 46' E, 525.30 feet to an iron rod, which is the true point of beginning; thence
N 39°32'40" E, 247.14 feet to an iron rod; thence
N 32°35'30" E, 366.88 feet to an iron rod; thence
N 41°43'50" E, 402.19 feet to an iron rod; thence
N 50°45'40" E, 199.08 feet to an iron rod on the east line of Tract 14; thence
West 398.25 feet (rec. 498.2) to an iron rod on the right-of-way line of Highway 5; thence
along the right-of-way S 41°28'25" W, 571.72 feet to an iron rod; thence leaving the highway south 497.40 feet (rec. 491.93 feet) to an iron rod, which was the true point of beginning.

By reason of the automatic stay provisions of U.S. Bankruptcy Code 11 U.S.C. 362, the sale was discontinued, and pursuant to provisions of Idaho Code 45-1506(A) the sale was rescheduled and conducted following expiration or termination of the effect of the stay in the manner provided by that section. The Affidavit of Compliance with I.C. 45-1506A(2)(3), together with copies of the required Affidavit of Affidavits which are attached hereto and incorporated herein.

This conveyance is made pursuant to the powers conferred upon Trustee by the Deed of Trust between Roy J. Green, unmarried man, as original grantor(s) for the benefit and security of JPMorgan Chase Bank, N.A., as beneficiary, recorded November 7, 2008, as Instrument No. 252461, and assigned to Chase Home Finance LLC, by assignment recorded October 13, 2009, as Instrument No. 255369, Mortgage Records of Benewah County, Idaho and after the fulfillment of the conditions specified in said Deed of Trust authorizing this conveyance as follows:

1. Default occurred in the obligations for which said Deed of Trust was given as security and the beneficiary made demand upon the said trustee to sell said property pursuant to the terms of said Deed of Trust. Notice of Default was recorded as Instrument No. 255371, Mortgage Records of Benewah County, Idaho and in the office of the Recorder of each county in which the property described in said deed of trust or any part thereof, is situated, the nature of such default being as set forth in said Notice of Default. Such default still existed at the time of sale.
2. After recordation of said Notice of Default, trustee gave notice of the time and place of the sale of said property by registered/certified mail, return receipt requested, by personal service upon the occupants of said real property and/or by posting in a conspicuous place on said premises and by publishing in a newspaper of general circulation in each of the counties in which the property is situated as more fully appears in affidavits recorded as least 20 days prior to date of sale as Instrument No(s). 256006, 256007 & 256008, Mortgage Records of Benewah County, Idaho.
3. The provisions, recitals and contents of the Notice of Default referred to in paragraph (1) supra and of the Affidavits referred to in paragraph (2) supra shall be and they are hereby incorporated herein and made an integral part hereof for all purposes as though set forth therein at length.
4. All requirements of law regarding the mailing, personal service, posting, publication and recording of Notice of Default, and Notice of Sale and all other notices have been complied with.
5. Not less than 120 days elapsed between the giving of Notice of Sale by registered or certified mail and the sale of said property.
6. Trustee, at the time and place of sale fixed by said notice, at public auction, in one parcel, struck off to Grantee, being the highest bidder therefore, the property herein described, for the sum of $316,587.08, subject however to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, advances and costs.

IN WITNESS WHEREOF, The Trustee, pursuant to a resolution of its Board of Directors has caused its Corporation name to be hereunto subscribed.

Dated: June 16, 2011

TITLEONE CORPORATION, Trustee

Cindy Van Lith

By: Cindy Van Lith
Its: Assistant Treasurer

State of Idaho
County of Ada
On this 16th day of June in the year 2011, before me, the undersigned, a notary public in and for said state personally appeared, Cindy Van Lith known to me to be the Assistant Treasurer of the corporation that executed this instrument and the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same. In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Amy L. Wilcoxson

Notary Public
Residing at: Meridian
My commission expires on: January 11, 2013

AMY L. WILCOXSON NOTARY PUBLIC STATE OF IDAHO

Exh A

302184-SM

260235

RECEIVED
2011 JUN 17 PM 3 48
BENEWAH COUNTY
J. MICHELE REYNOLDS, CLERK

Affidavit of Publication

To FORLO

STATE OF IDAHO
County of Benewah, ss.

Cynthia Ann Hammes, being first duly sworn on oath, deposes and says that she is vice president of The Corporation, owner of the St. Maries Gazette Record, a weekly newspaper printed and published at St. Maries, Benewah County, State of Idaho; the St. Maries Gazette Record is a newspaper having general circulation in Benewah County, State of Idaho, and has been continuously and uninterruptedly published in Benewah County, State of Idaho, during a period of more than seventy-eight consecutive weeks prior to the first publication of notice of advertisement herein.

That the notice, of which the one hereto attached is a true copy, was published in said newspaper for a period of 3 issues, the first publication being on the 23 day of February 20 11 and the last on the 9th day of March, 20 11

That said newspaper was regularly distributed to its subscribers during the time of the same period; that said notice was published in the regular and entire issue of said paper.

Dated this 9th day of March, 20 11

Cynthia Ann Hammes

STATE OF IDAHO)
COUNTY OF BENEWAH)

On this 9th day of March, in the year of 2011 before me, a Notary Public, personally appeared Cynthia Ann Hammes, known or identified to me to be the person whose name subscribed to within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that she executed the same.

DANIEL A. HAMMES NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at St. Maries, Idaho
My commission expires:
02-13-2011

RESCHEDULED SALE
CFN 2008087507
Order No. TS09010944
RESCHEDULED NOTICE OF TRUSTEE'S SALE
On the 21st day of April, 2011, at the hour of 10:00 a.m. of this day (recognized local time) in the office of First American Title Company, 831 Main Avenue, St. Maries, Idaho 83861, in the County of Benewah, County, State of Idaho, TitleOne Corporation, an Idaho corporation, as successor trustee, will sell at public auction to the highest bidder, for cash or cashier's check (cash equivalent) in lawful money of the United States, all payable at the time of sale in compliance with Section 45-1506(8) Idaho Code, the following described real property, situated in Benewah County, State of Idaho and described as follows to wit:
A parcel of land, which is a portion of Tracts 13 and 14 of Cherry Grove Tracts, in the Northwest Quarter of the Southwest Quarter of Section 32, Township 46 North, Range 2 West of the Boise Meridian, Benewah County, Idaho described as follows:
Beginning at the Southwest corner of said Tract 13; thence along the south line of Tract 13 N 89° 46' E 525.50 feet to an iron rod, which is the true point of beginning; thence
N 39°32'40" E 247.14 feet to an iron rod; thence
N 32°35'30" E 366.88 feet to an iron rod; thence
N 41°43'50" E 462.19 feet to an iron rod; thence
N 50°45'40" E 199.08 feet to an iron rod on the east line of Tract 14; thence
West 998.25 feet (rec. 998.2) to an iron rod on the right-of-way line of Highway 5; thence
along the right-of-way S 41°28'25" W 571.72 feet to an iron rod; thence leaving the highway south 497.40 feet (rec. 491.98 feet) to an iron rod, which was the true point of beginning.
By reason of the automatic stay provisions of U.S. Bankruptcy Code 11 U.S.C. 362, the original sale was discontinued, and pursuant to provisions of Idaho Code 45-1506(8) this sale is rescheduled and will be conducted as allowed by the expiration or termination of the effect of the stay in the manner provided by that section.
The Trustee has no knowledge of a more particular description of the above referenced real property, but for purposes of compliance with Section 60-113, Idaho Code, the Trustee has been informed that according to the County Assessors office, the address of 110 Highwood Drive, Saint Maries, ID, 83861, is sometimes associated with said real property.
Said sale will be made without covenant or warranty regarding title, possession, or encumbrances to satisfy the obligation secured by and pursuant to the power of sale conferred in the Deed of Trust executed by Roy L Greenamyer, a married man, as Grantor(s), to TideOne Corporation, an Idaho corporation, as successor trustee, and JPMorgan Chase Bank, N.A. as Beneficiary, recorded November 7, 2006, as Instrument No. 252461, and assigned to Chase Home Finance, LLC, by assignment recorded October 15, 2009, as Instrument No. 258369, in the records of Benewah County, Idaho.
THE ABOVE GRANTORS ARE NAMED TO COMPLY WITH SECTION 45-1506(4)(A)(ii) IDAHO CODE. NO REPRESENTATION IS MADE THAT THEY ARE, OR ARE NOT, PRESENTLY RESPONSIBLE FOR THIS OBLIGATION.
The default for which this sale is to be made is the failure to pay when due, under Deed of Trust, note, the monthly payments of $1,785.42, due per month for the month of January 1, 2008 and all subsequent months, payments, or payment of interest, late charges and other miscellaneous fees thereafter. The Principal balance is $266,657.81, the current interest rate is 5.50% per annum, as of June 3, 2009. All amounts are now due, together with unpaid and accruing taxes, assessments, trustee's fees, attorney's fees, costs and advances made to protect the security associated with this foreclosure and that the beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation.
Dated: February 11, 2011
TITLEONE CORPORATION
By: Amy L Wilcoxson
Trust Officer
2013 2-23/3-9

Exh B

302184-SM

Order No.: TS0901094A
CHF No. 1786087507/Green/302184-SM

AFFIDAVIT OF COMPLIANCE

I, Cindy Van Lith, the undersigned, being first duly sworn, deposes and says that I am a citizen of the United States, over eighteen (18) years of age, a resident of Ada County, State of Idaho, that I am an officer of TitleOne Corporation, our business address is 868 E. Riverside Drive, Suite 100, Eagle, Idaho 83616, and that we are successor trustee.

That by reason of the expiration or termination of the effect of the automatic stay provisions of the U.S. Bankruptcy Code 11 U.S.C. 362 and by that reason of Idaho Code 45-1506(A) Rescheduled Sale, the successor Trustee rescheduled the sale for the 21st day of April, 2011 and further postponed sale to May 19, 2011 and then to June 16, 2011.

That Notice of the Rescheduled Sale was given at least thirty (30) days before the day of the rescheduled sale by registered or certified mail to the last known address of all persons who were entitled to notice by mail of the original sale and to any person who shall have recorded a request for notice of sale at least forty-five (45) days prior to the rescheduled sale date in the form and manner required by section 45-1511, Idaho Code.

That Notice of the Rescheduled Sale was published in the newspaper of original publication once a week for three (3) successive weeks, making three (3) publications in all, with the last publication at least ten (10) days prior to the day of sale.

That the successor Trustee makes this Affidavit, stating compliance with sub-section (2) and (3) of Section 45-1506A, Idaho Code, as more further required in sub-section (4) of said Section.

Dated: June 16, 2011

TITLEONE CORPORATION,
Successor Trustee

Cindy Van Lith

By: Cindy Van Lith
Its: Assistant Treasurer

State of Idaho
County of Ada

On this 16th day of June in the year 2011, before me, the undersigned, a notary public in and for said state personally appeared, Cindy Van Lith, known to me to be the Assistant Treasurer of the corporation that executed this instrument and the person who executed the instrument on behalf of said corporation as trustee, and acknowledged to me that such corporation executed the same. In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Amy L. Wilcoxson
Notary Public
Residing at: Meridian
My commission expires on: January 11, 2013

AMY L. WILCOXSON NOTARY PUBLIC STATE OF IDAHO

260234

RECEIVED
2011 JUN 17 PM 3 48
BERNARD COUNTY
J. MICHELE REYNOLDS, CLERK
TOGATTO

Exh C

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, v. ROY GREEN DBA ST JOE SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-07698** **ORDER DENYING REQUEST FOR SANCTIONS** FILED SEP - 9 2011 INDUSTRIAL COMMISSION

On May 20, 2011, Claimant filed a motion for sanctions against the Industrial Special Indemnity Fund (ISIF) pursuant to Industrial Commission JRP 16. Claimant argues that he entered into good faith negotiations with the ISIF, and the parties submitted a lump sum settlement agreement (LSSA) to the Commission. The Commission declined to approve the LSSA, because the LSSA failed to meet the requirements of *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P. 3d 1008 (2009). Claimant requests that the Industrial Commission award Claimant reasonable attorney fees, punitive costs/damages, and require the ISIF to pay the Commission a reasonable sum to compensate it for the lost time the Commission

spent reviewing and considering the proposed LSSA. Claimant attached documentation to support his contention that the ISIF proceeded without good faith.

On May 27, 2011, ISIF filed a response to Claimant's motion. ISIF argues that Claimant is not entitled to sanctions, an award of punitive damages, or costs to the Commission for the LSSA. ISIF presents that the parties entered into settlement negotiations around September 2009. ISIF submitted a LSSA to Claimant for review around February 2010, which Claimant rejected and filed a request for hearing. Around December 2010, Claimant accepted ISIF's previous offer for settlement. ISIF did not guarantee that the Commission would approve the parties' proposed LSSA, and expressed reservations of how the Commission would proceed, due to the recent *Wernecke* decision. The ISIF declined to make certain admissions in the LSSA requested by Claimant, in the event that the parties might litigate the matter. Ultimately, the Commission declined to approve the parties' LSSA agreement.

On June 7, 2011, Claimant submitted a reply regarding his request for sanctions, and the supplement affidavit of Claimant's attorney, Starr Kelso, on June 27, 2011. Mr. Kelso stated that Claimant could have avoided foreclosure had the proposed lump sum settlement agreement been approved and paid, and attached documentation of foreclosure proceedings.

DISCUSSION

Rule 16 of the Judicial Rules of Practice and Procedure grants the Commission power to impose appropriate sanctions for any violation or abuse of its rules or procedures. Claimant's request for sanctions following the Commission's decision to decline approving a LSSA is without precedent. The Commission does not award punitive damages for an unapproved settlement or costs to the Commission for the time spent reviewing and analyzing LSSAs.

The Commission notes that nothing in the regulatory or statutory scheme requires parties to settle their disputes, just as nothing requires one party to accede to the terms of a settlement proposed by the other. The Commission assumes that Claimant and his attorney discussed the terms of the settlement, including its strengths and weaknesses, and that Claimant eventually decided to accede to the terms of the proposed settlement despite evidently having some reservations about the same. By its very nature, a LSSA is a compromise between the parties and has no binding authority until the Commission reviews and approves the LSSA. The parties' submission of a LSSA does not guarantee Commission approval of such agreement. The parties are correct that the Commission scrutinizes ISIF settlements for adherence to the principles outlined by the Supreme Court in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P. 3d 1008 (2009).

It is evident from the submitted documents that Claimant did not receive all the desired concessions from the ISIF regarding the wording of the settlement, and that Claimant felt that his requested changes would have satisfied the Commission and prevented the foreclosure of Claimant's house. Defendants were clear that they would not make the requested concession. Understandably, Claimant was frustrated about the settlement, yet still chose to execute and submit the same to the Commission. The Commission has no remedy for this situation. The Commission does not and cannot evaluate LSSAs on hypothetical terms from the parties. While the Commission is sensitive to the financial constraints facing workers' compensation claimants, the Commission cannot simply rubber-stamp a LSSA due to financial challenges of the parties. The Commission carefully reviews all proposed LSSAs, pursuant to its statutory authority. In this case, the Commission declined to approve the proposed LSSA, and the case will proceed to hearing.

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///

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Based on the foregoing, the Commission hereby **DENIES** Claimant's request for sanctions, damages, and costs to the Commission.

IT IS SO ORDERED.

DATED this 9th day of September, 2011.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Chairman

R.D. Maynard, Chairman

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2011 a true and correct copy of the foregoing **Order Denying Request for Sanctions** was served by regular U.S. mail upon:

STARR KELSO
ATTORNEY AT LAW
PO BOX 1312
COEUR D'ALENE ID 83816

THOMAS CALLERY
PO BOX 854
LEWISTON ID 83501

ERIC S BAILEY
BOWEN & BAILEY, LLP
PO BOX 1007
BOISE ID 83701

cs-m

STARR KELSO
Attorney at Law
P.O. Box 1312
Coeur d'Alene, Idaho 83816
Tel: 208-765-3260
Fax: 208-664-6261

Attorney for Mr. Green

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN Claimant,	:	Case No. I.C. 06-07698
vs.	:	MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR SANCTIONS AND REQUEST FOR HEARING
ROY GREEN DBA ST. JOE SALVAGE LOGGING, Employer,	:	
TRAVELERS INDEMNITY COMPANY, Surety, and	:	
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants	:	

COMES NOW Claimant by and through his attorney of record and moves that the Industrial Commission reconsider its denial of Claimant's motion for sanctions against the ISIF and requests that a hearing be scheduled on the motion for sanctions.

The Industrial Commission misperceives the basis of the motion for sanctions. The basis is *not* that the Industrial Commission denied the proposed lump sum settlement agreement. To the contrary the basis of the motion is contractual and it is founded upon the following facts:

1. ISIF and Claimant agreed to settle the ISIF's exposure to Claimant for the sum of $50,000.

2. At the time of the offer and the acceptance there was no *caveat* made to the offer by the ISIF that it would only agree to a lump sum settlement agreement that would not be consistent with the *Werneke v. St. Maries Joint School District No. 401, 147 Idaho 277, 207 P. 3d 1008 (2009)* decision of the Idaho Supreme Court. To even suggest that it the offer was made with such a *caveat* would be to be an implicit admission of bad faith and probably fraud. Claimant entered into the lump sum settlement agreement in the belief, fully justified by the known decision of the Idaho Supreme Court, that the offer necessarily was one that required a lump sum settlement agreement to be prepared in compliance with *Werneke*.

As the Industrial Commission decision "assumes", Claimant's counsel most certainly "discussed the terms of the settlement." However, contrary to the Industrial Commission's further assumption that "Claimant eventually decided to accede to the terms of the proposed settlement despite evidently having some reservations about the same" what the Claimant did was sign the agreement because it was the last, and only, chance to save his family home. A *refusal* by the Claimant to sign the agreement that the ISIF *required* would have been totally contrary to his agreement to settle the claim and totally contrary to his extreme efforts undertaken to save his family home. He simply had no choice but to sign the agreement, exhaust all his efforts to obtain the contracted for payment, and hope that the Industrial Commission would approve the agreement.

The Claimant is not suggesting, or requesting, that the Industrial Commission approve the lump sum agreement that was presented to it. As the Commission correctly notes there is "nothing in the regulatory or statutory scheme that requires parties to settle their disputes." That, however, misses the whole point. The Claimant and the ISIF *did* settle their dispute. The ISIF

just chose to subsequently sabotage the approval of the settlement agreement submitted to the Industrial Commission. Further whether or not the contractual agreement is binding on the Industrial Commission has no bearing on the contractual obligation of the ISIF to either provide Claimant with an agreement that the Industrial Commission will approve consistent with *Werneke* or pay him $50,000 subject to later setoff against a future award of benefits to the Claimant.

Indeed the Industrial Commission has a very clear remedy for this situation. The Claimant claims that the Industrial Commission must either order ISIF to provide Claimant with a lump sum settlement agreement that complies with *Werneke* or pay to Claimant the amount of the settlement contractually agreed to by the parties. If the Industrial Commission choses to order the payment of the contractually agreed amount instead of requiring the ISIF to submit a lump sum settlement agreement in compliance with *Werneke*, the ISIF will be entitled to set-off against the amount of benefits awarded by the Industrial Commission with the payment made under the contract. The Commission decision comments that the "Commission is sensitive to the financial constraints facing workers' compensation claimants" is without substance if the Commission chooses to deny Claimant's request that the ISIF be ordered to comply with one of the two remedies set forth by Claimant. The workers' compensation is a slow, cumbersome, and financial nightmare for injured workers who are left grasping at ways to save everything that they have worked for their entire life to acquire. A failure to require the ISIF to choose 'option A or option B' can be viewed as nothing less than a rejection of the Commission's responsibility to the injured workers of Idaho in favor of ensuring that a state agency, the ISIF, retains money that was provided by surcharges on other workers' compensation settlements or awards for the

express purpose of assisting workers who, despite prior impairments and disabilities, continue on and struggle to lead productive lives.

The matter before the Industrial Commission at this time is one of enforcing a contract entered into between the ISIF and the Claimant. The contract simply requires the ISIF to pay the Claimant $50,000.00 for the dismissal of the claim against it. The Industrial Commission correctly notes in its decision that after Claimant and the ISIF agreed to the settlement the ISIF unilaterally changed the contract. The decision notes that the ISIF declined to make the admissions necessary for the agreement to pass *Werneke*, "in the event that the parties might litigate the matter." As the Industrial Commission decision further notes the Commission "scrutinizes ISIF settlements for adherence to the principles outlined by the Supreme Court in *Werneke*." If the agreement was prepared lawfully, by the ISIF's skilled counsel, to be in compliance with *Werneke* there would there be a reason to reasonably suspect the Industrial Commission would fail to follow its statutory mandates and approve it. There would be no reason to suspect that the ISIF would have to later litigate the matter. The 'logic' behind the submittal of the agreement by the ISIF must have been that it perceived there to be a reasonable chance that the Industrial Commission would reject a lump sum settlement involving the ISIF, even if it was in full compliance with *Werneke*. Such a position by the ISIF is nothing short of a direct attack on the integrity of the Industrial Commission when it is acting pursuant to its statutory mandates. The fact that the ISIF chose to require that Claimant sign a lump sum settlement that the Industrial Commission found did not comply with *Werneke*, does not relieve the ISIF from its contractual obligation nor Claimant from his acceptance of the contract.

The Idaho Supreme Court, since at least 1959, in *Wilson v. Bogert, 81 Idaho 535, 347 P. 2d 341(1959)* has mandated that when the parties to a legal controversy enter into a contract compromising and settling their adverse claims, such agreement is binding and is enforceable at law or in equity. Claimant and ISIF entered into an oral contract to settle their adverse claims in this matter. That was the contract. The ISIF subsequently chose to require the Claimant to sign a lump sum settlement agreement that it knew was not compatible with *Werneke*. The contracted settlement was not contingent upon the Industrial Commission approving an agreement that did not comply with *Werneke*. It was the ISIF's obligation, after agreeing to settle for the stated amount, to provide Claimant with a lawful agreement. The law is clear that a contract (*here the accepted offer to pay Claimant $50,000*) consists not only of the expressed words (*e.g. we will pay Claimant $50,000 to be released from this claim*) but it also consists of the obligations reasonably implied (*here it was reasonably implied that the ISIF would prepare and provide Claimant with an agreement that was consistent with the law*). The ISIF, instead of submitting a lawful agreement to Claimant to sign, demanded that he sign one that it knew, or should have known, did not comply with *Werneke*. Claimant could not have, and did not, foresee that the ISIF would proceed in such a bad faith manner. Claimant was entitled to presume that the ISIF would provide a lawful agreement to memorialize the contract it entered into for submittal to the Industrial Commission. The *contract* for payment is enforceable against the ISIF in law and in equity. In equity, the ISIF is entitled to a set-off, equal to the amount of its contracted payment, against a subsequent award by the Industrial Commission. The action of the ISIF in demanding that Claimant sign an agreement, solely for the purpose of presenting it to the Industrial Commission, vilates, nullifies and significantly impaired the benefit of the contract to Claimant

and it can only be presumed that it was done with malice aforethought knowing the requirements of a lump sum settlement agreement under *Werneke*. The benefit of the contract was obvious. Claimant was going to use the settlement money to save his family home. The ISIF's refusal to provide an agreement memorializing its contract with the Claimant was a violation of the implied-in-law covenant of good faith and fair dealing that exists in all contracts in Idaho. *Idaho First Nat. Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P. 2d 841 (1991).*

This is a proceeding to enforce the agreement of compromise and settlement. This is not a proceeding demanding that the Industrial Commission approve an agreement memorializing a settlement that does not comply with *Werneke*. In considering the motion the Industrial Commission does not evaluate the merits or the validity of the lump sum settlement agreement forced upon Claimant, after the agreement to settle was made. *see Wilson, supra.* The Industrial Commission only orders the ISIF to live up to its contractual obligation to the Claimant. The Industrial Commission should either order the ISIF to submit a lump sum settlement agreement to Claimant that is in full compliance with Werneke and without regard to whether the ISIF "might litigate the matter," or order the ISIF to pay Claimant the sum of $50,000 now subject to potential offset.

DATED this 20th day of September, 2011.

Starr Kelso, Attorney for Claimant Mr. Green

CERTIFICATE OF SERVICE: A copy was faxed to Eric Bailey attorney for employer/surety 208-344-9670 and Thomas Callery attorney for ISIF 208-746-9553 on the 20th day of September, 2011.

Starr Kelso

Thomas W. Callery, ISBN 2292
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, vs. ROY GREEN DBA ST. JOES SALVAGE LOGGING, Employer, TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	Case No. I.C. 06 - 07698 **RESPONSE TO CLAIMANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR SANCTIONS AND REQUEST FOR HEARING**

Comes now the Defendant, STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, by and through its attorney of record, THOMAS W. CALLERY of Jones, Brower & Callery, PLLC, and hereby responds to the Claimant's motion for reconsideration concerning the order entered by the Commission denying a request for sanctions dated September 9, 2011. The

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Claimant had previously filed a motion requesting sanctions pursuant to Rule 16 of the Judicial Rules of Practice and Procedure related to the ISIF's alleged misconduct surrounding the preparation and submission of a proposed lump sum settlement agreement between the Claimant and the Fund.

In its decision, the Commission noted that the Claimant's request for sanctions against a party following a Commission decision to decline approval of a lump sum agreement was without precedent. The Commission further ruled that a lump sum settlement agreement is a compromise between the parties and is not binding until the Commission reviews and approves the lump sum settlement. The Commission further declined to impose sanctions or costs related to Commission time and expense reviewing lump sum agreements that are ultimately not approved.

The Claimant's motion for reconsideration now appears not to request sanctions pursuant to Industrial Commission Judicial Rule 16, but requests an order from the Commission requiring the Fund to provide Claimant with a lump sum settlement agreement that complies with *Wernecke* or, in the alternative, to pay the Claimant the $50,000.00 referenced in the lump sum agreement. The relief requested in the motion for reconsideration is different than the relief requested in the Claimant's original motion for sanctions. The Commission should summarily deny this purported motion for reconsideration that attempts to raise completely new issues.

A motion for reconsideration brought pursuant to Idaho Code Section 72-718 and Industrial Commission Rule 3(f) must be properly supported by a recitation of the factual findings and/or legal conclusion with which the moving party takes issue.

The Commission does not re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor. A motion for reconsideration must

present to the Commission new reasons factually and legally to support reconsideration rather than rehashing evidence previously presented. *Curtis v. M.H. King Company*, 142 Idaho 383 (2005).

The motion for reconsideration now requests that the Commission enforce a lump sum agreement the Commission has refused to approve. The Claimant, in essence, is asking the Commission to enforce the terms of the lump sum agreement even though the Commission evaluated and rejected the agreement pursuant to *Wernecke v. St. Maries Joint School District No. 401*, 147 Idaho 277 (2009). The fallacy of the Claimant's argument is that there is no contract to enforce if the Commission does not approve of the lump sum agreement. As the Idaho Supreme Court stated in *Wernecke*:

> "Claimants and ISIF do not have absolute freedom to contract because the duties of the parties arise under the act."

Further, the Court stated:

> "Unless the Commission finds that the requisite elements exist, it may not approve a lump sum settlement agreement involving ISIF. Such findings are for the benefit of both the Claimant -- to protect him or her from himself or herself -- and of ISIF -- to keep it from making unwarranted payments when there are no findings establishing ISIF liability."

Without Industrial Commission approval there is no legal contract for the Commission to enforce. The entire rationale of *Wernecke* would be negated if the Fund could enter into lump sum settlement agreements with claimants that are contractually binding upon the parties but do not generate Commission approval.

Moreover, the Claimant and his legal counsel knew full well that any agreement between the Fund and the Claimant to settle the case on a lump sum basis required Commission approval

and was not binding upon either party without Commission approval. Any agreement between the ISIF and the Claimant was contingent upon Industrial Commission approval and an order dismissing the complaint of the Claimant with prejudice. Without Industrial Commission approval and without an order dismissing the Claimant's complaint with prejudice, there is no agreement to enforce. The Claimant, in essence, is asking for a $50,000.00 cash payment without the ISIF receiving any of its benefit of the bargain.

In addition, the Claimant conveniently ignores his letter of December 3, 2010, which is attached to this brief as Exhibit A. In that letter, counsel admitted that discussions had occurred between him and the ISIF that indicated that the Commission had been cautious in approving settlements involving the ISIF in light of the *Wernecke* case. The Claimant was fully advised that the lump sum agreement may very well not be approved due to the particular facts of the case. The Claimant went on to condition his agreement to enter into a lump sum settlement agreement with the following language contained in his December 3, 2010 letter to counsel for the ISIF:

> "Thus of course if the Commission determines to not approve the settlement agreement the offer and Mr. Green's acceptance will be null and void and we will have to proceed to hearing."

It was clear to both parties to the lump sum agreement that if the agreement was not approved by the Commission it would be null and void, not be binding, and that both parties were then free to proceed to hearing. That is exactly what has happened.

An understanding of the factual history of this case is important to an understanding of how the parties got to the point of submitting a lump sum agreement to the Commission that eventually was rejected. Throughout his briefing, the Claimant has eluded to the financial problems that the Claimant has and the length of the Industrial Commission process. The Claimant and his counsel conveniently ignore the fact that the Fund made a settlement proposal

to the Claimant at a mediation that occurred in Coeur d'Alene on September 29, 2009. This settlement offer was neither accepted nor rejected by the Claimant, but was held open by the ISIF after the mediation to give the Claimant additional time to think about the settlement. The Claimant received an initial lump sum agreement for his review on February 24, 2010, which was never signed. The Claimant eventually rejected the proposed settlement and on March 10, 2010, requested that the case be set for hearing.

The first indication from the Claimant that he would accept the ISIF settlement offer came in a faxed letter dated December 3, 2010 (see attached Exhibit A), fifteen months later. This letter contained numerous conditions that Claimant insisted be incorporated into the lump sum agreement. The ISIF acquiesced to the Claimant's demands contained in the December 3, 2010 letter and incorporated those conditions into the proposed lump sum agreement. Contrary to the assertion of Claimant, the Fund did not sabotage this lump sum agreement, but the Claimant, in insisting that he had no restrictions of any kind prior to the last accident, and that he became totally disabled solely as a result of the last accident, made the likelihood of Commission approval remote in light of the *Wernecke* decision. The Claimant, in his December 3, 2010 letter, demanded the following conditions:

1. **If the matter proceeded to hearing solely against the Surety and the Commission ruled that the Fund had no liability, the Fund would not receive any type of refund on its $50,000.00 payment.**
2. **The acceptance by Mr. Green is not an admission or concession of any nature or kind that the ISIF has any liability regarding Mr. Green's industrial accident and injury of July 3, 2006.**

The Claimant is asserting a position that the Fund has no liability and required that to be

included into the lump sum agreement, and now complains that the Fund in some manner sabotaged the lump sum approval process. It was the Claimant's insistence on settling the matter on the conditions outlined in the December 3, 2010 letter which made it highly unlikely that the Commission would approve the lump sum agreement.

3. **I want to specifically recognize the fact that Mr. Green did not join the ISIF in this matter.**
4. **Mr. Green's deposition testimony documents that he did not believe that his physical condition prior to the accident and injury was a hindrance or obstacle to his ability to obtain employment.**

Under Idaho law it is clear that a Claimant must establish a pre-existing impairment that constituted a hindrance and obstacle to employment or reemployment prior to the last accident. This statement contained in the letter of counsel for the Claimant also made it highly unlikely that the Commission would approve the lump sum agreement.

5. **His current total permanent disability is solely caused by said July 3, 2006 accident.**

Again, the Claimant is asserting that his pre-existing impairments did not contribute to his total disability and that he is totally and permanently disabled based upon the effects of the 2006 accident alone. In other words, there is no combined with, which is a necessary prerequisite to ISIF liability.

6. **Mr. Green's belief that the ISIF has and had no liability in his claim arising out of his accident and injury.**

In essence, I'll take your money, but under Idaho law I am not entitled to it.

7. **If the Commission determines to not approve the settlement agreement the offer**

and Mr. Green's acceptance will be null and void and we will have to proceed to hearing.

Claimant recognized that if the Commission does not approve the lump sum settlement, neither party will be bound by the agreement and both parties will be free to assert their position at hearing. This is directly contrary to the position that the Claimant is now taking that there is an enforceable contract when, in fact, the Claimant insisted that he had a right to pursue his case against the Fund if the lump sum agreement was not approved. The Claimant's position now has conveniently changed.

8. **It is my understanding from our discussions that the Industrial Commission has been cautious in approving settlements involving the ISIF.**

The Claimant and his counsel were well aware of the *Wernecke* decision and had been advised by the Fund that the Commission may very well not approve the lump sum agreement. It is clear that under Idaho law there is no contract to enforce, nor any basis to order the Fund to pay any funds to the Claimant. The Commission has properly exercised its role in reviewing lump sum agreements, particularly in light of the *Wernecke* decision.

In *Wernecke*, the Court stated:

> "ISIF's liability under Section 72-332 is not invoked unless the four elements requisite to such a claim are found by the Commission to be present. If the Commission does not make the requisite findings, it has no authority or jurisdiction to hold ISIF liable on a claim. In this case the Commission merely gave its stamp of approval to the agreement, making no findings as to whether ISIF's liability under Section 72-332 had been properly invoked. Without such findings the Commission lacks statutory authority to approve the agreement and its order purporting to do so is void. Without Commission approval the lump sum agreement is void."

As the Court went on to state in *Wernecke*:

> "ISIF's liability may only be invoked when the conditions specified in the statute, as defined in *Garcia*, are present. That requires findings by the Commission.[8] Unless the Commission finds that the requisite elements exist, it may not approve a lump sum settlement agreement involving ISIF. Such findings are for the benefit of both the claimant -- to protect him or her from himself or herself -- and of ISIF -- to keep it from making unwarranted payments when there are no findings establishing ISIF's liability.[9]
>
> In this regard, the Commission plays a gatekeeper role and must scrupulously perform that function. The requisite findings may be made by the Commission upon a hearing on the merits or upon a stipulation of the parties considered and approved by the Commission.
>
> [9]These issues were recognized by Commissioner Maynard in his dissent:
> *The majority would have you believe that a claimant's assertion of total and permanent disability is adequate information for all parties, including the Commission, to proceed with the settlement. On the contrary, it is proper for the Commission "to consider the underlying merits of the [claimant's] claims when making its statutorily required determination as to whether the settlement agreements were 'for the best interest of all parties.' Without some preliminary inquire into the merits of the claim, the Commission cannot properly judge whether an injured worker is surrendering a strong claim for too small a settlement, or whether the ISIF is unwisely satisfying spurious claims at great cost."* (quoting *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 137, 106 P.3d 455, 463 (2005)."

Finally, the Claimant asserts that the Fund acted in bad faith by not preparing a lump sum agreement that complied with the requirements of *Werneke*, and further that the Commission should order the Fund at this point in time to redraft a lump sum agreement that complies with *Wernecke*. This allegation by the Claimant controverts the purpose of *Wernecke* and counsel's duty to the Commission and to the court system. The purpose of *Wernecke* is to ensure that lump sum agreements that compromise the rights of claimants to file future claims meet the strict criteria of Idaho Code Section 72-332, which outlines the basis for liability of the second injury fund. Counsel for the Fund will not construct a lump sum agreement that ignores certain facts in the case, or make inaccurate and misleading statements to the Commission in an attempt to

obtain approval of the lump sum agreement. What specifically does the Claimant want to change in the lump sum agreement? The Claimant himself, in his letter of December 3, 2010 outlining the various conditions attached to the lump sum agreement, made the likelihood of the Commission approving this lump sum agreement remote. The Fund takes the preparation of a lump sum agreement seriously and attempts to provide to the Commission a full factual basis for the agreement. The lump sum agreement prepared by the Fund in the present case accurately summarized the pre-existing condition, the July 3, 2006 accident and resulting surgery, and included the various impairment ratings and restrictions that the Claimant sustained.

Frankly, if there were some small change in the lump sum agreement, or clarification that would result in approval by the Commission, the Fund certainly would have made the correction or change. However, it was clear that the Commission, under the facts of this case, chose not to approve the lump sum agreement in large measure based upon the position of the Claimant, where he was asserting total disability based upon the effects of the last accident alone.

The Fund in this case has acted both appropriately and ethically toward the Claimant and the Commission. The Fund participated in a requested mediation which resulted in a settlement offer made to the Claimant which the Claimant refused to accept for a period of fifteen months. Ten days before hearing the Claimant finally accepted the Fund's offer, but inserted numerous conditions as a basis for its acceptance. The conditions requested by the Claimant were incorporated in the lump sum agreement but resulted in an agreement that was not acceptable to the Commission in light of the *Wernecke* case. The Claimant knew full well that approval by the Commission was not assured and that both parties reserved the right to bring the case to hearing in the event the lump sum agreement was not approved. The Claimant, nevertheless, has brought two motions in an attempt to force the Fund to amend the lump sum agreement in a manner

which the Claimant does not specify. Frankly, it should be the Fund seeking sanctions for attorney fees and costs for the meritless use of the legal process by Claimant in filing these two motions.

The ISIF respectfully requests that the Commission deny the motion for reconsideration.

DATED this 23 day of September, 2011.

JONES, BROWER & CALLERY, P.L.L.C.

THOMAS W. CALLERY
Attorney for Defendant ISIF

CERTIFICATE OF SERVICE

I certify that on the 23 day of September, 2011, a true and correct copy of the *Response to Motion for Reconsideration* was served by the method indicated below and addressed upon each of the following:

STARR KELSO ATTORNEY AT LAW P.O. BOX 1312 COEUR D'ALENE, ID 83816	☒ ☐ ☐ ☐	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to:_____
ERIC S. BAILEY BOWEN & BAILEY, LLP P.O. BOX 1007 BOISE, ID 83701	☒ ☐ ☐ ☐	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to:_____

THOMAS W. CALLERY

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STARR KELSO
Attorney at Law

Stephanie Gossard
Office Manager

Max Kelso
Sr. Claims Investigator

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"There are evil men, and they are to be feared. However, the greatest evil we all face today is the indifference of good men!"

December 3, 2010

Thomas W. Callery
Attorney at Law

Via fax: 208-746-9553

RE: **Green v. St. Joe Salvage, Travelers Indemnity Co., and ISIF**

Dear Tom:

Mr. Green has authorized me to accept the $50,000.00 full and final lump sum settlement offer of your client, the ISIF, in the above matter. Mr. Green's acceptance of the ISIF's offer is not a waiver of any claim against the employer/surety in this matter. Mr. Green reserves the right to provide appropriate language regarding the apportionment of the settlement over his remaining life expectancy. It has not yet been determined whether or not Mr. Green is willing to accept the surety's offer. This offer and acceptance is only a settlement of the contingent liability of the ISIF regardless of whether the Industrial Commission, if the matter proceeds to hearing against the surety, determines that the ISIF actually has no liability or some liability regardless of the extent. I want to also emphasis that this acceptance by Mr. Green is not an admission, or concession, of any nature or kind, that the ISIF has any liability regarding Mr. Green's industrial accident and injury of July 3, 2006. I want to specifically reference the fact that Mr. Green did not "join" the ISIF in this matter, that Mr. Green's deposition testimony documents that he did not believe that his physical condition prior to the accident and injury was a hindrance or obstacle to his ability to obtain employment, that his current total permanent disability is solely caused by his said July 3, 2006 accident. The fact that the surety chose to join the ISIF and the fact that the ISIF has chosen to offer a full and final settlement to Mr. Green, based upon their respective independent decisions, in no way influence or compromise Mr. Green's belief that the ISIF has, and had, no liability in his claim arising out of his accident and injury. It is my understanding from our discussions that the Industrial Commission has been cautious in approving settlements involving the ISIF. Thus, of course, if the Commission determines to not approve the settlement agreement the offer and Mr. Green's acceptance will be null and void and we will have to proceed to hearing.

Very truly yours,

Starr Kelso
Attorney at Law

EXHIBIT A

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY J. GREEN, Claimant, v. ROY GREEN, dba ST. JOE SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-007698** **ORDER DENYING RECONSIDERATION**

Pursuant to Idaho Code § 72-718, Claimant moves for reconsideration of the Commission's Order Denying Request for Sanctions ("Order") in the above-captioned case. Defendant Industrial Special Indemnity Fund ("ISIF") objects to the motion and asks that the Order be upheld.

A decision of the Commission, in the absence of fraud, shall be final and conclusive, provided that within twenty days from the date of filing the decision, any party may move for reconsideration. Idaho Code § 72-718. A motion for reconsideration must "present to the Commission new reasons factually and legally to support [reconsideration] rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 128 P.3d 920 (2005). The Commission is not inclined to reweigh evidence and arguments simply because an issue was not resolved in the party's favor.

On May 20, 2011, Claimant filed a motion for sanctions against ISIF. Claimant had previously entered into a lump sum settlement agreement ("LSSA") with ISIF, but the Commission declined to approve the LSSA because it failed to meet the requirements set forth in *Wernecke v. St. Maries Joint School District No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). In his subsequent motion for sanctions, Claimant stated that he had suffered financial hardship because the LSSA was not approved, and he argued that the failure of the LSSA was due to ISIF's refusal to insert language in the LSSA that would have rendered it consistent with *Wernecke*. Essentially, Claimant blamed ISIF for his hardship. Claimant asked the Commission to order ISIF to 1) pay Claimant reasonable attorney fees, 2) pay Claimant punitive costs and damages, to be determined at a hearing, and 3) compensate the Commission for the "lost time" of the Commissioners and staff who considered the LSSA.

ISIF responded that Claimant and Claimant's counsel were aware at the time the LSSA was submitted that it might not be approved under *Wernecke*, but Claimant chose to sign the agreement anyway. ISIF disagreed that its actions caused Claimant hardship, characterizing Claimant's motion as "frivolous."

Claimant replied that ISIF had a duty to prepare the LSSA in a manner that would be consistent with *Wernecke*. However, ISIF refused to do so. Such refusal constituted bad faith and caused the LSSA to be disapproved by the Commission. Claimant argued that his settlement agreement with ISIF was a legally binding, enforceable contract, that good faith and fair dealing are implied obligations in every contract, and that ISIF acted in bad faith by not inserting language consistent with *Wernecke* in the LSSA. Consequently, the Commission should order ISIF to "submit … a lump sum settlement agreement that complies with the standards expressed in *Wernecke*." In the alternative, the Commission should hold a hearing to determine the "nature

and extent of damages suffered" by Claimant "as a result of ... ISIF's actions." *See* Claimant's Reply to ISIF's Response to Motion for Sanctions, p. 7.

On September 9, 2011, the Commission issued the Order Denying Request for Sanctions, noting that the Commission "does not award punitive damages for an unapproved settlement," as there is "nothing in the regulatory or statutory scheme [that] requires parties to settle their disputes." *See* Order, pp. 2-3. Whatever Claimant's reservations about the LSSA, he voluntarily signed it, thus subscribing to the language therein. Claimant failed to cite a basis for which sanctions could be imposed.

On reconsideration, Claimant argues that the Commission misunderstood the basis of his motion for sanctions. Claimant did not ask that sanctions be imposed because the LSSA was not approved. Rather, sanctions should be imposed because ISIF knowingly "sabotaged" the LSSA by refusing to insert language that would satisfy the *Wernecke* requirements. Claimant repeats his argument that when ISIF agreed to settle the case, it formed an oral contract with Claimant and was thus obliged to act in good faith under the law of contracts. By refusing to include language consistent with *Wernecke*, ISIF acted in bad faith, as it knowingly caused the LSSA to be disapproved, causing hardship to Claimant. Therefore, Claimant is entitled to one of two remedies: either the Commission should order ISIF to submit an LSSA that complies with *Wernecke*, or the Commission should order ISIF to pay to Claimant the sum of $50,000.00, which Claimant would have received had the LSSA been approved.

ISIF denies that it acted in bad faith. It notes that Claimant and Claimant's counsel were aware that the LSSA might not be approved by the Commission, and that the agreement was not binding or enforceable without Commission approval. In the absence of a binding agreement, ISIF is not obliged to pay anything to Claimant, because there is no contract to enforce.

Furthermore, ISIF argues that Claimant's motion for reconsideration should be denied because the requested relief is not the same as the sanctions requested in the original motion for sanctions.

Regardless of the relief requested, we find that reconsideration is not warranted. Claimant is incorrect that his motion for sanctions was misunderstood. The Commission addressed Claimant's argument about ISIF's refusal to include certain language in the agreement when the Commission observed:

> It is evident from the submitted documents that Claimant did not receive all the desired concessions from the ISIF regarding the wording of the settlement, and that Claimant felt that his requested changes would have satisfied the Commission and prevented the foreclosure of Claimant's house....Understandably, Claimant was frustrated about the settlement, yet still chose to execute and submit the same to the Commission.

See Order, p. 3. Thus, the Commission has already considered Claimant's arguments concerning the language of the LSSA and ISIF's alleged bad faith, but was not persuaded by them. Claimant's argument about bad faith might be more compelling if ISIF had promised to include language consistent with *Wernecke* in the LSSA, only to renege on that promise; however, Claimant has not shown that ISIF made such a promise, and Claimant has not offered additional arguments that would support imposing sanctions. Therefore, Claimant's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED this 1st day of November, 2011.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day November, 2011, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN,

Claimant,

v.

ROY GREEN, dba ST. JOE SALVAGE,

Employer,

and

TRAVELERS INDEMNITY COMPANY,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

IC 2006-007698

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in St. Maries on August 21 and 22, 2012. Claimant was present at the hearing and represented by Starr Kelso of Coeur d'Alene. Eric S. Bailey of Boise represented Employer and Surety (referred to collectively as Surety), and Thomas W. Callery of Lewiston represented the Industrial Special Indemnity Fund (ISIF). The parties presented oral and documentary evidence and five post-hearing depositions were taken. Post-hearing briefs were filed, and the matter came under advisement on March 21,

2013. Upon Referee Just's retirement from the Commission in April 2013, the case was reassigned to the Commissioners.

ISSUES

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

1. Whether Claimant's condition is due in whole or in part to a pre-existing or subsequent injury or condition;

2. Whether and to what extent Claimant is entitled to benefits for:

   a. Medical care;

   b. Temporary partial and or temporary total disability (TPD/TTD);

   c. Permanent partial impairment (PPI); and

   d. Disability in excess of impairment, including total permanent disability pursuant to the odd-lot doctrine;

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

4. Whether ISIF is liable under Idaho Code § 72-332; and, if so,

5. Apportionment under the *Carey* formula; and

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

CONTENTIONS OF THE PARTIES

Claimant contends that he is totally and permanently disabled as an odd-lot worker due, at least in part, to his 2006 industrial injury to his cervical and lumbar spine. He primarily relies upon the opinions of Dr. Dirks, his treating orthopedic surgeon, as well as those of Dan Brownell, vocational consultant. Claimant does not advance any arguments regarding ISIF

liability. Claimant also asserts he is entitled to an award of attorney fees for Surety's unreasonable adjustment of his claim.

Surety contends that Claimant suffered no permanent impairment (and, therefore, no disability) due to his 2006 industrial injuries and, further, that Claimant is not totally and permanently disabled. In the event the Commission disagrees on both of these issues, then Surety asserts that ISIF is liable for 57% to 67% of Claimant's benefits because Claimant's total and permanent disablement is due to a combination of Claimant's 1) pre-existing permanent impairments due to prior injuries to his cervical, thoracic and lumbar spine, both of his upper extremities and both of his lower extremities, and 2) the cervical and lumbar injuries Claimant sustained in his last industrial accident in 2006. Surety seeks findings that Claimant's pre-existing impairments were manifest, constituted subjective hindrances to employment, and "combined" with injuries sustained in Claimant's last accident such as to trigger ISIF liability. Surety also seeks a credit for overpaying temporary disability benefits.

ISIF joins Surety in maintaining that Claimant is not permanently and totally disabled under either the 100% method or the odd-lot doctrine. However, if the Commission finds that he is, then ISIF contends it is nevertheless not liable because 1) the evidence fails to establish Claimant had any pre-existing permanent impairments that meet the first three requirements of the *Dumaw* test, and 2) any pre-existing impairment did not combine with Claimant's 2006 industrial accident to cause total and permanent disability.

Surety and ISIF both rely upon the vocational opinions of Nancy Collins, Ph.D.

OBJECTIONS

All pending objections preserved in the deposition transcripts are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing depositions of:

    a. Claimant dated January 5, 2007 and February 20, 2009;

    b. Michael Ludwig, M.D. dated January 5, 2007;

    c. Bret Dirks, M.D. dated December 23, 2004; and

2. The testimony taken at hearing of:

    a. Claimant;

    b. Robby Macklin;

    c. Randy Reynolds;

    d. Dewey Shawver;

    e. Shelby Green;

    f. Wesley Green;

    g. Mike Roland;

    h. Dan Brownell; and

    i. Nancy Collins, Ph.D; and

3. Joint Exhibits 1-91 submitted after the hearing, which consist of the following exhibits admitted at the hearing:

    a. Claimant's Exhibits 1-59;

    b. ISIF and Employer's Exhibits 1-32; and

    c. Employer's Exhibits 1-12; and

4. The post-hearing depositions of:

a. Nancy J. Collins, Ph.D. taken December 27, 2011;

b. Carrie Nordin taken October 5, 2012;

c. Don Williams, D.O. taken September 17, 2012; and

d. Bret Dirks, M.D. taken September 18, 2012.

After having considered all the above evidence and briefs of the parties, the Commission renders the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

PRE-INDUSTRIAL INJURY VOCATIONAL AND MEDICAL HISTORY

1. Claimant was 53 years of age at the time of the hearing and resided in St. Maries, the seat of Benewah County. He was 46 at the time of his relevant industrial accident in 2006.

2. Claimant left high school after the 11th grade (in 1976) to go to work to help support his parents. He later obtained a GED. He has no further formal education.

3. While in high school, Claimant began working at a service station where he changed oil, pumped gas, checked tires, filled propane tanks, and performed other service station work. He left to work in saw mills, including the Potlatch saw mill.

4. In 1980, Claimant was incarcerated for grand larceny after he cut cedar trees from federal land and sold them. He testified that he did it to support two families of cousins who were starving. Claimant has had no other problems with the law. While he was incarcerated, he got his GED and did some teaching. Later, in 1981, Claimant took a job operating a Caterpillar tractor (Cat).

5. Claimant's pre-existing medical history is long and complicated.

6. In 1981, Claimant underwent cervical imaging that, according to Drs. Westbrook, Zoltani, and Barnard, evidenced some sort of neck injury. (No accompanying medical records were available.)

7. In 1982 and 1983, Claimant worked in Alaska as a night shift foreman on a fish butchering line. He also ran a forklift and organized cold storage, among other things. In addition, Claimant performed some electrical work and "engineered a fishing boat." JE-339.

8. In 1984, Claimant was seriously injured when a choker belt struck him in the low back, causing him to fall down a mountainside. Claimant was off work for 245 days in recovery. With assistance from the Industrial Commission Rehabilitation Division (ICRD), Claimant received on-the-job training with CC Services, a vehicle repair shop, but he soon left to take another logging job because the pay was too low. Claimant testified that he made a full recovery and returned to logging without further difficulties.

9. Thereafter, Claimant began working as a sawyer and operator of logging equipment including skidders, Cats and log processors, among other machines. Notably, he ran Mike Roland's salvage logging operation for several years, during which he also logged the timber he used to build his own house.

10. In 1987, Claimant injured his neck and jaw when he was involved in a rollover skidder accident. He initially reported symptoms including right arm and hand pain which his physician ultimately deemed to be unsupported by findings evidencing true neurologic deficits in sensation. Claimant received conservative treatment, including physical therapy (which worsened his symptoms) and medications (including Flexeril, Tylenol 4 and Motrin 800).

11. As time passed, Claimant developed additional symptoms including pain in his right scapula and shoulder, paresthesia in his right upper extremity (RUE) without radiation, and low back pain. He then developed pain in both upper extremities with spasm in his left posterior cervical dorsal muscles, crepitus in his neck and upper back, and neurologic complaints without objectively identifiable source. Claimant's complaints grew to include ear-ringing (worse with a wide open mouth), but his neck and shoulder symptoms remained his worst problems. Claimant also reported temporomandibular joint (TMJ) symptoms that Dr. Westbrook could not connect to an objectively identifiable injury. In addition, Claimant reported his arms would fall asleep if he slept on his back and that he could not carry a half gallon of milk with his right arm because it was too heavy, among other intensifying symptoms, all of which Claimant attributed to the skidder rollover.

12. A panel evaluation by Drs. Powell and Clark on February 29, 1988 produced opinions that Claimant's subjective complaints were out of proportion to the (lack of) objective findings. The panel returned Claimant to work with no impairment and no restrictions. Nevertheless, Claimant continued to report symptoms and obtain medical treatment. In March 1988 Claimant advised Dr. Westbrook that he intended to pursue the matter in the courts. In April 1998, Dr. Lea opined that Claimant's bizarre complaints were likely due to psychophysiologic factors aggravating his pain, but he later opined that EMG findings were consistent with mild right carpal tunnel syndrome. In May 1988, a functional capacity evaluator opined Claimant exaggerated his pain and recommended, among other things, a psychological assessment. Thereafter, Claimant sought treatment from Dr. Gould, a chiropractor, and Drs. Hopwood and Henriksen, who recommended more treatment for cervical strain, chronic

neck pain, and left carpal tunnel syndrome. Dr. Henriksen and Dr. Gould advised Claimant not to return to skidder operating.

13. In 1988, Dr. Gould, a chiropractor, opined that Claimant had weakness at L4-5 that would likely result in a disc problem if not stabilized, and thinning at L5-S1.

14. In approximately October 1988, Claimant submitted a lump sum settlement agreement (LSSA), which was approved by the Commission on November 10, 1988. Claimant's settlement included a general 5% whole person PPI. The LSSA states that Claimant alleged he incurred injuries to his head, neck, back, knee, fingers, shoulder and right arm, specifically including acute strains of his neck and dorsal areas, mild concussion, and residual tinnitus. In addition, Claimant received $6,147.18 via the LSSA for retraining (presumably truck driver training recommended by ICRD). For whatever reason, Claimant did not follow up after receiving his settlement funds. He testified at the hearing that he did not pursue this option because he could not afford it, he was not interested in a sedentary job, and furthermore, he felt uncomfortable (fearful) with the idea of driving a big rig truck. However, ICRD records indicate that Claimant, at the time, told the consultant that he was very interested in truck driver training and intended to pursue it. By December 9, 1988, Claimant still had not returned to work; however, he ceased obtaining treatment for neck, TMJ, or back conditions. Claimant returned to logging and testified that he was able to perform his job without difficulty.

15. In approximately 1992, Potlatch contracted Claimant to log its property. Claimant hired a sawyer, obtained a business loan and workers' compensation coverage, moved his Cat trailer to Mica Meadows, and went to work. He named his sole proprietorship St. Joe Salvage.

16. Over time, Claimant acquired a log processor, a crane, and a bulldozer, among other equipment. Claimant's work consisted of salvage and cleanup, almost exclusively for Potlatch. "I go through - - they give me areas that the wind blows trees down, or that we have bug kill, and I just pretty much - - they start me in an area and I work my way." 2007 Cl. Dep., p. 8.

17. Potlatch provided 90 to 95% of the logging salvage work for St. Joe Salvage. Claimant did not need to bid jobs; Potlatch contacted him when logging work was available and paid just under $40 per ton delivered to the mill. After expenses, such as a 34% charge for loading and hauling, fuel costs, payroll, payroll taxes, and workers' compensation, Claimant figured he averaged $314 or $340 (apparently he could not remember which) per day over five or six years.

18. Claimant developed bilateral carpal tunnel syndrome while working for Mr. Roland's salvage logging operation. He underwent bilateral corrective surgeries in 1993. The surgeries were ultimately successful. Claimant testified he fully recovered from his carpal tunnel conditions, with no residual difficulties and no PPI.

19. In August 1995, Claimant separated his right AC (shoulder) joint while running down a hill with chokers, when the line tangled and abruptly stopped, yanking his arm. Claimant underwent surgery by Dr. Cody in Spokane. The surgery was successful and Claimant returned to work without permanent restrictions or pain.

20. In February 2000, Claimant was diagnosed with a hernia. He underwent hernia repair surgery, after which he returned to logging work. Complications with the repair mesh ensued, and Claimant underwent a second hernia surgery. Following this procedure, Claimant

fully recovered without any residual symptoms and returned to logging. No related PPI or medical restrictions were assessed.

21. On September 25, 2001, Claimant separated his left AC joint pulling on a winch line. At his 2009 deposition, Claimant described being hit by a root wad (stump with roots attached) rolling down the mountain. At the hearing, however, Claimant described the accident differently. "Running down the mountain with a choker and the winch came loose and stopped, and it just yanked you [*sic*]." TR1, p. 80. "[S]o I'm kind of just like hanging by one arm, but you [*sic*] don't know it's coming, so...[y]our [*sic*] collar bone just pops out of that socket right there and pops up." *Id.* Claimant also described wrapping his collar bone with an Ace bandage to keep it stable, and using his other arm at work until breakup in March or February because he did not want to take time off from work to have it repaired. Apparently, Claimant did not accurately remember which of his shoulder injuries occurred first. In any event, on March 14, 2002, Claimant underwent left AC repair surgery with Dr. McNulty. The surgery was successful. Claimant returned to work without restrictions or residual pain. The date of Claimant's return to work is not discernible from the record.

22. On January 14, 2003, Claimant reported to William Ganz, M.D., a neurosurgeon, that he had injured his mid-back limbing a tree on April 29, 2002:

> I was just cutting a big bull pine limb, pulling up on it, because the way it was bent, I couldn't cut it down, I had to pull up. And it felt like somebody shot me right in the back and paralyzed me. And I ended up in a puddle on the ground. And three days later I could work and I went back to work. I laid on the couch for three or four days, though.

TR1, p. 82. Claimant was eventually diagnosed with a herniated disc with spurring at T12-L1, for which Dr. Ganz performed a T12-L1 fusion surgery in January 2003. After conducting a

record review, Dr. Weiss opined that Claimant's medical records did not support his claim that his back problem was the result of an April 2002 industrial accident. Claimant first reported back pain in May 2002; however, at that time, he attributed it to a November 2001 accident. Also, Dr. Weiss opined that Claimant's long history of arthritic problems in his neck and shoulders, long smoking history, the suggestion of a chronic degenerative process not yet ruled out, and Dr. Ganz's intraoperative findings of significant osteophytes suggesting an underlying degenerative process all complicated the question of what brought on Claimant's disc herniation. As well, after reviewing Claimant's prior records that were not available to him at the time he performed surgery in 2003, Dr. Ganz became suspicious that Claimant's injury was due to natural degeneration, and not an April 2002 injury.

23. In recovery, Claimant wore a back brace for four months. Dr. Ganz initially restricted Claimant from heavy lifting and bending on a regular basis; however, Claimant did not heed these restrictions. "Well, that's impossible. That entails tying your shoe. You know? So I just ignored him and took my time and got better because I could." TR1, p. 85.

24. Claimant returned to work after about four months. As detailed in the Safety Video section below, Claimant testified inconsistently in these proceedings with respect to his actual abilities following his thoracic spine surgery. However, he consistently testified that he does not believe he was employable by anyone else as a logger following his 2003 spinal fusion, regardless of his actual abilities, because of the perception that he was an unreasonable insurance risk. Claimant believed that, had he not been running his own logging business, he could have obtained employment as a mechanic or mill worker running a debarker, forklift, or other equipment in 2003.

25. Claimant's children, Shelby and Wesley, addressed Claimant's condition following his 2003 surgery. Shelby did not know how her dad did after his 2003 back surgery because she was only 10 years old at the time. Wesley was 11 years old at the time. He recalled that his dad worked just about every day, but when he got home he mostly just relaxed. "He wouldn't do as much after that." TR2, p. 17. Dr. Williams (see below) recalled that Claimant told him he no longer did any heavy work after the 2003 surgery.

26. Dewey "Duke" Shawver, a long-time salvage logger in the St. Maries area who has worked with Claimant and respects his work ethic and logging abilities, agreed that Claimant was not employable as a logger following his 2003 surgery.

27. No PPI has been assessed to Claimant's thoracic spine condition, and Dr. Ganz released Claimant without restrictions in 2004. On the other hand, Dr. Dirks endorsed restrictions for Claimant following his 2003 thoracic spine surgery of no heavy lifting and limited bending. Dr. Ludwig agreed that he would assess similar restrictions, but deferred to Dr. Ganz in Claimant's case.

28. Claimant received a check for temporary disability benefits related to his surgery with Dr. Ganz because he had been required to miss ten weeks of work. Claimant testified that he refused the check, however, because he had saved enough money to cover his wage loss. "Associated Loggers, yeah. They told me, "Well, you got 10 weeks coming." And I said, "Well, I don't need it, man. Put it somewhere else." They thought I was crazy." TR1, pp. 84-85.

29. MRI and other imaging techniques in 2003 and 2004 revealed diffuse disc bulges at every lumbar level, and other pathology, but no spinal impingement. By November 2004, Claimant's L4-5 diffuse posterior disc bulge was accompanied by moderate bilateral apophyseal

spondylosis and ligamentous hypertrophy, contributing to mild central canal stenosis and mild bilateral neural foraminal narrowing. Also, a November 2004 EMG nerve conduction study produced findings consistent with right-sided S1 radiculopathy, according to Dr. Dirks, even though his lumbar spine MRI revealed no impingement.

30. In 2004, Claimant fractured his right calcaneus showing his son how (not!) to jump a motorcycle. He worked in a cast for a period before fully recovering without work restrictions or limitations. Following this event, however, Claimant cut down on his motorcycle-riding. He also contracted pneumonia, from which he fully recovered with no residual effects.

31. In November 2004, Claimant hit his head while getting into the cab of his dozer. Dr. Dirks obtained an MRI on November 24, 2004 that identified minor disc bulging and minor arthritic changes, but no frank disc herniations or compression on the spinal cord. "I did not see anything that was surgical or might explain any of his pain complaints." 2004 Dirks Dep., p. 10. Further, he opined that any future care related to Claimant's neck would be due to a new accident. Claimant's industrial claim related to this injury was settled by LSSA approved January 27, 2005. No related PPI or medical restrictions were assessed.

32. Claimant also complained of numbness in his feet in 2004 that Dr. Dirks opined could not be explained by his MRI findings. "It may be residual problems from the previous surgery and herniated disk problems." 2004 Dirks Dep., p. 12. Claimant also reported persistent pain down his back and into his legs with numbness, increased electrical shocks down the back of his thighs, calves, and into his heels (right worse than left), incontinence, sleeping problems, and tingling with motion, which Dr. Dirks opined were attributable to his injuries and surgery at T12-L1, from which he had reached medical stability.

33. Claimant settled his industrial claim related to his 2002 (thoracic spine) and 2004 (cervical spine) injuries by LSSA approved January 27, 2005. Therein, Claimant acknowledged PPI of 5% of the whole person due to his 1984 back injury.

34. In 2005 and 2006, Claimant was awarded the Potlatch Logger of the Year Award. To Claimant's knowledge, no one else has been twice honored with this distinction.

35. At the hearing, Claimant testified that there isn't much salvage work left anymore because "they're" now "[j]ust clear cutting everything." TR1, p. 170. Mr. Shawver agreed. "Getting to be less and less all the time." TR1, p. 214.

36. Claimant's tax returns show his gross receipts/adjusted gross income (AGI) from 2001 through 2008:

- 2001 - $187,349 / $53,286
- 2002 - $204,757 / $41,052
- 2003 - $346,596 / $17,180
- 2004 - $303,757 / $60,107
- 2005 - $200,288 / $27,345
- 2006 - $150,177 / $42,321
- 2007 - $244,396 / $70,295
- 2008 - $187,673 / $50,016

SAFETY VIDEO: JUNE 25, 2006

37. On June 25, 2006, just eight days before his industrial accident, Claimant and his employee made a Safety Video that captured images of Claimant doing salvage work. He is featured climbing, jumping down from logs, walking across logs, and falling and limbing trees

with a large chainsaw in a canyon, as well as driving and operating a log processor, among other things. In 2009, Claimant testified that, immediately before the July 3, 2006 accident, he could do everything he used to do, except install a winch line on a Cat. "I could run and jump. Everything. Ride motorcycles. I could do anything I wanted to." JE-345. He said he could still hook a tree, set chokers, saw down and skid trees, limb trees, and carry buckets of oil, and he did not feel at all disabled. He recalled that Dr. Ganz told him to avoid only extremely heavy lifting, which he did:

> Q. And what do you mean by extremely heavy lifting?
>
> A. Oh, like putting a winch line on a Cat. Eighty, ninety, hundred pound winch line.
>
> Q. So you did avoid that?
>
> A. Yes, I did.
>
> Q. Anything else?
>
> A. No.
>
> Q. Did the doctors recommend that you get out of logging?
>
> A. Yeah, possibly. I don't remember.
>
> Q. Did you ever think about getting out of logging after the T-12 L-1 surgery?
>
> A. No, sir.

JE-345.

38. At the hearing, Claimant contradicted his 2009 testimony:

> Q. ...Does the video accurately reflect what you were doing on a regular eight-hour-a-day basis?
>
> A. Well, no. I didn't - - that was a - - I didn't saw much. I mostly run the Cat. I sawed maybe two hours a day, if that.

Q. Okay. And was there a reason - - was the reason because your employee did most of the falling?

A. Well, that, and the fact that it did bother me. Because you have to bend over to cut the stump or get on your hands and knees or on your knees.

Q. So would it be fair to say two hours a day you did the activities in the video and the rest of the time you would work on the Cat or the log processor?

A. Not every day. Some days I didn't even saw.

Q. Some days you did no sawing?

A. Yeah.

Q. Would there be some days you did eight or ten hours of sawing?

A. No. Never. Two is about tops.

Q. Did you ever think about getting out of logging after the T12-L1 surgery?

A. No, not really. I figured I'd give it a shot anyway and see if I could do it.

Q. Your testimony is that you avoided the sawing part of the job after your T12-L1 surgery. Correct?

A. Yeah.

TR1, pp. 161-162.

SUBJECT INDUSTRIAL ACCIDENT: JULY 3, 2006

39. On July 3, 2006, Claimant was working alone when he was struck on his hardhat by a falling tree. Claimant's employee had previously cut the tree that hit Claimant, but left it standing. The draft created by a tree Claimant had just fallen apparently knocked the rogue tree loose, unbeknownst to Claimant. Fleeing the tree he had just cut, Claimant ran smack into it. A nearby stump prevented the tree from crushing Claimant. When he came to, Claimant wriggled out from under the tree. His legs were tingling and numb. He couldn't lift his chainsaw. He

made his way to his pickup and drank a soda. When he tried to walk, he knew he had seriously injured himself. "I was clumsy and my legs were like - - it was like, I'm done." TR1, pp. 102-103. Claimant drove to the emergency department at Benewah Community Hospital in St. Maries.

POST-INDUSTRIAL INJURY MEDICAL CARE

40. **July 3, 2006 initial evaluation (Dr. Katovich).** At Benewah Community Hospital, Claimant was examined by John R. Katovich, Jr., M.D. Claimant reported he had been momentarily stunned by the accident, but he did not believe he had lost consciousness for a significant period of time, and he remembered everything after the event. He had a 9/10 headache, as well as pain in his neck, elbow, and back. He was taking Neurontin daily. He smoked two packs of cigarettes and drank a six pack of beer per day. On exam, Claimant had "no evidence of ecchymosis, swelling or anything on the scalp and occiput, evidently to the credit of his hard hat. Tenderness to the neck but full range of motion." JE-2. Claimant did have a small bruise on his left side at the pelvic brim. A cervical x-ray revealed degenerative changes, but no fracture. Dr. Katovich diagnosed multiple contusions, prescribed medications (Flexeril and Lortab), took Claimant off work for 24 hours, and recommended follow-up with his primary care physician.

41. **July 7, 2006 follow-up (Dr. Ludwig).** Claimant was certain he had injured his back, but he felt Dr. Katovich had not properly evaluated him for a spinal injury. Claimant testified at the hearing for the first time that, the next day, he had clear fluid running out of his ears, so he called Mary Cronin, adjustor. She approved an evaluation by Dr. Ludwig, a physiatrist, in Coeur d'Alene.

42. Dr. Ludwig evaluated Claimant on July 7, 2006. Claimant reported 9/10 pain in his back, left leg and neck, worse while standing and looking up/down, walking or bending forward. He also reported bladder incontinence, but no worse than before the tree hit him. There is no mention of ear drainage in these or any other medical records. Claimant was taking three Neurontin pills per day. On exam, Dr. Ludwig noted no gross ecchymosis over the area of impact, pain localized to the left temporal region, diffuse tenderness over the cervical spine, tenderness over the vertebral prominence, no evidence of instability, good bilateral upper limb strength, lower extremity strength testing inhibited by pain, diminished Achilles reflex on the right as compared to the left, mildly positive adverse neural tension to seated slump exam,[1] tenderness over his lower lumbar spine "well inferior to the area of his previous surgery," no rash or erythema, intact distal pulses and no edema or swelling. Dr. Ludwig reserved his diagnosis, but recommended cervical and lumbar MRIs due to the nature of Claimant's recent trauma, his vague symptoms including pain, his recurrence of problems similar to those he experienced prior to his 2003 spinal fusion surgery, and his asymmetric reflexes, which Claimant could not identify as either pre-existing or new. In the meantime, Dr. Ludwig returned Claimant to work, restricting him from overhead work, bending and lifting no more than 30 pounds.

43. **July 11, 2006 lumbar spine MRI.** The radiologist's report indicates Claimant had lower extremity pain, worse on the left, and that Claimant's March 17, 2004 lumbar spine MRI (or at least its report) was available for comparison. The radiologist noted four findings in his "Impression" section. At L4-5, a left lateral disc extrusion was compressing the left L4 nerve

[1] Dr. Ludwig described the seated slump exam: "The patient is in a seated position and with cervical flexion and concomitant extension of a leg at a time. They have varying degrees of pain and reproduction of back pain, leg pain with extension of the knee. A grossly positive test is reproducible at the same angle usually corresponding to exact symptoms. A mildly positive test usually refers to some diffuse pain either nonlocalizing to a nerve distribution or with varying reproducibility." Ludwig Dep., p. 42.

root, with a superimposed disc bulge now compressing the thecal sac to 6-7 mm. There was worsening at L3-4 with a disc bulge compressing the thecal sac to 6 mm and moderate foraminal narrowing. There was mild worsening at T10-11 with a left paracentral disc protrusion that might be contouring the thoracic cord. Finally, the radiologist noted a mild left lateral disc protrusion at L5-S1.

44. **July 11, 2006 cervical spine MRI.** The radiologist's report indicates Claimant had neck pain following his industrial injury and that Claimant's July 3, 2006 cervical spine x-ray film and November 24, 2004 cervical spine MRI report were available for comparison. The radiologist noted three findings in his "Impression" section. At C5-6 Claimant had an interspinous ligament sprain with adjacent paraspinous musculature strain involving C4-5 without malalignment or evidence of longitudinal ligament disruption. Also at C5-6, a broad-based right paracentral disc bulge causing mild contouring of the cervical cord was identified, as was minimal spinal stenosis. There was also multilevel facet arthropathy and variable-to-moderate foraminal narrowing at other cervical levels.

45. **Dr. Ludwig's initial diagnoses.** Claimant followed up with Dr. Ludwig on July 12, 2006. Claimant's Achilles reflexes were symmetric on this exam, and he had tenderness over his mid cervical spine. Given Claimant's imaging results and his exam findings, Dr. Ludwig diagnosed a C5-6 ligament sprain and a left L4-5 disc extrusion, consistent with his left leg complaints, along with mild progression of the same degenerative changes demonstrated on his November 2004 lumbar spine MRI. As to Claimant's left leg complaints, Dr. Ludwig clarified in his deposition that Claimant's reported pain did not follow the typical dermatomal pattern associated with compression of the L4-5 nerve root. The typical expectation is pain in

the lateral hip and anterior lateral thigh, extending across the medial knee and medial ankle. However, Claimant reported pain down both the back and front of his thigh. Dr. Ludwig recommended relative rest for Claimant's neck, which he believed would heal on its own.

46. For Claimant's lumbar disc extrusion, Dr. Ludwig recommended a diagnostic/therapeutic transforaminal epidural steroid injection. A positive response to the injection would indicate an inflammatory component to Claimant's pain, signaling an acute (within six months) injury. Chronic conditions, on the other hand, like chronic herniations, are associated with less inflammation and do not respond well to steroid injections. "Lack of response to the injection is also helpful in that it may not be the structure causing the pain." Ludwig Dep., p. 59. "Pain could be coming from other structures; bone, muscle." *Id.* In response to the injection, Claimant had "[m]inimal improvement, at best." *Id.*, p. 56. Dr. Ludwig released Claimant to modified duty work as described above, and prescribed 70 more Lortab pills for pain control.

47. On July 27, 2006, Dr. Ludwig noted Claimant still had pain in his neck, but his motion was improved and there was no evidence of instability or step-off. Claimant still had positive adverse neural tension bilaterally to seated slump exam and diminished sensation in a "subjective pattern in the bilateral thighs." JE-19. Dr. Ludwig recommended an EMG study to confirm whether or not there was acute axonal loss or denervation in the L4 myotomal distribution and to reevaluate Claimant's right leg. He also noted Claimant's history of underlying peripheral neuropathy diagnosed via EMG testing several years previously.

48. Claimant returned to work at some point, but he was still having trouble walking. "I tried, yes, and I - - my legs wouldn't work, and I couldn't - - I was floundering half the time."

TR1, p. 104. On July 28, 2006, Claimant was unable to get out of the way fast enough and was struck on the left arm (as he was protecting his face) by a falling tree top. Claimant's son, Wesley, testified that Claimant's arm was pretty torn up as a result. The next day, Claimant attended the Idaho State Championships at Fossil Bowl, a motorcycle race in which his son was competing. There, Claimant spoke to a nurse about his left arm swelling. She encouraged him to seek medical treatment. Surety obtained surveillance video of Claimant attending this event, among other things (see below).

49. On July 30, 2006 Claimant sought treatment for his left forearm injury. X-ray imaging showed no acute changes, and he was diagnosed with contusions and abrasions of his left forearm and wrist. Claimant's arm was placed into a sling, Norco (26 pills total) was prescribed, and Claimant was instructed to rest and ice the arm.

50. **July 29 and 30, 2006 Surveillance Video.** Surety obtained video recordings of Claimant on July 29 and 30, 2006, as he drove in his truck and attended his son's motorcycle competition. The video is of poor quality for the most part, apparently shot from a significant distance, and most of the frames are shaky. Claimant is depicted standing and walking around without a limp, talking to people, and a couple of times he bent deeply at the waist to look more closely at the engine areas on motorcycles. At one point, it appears as if Claimant is limping and the camera is shut off for no reason that is apparent from the video. Claimant is also depicted climbing a mobile stair unit, standing on it videoing the action, and sometimes sitting down on one of the steps.

51. **Social Security Disability Insurance (SSDI).** Claimant applied for SSDI benefits on July 31, 2006, alleging disability based upon a broken back and a neck injury. His

application was denied because he retained the ability to perform a wide range of medium duty jobs. Claimant either appealed or reapplied several times after this initial denial. On October 8, 2008, he was denied because he was still making management decisions for St. Joe Salvage. Around this same time, Claimant ceased operations. Following Claimant's retention of an attorney in 2009, and his subsequent non-industrial accident in 2010 (see below), his SSDI application was eventually approved.

52. **Follow-up with Dr. Ludwig.** On August 7, 2006, Claimant followed up with Dr. Ludwig. His cervical sprain was unchanged, with some stiffness but not much interference with his range of motion. He still had tenderness over his occiput and claimed he could make his legs go numb by pressing on it. With respect to his low back, Claimant had numbness and tingling in his right leg and left posterior calf and thigh. Claimant's recent EMG testing revealed no evidence of acute denervation of his left leg. On exam, Claimant's Achilles reflex testing revealed symmetric results, and he no longer demonstrated adverse neural tension to seated slump examination. Claimant walked without significant foot drop. Dr. Ludwig noted some twitching of the left medial gastrocnemius, but no edema or swelling. Claimant had a little crepitus over his posterior cervical spine to active motion, with no instability and no upper limb weakness.

53. Dr. Ludwig diagnosed, among other things, multi-level lumbar degenerative disc disease. Given Claimant's EMG results, he was uncertain whether his L4-5 herniated disc was acute. He wrote, "Interval development of a left L4-5 herniated nucleus pulposus without evidence of acute denervation. It is unclear if this actually [*sic*] from his trauma or if he had developed this in the interval." JE-22. "At this point, the L4-5 [...herniation] does not appear to

be acute in such that it is not showing any acute denervation potentials into the left leg." JE-23. Dr. Ludwig also opined that Claimant's cervical sprain was stable. He opined that Claimant would reach medical stability from his July 3, 2006 injuries in about a month, prescribed pain medications, including gabapentin and 50 hydrocodone pills, and returned him to modified duty work. "I do feel that Roy has a number of medical problems pre-dating his on-the-job injury which are contributing to his ongoing problems including his peripheral neuropathy and known right S1 radiculopathy." JE-23.

54. On August 24, 2006, Dr. Ludwig again evaluated Claimant. Since the last examination, Dr. Ludwig learned that Claimant obtained unauthorized refills of his prescription pain medication.[2] Accordingly, he ceased Claimant's Lortab prescription and looked into Claimant's past medical records, which evidenced 1) Dr. Lea's opinion in April 1988 that Claimant demonstrated significant symptom amplification, and 2) left leg numbness following his 2003 spinal fusion surgery, among other things. Dr. Ludwig administered Waddell's testing on exam, which he detailed in his report and summarized was "positive by multiple accounts." JE-29.

55. Dr. Ludwig opined that Claimant's cervical sprain appears acute on his July 2006 MRI, but those findings are insufficient to explain his current cervical symptoms of tingling in his hands, in his legs with motion, and when pressing on his back. Along those lines, he noted Claimant's "motion with distraction is significantly improved as opposed to his motion during active testing." JE-30. With respect to Claimant's left leg numbness, "His interval MRI does show a left L4-5 disc extrusion but there is no correlation with his electromyelogram findings

[2] Dr. Ludwig believed at the time that Claimant had altered his prescription to obtain more narcotic pain medication. By the time of his deposition, however, the parties agreed that Claimant's friend had admitted to altering the prescription to obtain more medication for Claimant.

and given his symptom amplification and denial of previous symptoms despite documented medical record reports of left leg numbness, I cannot say this is a new complaint given his date of injury." *Id.* "At this point I feel that the patient is manifesting significant symptom amplification of his relatively benign injuries." *Id.* Dr. Ludwig opined Claimant had reached maximum medical improvement (MMI), recommended an impairment evaluation, and released Claimant to modified duty work of "no significant repetitive bending or heavy lifting due to his ongoing condition of chronic S1 radiculopathy on the right as well as his history of lumbar fusion, but not due to his date of injury of 07/03/2006." *Id.*

56. At his deposition, however, Dr. Ludwig had softened his stance. "I do not know whether or not that disc herniation occurred with his work injury dated 7/3/06 and whether or not the surgery recommended by Dr. Dirks is required for the work injury or for the preexisting condition." Ludwig Dep., p. 34. He pointed out that disc herniations are not always due to a traumatic event, and can be due to degeneration. Although Claimant's MRI showed an L4-5 disc herniation impacting the nerve, Claimant's response to the diagnostic nerve block did not confirm that this was the source of his pain, and his EMG did not suggest any acute nerve damage, which Dr. Ludwig opined would be expected. "So I had nothing at that point to date his pain or the change of the disk at the L4-5 level to his date of injury. It was new since '04. That was all I knew." *Id.*, p. 74.

57. Dr. Ludwig did not consider somatoform disorder in diagnosing Claimant's conditions. Somatoform disorder as "[a] pain process that is - - has a large psychogenic component not necessarily from a[n] anatomic defect or disease." Ludwig Dep., p. 92.

58. **Dr. Ludwig's ultimate opinion.** By the end of his deposition, Dr. Ludwig opined that Claimant's L4-5 disc herniation was likely due to the 2006 industrial accident, and that the L3-4, L4-5 bi-level fusion performed by Dr. Dirks in 2007 was reasonable. His change of heart was based upon new information, including Dr. Dirks' opinion, Claimant's history of left leg radicular symptoms (indicating a chronic problem), and Claimant's pre-injury functionality as depicted on the Safety Video. "His previous level of function was - - did not appear to be significantly inhibited by his stenosis that was known to be present at that time. So being the new change being [*sic*] the disc herniation, that appears to be what was likely due to his injury dated 7/3/06." Ludwig Dep., p. 114.

59. **September 11, 2006 IME (Dr. Stevens).** On September 11, 2006, Claimant underwent an independent medical evaluation (IME) at Surety's behest by Craig Stevens, M.D., a physiatrist. Dr. Stevens reviewed medical records pertaining to Claimant's pre-existing conditions prior to examining Claimant. He apparently did not have the chart note corresponding to Claimant's initial evaluation by Dr. Katovich or Dr. Ludwig's records prior to July 12, 2006, but he did review the July 2, 2006 cervical spine x-ray films and the July 11, 2006 cervical and lumbar spine MRI films.

60. Claimant reported continuing back and neck pain.

61. On exam, Dr. Stevens noted positive Waddell's signs and nondermatomal sensory loss, among other things. Dr. Stevens found Claimant's presentation lacking in credibility:

> I did note signs of malingering and symptom magnification, in particular the positive Waddell's signs as noted above with multiple inconsistencies noted on the physical examination including inconsistency of SLR, nondermatomal sensory loss, described pain and numbness of the entire left leg with grams of pressure applied to the top of his head and description of increased low back pain on various postural maneuvers that in no manner stress the low back.

JE-45. Dr. Stevens also admitted that he controlled for a possible bias against Claimant by leaving his knowledge of information in Claimant's past medical records out of his considerations:

> I have come to these conclusions independent of his previous medical records which reveal multiple previous workmen's compensation claims which I feel may cause me to become biased in my approach to this evaluation. I tried to maintain an unbiased approach and come to my conclusions separately from knowledge of those previous events.

Id.

62. Dr. Stevens diagnosed chronic pre-existing cervical and lumbar disc degeneration and left S1 radiculopathy. In addition, he diagnosed cervical strain (temporary and now medically stable), as a result of the July 3, 2006 industrial accident, with no permanent impairment related to his industrial injury and no recommendation for further treatment. "Certainly he may eventually experience some increase in impairment as a result of his progressive lumbar degenerative disc disease but again no further impairment has occurred as a result of the date of injury of July 3, 2006." JE-46.

63. Dr. Stevens also noted, in his answers to questions posed by counsel for Surety, that Claimant's prior injuries precluded him from heavy lifting and heavy work. "Certainly it had already been established previously that the claimant not engage in heavy lifting or heavy work because of his prior injuries. It is very likely that, if the claimant were not to engage in such work, he would be less likely to have sustained cervical strains or other injuries such as occurred on the date associated with this injury." JE-46.

64. **Additional treatment sought by Claimant (Drs. Norce and Dirks).** On September 11, 2006, Claimant consulted Brian Norce, D.C., who referred him to Dr. Dirks. (As

discussed, above, Claimant had previously seen Dr. Dirks in 2004.) Dr. Dirks and his nurse practitioner first saw Claimant regarding this injury on September 18, 2006. Claimant reported long-standing pain and numbness in his right heel, for which he was taking Neurontin, as well as details concerning his industrial accident. He had some neck and elbow pain, and back pain, and he reported that his left leg just did not work anymore. Dr. Dirks' nurse practitioner diagnosed neck pain without radiculopathy ("He does have a disc bulge at C5-6, but this does not seem to be clinically significant for the patient") and back pain with a radicular component and weakness ("left leg sensory dysesthesias, longstanding in the right leg, correlating with MRI findings of disc bulges at L3-4 and L4-5 with moderate to severe neural foraminal [*sic*] as well as central canal stenosis from L3 to L5"). JE-54.

65. On September 26, 2006, Dr. Dirks recommended lumbar fusion surgery, from L3 to L5 with decompression. On October 5, 2006, Claimant left a telephone message for Dr. Dirks advising that his left leg was sore, and very weak. Claimant sought an estimate for surgery, because Surety denied benefits for further treatment. On November 10, 2006, Dr. Dirks wrote to Claimant's attorney, "Roy Green has bee [*sic*] a patient of mine for quite some time....I believe his current injury in his lower back requiring surgical intervention, which would include a lumbar decompression and fusion from L3 to L5, is directly related to his worker's compensation injury that he sustained on July 3, 2006." JE-59. At his 2012 deposition, Dr. Dirks reasoned that the changes demonstrated on Claimant's July 2006 MRI, in comparison to his former MRI studies, were consistent with further injury to Claimant's lumbar spine due to a tree falling on his head in July 2006.

> So if I put together the mechanism of injury, in this case the tree falling on him, the temporary relationship of that, knowing I have a previous MRI before that

> does not show a herniated disc, then on a 51 percent basis or better, I have to say the accident caused the current problem and caused him to come in and see me, which culminated in the surgery.

2012 Dirks Dep., p. 20.

66. On October 4, 2006, Dr. Ludwig responded to a letter from Surety's counsel, essentially confirming opinions he set forth previously in Claimant's chart.

67. By the time of his deposition in January 2007, Claimant had two employees to assist him at work (instead of his usual one) because he had to hire someone to replace himself. Claimant testified that he had no problems driving out to the job sites or managing his business. His symptoms included peripheral neuropathy in his right foot, shocks and nerve damage in his calf from his prior injury; right-sided pain from his spine surgery; "dead" feeling left leg with pins and needles (new with the 2006 accident); and grinding noises and pain in his neck and low back.

68. Claimant never returned to manual logging work.

69. **Lumbar fusion surgery, L3 to L5 (February 21, 2007).** Following Dr. Dirks' surgical recommendation, Claimant underwent testing with Bruce Woodall, M.D., a family practitioner, to obtain medical clearance. On January 31, 2007, noting Claimant was a heavy smoker, Dr. Woodall diagnosed chronic obstructive pulmonary disease (COPD) with acute bronchitis, which he treated with Rocephin. No PPI has been assessed to Claimant's COPD. In response to Claimant's request for pain medication, Dr. Woodall prescribed 120 Lortab pills. However, he declined to undertake long-term management of Claimant's pain.

70. On February 21, 2007, Claimant underwent a bi-level lumbar fusion with decompression surgery, from L3 to L5, with Dr. Dirks. Claimant's recovery was complicated by

a staph infection at the surgical site, which Dr. Dirks successfully treated with ciprofloxacin. On April 17, 2007, Dr. Dirks referred Claimant for physical therapy. On May 17, Dr. Dirks reported Claimant was doing fine in regard to his back, but he still had "complaints of leg pain from before and he has low back pain." JE-103. On exam, Claimant had good leg strength and was walking. Also, "He has right-sided neck pain that goes into the right arm and makes it feel like jelly," with right deltoid, triceps, and biceps weakness on exam. *Id.*

71. **Cervical fusion surgery at C5-6 (July 16, 2007).** Dr. Dirks ordered a new cervical spine MRI, performed on May 23, 2007. The images demonstrated motion; however, the radiologist reported they revealed bony changes at C3-4, C4-5, and C5-6, as well as "moderate narrowing of the bilateral C3-C4 neuroforamen and moderate narrowing of the C5-C6 right neural foramen." JE-104. On June 7, 2007, Claimant continued to have pain in his neck and down his right arm "since his accident." JE-106. Claimant explained that previously, when he had neck pain, he could alleviate it by lying on a rolled-up towel. After his 2006 industrial injury, however, this procedure provided no relief. "If I lay on that towel now with stenosis, or whatever is going on in there now, I can't - - everything goes numb." 2007 Cl. Dep., pp. 26-27.

72. Upon review of the latest MRI, Dr. Dirks opined Claimant's neck and right arm complaints were the result of a "right, greater than left, radicular component correlating with a C5-6 disk bulge on the right." JE-110. Dr. Dirks recommended an anterior cervical discectomy and fusion at C5-6 with plating and cadaver bone. He attributed the need for surgery to the 2006 industrial injury.

73. On June 14, 2007, Claimant sought pain medications from Dr. Woodall. Dr. Woodall complied, cautiously, by prescribing 60 Lortab pills and 10 Duragesic patches,

along with Baclofen and Lyrica. "My impression is that patient is probably reliable with his medications, he is not coming in repeatedly with conflicting demands." JE-134. Dr. Woodall also strongly encouraged Claimant to quit smoking in order to prevent progression of his COPD and reduce his chronic pain. Dr. Woodall again provided pain medication to Claimant on June 28, 2007 (100 Norco 7.5 mg., 1-2 every six hours as needed, or 100 per month, with two refills). "Patient understands that I am only providing analgesics until Dr. Dirks gives him definitive treatment." JE-135.

74. On July 16, 2007, Claimant underwent cervical fusion surgery, at C5-6, with Dr. Dirks. A week later, Claimant sought stronger pain medication from Dr. Dirks for continued right arm pain and mostly posterior bilateral shoulder pain. Claimant was also experiencing numbness into his hands. Dr. Dirks prescribed Norco 10. On August 7, 2007, Claimant sought pain medication from Dr. Woodall, who prescribed MS Contin and Duragesic patches. "He has an appointment with Dr. Dirks for follow-up on 08/30....Patient anticipates that he will ask Dr. Dirks to make a referral to a pain management center. If Dr. Dirks declines, we will make the referral as my continuing to provide him with large quantities of synthetic opiates for a permanent condition is not an option." JE-135. Dr. Woodall also noted, "In February he had L3-L5 fusion which he states was fabulously successful and alleviated his lower body pain." *Id.*

75. On August 14, 2007, Dr. Dirks observed that Claimant was doing better pain-wise, having procured MS Contin, a long-acting pain reliever, from Dr. Woodall. However, he still had pain across his shoulders. Dr. Dirks prescribed physical therapy, twice weekly for four weeks. Claimant did not follow up.

76. On August 29, 2007, Claimant again approached Dr. Woodall for narcotic pain medication.

> As with every encounter for the past year, patient is in seeking pain medications....Taking him at his word that he sees Dr. Dirks on 09/13, I provided MS Contin...Since chronic pain management with opiates such as MS Contin is not part of my practice scope, I will not be providing any opiate narcotics for patient beyond today. If this issue is not addressed with Dr. Dirks, patient will need to see a pain management consultant or perhaps seek a different primary care provider.

JE-137.

77. **Surveillance video (September 11 and 12, 2007)**. Surveillance video taken September 11, 2007 shows Claimant, alone, backing his boat and trailer into the water, getting in and out of his truck multiple times, jumping from his truck cab a few feet over to the dock to avoid getting into the water, tugging on the boat to get it off the trailer, lowering himself to his stomach on the dock to retrieve a hubcap from the water, and other activities. It is not apparent that Claimant ever bent at the spine below approximately shoulder-level. He maintained a straight low and mid spine throughout his activities. Claimant thinks he was wearing a back brace. In addition, he recalls wearing a Fentanyl patch and having taken morphine, an anti-inflammatory, Gabapentin, and Neurontin that day.

78. Video footage taken September 12 shows Claimant carrying a gallon of milk in his right hand and a small sack in the other. When he got to his pickup, he smoothly lifted the milk jug to chest-height and tossed it into the passenger seat. Claimant described his symptoms on the 12th:

> Well, I was ruined. My shoulder would get - - it was the weirdest thing. It would get so bad that I couldn't move. All my body wanted to do was lay there with heat on it. And after a couple days of that, I could go out and do some - - you know. I was trying -- the more I - - if I used it, it would get better. That's what I

thought. Not heavy use, but if I used it. But it didn't work that way with it. It made it worse.

TR1, pp. 119-120.

79. In 2012, Dr. Dirks opined that Claimant's functionality as depicted in the surveillance videos was consistent with his recollection of Claimant's presentation, on pain medication, on August 14, 2007. As discussed below, Drs. Zoltani and Barnard disagreed. They opined these videos evidenced what they had already concluded based upon their evaluation of Claimant: that he was faking his symptoms.

80. **MRIs of cervical and lumbar spine (September 12, 2007).** On September 12, 2007, Claimant underwent MRIs of his cervical and lumbar spine. The cervical studies revealed slight anterior subluxation of C4 relative to C5 with flexion. The lumbar studies revealed a well-seated L3-5 laminectomy and posterior fusion with no definite subluxation on flexion or extension, as well as an unchanged T12-L1 right-sided bone graft with metallic plates and screws.

81. **Pain management.** On September 13, 2007, Claimant returned to Dr. Dirks, who provided him with a prescription for 20 Norco tablets with instructions to make them last for at least a couple of weeks. He also referred Claimant to Dr. Magnuson for pain management. "He is hurting quite a bit in his neck and along the top of his shoulders....He is difficult to assess because he hurts so much." JE-123.

82. **MRI of cervical spine (September 19, 2007) and EMG study (October 2007).** Due to ongoing neck pain complaints, Dr. Dirks ordered another cervical MRI, which was performed on September 19, 2007. It demonstrated mild narrowing of the bilateral C3-4 neural foramina, with no significant impinging lesions. Dr. Dirks summarized, "...good decompression

without evidence of any structural lesions." JE-128. On exam on September 27, 2007, Dr. Dirks noted no atrophy in Claimant's arms and a satisfactory gait. Claimant reported that his lower back was doing quite nicely. At Claimant's attorney's prompting, Dr. Dirks ordered an EMG study to further evaluate Claimant's nerve condition. On October 30, following the EMG study, Dr. Dirks wrote, "As far as his arms are concerned, the EMG studies were unremarkable and do not show any sort of radiculopathy." JE-129. He ordered a thoracic MRI to rule out problems at that level, "although I doubt this will be the case." *Id.*

83. **Pain management.** On October 1, 2007, Claimant was evaluated by Scott Magnuson, M.D., a pain specialist. According to the chart note, the purpose of the visit was (contrary to Dr. Woodall's repeated instructions) "simply to have a recommendation back to Dr. Woodall to prescribe." JE-142. Following an examination, Dr. Magnuson recommended to Dr. Woodall that he continue prescribing pain medications for 3 to 6 months in tandem with physical therapy. Dr. Magnuson opined that Claimant had obtained good relief of his cervical radicular symptoms following surgery, but was now experiencing severe chronic myofascial pain in his shoulders and thoracic back area.

84. On October 8, 2007, Claimant again sought pain medication from Dr. Woodall. This time, Claimant specifically requested oxycodone. Dr. Woodall complied, but reluctantly. "Chronic pain and opiate seeking behavior. I shared with him Dr. Magnuson's written communication of the non-advisability of long-term opiate use…Also at his request I am making a referral to a pain management consultant in Moscow who may be more willing to accept his management than Dr. Magnuson was." JE-136. He also noted that, as far back as 2003, Claimant had been receiving large amounts of narcotic pain medications. The record does not

support the conclusion that Claimant received such medications consistently between 2003 and July 3, 2006.

85. On October 18, 2007, Claimant was reporting bilateral shoulder pain, neck pain, and bilateral arm weakness, worse on the right. An EMG nerve conduction test by R. Clinton Horan, M.D., revealed mild nerve conduction abnormalities that he opined did not meet criteria for an entrapment neuropathy, and are of questionable clinical significance. An underlying peripheral neuropathy could not be ruled out, but would be unlikely to explain arm weakness. No electrodiagnostic evidence of cervical radiculopathy or brachial plexopathy existed.

86. On December 18, 2007, Dr. Woodall again declined to continue prescribing pain medications and advised Claimant to return to Dr. Magnuson or Dr. Dirks. Claimant also requested an MRI of his thoracic spine, as Dr. Dirks' request had been denied by Surety. (Dr. Woodall made the MRI recommendation; however, Surety denied this request, as well.) Ten days later, Claimant returned. He had been unable to get in to see Dr. Magnuson. Dr. Woodall prescribed ten days worth of MS Contin to tide him over.

87. On January 3, 2008, Dr. Dirks' nurse practitioner contacted Dr. Woodall's office to advise she had prescribed 40 Norco 7.5 mg. and concurrently advised Claimant that she would not prescribe any more pain medications and that he should not be going around to other physicians and "double dipping." JE-138.

88. **Continued right arm/shoulder and neck pain.** Also on January 3, 2008, Dr. Dirks evaluated Claimant for right arm and shoulder pain, as well as neck pain. Dr. Dirks found "severe atrophy of his arm and in the deltoid and biceps area. He also has strength loss in

the right deltoid muscle." JE-131. Dr. Dirks referred Claimant to Dr. McNulty for a shoulder evaluation and recommended a CT myelogram to investigate C5-6 and C4-5.

89. On January 10, 2008, Dr. McNulty evaluated Claimant's right shoulder. "[Claimant] states during the original injury he did not hurt his shoulder. He is having pain mostly in the trapezial area, radiating to his neck." JE-515. Dr. McNulty diagnosed tendonitis and injected Depo-Medrol and Lidocaine. He denied Claimant's request for narcotic pain medication.

90. On January 16, 2008, Dr. Woodall declined to make an appointment for Claimant to discuss refilling his pain medication. Instead, he referred Claimant to Don Williams, D.O., for pain management.

91. **January 31, 2008 initial evaluation by Dr. Williams for pain management.** Dr. Williams undertook Claimant's pain management treatment on January 31, 2008. At this visit, Claimant reported almost complete loss of use of his right shoulder.

92. **Thoracic MRI (February 5, 2008).** On February 5, 2008, Claimant underwent a thoracic MRI, which revealed normal findings except for a small left posterior disc protrusion at the T10-11 level that mildly contoured the ventral aspect of the thecal sac on the left, resulting in mild encroachment of the inferior recess of the left neuroforamen.

93. **February 13, 2008 panel evaluation (Drs. Barnard and Zoltani).** On February 13, 2008, Claimant underwent a panel evaluation arranged through Inland Medical Evaluations by Surety. The panelists were J. Greg Zoltani, M.D., a neurologist, and Michael Barnard, M.D., an orthopedist. The panelists reviewed Claimant's industrial injury-related medical records through December 18, 2007, when Dr. Woodall diagnosed chronic pain and

drug seeking behavior and ceased prescribing morphine. They also reviewed Dr. Stevens' September 2006 IME report and Claimant's prior medical records evidencing diagnoses of, among other things: low back symptoms, neck pain and headaches, left hand and right arm numbness, chronic pain disorder in the absence of any objective organic cause, generalized axonal motor neuropathy (as suggested by EMG findings), thoracolumbar disc fusion followed by physician restrictions of no regular heavy lifting or bending at the waist plus a recommendation to obtain retraining assistance, residual right S1 radiculopathy (as demonstrated by November 1, 2004 EMG study), and multilevel degenerative changes (as demonstrated by lumbar spine MRIs dated January 8, 2003 and November 10, 2004). Claimant brought in his February 2007 lumbar MRI films, but no cervical spine films. The panel also had a report of the February 2008 thoracic MRI identifying a small disc protrusion at T10-11. In addition, the panelists reviewed Dr. Dirks' December 23, 2004 deposition and interviewed and examined Claimant.

94. According to the report, Claimant told the panel physicians that he was still having pain in his neck, mid back and low back, with crunching and snapping in his neck, and that his symptoms had worsened since his neck surgery. Also, "He notes that he had symptoms previous to this incident in both legs prior to his fusion at T12-L1, and following that surgery he had improvement in his left leg, but had no improvement in the right leg. He notes that following the incident, his left leg was then worse than the right." JE-166.

95. Functionally, Claimant told the panel physicians that he was unable to do any neck or back exercises, clean fish, carry or lift items ("Even lifting a carton of milk would be impossible for him with the right arm," *Id.*), do bookwork (because he cannot look down), or

bend over to pick anything up (because he would fall over). He had trouble riding in his pickup because of the bouncing, and looking in an upward direction. Activities Claimant could do included fishing, cooking (some), and walking out and getting the mail.

96. On entering the exam room, the panel physicians noted Claimant was lying on the exam table. Claimant's sensory exam revealed, among other things, "subjectively decreased" feeling in the right arm that "does not follow any specific dermatomal pattern," and was negative for Tinel's sign. Claimant had heavily callused hands.

> It is noted that the claimant's hands are not only callused but they are extremely heavily callused and extremely dirty. There is ground in dirt, there is subungual dirt, and there are heavy calluses which are discolored. The claimant states that all of the calluses on his hands, which are several millimeters thick, and all of the dirt is from a recent snowfall where he had to move snow. This is not possible. The Claimant is, in my opinion, purposefully misrepresenting his history. There is no way he would develop multiple thick calluses on his hands and fingers in the period of the last week.

JE-169.

97. During his orthopedic exam, Dr. Barnard noted, "The claimant moans, groans, grunts, and complains of pain throughout the entire examination, no matter what position he is in." JE-168. Claimant demonstrated positive Waddell's signs at the shoulders and in en bloc rotation, with complaints of severe pain. Claimant refused the lumbar range of motion test because he was unable to do it. Asked to demonstrate what he could do, Claimant rotated bilaterally approximately 30 degrees, but exhibited 0 degrees of flexion, extension, right tilt, and left tilt. "It is interesting to note that he would have to have far more motion in his lumbar spine to get on and off the table than demonstrated when he was asked to do so. These measurements are felt to be completely invalid, with no effort on the part of the claimant." JE-168. Likewise, Claimant's cervical range of motion testing was deemed invalid. Claimant complained of severe

pain while demonstrating 20 degrees of flexion, extension, right tilt, and left tilt, 45 degrees of right rotation and left rotation, as measured by inclinometer. "When asked to do active shoulder range of motion, the claimant does not participate fully in the examination. He claims he cannot move his shoulders." JE-169. However, with encouragement, Claimant demonstrated motion in all planes. "Again, it is felt that all of these measures are invalid, as the claimant does not appear to be participating fully and does appear to be manipulating the examiner." *Id.* "The claimant has 'total body jolting' with his movements. He has cogwheel motions with his neck, back, shoulders, etc., which are nonanatomical." *Id.*

> Overall, the orthopedic examiner found no objective findings consistent with the claimant's current complaints, and found multiple findings which I feel are manipulated by the patient and are false. I cannot give any valid rating for his neck, back, shoulders, etc., based upon my examination, as I do not feel the findings are correct. I am mystified by the claimant's statement that he does no work whatsoever and has not worked for several years, although he claims that calluses on his hands, which are obviously months or years old, are recent in the last snow storm. This is blatantly false.

JE-170.

98. The panel concluded that Claimant was medically stable from his 2006 industrial accident. Drs. Barnard and Zoltani opined Claimant's subjective complaints were far out of proportion to any objective findings, that he is more functional than he reports he is, and that he inaccurately reported his symptoms in relation to his prior injuries and pre-existing conditions, including chronic pain syndrome. Further, Claimant suffered only muscle strains that had resolved, with no permanent aggravation of any pre-existing conditions, and no permanent impairment as a result of his 2006 industrial injury.

99. The panel approved Claimant to return to his time-of-injury job as a full-time owner/operator of his salvage logging company, as described on a Job Site Evaluation (JSE)

prepared and provided by the ICRD, without restrictions. That JSE indicated Claimant needs to travel up to two hours per day to reach his job site; lift (at the heaviest) 35 to 50 pounds frequently and 51 to 75 pounds rarely; bend/stoop, twist, and reach at shoulder height or below continuously; climb, kneel, reach at shoulder height or above, and grasp/handle frequently; finely manipulate/finger occasionally; and crouch rarely.

100. Subsequently, Drs. Barnard and Zoltani reviewed the September 11, 2007 surveillance video depicting Claimant launching his boat. They appended individual notes to the end of the panel report in which each, in the strongest possible terms, opined that Claimant lied in his IME and that he is not disabled. According to Dr. Barnard:

> There is no doubt in this examiner's...mind that the claimant is willfully and deliberately misrepresenting his claim for secondary gain. He has, in my opinion, absolutely nothing to justify his current claimed disability....It is impossible to believe that a person with his claimed disabilities could do any of these activities, which included jumping out of a pickup truck onto a stone wall, pulling on a leader for the boat, and launching the boat by himself. His activities, as demonstrated in the video, demonstrate in my opinion complete and total misrepresentation on his part.

JE-172 to 173. According to Dr. Zoltani:

> The diagnosis he best fits at this time is a willful misrepresentation of his medical condition to his providers. It is our opinion that this further confirms our opinions that he is fully capable of continuous gainful work activity and is not in need of any formal treatment to his spine nor is it indicated that he should continue to receive narcotic medications.

JE-173.

101. **February 21, 2008: Claimant reached MMI as per Dr. Dirks.** Dr. Dirks opined that Claimant reached MMI following his July 3, 2006 industrial accident on February 21, 2008 (one year following his February 2007 lumbar spine surgery).

102. Dr. Dirks acknowledged that, with Claimant's history of cervical, thoracic and lumbar spine surgery, "you could certainly make an argument at that time not to send somebody back to work with a heavy labor, heavy lifting position." 2012 Dirks Dep., pp. 10-11. However, he speculated that Claimant could have probably returned to work in some capacity as of February 2008.

103. Dr. Dirks believes Claimant would be back at work, apparently in his time-of-injury position, if he had not injured his lumbar spine in 2006.

> ...If you talk to [Claimant] now I don't think he has a lot of complaints in the cervical region. I don't think - - let's put it this way. If you measure what I was saying about the success of the surgery or not, if he just had had the cervical surgery do I think he would be back to work today. [*sic*] Yes.

Dirks Dep., p. 23.

104. **Functional capacity evaluation by Dr. Williams.** On February 28, 2008, Dr. Williams prepared an estimate of Claimant's physical capabilities at Surety's request. He opined that, in an eight-hour workday, Claimant could sit a total of two hours, stand one hour out of each four-hour segment, and walk one hour out of each four-hour segment. He could carry up to five pounds continuously (67% to 100% of the day), up to 10 pounds occasionally (2% to 33% of the day), and up to 20 pounds seldom (0 to 1% of the day). (*See* JE-155.) In addition, Claimant could occasionally bend, squat, kneel, crawl, and crouch, but could not reach above shoulder level at all. Dr. Williams did not restrict Claimant's left hand use, but opined that he could not push, pull, or execute fine manipulations or simple grasping with his right hand. Dr. Williams opined Claimant could work at unprotected heights and around moving machinery, and in environments with marked changes in temperature and humidity. As well, Dr. Williams opined Claimant could drive automotive equipment.

105. On April 9, 2008, Dr. Williams opined that Claimant was unable to return to his time-of-injury job. He anticipated Claimant would need another year to reach medical stability and, in the meantime, would require ongoing care.

106. **CT myelogram of cervical and thoracic spine (April 10, 2008).** On March 25, 2008, Claimant sought treatment from Dr. Dirks for ongoing pain in his neck and down his right arm primarily, but also into the left arm. Dr. Dirks ordered a CT myelogram.

107. On April 10, 2008, Claimant underwent a CT myelogram of his cervical and thoracic spine. The cervical myelogram demonstrated small ventral impressions on the thecal sac at the C4, 5, 6, and 7 levels consistent with small disc protrusions, with normal filling of the nerve root sleeves. The thoracic myelogram returned results within normal limits. "There are no significant abnormal impressions on the thecal sac." JE-293. The post myelogram CT of the thoracic spine revealed a moderate, focal, central disc protrusion at T10-11. "The protrusion, in combination with posterior osteophytic spurring results in ventral impression on the thecal sac with abutment and mild contouring of the ventral cord. The clinical significance of this lesion is uncertain." JE-288. The post myelogram CT of the cervical spine revealed facet joint arthropathy at C3-4 on the right and at C7 and T1 on the left, as well as small focal central disc protrusions at C4-5 and C6-7. "These result in mild contouring of the ventral thecal sac but do not appear to significantly focally impinge on the neural structures." JE-297.

108. On April 22, 2008, Dr. Dirks opined, "His CT scans of his cervical and thoracic spines do not show any evidence of neural element compression at this time. They show good decompression where the surgical sites are." JE-298. Nevertheless, because Claimant continued

to complain of pain, "it seems reasonable to obtain cervical and thoracic spine MRIs and I will see him back following these studies." *Id.*

109. **MRIs of cervical and thoracic spine (April 25, 2008).** On April 25, 2008, Claimant underwent MRIs of his cervical and thoracic spine. At the cervical level, there was broad-based bulging (a protruding disc), accentuated on the extension views at C4-5, abutting the ventral cord. In addition, foraminal stenosis was noted at this level and mild subluxation between the flexion and extension data suggested ligamentous laxity at C4-5. "Facet arthrosis may contribute to the listhesis." JE-299. At the thoracic level, a broad-based leftward eccentric spondylotic disc protrusion at T10-11 effacing the ventral and leftward aspect of the thecal sac, along with mild foraminal encroachment, was identified. "Otherwise, spondylosis is of mild severity and includes shallow noncompressive spondylotic disc displacements at several levels without central or lateralizing soft disc herniation or soft disc extrusion." JE-300.

110. On May 8, 2008, Dr. Dirks opined, "His cervical and thoracic spine MRIs shows [*sic*] multilevel minimal disk degeneration. He shows good postoperative decompression." JE-301. Dr. Dirks recommended no treatment, but instructed Claimant to follow up in three months. He also encouraged Claimant to file for SSDI "as he hurts and is not able to do any heavy labor activity at this time. He has had multiple surgeries on his cervical, thoracic, and lumbar spines and I believe he is disabled and unable to return back to work at this time." JE-301. Dr. Dirks was apparently unaware that Claimant had been pursuing an SSDI award since July 2006.

111. Dr. Williams continued to treat Claimant periodically with narcotic pain medications and osteopathic manipulations for his lumbar, thoracic, and cervical pain, as well as for his right shoulder pain and rotator cuff-like symptoms.

112. On July 19, 2008, Dr. Dirks authored a letter to Claimant's counsel, apparently responding to questions previously posed. He wrote that, following review of Claimant's records and films, he did not believe that the current MRI findings were contributing to Claimant's current symptoms or that further surgical intervention was warranted. He opined that physical therapy, injection therapy, and anti-inflammatory medication were reasonable options to treat Claimant's neck pain.

113. On July 21, 2008, Dr. Williams took Claimant off logging work for six months.

114. On August 7, 2008, Dr. Dirks wrote an open letter confirming that he does not believe Claimant can return to his time-of-injury job and that he suggested Claimant file for SSDI. The corresponding chart note indicates that, on exam that day, Claimant had good strength and his incision was well-healed. Claimant was seeing a chiropractor, "which seems to help him as far as keeping his head in alignment." JE-304.

115. On October 1, 2008, Dr. Ganz evaluated Claimant, at Claimant's request. Following review of Claimant's imaging and an examination, Dr. Ganz opined that Claimant's persistent neck pain is due to musculoskeletal factors, not neurogenic causes. To be certain, he recommended an EMG study "to confirm that there is no radicular component to his pain." JE-309. He recommended that Claimant get back into physical therapy. "After his neck surgery he only had two sessions…and then he quit because it hurt. I have explained to him that the muscle spasm is the main cause of his pain and that he needs to give therapy another try and I think his symptoms will significantly improve." JE-309. He wrote Claimant a prescription for physical therapy two to three times per week for six to eight weeks. Dr. Ganz also opined that Claimant should not return to logging work or heavy labor because of his prior back surgeries. "The only

motion segment that remains in his back is at L1-2 and L2-3, and with heavy work, those will certainly begin to fail and most likely will require surgery in the future." JE-309.

116. On November 11, 2008, counsel for Defendants enclosed the February 2008 IME report in a letter to Dr. Dirks seeking information regarding an impairment rating. Dr. Dirks did not respond because he does not do impairment ratings. At his 2012 deposition, he could not recall anything about the IME report.

117. Also in November 2008, Claimant underwent an appendectomy. He does not allege that this procedure was related to an industrial injury. No related PPI was assessed, and no permanent medical restrictions were issued.

118. **Functional capacity evaluation by Mark Bengston, MPT (March 31, 2009 and April 2, 2009).** On March 31, 2009 and April 2, 2009, Claimant underwent a functional capacity evaluation (FCE) by Mark Bengston, MPT, at the request of Claimant's attorney, to determine his physical abilities and limitations. Mr. Bengston opined that Claimant gave 100% maximal effort on all test items, that his performance was consistent among FCE items, as well as from the first to the second day of testing (indicating Claimant should be able to perform at the tested levels sustainably day-to-day), and that his functional abilities as measured by the Spinal Function Sort were consistent with his perceived abilities, among other things. Mr. Bengston administered Waddell's tests, opining that five of five were negative.

119. Mr. Bengston opined that Claimant had high hand function and coordination, "occasional" sitting tolerance, "frequent" walking tolerance, and "prolonged tolerance to activity was noted with a myriad of position and activity changes instead of maintaining sustained postures and repetitive lifting and Right [*sic*] hand use." JE-679. Claimant could sit/stand/walk

with frequent position changes, at a pace set by Claimant, for up to eight hours per day, five days per week. In addition, Claimant could carry 30 pounds rarely (ten pounds occasionally or frequently), and could bend and stoop occasionally. However, Mr. Bengston also opined that Claimant was significantly limited in activities requiring him to shift from a neutral spine position (i.e., bending, twisting), as well as in repetitive grasping and handling with his right hand, due to right cervical pain and numbness in the C7 distribution.

120. Given Claimant's limitations, Mr. Bengston did not entirely rule out the possibility of Claimant someday returning to logging, but given "the large discrepancy between [Claimant's] abilities and job demands," he may be better off to look for alternate employment, rather than to attempt to rehabilitate himself to his prior level of function.

121. On May 7, 2009, Dr. Dirks had an informal conversation with Claimant about his right shoulder. Claimant asked for a right shoulder MRI, and Dr. Dirks complied by making the recommendation. "I have suggested that he get this looked at in the past." JE-314. Also, Dr. Dirks commented, "He is actually happy with his neck and his back at this stage." JE-314.

122. On September 8, 2009, Claimant underwent an IME by John McNulty, M.D., an orthopedic surgeon. Following a medical records review and examination of Claimant, Dr. McNulty opined that the injuries requiring surgeries in 2007 were due to the 2006 industrial accident. "The mechanism of injury of being hit on the head with a tree in parts [*sic*] axial load throughout his spine. The injuries he sustained to his cervical and lumbar spine that resulted in surgical treatment are on a more probable than not basis the result of being struck on the head by a tree." JE-331.

123. Dr. McNulty opined Claimant was medically stable and assessed 25% whole person impairment to the cervical spine condition and 20% whole person impairment to the lumbar spine condition. He did not apportion any impairment to pre-existing degeneration because he believed this was asymptomatic prior to the industrial injury. In the event Claimant is found to have lumbar impairment due to his prior accident, Dr. McNulty opined this should be subtracted from his lumbar impairment rating for apportionment purposes.

124. Regarding the right shoulder, Dr. McNulty found evidence of muscle atrophy, weakness and limited movement on exam. He also noted that Claimant had an injection in January 2008 that did not relieve his symptoms. Given Claimant's report that he fell on his shoulder in the accident (which is notably inconsistent with earlier notes stating Claimant did not injure his shoulder in the 2006 accident), Dr. McNulty recommended a right shoulder MRI to evaluate Claimant's rotator cuff.

125. Dr. McNulty agreed with Mr. Bengston's FCE findings, opining that Claimant should not engage in heavy physical activities such as logging due to his thoracic and lumbar fusions. "He should not engage in heavy physical activities such as logging. He is more suited to work in a light job duty category as outlined in the FCE." JE-332.

126. Although Dr. McNulty summarized medical records in which other physicians doubted his credibility, including the panel IME report, he did not comment on them or, apparently, administer any validity testing on exam.

127. On September 10, 2009, Dr. Dirks opined that Claimant could not return to his time-of-injury job, as defined in the ICRD JSE previously approved by the IME panel physicians. He also disapproved, without comment, JSEs provided by Mr. Brownell for

machine/equipment operator, boat/marine mechanic, and small engine mechanic. On September 16, 2009, Dr. Dirks returned a check-box letter to Claimant's counsel in which he indicated he agreed with Mr. Bengston's FCE of March 31-April 2, 2009 and recommended a right shoulder MRI.

128. On November 18, 2009, Claimant underwent an MRI of his right shoulder. The radiologist opined there was no evidence of discrete rotator cuff tear; however, the imaging did reveal tendinopathy of the supraspinatus and infraspinatus tendons, as well as mild acromioclavicular arthropathy. On January 14, 2010, Dr. McNulty opined that Claimant had chronic tendinitis in his right shoulder and offered an injection, which Claimant declined. "It appears he did not have a significant injury to the shoulder as a result of the 7/3/2006 injury. He does not require any further treatment related to that accident." JE-515.

129. On January 28, 2010, Dr. Williams diagnosed Claimant with depression, prescribed Effexor and discussed coping strategies. Claimant had lost his ambition, was stressed about finances and the prospect of losing his house to foreclosure, and felt like a burden to his family. He had initiated bankruptcy paperwork. After a couple of months, Claimant no longer took Effexor because he did not believe it helped.

130. **Psychological evaluation (April 13, 2010).** On April 13, 2010, Claimant was evaluated by Tim Rehnberg, Ph.D., a licensed psychologist, at Claimant's SSDI attorney's request. Dr. Rehnberg administered psychometric testing and interviewed Claimant. Test results revealed no clinically significant match with malingering criteria. However, Claimant did produce scores clinically significant for identifying somatization, depression, acute stress, affective and psychological symptoms of depression, somatoform disorder, Cluster 8 (often seen

in persons reporting marked concerns about physical functioning, most commonly associated with diagnoses of somatoform disorder, adjustment disorder and dysthymia), and adjustment reaction.

131. Although Dr. Rehnberg was informed that a prior IME had resulted in an opinion that Claimant was exaggerating his symptoms and that he had previously been accused of manipulating his prescriptions, the actual IME report was not provided for review. Likewise, neither Dr. Lea's records, nor the panel IME report were provided. These omissions undercut his ultimate opinion that "[t]here was nothing in the clinical interview, medical record or current testing that would indicate that he is malingering or exaggerating his current physical and psychological symptoms." JE-376.

132. Dr. Rehnberg diagnosed Claimant with a pain disorder associated with both psychological factors and a general medical condition (chronic), adjustment disorder with depressed mood (chronic, in response to his chronic physical health issues), sleep disorder due to chronic pain (insomnia sub-type), and nicotine dependence. In addition, he opined that Claimant has psychosocial stressors from occupational, financial and health care access problems, as well as Global Assessment of Functioning (GAF) scores of 50 (current) and 50 (highest). Dr. Rehnberg did not explain his diagnoses. Specifically, he did not discuss how Claimant's pain disorder affects his perception or reporting of pain to his physicians, if at all.

133. On April 23, 2010, Dr. Williams completed a fill-in-the-blank worksheet provided by Claimant's Social Security benefits attorney. Among other things, Dr. Williams opined that Claimant could only do seated work for four hours out of every eight-hour day.

134. **Subsequent injury – chair fall (October 22, 2010).** In October 2010, Claimant fell off a chair while eating at a casino, reigniting his back and neck pain, as well as radiculopathy into his left leg. Cervical and lumbar spine MRIs taken that day raised the question of a C-4 fracture versus an imaging artifact. They also identified mild grade 1 cervical anterolisthesis, and no evidence of lumbar fracture or static evidence of lumbar instability. A CT of Claimant's cervical spine the next day revealed no evidence of cervical fracture, C3-4 facet arthrosis, mild dextroscoliosis, or cervical spondylosis, and he had "adequately patent neural foramina at all levels." JE-393.

135. Thereafter, Dr. Williams prescribed either Lortab or Norco in addition to MS Contin for Claimant's pain. In March 2011, he referred Claimant to Dr. Dirks for a surgical consultation and increased Claimant's restrictions to no lifting over ten pounds, with bending, lifting, and twisting only seldom.

136. **EMG nerve conduction study (May 9, 2011).** On May 9, 2011, Claimant underwent an EMG nerve conduction study by Ken Young, D.O., to help sort out the etiology of his new complaints of left lower extremity symptoms. Dr. Young opined the results demonstrated "left sided lumbar radiculopathy mainly involving the lower lumbar and sacral region on that side. Right lower extremity reveals residual chronic neuropathy without any active lumbar involvement currently." JE-396.

137. **Spinal fusion surgery at L3-S1 by Dr. Dirks (April 2012).** Claimant underwent another fusion surgery with Dr. Dirks in April 2012. The procedure required removal of his prior lumbar fusion hardware at L3-L5 to integrate L5-S1.

138. **June 29, 2011 pain management by Dr. Williams.** On June 29, 2011, Dr. Williams administered a questionnaire, the results of which he interpreted to mean Claimant is a low-risk for opioid abuse or addiction.

139. On August 13, 2011, Dr. Williams wrote an open "Justification Letter" stating that Claimant is "unable to participate in any form of gainful employment for the next two years" due to his post-surgical status. JE-273. The corresponding chart note indicates the purpose of this letter was "to support getting government aid for housing." JE-274.

140. Dr. Williams' chart notes following Claimant's 2012 lumbar spine surgery indicate he continued to have left foot numbness and lower extremity weakness, along with cervical, thoracic and lumbar pain. Around the end of 2012, Claimant's left foot and lower extremity symptoms apparently resolved.

POST-INDUSTRIAL INJURY VOCATIONAL AND INCOME HISTORY

141. Claimant was approved for SSDI benefits in 2012.

142. Claimant remained in business until October 2008. He explained that he ceased operations because Jerry Pokriots, his most trusted employee, was off work with an injury, his Cat was broken down, he had been operating at a loss for several months, and he could not afford to pay a $12,000 workers' compensation bill coming due. So, he saw no other viable options. Claimant could not explain why his tax forms demonstrated he had substantial earnings during the two years following his industrial accident, even though Claimant was not doing any heavy logging work.

143. To support himself after he closed his business, Claimant sold his equipment and whatever belongings he could. In October or November 2008, Claimant mortgaged his house

and property (5.78 acres about a mile from St. Maries). Claimant could not recount how the funds were spent, but he only made one mortgage payment. Eventually, foreclosure proceedings were initiated. He later filed for bankruptcy.

144. Claimant did not look for work until the first part of 2009 because he did not believe there were any jobs he could do in the St. Maries area. His daughter brought him an application from a casino and he filled it out, but did not keep it current. He initially thought he could do security work there, or flagging work elsewhere, but changed his mind when he learned these jobs required constant standing. Claimant thought he could do millwork, but upon inquiry at a mill, he was told his condition presented too big of a liability. He applied for a job as a lead forester with the Coeur d'Alene Tribe in Plummer. "This one I went over there as soon as I seen it." TR2, p. 179. The application process included a two-hour exam testing Claimant's knowledge of topics like tree species and fire procedures. Claimant believed he aced the exam, but then he was required to demonstrate that he could walk a mile carrying a 45-pound fire fighting pack. This, Claimant could not do. He was disappointed:

> ...another requirement was to know their land, where it is and whatnot, and from all the time I worked for Potlatch, man, designing the logging operations, it was right up my alley. It was perfect. And I was very disappointed about that.

TR2, p. 181.

145. Claimant was also listed with Job Service for a period, and he regularly perused the Nickel's Worth and the St. Maries Gazette for job listings. Claimant never found any listed openings for which he felt qualified, and no employer he approached ever offered him an interview or a job.

146. Claimant did not have an active file with ICRD because the 2008 panel evaluation concluded he could return to work without restrictions. He did not have an active file with Idaho Division of Vocational Rehabilitation (IDVR), apparently because he was unaware of how to go about initiating this. After the first part of 2009, he worked with Dan Brownell, vocational consultant, to find work. With Mr. Brownell, Claimant has approached a number of employers about jobs. Those efforts were unsuccessful.

147. In July 2012, Claimant lost his house. He was living in a camp trailer on mortgaged land at the time of the hearing, receiving $1,700 per month in Social Security Disability benefits along with assistance from his children. Claimant's three children help him financially. Two of them, Shelby and Wesley, sincerely testified that Claimant can no longer do the things he did before his 2006 industrial accident, that he was devastated that he could no longer work and support his family, and that he was ashamed of having to accept assistance from his children. Wesley explained the hardships occasioned by Claimant's inability to work, including the loss of their house to bankruptcy and Claimant's resulting depression. He believes that Claimant stopped socializing because his source of pride – his work – was gone.

TESTIMONY FROM POTENTIAL EMPLOYERS

148. Mike Roland, owner of a logging salvage operation and Claimant's former boss, confirmed that Claimant is an excellent worker and has a reputation as such in the St. Maries community. He heard through the grapevine about Claimant's 2006 back injury. Mr. Roland would not hire anybody with a back condition, including Claimant. "It's just business, you know, work. You gotta be able to, you know, work, pull winch line, run chainsaws. And you can't do that with a bad back. You can't do it." TR2, p. 22.

149. Robby Macklin, owner of St. Maries Saw & Cycle, a Yamaha dealership and repair shop catering to all brands, confirmed that Claimant had approached him about a job several times over the four years preceding the hearing. Mr. Macklin has known Claimant all his life and knows his mechanical experience and abilities. Although he would like to help Claimant out with a job, he never had a position that fits Claimants functional capabilities (specifically, his lifting limitations that he presumed from observing Claimant). Also, Mr. Macklin gets many inquiries from presumably able-bodied job-seekers. Mr. Macklin said he thought he could hire Claimant to be a "broom pusher" four years ago, but he never had an opening when Claimant inquired. TR1, p. 133.

150. Randy Reynolds, owner of a marine and automotive repair shop/U-Haul rental store in St. Maries, confirmed that he has declined to offer work to Claimant, who he knows incurred a spine injury in a logging accident. "He's asked me for work, and I just - - to be honest, I gotta have somebody that has a strong back and is not going to be a liability to our business." TR1, p. 143. Also, Mr. Reynolds must hire mechanics who, unlike Claimant, are certified to do warranty work. He sometimes hires high school kids to clean out the U-Hauls, but he has not done so since 2010. Mr. Reynolds owns the shop along with his brother. They have only employed one other mechanic since they went into business in 1983, and that individual only worked two days per week.

151. Dewey "Duke" Shawver, a long-time salvage logger in the St. Maries area who has worked with Claimant and respects his work ethic and logging abilities, testified that Claimant was not employable as a logger following his 2003 surgery.

152. Carrie Nordin, administrative assistant, handles all of the workers' compensation reporting at Stimson Lumber, where she had worked for nearly 16 years at the time of the hearing. She testified that she is familiar with the job of a forklift driver at the mill. Usually, this job is filled from the pool of available general laborers already working for Stimpson. Also, an individual with limitations on bending and twisting one-third of the time, limited grasping and handling with his right hand, sitting limited to one-third of the time, lifting limited to ten pounds on a frequent basis, and moving his head from side to side would likely not be able to drive a forklift on a full-time basis. She estimated that forklift drivers must sit 85% to 90% of the day, which is sometimes ten hours long. She also explained that sometimes boards fall off the forklift, and the driver needs to pick them up, requiring an ability to bend and lift more than ten pounds. In addition, Ms. Nordin estimated that a forklift driver spends 75% of his day driving backwards, requiring him to twist and move his head from side to side. Further, forklift-driving entails a great deal of bouncing.

VOCATIONAL REHABILITATION OPINIONS

153. **Dan Brownell.** Mr. Brownell, a vocational rehabilitation consultant, was retained by Claimant in early 2009 both to assist him in job placement in the St. Maries local labor market, and to provide an expert forensic opinion as to Claimant's employability. He continued to work with Claimant and/or look into job possibilities for the next three years. He "was kind of excited" to work with Claimant "because he was famous down here. Logger of the year for Potlatch for two years, that's a big deal. So I thought it was going to be a piece of cake in job placement." TR2, p. 41. However, Mr. Brownell ultimately opined that Claimant is totally and permanently disabled.

154. Mr. Brownell prepared two reports in evidence: one dated August 15, 2009, and one dated August 7, 2012. He noted in 2012 that Claimant appeared to have regressed since 2009. He reviewed Claimant's medical and vocational records and spent a great deal of time assisting Claimant with his job search.

155. In determining what jobs Claimant could physically do, Mr. Brownell adopted Mr. Bengston's 2009 FCE limitation recommendations for limitations on:

- Any activities requiring him to lose his neutral spine position (bending, twisting)
- Repetitive right (dominant) hand grasping and handling
- Sitting: occasional
- Sit/stand/walk: up to 8 hours per day
- Lifting/carrying: 10 pounds frequently/occasionally, 30 pounds rarely
- Bending/stooping: occasionally

156. Mr. Brownell defined Claimant's local labor market to include all of Benewah County (St. Maries, Plummer, Worley, the Coeur d'Alene Casino, Fernwood, Santa, Harrison and Princeton).

157. It is undisputed that Claimant is a bright fellow. In 2012, a TABE test administered by Mr. Brownell revealed that Claimant has college-level applied math skills.

158. Although Mr. Brownell did not detail Claimant's transferrable skills specifically, he identified Claimant's main occupations with transferrable skills as logger, owner/operator, lumber mill laborer, mechanic and operator of logging truck and skidder.

159. Mr. Brownell opined that Claimant's physical limitations following his 2006 industrial accident place him in the light/sedentary work category, taking him out of any of his

prior occupations, including mechanic jobs. Previously, as a result of his 2003 thoracic spine surgery, he opined Claimant was able to do medium/heavy work, but he was unemployable in the logging industry because employers were aware of his limitations and prior accidents. However, Mr. Brownell opined that Claimant remained employable as a mechanic at that time.

160. In Claimant's job search, Mr. Brownell started with potential employers in Claimant's "sphere of influence." TR2, pp. 49-50. "...I really talked to Roy about who his sphere of influence was, and his sphere of influence is massive. I mean, he knows - - it's a rarity for some of the old timers or most of the people in town to not know Roy or Roy to not know them. He has relatives that own businesses here in town....So I utilized a lot of that, and he and I came up with a list of a lot of people to contact that way." *Id.* He also picked Claimant up at his house and, on some occasions, helped him get ready to go meet employers.

161. Mr. Brownell opined that Claimant's popularity in his community was detrimental to his job search in that "most, if not all, possible employers know of the injuries that Mr. Green suffered in the 7/3/06 accident and...as a result he was unable to keep his salvage logging business operating." JE-699.

162. Together, Mr. Brownell and Claimant approached Claimant's relatives, who own a local sporting goods store. They declined to offer employment because they could not afford to hire anyone outside the immediate family. Also, Claimant was unable to do any stocking.

163. Either together with Claimant or on his own, Mr. Brownell approached other employers, too. A local hardware store had no positions and was laying people off. The sawmill and other employers were afraid of the liability risk Claimant posed. Pete Manufacturing, a

larger employer, only hires women for the production line and some of the work requires lifting up to 20 pounds. (Mr. Brownell did not elaborate on how often such lifting would be required.)

164. Mr. Brownell also apparently ruled out some positions without contacting the employers due to Claimant's appearance, personality, physical abilities, and other factors. For example, he believed Claimant could work in retail clothing sales, but for the "yuck factor" – essentially Claimant's poor appearance – which he opined would preclude Claimant from being hired. He similarly ruled out convenience store and smoke shop work. Mr. Brownell opined Claimant had a speech impediment on the telephone that precluded him from call center work. He ruled out the Subway sandwich maker position because the employer has a lot of turnover and a lot of biases, and he did not see Claimant fitting in there. He thought Claimant's hobbling around, his personality, and his overall appearance would be off-putting. He also thought there would be too much computer work and tallying, and he vaguely opined that there would be too much physical work. "They expect them to work in other areas." TR2, p. 56. Mr. Brownell ruled out any security guard position at a casino because there is a hiring preference for tribe members and, too, Claimant would be physically unable to apprehend uncooperative rowdies. He ruled out Potlatch and, apparently Jack Buell Trucking, because he did not believe Claimant, physically, could do any job at either place.

165. In his 2012 report, Mr. Brownell asserted that he had contacted over 50 employers in Claimant's local labor market. Although it is unclear exactly which employers Mr. Brownell actually approached, or when, Mr. Brownell testified that he exhausted all possible options in Claimant's job search. "I can honestly say that I sincerely saturated the market on possibilities....I can sincerely say that I think he is a total perm. He's not employable in the labor

market. I challenge anybody else who thinks that they could place him." TR2, pp. 59-60. Mr. Brownell did not reveal his private database of employer information because it is proprietary.

166. In developing his opinions and trying to place Claimant in a job, Mr. Brownell also consulted Carol Jenks, ICRD consultant; Tony Frazier, IDVR consultant; Alivia Metts, Idaho Department of Labor (IDOL) labor analyst; Annie Frederick and Sue Shoemaker, IDOL workforce consultants; a testing counselor at ABE in St. Maries; and Jeff Truthman, president/owner of *SkillTRAN*.

167. As for his statistical analysis of the job market, Mr. Brownell included a list of resource materials and some raw job market data. However, he did not describe his methodology in either of his reports or at the hearing.

168. Mr. Brownell is not a certified rehabilitation consultant, and he does not agree that his involvement in a case should be limited to *either* forensic analysis *or* job placement assistance. He believes he can be a strong hands-on advocate in assisting an individual in job placement, and at the same time provide an objective opinion based upon statistical analysis of the relevant job market and an individual's established education, skills, and abilities. Mr. Brownell has extensive knowledge of the St. Maries labor market through his many years working as an ICRD consultant before he began his own vocational consulting business.

169. **Nancy Collins, Ph.D., CRC.** Dr. Collins was retained by ISIF to assess Claimant's employability. Surety also relies upon her opinions.

170. Dr. Collins authored a letter summarizing her preliminary opinions (based upon records provided by ISIF and Claimant's 2007 deposition transcript) on July 27, 2009. She

opined that Claimant's most restrictive limitations were from his 1988 FCE, which outlined limitations on lifting over 20 to 35 pounds, stooping, overhead work, and right-handed strength limitations, as well as physician recommendations that he leave logging. Also noting Claimant's 2003 condition prompting new recommendations that Claimant leave logging, Dr. Collins was unable to find any permanent restrictions related to either the 2002 or the 2006 injury. She did note Dr. Williams' 2008 temporary restrictions, as well as the 2008 panel IME opinion that Claimant could return to work as owner/operator of St. Joe Salvage. Dr. Collins concluded:

> Mr. Green's deposition testimony is certainly different from the medical records the [*sic*] discuss past pain complaints and physical restriction. My preliminary opinion, based on the records reviewed, is that he has some pre-existing restriction (that was ignored), but there is no support for a total disability opinion as a result of a combination of industrial injury and pre-existing condition.

JE-741.

171. On August 20, 2009, Dr. Collins prepared a full written analysis and report in which she listed all of the records she reviewed, including medical records, Claimant's 2007 deposition and interrogatory responses, ICRD records, and Dan Brownell's report. She also identified vocational information databases and software she relied upon.[3] She requested an interview with Claimant, but he refused.

172. Dr. Collins defined functional limitation as "the hindrance or negative effect on the performance of tasks or activities, and other adverse and overt manifestations of a mental, emotional, or physical disability." She cited authority (Wright, 1980) in identifying the following 14 functional limitation areas that result from disability: mobility, communication, sensory, invisible, mental, substance abuse, pain, consciousness limitation, debilitation, and

[3] Dr. Collins utilized *SkillTRAN, Idaho Occupational Wage and Employment Survey, Occupational Outlook Handbook,* Department of Labor job listings, and O*NET.

motivity, restricted environment, uncertain prognosis, functional behavior, and atypical appearance. She identified Claimant's limitations based upon his 1988 FCE (noted, above) and his 2009 FCE, which she interpreted to include: no lifting more than 20 pounds, 15 pounds occasionally and 10 pounds frequently[4]; significant limitation with elevated work, kneeling and forward bending while standing; some limitation with standing work and static standing and sitting; some limitation for crouching and kneeling, stairs, and ladder climbing; no limitation on walking; and no limitation for right or left hand grip. In summary, "His most recent FCE allows light work with additional restriction for elevated work, position changes, occasional bending, climbing and kneeling." JE-748.

173. Dr. Collins identified job categories for work Claimant has performed in the past in the logging and mechanic fields. She erroneously assumed Claimant had truck driving experience based upon ICRD records indicating Claimant wished to retrain as a truck driver.

174. Using the *SkillTRAN* program, Dr. Collins compared Claimant's pre-injury employability with his post-injury employability in order to estimate his loss of access to the local labor market. As to Claimant's pre-injury status, Dr. Collins opined that without any restrictions, Claimant had directly transferable skills for 71 job titles; with medium restrictions he had directly transferrable skills for 60 job titles and, assuming the restrictions from his 1988 FCE, he had directly transferable skills for 10 job titles, representing an 86% loss of access to the labor market as a result of his 1987 neck injury. Considering unskilled work, he had access to 58.8% of jobs in the Dictionary of Occupational Titles. Post-injury, Claimant had restrictions greater than imposed in 1988 due to additional restrictions on static sitting and standing.

[4] These are not consistent with Mr. Bengston's recommendations of 10 pounds occasionally and frequently, and 30 pounds rarely.

Assuming Claimant was restricted to medium duty work prior to his 2006 injury, and light duty afterward, Dr. Collins opined Claimant's loss of access would be 83%. Considering unskilled work, his loss would be 53%. Dr. Collins posited that Claimant could, for example, still do some sawyer work. Also, he could inspect exhaust emissions, do some sorter operating and machine operating, hand soldering and knife setting, and some retail and driving jobs.

> By considering the most restrictive limitations, he can do some light work that does not require constant sitting or standing. Light work makes up 60% of the jobs in the labor market. If he improves like he did after his 1988 FCE, his access will be greater.

JE-750.

175. Dr. Collins also opined Claimant lost significant earning capacity as a result of his 2006 industrial injury. She understood, incorrectly, that Claimant's net earnings for 2008 were $70,000, and, based upon an ad for a logger in St. Maries, that his pre-injury hourly wage was approximately $18. Post-injury, Dr. Collins opined that Claimant should be able to earn $8 to $10 an hour in light-duty jobs, such as driver, some production work, inspection, and retail jobs that are regularly available within 30 miles of his home.

> Labor market research using the Department of Labor job listings for one day found retail jobs, customer service work, front desk work, driving jobs, lot attendant/driver, solderer, and a runner position. The Department of Labor posts less than 25% of jobs that are available in a community, so this is just a small percentage of jobs he might consider. The economy is poor right now, but should improve in the next two years and provide additional opportunities.

JE-750.

176. Dr. Collins understood that Claimant had not attempted any job search since closing his business, and that he did not know how to look for work. Too, he did not believe he could do any work because he could not bend or do heavy lifting. She recommended that he

work with a vocational rehabilitation counselor and take a short computer training course to improve his employment opportunities.

177. On September 11, 2009, after interviewing Claimant in the presence of Mr. Brownell, Dr. Collins updated her opinions. She observed that Claimant appeared somewhat disabled because he did not move his head much, and that he answered her questions in a straight-forward manner. Claimant reported that his neck and shoulder conditions were his primary problems, with constant aching and sharp pains in his neck and shoulder, and limited function in his right shoulder. He was concerned that he had a rotator cuff tear or some other unaddressed, repairable, condition. He said he did not have permanent problems with his arms or hands prior to his 2006 injury. Also, when he looks down he gets a shooting pain in his right hand and his hand is very weak. He cannot read for long (he testified 20 minutes every three to four hours), cannot shave well because he has to hold his arms and chin up, and has a hard time doing anything that requires repetitive use of his hands if he also has to move his head. He also described low back pain with limited motion including bending, twisting, stooping, and squatting. He reported being able to stand only 15 minutes at a time. He could walk fairly well, but slowly because he cannot look at the ground and fears falling. He could sit for an hour before changing positions, or drive for an hour before getting out and walking around. He spent most of the day on the sofa watching television and did not climb the stairs in his house very often.

178. Claimant reported that, prior to the 2006 accident, he could perform all aspects of his job as a logger, including operating a bull dozer, loader and processor; operate a chain saw all morning; walk on uneven ground, over logs and up hills, and other activities.

179. Claimant and Mr. Brownell also advised they had tried to find work for Claimant, to no avail. Dr. Collins still believed Claimant could do some retail work that would allow him to walk primarily during the day without much lifting. "There have been two retail clerk positions listed in the past week for cashier/clerk in St. Maries." JE-753. She also noted Claimant's ideas for self-employment, including producing videos on safety for the logging industry, and on saw sharpening. He also had ideas about inventing underwater logging equipment and marketing some recipes.

180. If Claimant's testimony as to his pre- and post-injury capabilities is found as fact, Dr. Collins opined that all of his post-injury disability is due to the 2006 injury. She also acknowledged that Claimant's difficulty looking down and his right hand pain are significant. "This is not addressed by the physicians, but there is mention of right hand problems in the functional capacities evaluations. This will be problematic in most light and sedentary work." JE-754. In addition, Dr. Collins acknowledged the job search difficulties accompanying the lackluster economy, but opined that it would improve in the next two years.

181. Dr. Collins again updated her opinions in a written report dated October 23, 2010 after reviewing Dr. McNulty's IME report and the Safety and Surveillance videos, and periodically considering the labor market within 30 to 40 miles of Claimant's home in St. Maries. She noted generally that Dr. McNulty, unlike most of Claimant's medical providers, felt Mr. Green's impairment was due to the 2006 injury and that he was asymptomatic previously. Also, Dr. McNulty agreed with Mr. Bengston's FCE recommendations and agreed that Claimant could do light duty work.

182. As for the Safety Video, Dr. Collins noted, "He showed no range of motion difficulties in his neck or low back." JE-755. Concerning the September 2009 surveillance video of Claimant at his son's motorcycle competition, she opined, "This video depicted a gentleman that was very different from the gentleman I interviewed in his home in September of 2009. At the time I met with him, he displayed fairly severe pain behavior, had very limited range of motion in his neck, and he stayed in a reclined position during most of the interview." *Id.*

183. Dr. Collins did not believe that Claimant had conducted a "realistic" job search. "Based on my review of his physical capacities as shown on the surveillance video, and a light work restriction, I do think Mr. Green could have returned to work in some capacity, had he conducted a reasonable job search." JE-756. She listed a number of job openings[5] in the area listed in June, July, August, September, and October 2010 that she thought Claimant may be able to do.

184. Dr. Collins also criticized Mr. Brownell's methods. "It appeared Mr. Brownell was working in a dual capacity by providing vocational rehabilitation advice, while at the same time he appeared to be providing expert opinion regarding disability. I am unsure of his role, but under CRC guidelines, this is an ethics violation." JE-756. At the hearing, Dr. Collins elaborated that, whereas Mr. Brownell accompanied Claimant to talk to prospective employers with no current job openings, she would have instead provided Claimant with the information

[5] Job titles included log truck driver, truck driver (multiple), food service substitute, pit attendant, equipment operator (multiple), lead cook, delivery driver (multiple), fuel truck driver, truck driver to haul steel to Seattle, grocery store cashier, retirement home transportation driver, security officer, buffet cashier, transportation/cart attendant, gas station cashier, apartment manager, museum guide and gift shop sales person, semi-truck driver, security guard, construction truck driver, CDA resort driver, parkade night attendant, entry level loan processor, customer service representative (Kelly Services), part-time telephone operator, deli worker, retail sales associate, cashier (multiple), assembly worker, banquet cook, and buffet attendant.

and support to approach employers with current openings independently. She believed Mr. Brownell's approach only highlighted Claimant's disability. Mr. Brownell disagreed, testifying that he had been able to put together job training packages for others in the past, with assistance and funding from IDVR.

185. Dr. Collins opined that Claimant has good communication skills and "if he presents to an employer as he did on the surveillance video, he does not appear disabled. He is in his early 50's and appears to be fit." JE-757.

CLAIMANT'S CREDIBILITY

186. This matter was heard by Referee Just, prior to her retirement. Only Referee Just was in a position to make a judgment concerning Claimant's "observational credibility". Since the Commission did not have the opportunity to observe Claimant's demeanor at hearing, it is only empowered to make a judgment concerning Claimant's "substantive credibility". This determination may be made based on the Commission's review of the record before it. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008). Here, the record is filled with conflicting facts and internal inconsistencies such that we are unable to conclude that Claimant is a credible witness.

187. Claimant, two of his children, and Dan Brownell all testified that Claimant is the hardest-working, strongest, and toughest person they have ever known. However, the record is replete with evidence that challenges Claimant's credibility.

188. With respect to the injuries Claimant claims are due to the 2006 industrial accident, Drs. Ludwig, Stevens, Zoltani, and Barnard all opined that Claimant magnified his symptoms during examinations, based in part upon Claimant's responses to Waddell's testing. It

is noted that Claimant disagreed with some of the methods employed by evaluators who were critical of him, as well as the conclusions they drew. For example, Claimant felt justified in refusing to bend at the waist in the 2008 panel evaluation because he felt unsafe:

> There was a - - not bed - - but a whatever there, similar to a table, but it was padded. And I told them, "I'll bend over towards that in case I keep going, because I have no balance." And they're like, "No, we want you to do it here," right toward the concrete floor. And I'm like, "I'm not doing that." I mean, seriously. Especially if they wanted me to keep my legs straight.

TR1, p. 123. Similarly, Claimant minced no words in conveying his sentiments about the panel physicians' opinions that he could still work. "Well, they can go to hell. I worked with a broken foot before. I never stopped." TR1, p. 152. However sincere Claimant's protestations may be, they are insufficient to support a finding that the ultimate conclusions of any of his evaluators are based upon improper methodology or a preponderance of inaccurate medical findings. Importantly, no medical opinions in the record rebut these physicians' use or interpretation of Waddell's tests, their findings on exam, or the manner in which they considered Claimant's medical history in deriving their opinions. Key physicians who found Claimant credible, including Dr. Dirks, Dr. Williams, and Dr. McNulty, apparently administered no credibility testing at all. They were satisfied to take Claimant at his word, even though his credibility had been questioned by others, both before and after his 2006 accident and injury.

189. In addition, Claimant's testimony concerning his medical course was often inconsistent with information contemporaneously recorded in his medical records, and he has reported symptoms in excess of objective findings throughout his worklife, sometimes receiving monetary settlements as a result of his persistent but uncorroborated complaints. Furthermore, Claimant's testimony in these proceedings has been undeniably internally inconsistent on the key

points of his functionality both pre-injury and post-injury. For example, consider Claimant's testimony concerning the quality of his recovery following the 2003 T12-L1 surgery performed by Dr. Ganz. Both on questioning by his attorney and by the attorney for the ISIF, Claimant testified that the surgery left him unable to perform many of the physical tasks he had been able to perform before he injured his thoracic spine. TR1, pp. 95/6-99/23; 159/5-162/4. Therefore, Claimant testified that following the 2003 thoracic spine surgery, he was never able to return to sawing all day owing to the problems he had with bending and lifting. He limited his sawing to two hours per day, and there were some days when he did not saw at all. He spent more of his time operating the Cat and the log processor. However, Claimant gave an entirely different description of his recovery from thoracic spine surgery at the time of his 2009 deposition. At that time, Claimant described his recovery as follows:

> Q. Do you think you made a full recovery from the thoracic, the T-12 L-1 surgery?
>
> A. Oh, yeah.
>
> Q. Yes?
>
> A. Yes.
>
> Q. Did you have any difficulty after you returned to work doing your logging?
>
> A. No, sir.
>
> Q. No part of the job?
>
> A. No. It was fine.
>
> Q. You could saw a tree, you could skid, you could operate machinery, everything?
>
> A. Yes. I could run and jump. Everything. Ride motorcycles. I could do anything I wanted to.

C. Depo. 2009, p. 47, ll. 3 – 16.

190. Later in his deposition Claimant qualified this testimony by stating that Dr. Ganz had told him to avoid extremely hard to heavy lifting, but said that this restriction only impacted his ability to install a role of winch cable on his Cat, an activity which he was required to do once every three months or so. However, he was quite explicit that this was the only aspect in which his ability to perform his logging work or other physical activities was impacted by the thoracic spine surgery. *(See* Exhibit 24 at 345-346.) Claimant did not explain the discrepancy between his hearing testimony and his 2009 deposition testimony. TR1, pp. 162/17-164/3. Claimant was unable to reconcile these conflicting versions of how he fared following the 2003 thoracic spine surgery, but his testimony on this issue is important because it might have a bearing on whether or not the thoracic spine injury is a pre-existing condition which constituted a subjective hindrance to Claimant prior to the subject accident. It is easy to understand how an insincere claimant might be incentivized, under circumstances similar to those at bar, to argue that he is totally and permanently disabled by virtue of the last injury alone; if the Claimant loses on his total and permanent disability claim, he has not hurt his chances of still obtaining a sizable disability award related to the last accident. This might explain Claimant's deposition testimony, which is counter to the great weight of the medical and other evidence; evidence which clearly denigrates Claimant's assertion that he could do anything he wanted to at the time the 2006 Safety Video was prepared.

191. It is also possible that Claimant's pre-injury medical and other records should not be relied upon to accurately characterize how Claimant was actually getting along prior to the subject accident. Perhaps Claimant overstated his physical problems in order to maximize the settlements he obtained in past workers' compensation cases. If so, then the 2006 Safety Video,

and Claimant's explanation of his physical prowess at the time of his 2009 deposition might actually be a more accurate representation of his functional capacity immediately prior to the subject accident.

192. Another factor in assessing Claimant's credibility is his psychological condition. Claimant was diagnosed with a somatoform disorder in the 1980s and, in 2010, psychological testing led to a diagnosis of pain disorder. As well, the 2010 testing failed to confirm Claimant was malingering. The full meaning of these conclusions was not fleshed out in the record but, at a minimum, they tend to establish that at least some of Claimant's complaints in excess of objective findings are likely not due to an intent on his part to mislead his caregivers or this tribunal, but are instead the result of a psychological disorder that manifested prior to the accident precipitating the instant claims.

193. It is also relevant that Claimant has been invested in obtaining a disability settlement since (at the latest) July 30, 2006, when he first applied for SSDI. At this time – less than one month following his 2006 industrial accident – no physician had yet opined Claimant had incurred any permanent impairment, let alone permanent disability, from any condition related to his subject injuries.

194. The evidence of record establishes that Claimant is not a reliable historian with respect to his medical condition at any given time, that he has exaggerated details about his condition in sworn testimony offered in these proceedings, and that he has given inconsistent testimony over the years concerning the impact of his various injuries on his ability to work. There is also sufficient evidence to establish that Claimant's testimony is at least partially colored by secondary gain factors, as well as his pre-existing psychological pain disorder.

Claimant is not a credible witness. However, we are mindful that just because Claimant's self-reported complaints have not been consistent over the years, does not mean that he is not significantly disabled at the present time.[6]

DISCUSSION AND FURTHER FINDINGS

195. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts 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).

CAUSATION

196. The Idaho Workers' Compensation Act places an emphasis on the element of causation in determining whether a worker is entitled to compensation. In order to obtain workers' compensation benefits, a claimant's disability must result from an injury, which was caused by an accident arising out of and in the course of employment. *Green v. Columbia Foods, Inc.*, 104 Idaho 204, 657 P.2d 1072 (1983); *Tipton v. Jannson*, 91 Idaho 904, 435 P.2d 244 (1967).

197. The claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be medical testimony supporting the claim for

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[6] One of the Commissioners remembers very well a comment made at a long ago hearing by then-Commissioner Gerry Geddes. In the middle of cross-examination intended to expose that Claimant's past acts of dissimulation, all to discredit his current claim, Commissioner Geddes interrupted counsel to point out: "Just because he is a liar doesn't mean he didn't hurt himself at work."

compensation to a reasonable degree of medical probability. A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 958, 560-61, 511 P.2d 1334, 1336-37 (1973). See also *Callantine, Id.*

198. The Idaho Supreme Court has held that no special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993).

199. Claimant asserts that he suffered injuries to his cervical, thoracic, and lumbar spine areas, and his right shoulder as a result of his July 3, 2006 industrial accident. He also argues that he has chronic pain syndrome caused by the accident and subsequent surgeries. Defendants and ISIF both argue that the conditions requiring Claimant's surgeries were pre-existing and not due, either in whole or in part, to an industrial accident.

200. ***Accident.*** The evidence is sufficient to establish that Claimant suffered an industrial accident on July 3, 2006. Claimant's description of being struck on his head/hardhat by a falling tree is consistent over time and it is unrebutted. Also, medical records indicate Claimant reported the accident immediately, and that he suffered injuries consistent with such an event.

201. ***Lumbar spine herniation (L4-5).*** Dr. Dirks and Dr. Ludwig opined that Claimant's lumbar spine herniation is consistent with being hit on the head by a falling tree. Further, no physician opined otherwise. Also, MRI imaging soon after the industrial accident

confirmed an increase in the size of Claimant's lumbar spine bulge at L4-5 since prior imaging taken in 2004. The pre-existing bulge had grown into a herniation that new imaging demonstrated was now compressing the left L4 nerve root. Also, some of Claimant's left-sided lower extremity symptoms were generally consistent with L4-5 neurological pathology. On the other hand, some of the symptoms Claimant reported were inconsistent; an epidural steroid injection failed to alleviate Claimant's symptoms (and, thus, failed to confirm that they arose from a neurological source) and an EMG study failed to confirm any left-sided acute neurological trauma. Also, some physicians were certain Claimant was not honest in his symptom presentation on their respective exams. Given this array of evidence regarding the new MRI finding, several physicians offered causation opinions.

202. Dr. Ludwig (in August 2006) initially ruled out an acute/industrial cause, even though Claimant's left-sided lower extremity symptoms were generally consistent with an L4-5 injury, based upon Claimant's normal EMG results and his Waddell's test failures, among other things. Also, Dr. Ludwig noted that Claimant did not have a clinically significant response to the epidural steroid injection he received shortly following his industrial accident. At his deposition in January 2007, Dr. Ludwig repeatedly testified that he could not opine either that the industrial accident was or was not related to his need for lumbar surgery. However, by the end of questioning, Dr. Ludwig opined that the lumbar herniation was likely related to the industrial accident, and that Dr. Dirks' proposed fusion surgery would be reasonable to treat Claimant's L4-5 condition. (He deferred to Dr. Dirks as to the relatedness of including L3-4 in the fusion surgery.) The reasons for Dr. Ludwig's change of heart are founded upon new information not

previously available to him in the forms of Dr. Dirks' opinion, evidence of prior left-sided lower extremity radiculopathy, and the Safety Video.

203. Dr. Stevens (in September 2006), and Drs. Barnard and Zoltani (in February 2008) all opined that the enlargement at L4-5 was more likely due to natural degeneration than to a new trauma. They found Claimant's presentation was not credible, in part, due to multiple failed Waddell's tests. Drs. Barnard and Zoltani, after viewing the September 2007 surveillance videos, were certain that Claimant was faking his symptoms on exam.

204. Dr. Dirks (in September 2006) opined that Claimant required surgery to decompress L3 through L5 due to his industrial injury. In 2012, he explained that the mechanism of injury was consistent with Claimant's complaints and his condition had worsened since 2004, so it is more likely than not that the industrial accident was a causal factor. He did not differentiate L3-4 from L4-5 when rendering an opinion, nor did he ever explain why a bi-level fusion was necessary.

205. Dr. McNulty (in September 2009) shared Dr. Dirks' ultimate opinion, employing a similar reliance upon the pre-existing imaging, the mechanism of injury, and the post-injury imaging.

206. It is somewhat troubling that neither Dr. Dirks nor Dr. McNulty explained how or whether the 2006 EMG testing figured into their respective opinions, given that it was pivotal to Dr. Ludwig's initial causation opinion. Dr. Ludwig did not fully explain why he changed his opinion, notwithstanding these results, but apparently Claimant's history of left-sided lower extremity neuropathy led him to place less reliance upon the EMG results.

207. Drs. Stevens, Barnard, Zoltani, McNulty, and Ludwig were all more familiar with Claimant's pre-existing medical history at the time they rendered their initial opinions than was Dr. Dirks. By the time of the hearing, it is not apparent from the record that Dr. Dirks ever knew that other physicians had opined Claimant was not credible in terms of accurately reporting his symptoms, or that he had a significant history of spine injuries and treatment prior to 2003. He took Claimant at his word regarding the symptoms he was experiencing. As Claimant's treating surgeon, however, Dr. Dirks was significantly more knowledgeable of Claimant's then-current conditions than any other physician.

208. Dr. Ludwig was aware of Claimant's credibility issue, having determined through his own examination that Claimant failed Waddell's tests, and also having looked into Claimant's prior medical records. Nevertheless, he appropriately altered his ultimate opinion regarding Claimant's lumbar spine condition after receiving new relevant information, establishing himself as an informed and objective witness more concerned with determining the "truth" than with advocacy. Also, as a former treating physician, Dr. Ludwig had more opportunities to evaluate Claimant than did any other opining physician except Dr. Dirks (and Dr. Williams, addressed below). On the other hand, Dr. Ludwig's reliance upon the Safety Video in changing his opinion is problematic. He took those images to mean that Claimant performed at that level all the time. However, Claimant's testimony concerning his actual condition when he made the Safety Video was internally conflicting. At one point, Claimant testified that the Safety Video only caught him on a good day, and that his condition was much worse than depicted. As a result, the Safety Video as interpreted by Dr. Ludwig is insufficient to support a change in his original assumptions regarding Claimant's pre-existing condition. Also,

Dr. Ludwig's reliance on Dr. Dirks' opinion is problematic because it was formed without full knowledge of Claimant's relevant pre-existing medical conditions and symptom reporting behavior. Dr. Ludwig's change of heart rests on shaky ground. It is not surprising that it came upon the heels of a confrontational cross-examination at his deposition.

209. At the end of the day, it is persuasive that all of Claimant's opining treating physicians agreed that there is a causal link between his worsened L4-5 condition and his industrial accident. Dr. Ludwig's struggles with this question brought the case complexities into better focus, inviting heightened scrutiny of the relatively cursory treatment the IME physicians provided. Although their opinions were well-grounded in Claimant's pre-existing history and findings from their respective one-time examinations, they lacked the depth and breadth of experience with Claimant's case possessed by Drs. Ludwig and Dirks, especially. Along these lines, none of the IME physicians testified under oath or defended their opinions under cross-examination in these proceedings; whereas, both Dr. Ludwig and Dr. Dirks did. Further, there is objective imaging evidence to corroborate Claimant's complaints, and Claimant's symptoms are consistent with the mechanism of injury.

210. Claimant has proven that his L4-5 disc herniation is the result of a permanent worsening of his pre-existing asymptomatic disc bulge at that level.

211. ***Thoracic spine herniation (T10-11).*** At his deposition in September 2012, Dr. Williams opined that Claimant has a symptomatic herniation at T10-11 due to the industrial accident. He relied upon a CT myelogram, presumably from April 2008, to support his opinion. That study revealed a protrusion at T10-11 that, in combination with degenerative spurring, mildly contoured the ventral cord. The results were of questionable clinical significance, so

Dr. Dirks ordered cervical and thoracic MRIs, also in April 2008, which he opined demonstrated multilevel minimal disc degeneration but, apparently, no neurologic pathology. There is apparently no imaging demonstrating a symptomatic herniation at T10-11.

212. Dr. Dirks also addressed a T10-11 herniation in his September 2012 deposition. He did not know whether Claimant, at the time, had a herniation at this level, but he opined that Claimant did not have a *symptomatic* herniation because Claimant had not reported any symptoms Dr. Dirks associated with that condition. Dr. Dirks had just taken Claimant to lumbar surgery in April 2012. Claimant's assertion in his briefing that Dr. Dirks "explained that the mechanism of the accident, getting struck on the head, was responsible for Green's current thoracic problems" is misleading. Dr. Dirks opined that being struck on the head could create or accelerate problems throughout the spine; however, he does not specifically address any thoracic problems, and he definitely does not opine that Claimant incurred a thoracic spine injury as a result of the July 2006 industrial accident.

213. Drs. Barnard and Zoltani acknowledged a 2008 thoracic MRI demonstrating a "small disc protrusion" at T10-11. JE-170.

214. No other physician has opined that Claimant suffered any thoracic spine injury in 2006.

215. Dr. Williams' opinion is unsupported by the weight of medical evidence in the record. Claimant has failed to prove that he sustained an industrial T10-11 herniation.

216. ***Cervical spine strain and bulge (C5-6).*** Radiologic imaging confirmed an acute cervical sprain in the ligaments and musculature at C5-6 shortly following Claimant's industrial accident. No physician disputes that this injury was likely caused by Claimant's industrial

accident. All opined that it would heal with conservative treatment. None have opined that Claimant's strain did not, eventually, heal. Claimant has failed to establish that he incurred any permanent damage to the ligaments or musculature at C5-6 due to his industrial accident.

217. Claimant's disc bulge at C5-6 was evident on post-accident imaging taken July 11, 2006. According to the reading radiologist, at C5-6 Claimant had a broad-based right paracentral disc bulge causing mild contouring of the cervical cord and minimal spinal stenosis. According to Dr. Dirks, "there was a diffuse disk bulge at C5, 6 but no frank impingement of the neural elements." 2012 Dirks Dep., p. 21. No physician opined, based upon the 2006 MRI, that the C5-6 bulge was either acute or caused by the industrial accident, or that it was causing any of Claimant's symptoms.

218. Following Claimant's L3-5 fusion in February 2007, Claimant began complaining of right-sided neck pain and numbness into his right arm. A cervical spine MRI conducted that month revealed, among other things, "moderate narrowing of the C5-6 right neural foramen" accompanied by bony changes. Dr. Dirks opined, without elaboration, that the MRI evidenced a C5-6 disc bulge correlating with Claimant's right radicular symptoms. In June 2007, Dr. Dirks performed C5-6 fusion surgery that he opined (in 2012) was related to the 2006 industrial accident. Dr. McNulty (in September 2009) also opined that Claimant's cervical surgery was necessitated by his industrial accident. On the other hand, Drs. Barnard and Zoltani (in February 2008) opined that Claimant's cervical spine disc pathology was entirely related to pre-existing degenerative processes, and that the industrial accident had no permanent effect.

219. According to the reporting radiologist, Claimant's November 24, 2004 cervical spine MRI showed pre-existing C5-6 pathology consisting of a mild to moderate broad posterior

and right posterolateral disc protrusion and end plate spurring causing a low-normal central canal volume, without deformity of the cord, and mild bilateral neural foraminal narrowing at C5-6, somewhat greater on the right. No physician provided any testimony establishing how, or whether, these findings were considered in developing their respective opinions regarding the nexus of Claimant's symptoms leading to his June 2007 C4-5 cervical fusion surgery. Dr. McNulty did not list this study among the records he reviewed prior to rendering his IME opinions. Dr. Dirks has never mentioned it. Drs. Barnard and Zoltani indicated in their IME report that they reviewed cervical imaging, but they did not identify any specific cervical studies.

220. Claimant reported neck pain on the day of his industrial accident and consistently thereafter, to Drs. Ludwig, Stevens, and Dirks. Also, it requires no stretch of the imagination to understand how Claimant's industrial accident could have an effect on his pre-existing cervical spine bulge, and all parties agree that Claimant suffered injuries to the ligaments and musculature at the C5-6 level as a result of his industrial accident. In addition, it is conceivable that Claimant's symptoms and medications related to his contemporaneous low back condition and related surgery masked the more significant neck pain Claimant may have otherwise experienced.

221. Amid conflicting expert testimony and in the absence of any testimony regarding the impact of Claimant's 2004 MRI results, the evidence establishes by a preponderance that Claimant incurred trauma to his C5-6 disc as a result of his industrial accident that necessitated his cervical spine fusion surgery.

222. ***Right shoulder injury.*** Shortly prior to his cervical fusion surgery in July 2007, Claimant reported right-sided neck and arm pain, and Dr. Dirks noted weakness in his right

deltoid, triceps, and biceps on exam. Just one week after his cervical fusion surgery, Claimant began complaining of mostly posterior bilateral shoulder pain along with right arm pain and he sought additional pain medication to deal with it. In August 2007, Claimant still claimed bilateral shoulder pain, even though he was now taking MS Contin. Follow-up imaging led Dr. Dirks to opine there was no neurological basis for Claimant's pain.

223. In September 2007, Claimant was filmed with no apparent shoulder difficulties in the surveillance video. In October 2007, Dr. Magnuson diagnosed chronic bilateral shoulder and thoracic spine area myofascial pain. Like others before him, Dr. Magnuson recommended physical therapy which, as before, Claimant did not follow up with due to his pain. On exam around this time, Dr. Dirks noted severe atrophy of the right arm in the deltoid and biceps areas, with loss of strength in the right deltoid muscle. Dr. Williams in early 2008 undertook management of Claimant's pain care and opined that his cervical and shoulder pain were his worst problems. Dr. McNulty reported in his September 2009 evaluation report that Claimant had reported right shoulder symptoms immediately following his industrial accident; however, Claimant's medical records through 2006 and early 2007 do not reference right shoulder pain or injury.

224. Claimant underwent a right shoulder MRI in November 2009. It failed to demonstrate any significant shoulder pathology, leading Dr. McNulty to opine that Claimant did not incur any permanent right shoulder injury as a result of his industrial accident. Dr. Williams, employing hopeful reasoning, opined that the clear MRI established not that Claimant had no injury, but that Dr. Williams' treatment must have healed the right rotator cuff tear he diagnosed

based upon Claimant's complaints and his examinations. No other physician has opined Claimant's right shoulder symptoms are related to his industrial accident.

225. Claimant's right shoulder and arm atrophy evidence a lack of use that could be related to pain. However, the record lacks sufficient evidence to connect the source of such pain to the industrial accident or either of his subsequent accident-related surgeries. Also, Claimant's medical records evidence a history of chronic right shoulder and arm symptoms unexplainable by objective evidence. In July 1987, following his skidder accident, Claimant had severe right shoulder pain with right arm and hand tingling without evidence of any neurological defect or acute injury. By May 1988, he was diagnosed with chronic pain in his neck, shoulders, right arm, and elsewhere. These pain reports continued through the end of 1988, when Claimant received a settlement related to the industrial injury he claimed caused it. Claimant did not return for treatment following receipt of his settlement payment and he soon returned to logging.

226. Claimant has failed to prove that he incurred a right shoulder injury as a result of the 2006 industrial accident.

227. ***Chronic pain syndrome.*** Claimant was diagnosed with somatoform disorder in 1988. In 2010, psychological testing confirmed he had a psychological pain disorder. Claimant has not established that he has a physical chronic pain syndrome, nor that he incurred any new psychological condition as a result of his industrial accident as set forth in Idaho Code § 72-451.

228. Claimant has failed to prove that he incurred chronic pain syndrome as a result of the 2006 industrial accident.

MAXIMUM MEDICAL IMPROVEMENT (MMI)

229. As a prerequisite to determining Claimant's PPI or PPD, the evidence must demonstrate that he is medically stable. To wit, "permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. The statute does not contemplate that a claimant must be returned to his original condition to be considered medically stable, but only that the condition is not likely to progress significantly within the foreseeable future. Another important consideration is that workers' compensation benefits are allocated based upon injuries stemming from specific workplace accidents and occupational diseases. In this case, that means that only the conditions related to Claimant's July 2006 industrial injuries are compensable. Therefore, the Commission should focus upon Claimant's current diagnoses related to his subject industrial injuries to determine whether he is medically stable.

230. Here, Claimant's permanent conditions resulting from his July 3, 2006 industrial accident include his L4-5 disc herniation requiring spinal fusion surgery in February 2007 and his cervical disc bulge at C5-6 requiring fusion surgery in July 2007.

231. Drs. Bernard and Zoltani opined that these conditions were medically stable as of the date of their panel evaluation on February 13, 2008, even though Claimant continued to report pain, crunching and snapping in his neck (worsening after surgery), as well as pain in his mid and low back. They found Claimant's complaints were unsupported by objectively verifiable causes and, further, they both opined that Claimant was faking his symptoms.

232. At his deposition, Dr. Dirks opined that Claimant reached MMI by February 21, 2008 (one year following his February 2007 lumbar spine surgery). He continued to recommend testing for Claimant's ongoing pain complaints after that time to confirm his industrial injuries were stable, including a cervical/thoracic spine CT myelogram on April 10, 2008, and MRIs on April 25, 2008, neither of which revealed pathology that would explain Claimant's continuing symptoms. Thereafter, Dr. Dirks agreed that conservative care to control Claimant's pain was warranted, but he did not believe Claimant had any condition as a result of his industrial injuries that could be improved with surgery.

233. Dr. Williams, on the other hand, opined on April 9, 2008, that Claimant would not reach MMI for at least a year and that he required additional pain medications and manipulative treatment for chronic pain in his neck and shoulders. The record establishes that the treatment Dr. Williams endorsed (and that Claimant received) was palliative in nature. As of September 2012, Dr. Williams still recommended ongoing treatment. He acknowledged that, as an osteopath, his concept of medical stability is different from a medical physician's. Dr. Williams' opinions regarding Claimant's medical stability status are less persuasive than the medical physicians' generally, and Dr. Dirks' in particular.

234. On October 1, 2008, Dr. Ganz evaluated Claimant's neck pain and opined that it was due to muscle spasm, with no radicular component. He recommended that Claimant return to physical therapy, noting that Claimant only went twice following his cervical fusion surgery, then quit because it hurt. Claimant had declined physical therapy before, due to pain, and there is no evidence in the record to establish that Claimant followed Dr. Ganz' recommendation.

235. On September 8, 2009, Dr. McNulty opined Claimant had reached MMI and assessed PPI to both his cervical and lumbar spine conditions.

236. Only Dr. Williams opined that Claimant was not medically stable in or around February 2008. Dr. Williams' opinion is based, in part, on Claimant's shoulder and right arm symptoms that were not proven to be related to his industrial injuries. Further, Dr. Williams apparently based his opinion (that Claimant had not reached MMI) on his concurrent opinion that Claimant needed treatment for pain relief, with which Dr. Dirks concurred. Claimant's need for pain relief as a result of his industrial injuries cannot be quantified, due to his credibility issues and his psychological pain disorder. Moreover, even if Claimant's residual pain could be attributed to his industrial injuries, the evidence in the record establishes that this condition was stable.

237. As Claimant's treating surgeon, Dr. Dirks had more opportunities to observe all of Claimant's relevant conditions than did the other opining physicians. He followed up with appropriate testing on all of Claimant's residual complaints, finding no physiological basis.

238. Claimant's residual pain complaints are likely due to a combination of his pre-existing somatoform disorder and incentives related to the pendency of the instant litigation.

239. Claimant reached MMI as of April 25, 2008, the date on which the last test ordered by Dr. Dirks to confirm the status of Claimant's industrial conditions returned benign results.

MEDICAL CARE

240. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital

service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. Claimant is also entitled to reasonable palliative care. *Hamilton v. Boise Cascade Corp.,* 84 Idaho 209, 370 P.2d 191 (1962).

241. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). Of course an employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997).

242. In *Sprague v. Caldwell Transportation*, 116 Idaho 720, 722-723, 779 P.2d 395, 397-398 (1989), the Court held that medical treatment already received is reasonable when: 1) the claimant made gradual improvement from the treatment; 2) the treatment was required by the claimant's physician; and 3) the treatment was within the physician's standard of practice, the charges for which were fair, reasonable, and similar to charges in the same profession. The Court has announced no similar standard for prospective medical treatment; thus, *Sprague* provides some guidance but the instant case must be judged on the totality of the circumstances with respect to his request for additional medical care. *Ferguson v. CDA Computune*, 2011 IIC 0015 (February 25, 2011); *Richan v. Arlo G. Lott Trucking, Inc.,* 2001 IIC 0008 (February 7, 2011).

243. Claimant seeks benefits for ongoing treatment by Dr. Williams of, primarily, his neck, thoracic spine, and shoulder conditions. He asserts that the manipulations and narcotic pain medications Dr. Williams administers are helping his body heal itself. Dr. Williams, at the

time of the hearing, was prescribing 25% more pain medications than in January 2008, when he first began treating Claimant. Claimant was only treating with Dr. Williams once per month at the time of the hearing, as opposed to once per week at the beginning of his treatment.

244. Dr. Williams has been a strong advocate of Claimant, writing open-ended letters opining as to his long-term disability and testifying under oath in these proceedings. He came to Claimant's case nearly a year following his lumbar spine surgery and approximately six months following his cervical spine surgery. His opinions are sometimes inconsistent with Dr. Dirks', and he believes Claimant will require manipulations and medications indefinitely. He diagnosed a right shoulder rotator cuff tear without the aid of radiologic imaging then, after Dr. McNulty ordered an MRI that demonstrated no tear, he took credit for helping the "tear" to heal without entertaining the possibility that there never was a tear in the first place. Dr. Williams' opinions are generally not very persuasive because they appear more strongly grounded in advocacy than in reasonable interpretations of objective and clinical evidence.

245. As discussed elsewhere herein, Claimant's pain complaints are unreliable in terms of identifying the etiology of the pain. Dr. Dirks ruled out a treatable cervical spine pain source in April 2008. He agreed that Claimant was in pain, due to his ongoing complaints and his right shoulder atrophy, but he did not causally connect Claimant's industrial injuries to this pain. He did not opine that Claimant should receive treatments from Dr. Williams indefinitely, but he did acknowledge that they helped because they kept Claimant's head aligned.

246. Claimant's thoracic and shoulder injuries were determined, above, not related to his industrial accident.

247. Claimant incurred a new whiplash-type injury to his cervical spine as a result of his October 22, 2010 chair fall which reignited his cervical spine symptoms.

248. Claimant has proven that Dr. Williams' treatment of his lumbar spine through April 25, 2008, and his cervical spine through October 22, 2010 (including palliative care following April 25, 2008) was reasonable and related to his 2006 industrial injuries. He is entitled to reimbursement for qualifying treatment through those dates.

INDUSTRIAL INJURY PPI AND MEDICAL RESTRICTIONS

249. Following his 2006 lumbar spine fusion surgery, Claimant was limited as set forth in Mr. Bengston's 2009 FCE. Although this FCE was conducted more than a year following the date on which Claimant reached MMI, no party disputes that these results accurately reflected Claimant's post-industrial accident functional abilities. The Claimant's lumbar and cervical spine injuries, with their attendant PPI and medical restrictions, are determined to be causally linked to Claimant's 2006 industrial accident. Unfortunately, no physician specifically diagnosed the source of each of Claimant's functional deficits. Drs. Dirks and McNulty did, however, rule out an industrial source for Claimant's right shoulder and hand deficits indicated in the FCE.

250. ***Lumbar spine.*** In September 2009, Dr. McNulty assessed 20% whole person PPI to Claimant's lumbar spine condition. No other physician assessed lumbar PPI. Therefore, Claimant has 20% whole person PPI, with no apportionment to pre-existing conditions.

251. ***Cervical spine.*** In September 2009, Dr. McNulty assessed 25% whole person PPI to Claimant's cervical spine, without apportionment.

252. ***2009 FCE restrictions related to Claimant's industrial injuries.*** Claimant could sit occasionally, walk frequently, and sit/stand/walk for eight hours per day, five days per week, so long as he could change positions frequently and at his own pace. Claimant could carry 30 pounds rarely and ten pounds occasionally or frequently and could bend or stoop occasionally. Claimant was significantly limited in any activity requiring him to shift from a neutral spine condition, like bending or twisting.

253. Dr. McNulty restricted Claimant from heavy (and very heavy) work due to the weakness in his spine created between his thoracic (non-industrial) and lumbar (partially industrial) fusions. He agreed with Mr. Bengston's light-duty FCE recommendations.

254. Mr. Brownell and Dr. Collins agree that Claimant was limited to sedentary and some light-duty work following his 2006 industrial injury.

PERMANENT DISABILITY

255. "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.

256. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill*

v. Swift & Company, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

257. **Time of disability determination.** The Idaho Supreme Court in *Brown v. The Home Depot,* WL 718795 (March 7, 2012) reiterated that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered. However, the Commission is afforded latitude in making alternate determinations based upon the particular facts of a given case.

258. ISIF argues that the time-of-hearing labor market statistics should be applied, as per *Brown*, but it would work an injustice to ISIF and Employer/Surety to assess Claimant's disability (particularly whether he is totally and permanently disabled) as of the time of the hearing because these defendants are not liable for any worsening in Claimant's condition attributable to non-industrial causes following the last accident. Consequently, ISIF argues that Claimant's disability should be determined as of the date of medical stability.

259. The Commission agrees that Claimant's disability should be assessed as of the date on which he became medically stable from his last industrial accident for the following reasons. Importantly, there is sufficient evidence in the record to establish that Claimant reached medical stability following his subject industrial accident, but before his subsequent injury.

Also, Claimant's condition attributable to the industrial accident and his pre-existing conditions can more precisely be assessed as of the date of MMI. This is because Claimant's subsequent injury required surgical intervention at a site he contends was permanently impaired by his subject industrial accident. The worsening in his functional abilities (if any) attributable to the subsequent condition cannot be separated from his industrial and prior conditions by objective testing. Yet, testing and opinions in the record confirm Claimant's functional capabilities prior to the non-industrial subsequent injury. Under these circumstances, it would be nothing more than an academic exercise to consider Claimant's time-of-hearing condition, then attempt to "subtract" his subsequent conditions to determine Defendants' liability. The addition, then subtraction of irrelevant information would unnecessarily complicate the determination of Claimant's disability, leading to a less accurate assessment of Claimant's loss of functional abilities attributable to his industrial accident and more effort and expense required of all parties. Therefore, Claimant's local labor market will be determined as of the hearing date; however, his functional capabilities will be determined as of April 25, 2008, the date on which he reached MMI.

260. **Nonmedical factors.** Claimant has a GED and scored at the college level in math skills on the TABE test administered by Mr. Brownell. He has some on-the-job training in mechanics, as well as extensive experience in all aspects of logging, including operating and maintaining machinery, hands-on management of logging salvage jobs, budgeting and record-keeping, paying bills, complying with laws related to employment and maintaining a business, and related activities. Claimant does not have experience hiring employees from outside his St. Maries "grapevine" area contacts. He does not possess office-ready computer skills, and he has

not worked in a job that requires him to accommodate walk-in customers since he was a service station attendant in high school.

261. Claimant is not disfigured, though he did walk with a limp, at times, on and around April 25, 2008. Claimant was, at that time, a fit man in his late 40s. Claimant is well-known in his local labor market as a logger who has suffered a significant back injury.

262. **Permanent disability – two methods.** As a threshold matter, Claimant must establish he was totally and permanently disabled as of April 25, 2008 to prove ISIF is liable for his benefits. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled.

263. **100% method.** A claimant may prove total and permanent disability if his or her medical impairment together with the nonmedical factors total one hundred percent. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement. If the claimant has met this burden, total and permanent disability has been established. If, however, the claimant has proved something less than one hundred percent

disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund,* 130 Idaho 278, 281, 939 P.2d 854, 857 (1997).

264. Claimant does not argue that he is totally and permanently disabled by the 100% method. Moreover, the record establishes that Claimant is not so disabled that he can do no work at all. Therefore, Claimant is not totally and permanently disabled by the 100% method.

265. **Odd-lot doctrine.** Claimant argues that he is totally and permanently disabled as an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund,* 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). Claimant carries the burden of proof to establish total permanent disability under the odd-lot doctrine, which may be established in any one of three ways:

> a. By showing that the claimant has attempted other types of employment without success;
>
> b. By showing that the claimant or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
>
> c. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

266. **First *Lethrud* method.** The record establishes that Claimant has attempted other types of employment since the subject accident. Following the date of injury, he continued as the sole proprietor of St. Joe Salvage, although all logging work was performed by his employees. Claimant was forced to close his business in October of 2008. The question is whether the facts demonstrate that it was because of his injuries that Claimant was ultimately unsuccessful in his efforts to continue as the sole proprietor of St. Joe Salvage.

267. In 2007 and 2008, Claimant's participation in the sole proprietorship consisted of running safety meetings, finding out where Potlatch wanted Claimant to log, doing payroll, and paying the bills. TR1, p. 169/20-23. He did no to minimal work in the woods. Even so, Claimant's business had gross receipts of $244,396.00 in 2007, and Claimant had an adjusted gross income of $70,295.00 in that year. Claimant only ran his business through October of 2008. Even so, for 2008, Claimant's tax returns show gross receipts of $187,673.00 with adjusted gross income of $50,016.00. Claimant testified that he closed his business in October of 2008 because he had been operating at a financial deficit. He testified that he lost a top worker due to an injury, had to deal with the breakdown of his Cat, and faced a $12,000.00 workers compensation insurance premium payment that he could not meet. It is difficult to square Claimant's testimony that he had been losing money in the business prior to its closure with his tax returns, which show an AGI in excess of $50,000.00 for 2008. However, it is easier to understand how events such as the loss of key personnel or equipment can suddenly turn a business from profitable to unprofitable. The closure of Claimant's business led, in short order, to the loss of his home and property, effectively putting him on the street, or close enough thereto to make no difference. If Claimant's business was still profitable, we doubt very much

that he would close the business in order to advance his designs upon obtaining SSDI and total and permanent disability benefits. Although Claimant's return to logging following the subject accident ultimately proved unsuccessful, we are not persuaded that it proved unsuccessful because of Claimant's work injury. Ultimately, the evidence persuades us that Claimant was forced to close his business because of business-related misfortunes, not because he was physically incapable of continuing to run his business in a profitable fashion. Therefore, Claimant has not shown total and permanent disability by evidence that he attempted other types of employment without success.

268. **Second *Lethrud* Method.** Next, Claimant can satisfy his burden of showing that he is an odd-lot worker by demonstrating that he, or vocational rehabilitation experts on his behalf, have searched for other work to no avail. Claimant has engaged in some independent job search activities since the subject accident. He has filed one application for employment with the Tribe, and though he alluded to other applications for employment, he did not identify any other employers with whom he filed a formal application. Aside from Claimant's application with the Tribe, Dan Brownell could not remember any other employers with whom Claimant filed an application, but testified that he thought the filing of formal applications for employment a waste of time in Claimant's case. (Transcript 93/15-23.) Mr. Brownell assisted Claimant in searching for employment by contacting area employers both with, and without, Claimant. Mr. Brownell did not prepare a resume for Claimant outlining Claimant's background, skills, and other attributes, explaining that such a resume would not actually advance any of Claimant's goals towards finding a job. However, he acknowledged that Claimant actually does have a lot of

things to be proud of which could be beneficially exploited on a resume, such as his good reputation with Potlatch and his multi-year awards as logger of the year.

269. Although Mr. Brownell testified that he saturated Claimant's labor market with job contacts and inquiries on Claimant's behalf, Dr. Collins was critical of this approach, testifying that by accompanying Claimant on job contacts, or making the contacts without Claimant, Mr. Brownell may have unintentionally sabotaged Claimant's prospects for making a good impression on a potential employer; Mr. Brownell's presence robs Claimant of the opportunity to make his own impression on a potential employer and signals to that employer that Claimant may be damaged goods. Dr. Collins was also critical of Mr. Brownell's lackadaisical attitude towards the preparation of formal job applications and a suitable resume to accompany such applications. Dr. Collins was also critical of Mr. Brownell for not seeking employment where the job openings were. Per Dr. Collins, many of the job contacts and inquiries made by Mr. Brownell were made at places where no current job openings existed.

270. Further, Mr. Brownell acknowledged that he did not focus his efforts on placing Claimant in cashiering, retail, or other service industry jobs because of his perception that Claimant suffered from what he colloquially described as a "yuck factor", even though Claimant admittedly had math and other skills that could be exploited in such employment. According to Mr. Brownell, Claimant's physical presentation, bad dentition, and rustic demeanor made him a poor candidate for any job which required interaction with the public. However, Mr. Brownell was also the first to state that Claimant was well-known and well-liked in his small community, a legend in fact. Even if we give credence to Mr. Brownell's observations concerning Claimant's appearance and mannerisms, we believe that he inappropriately excluded from his job search

those service industry jobs in which openings frequently appear, and which claimant was physically capable of performing. On balance, we cannot say that Mr. Brownell's failure to identify suitable employment for Claimant is sufficient to demonstrate that Claimant is an odd-lot worker.

271. **Third *Lethrud* method.** Mr. Brownell opined that it would be futile for Claimant to attempt to find work in the St. Maries area. In addition to Claimant's medical and non-medical factors, Mr. Brownell cited the peculiarity of Claimant's local labor market in which employers are familiar with the logging industry and the potential liability associated with employing an ex-logger with a spine injury. Specifically, everyone knows Claimant. They also know that he is no longer logging due to a spinal injury, and are unwilling to risk financial liability, should he again injure himself. Testimony in the record from potential employers supports Mr. Brownell's opinion in this regard, as does his 30 plus years of experience placing individuals in jobs in the St. Maries area.

272. Dr. Collins opined that, at least until his 2010 chair injury, Claimant was employable in regularly occurring jobs like retail sales, cashier, security guard, and driver. Mr. Brownell testified that security guard and driver likely required physical abilities in excess of Claimant's limitations. He did not believe Claimant would be employable in other jobs for a variety of reasons, many of which are peculiar to the St. Maries area. Contrary to Mr. Brownell's testimony regarding a deli job, the evidence does not establish Claimant would have trouble tallying. However, even though Claimant is apparently well-liked in his hometown, such that his rustic presentation might not be an obstacle to employment, Claimant would be competing with able-bodied individuals, many with customer service or other directly-related

experience, which he lacks. He is an older worker and, thus, may be viewed as more reliable. However, he had not worked for someone else for more than 20 years, and had not worked outside the logging industry for more than 30 years, except for one short stint as a mechanic. In addition, Claimant's lack of computer skills and his sitting restriction would have precluded him from being competitive for back office and telephone work for which he may otherwise qualify based upon his established computational skills.

273. Based on the foregoing, we find that Claimant has proven his odd-lot status by demonstrating that efforts to find suitable work would be futile. In making this determination, we recognize that there is some potential conflict between this conclusion, and our determination that Claimant did, in fact, successfully continue to work as the sole proprietor of St. Joe Salvage through October of 2008, and that the business' failure has more to do with a number of coincidental business misfortunes than it does Claimant's physical injuries. However, that Claimant was able to find ways to operate his business in 2007 and 2008 as a nonworking sole proprietor is not necessarily fatal to a determination that Claimant is totally and permanently disabled. Claimant need not demonstrate that there is no work that he can do. He is merely required to demonstrate that he can perform no services other than those which are so limited in quality dependability or quantity that a reasonably stable labor market for them does not exist. *See Bybee v. State Industrial Special Indemnity Fund, supra.* Claimant's self-employment was just such a limited employment opportunity, one that is unlikely to arise again for Claimant.

274. Based on the foregoing, we conclude that Claimant has met his *prima facie* case of demonstrating that he is an odd-lot worker because it would be futile for him to look for work.

275. The burden now shifts to Defendants "to show that some kind of suitable work is regularly and continuously available to the claimant." *Carey v. Clearwater County Road Department,* 107 Idaho 109, 686 P.2d 1067 (1995). Defendants must prove there is:

> An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [employer] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 565 p.2d 1360 (1977).

276. Dr. Collins listed a number of advertised positions that she opined may be within Claimant's restrictions within 30 to 40 miles of his home. Although she did not check on every opening, the evidence of record, including Mr. Brownell's opinions, indicates that it is likely that Claimant could have done, at a minimum, some retail sales/cashiering work. There is no evidence, however, rebutting the testimony herein of the potential employers regarding the stigma associated with Claimant's spine condition, or affirming that Claimant would be a serious contender for any specific job. As such, the evidence fails to establish that Claimant had a reasonable opportunity to achieve employment in any proposed position. Claimant's lack of experience and appearance would preclude him from some of the jobs within his functional abilities. The fact of his back injury would likely preclude him from the rest. Requiring few skills, these jobs would place Claimant in competition with a broad hiring pool of many able-bodied individuals, who would likely be selected over Claimant due to the stigma of his significant spinal pathology and related liability fears.

277. Defendants have failed to prove that there is work in Claimant's local labor market that he has a reasonable opportunity to obtain. Claimant has established that he was

totally and permanently disabled pursuant to the odd-lot doctrine as of April 25, 2008, the date on which he reached MMI following his July 2006 industrial injuries.

ISIF LIABILITY

278. Idaho Code § 72-332(2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a pre-existing permanent physical impairment to result in total and permanent disablement of the employee.

279. In *Dumaw v. J. L. Norton Logging,* 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a pre-existing impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance to employment; and

(4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

280. In evaluating the claim of Employer/Surety that responsibility for Claimant's total and permanent disability should be shared between Employer/Surety and the ISIF, it is first necessary to address Defendants' argument that notwithstanding his current proclamations, Claimant is bound by the provisions of the prior lump sum settlements which identify pre-existing impairments totalling ten percent of the whole person. The argument is that since Claimant acceded to these PPI ratings when settling the prior claims, he cannot now be heard to

assert that all of his total and permanent disability is referable to the subject accident. Essentially, Defendants argue that Claimant should be judicially estopped from arguing that responsibility for his total and permanent disability should not be shared between Employer/Surety and the ISIF. Notwithstanding any other objections which might be raised to the application of the doctrine of judicial estoppel, we find it inapplicable for the simple reason that in this proceeding Claimant takes no position that could be deemed inconsistent with the averments allegedly made in the earlier lump sum settlements. It is Defendants who have made claim against the ISIF, and it is Defendants who have assumed the burden of proving all the elements of ISIF liability. Claimant has asserted that he is totally and permanently disabled, but has taken no position on whether responsibility for his disability should be borne by Employer alone or by Employer and ISIF jointly. (*See* Claimant's Opening Brief at 28.) What Defendants are really attempting to do is bind the ISIF to the averments of the prior lump sum settlement. However, the ISIF did not make the averments in question and was not even a party to the prior settlements. The Commission concludes that the doctrine of judicial estoppel has no application to the facts of this case. Having determined that the doctrine of judicial estoppel does not apply, we must now determine whether or not the elements of ISIF liability are met by the evidence before us.

PRE-EXISTING PERMANENT PHYSICAL IMPAIRMENT

281. Claimant has a number of pre-existing conditions which may qualify as pre-existing permanent physical impairments. Some of these can be disposed of fairly quickly. In 1993 Claimant underwent bilateral carpal tunnel surgery. In 1995 he suffered a right shoulder separation for which he underwent surgery. In 2000 Claimant was diagnosed with a hernia for

which he underwent two surgeries. In 2001 Claimant suffered a left shoulder separation for which he underwent surgery in 2002. For the conditions referenced above, the record fails to disclose that Claimant suffered any permanent physical impairment. Nor does it appear that any of the other elements of ISIF liability are satisfied for any of these conditions.

Lumbosacral Spine

282. Claimant suffered an unspecified injury to his lumbar spine in 1984. The 2005 lump sum settlement agreement reflects that Claimant was given a five percent PPI rating for the effects of the 1984 injury. However, there are no medical records in evidence which support the assertion that Claimant was given a five percent PPI rating for a 1984 lumbar spine injury, much less the nature and extent of his lumbar spine injury. In 1987 Claimant suffered a work related accident while operating a skidder. Although his injuries were primarily to the neck, jaw, right shoulder and upper extremities, there are some references to lower back symptoms among the constellation of Claimant's other symptoms. The 1987 accident was eventually resolved via a lump sum settlement, which referenced Claimant's entitlement to a five percent PPI rating on account of the 1987 injury. However, the lump sum settlement does not reflect to what body part or parts the five percent PPI rating attached. Nor are there any contemporaneous medical records which support the award of a five percent PPI rating arising from the 1987 work accident.

283. The record does reflect that Claimant began reporting neuropathies in approximately 1988. In December of 2004, Dr. Dirks confirmed that an EMG evidenced residual radiculopathy in Claimant's S1 nerve distribution. In August of 2006, Dr. Ludwig assessed permanent restrictions of "no significant repetitive bending or heavy lifting due to his ongoing condition of chronic S1 radiculopathy on the right as well as his history of lumbar

fusion [*sic*], but not due to his date of injury of 7-3-06." JE-30. In September of 2006, Dr. Stevens diagnosed chronic pre-existing left S1 radiculopathy.

284. On September 8, 2009, Dr. McNulty assessed Claimant's permanent impairment related to the 2006 accident, assigning a 20% PPI rating to Claimant's lumbar spine injury. He declined to apportion any part of this impairment to a pre-existing condition, reasoning as follows:

> Though Mr. Green did have pre-existing degenerative changes, they were asymptomatic and he was functioning at a high level prior to his injury. For this reason, I did not feel that apportionment is indicated in this case. However, if he did have a prior lumbar spine workmen's compensation settlement, that would be subtracted from the 20% whole-person impairment that is attributable to his lumbar spine condition.
>
> ....
>
> I have reviewed the FCE and agree with the findings. Mr. Green has a fusion at T12-L1 and at L3-L5. Because of those fusions, he has increased stress between L1 and L3. He should not engage in heavy physical activities such as logging. He is more suited to work in a light job duty category as outlined in the FCE.
>
> JE-23, p. 332.

At first blush, Dr. McNulty's treatment of the issue of apportionment of PPI appears somewhat inconsistent with the records he reviewed in connection with his evaluation. Both Drs. Ludwig and Stevens noted Claimant's pre-existing chronic S-1 radiculopathy, yet Dr. McNulty failed to consider these findings when addressing the issue of apportionment, concluding that Claimant's lumbar spine was asymptomatic prior to the subject accident. Dr. McNulty's treatment of the apportionment issue can be reconciled with the records of Drs. Ludwig and Stevens by recognizing that Claimant's radiculopathy was at S-1, while Dr. McNulty's rating addressed only L3-L5.

285. The evidence persuades us that Claimant may have a pre-existing permanent impairment due to his well-documented S-1 radiculopathy. However, although we conclude that this pre-existing condition may have been of sufficient severity to warrant an impairment rating, the record does not disclose that Claimant was ever rated for this condition.

Thoracic Spine

286. In 2002, Claimant suffered an injury to his thoracic spine at T12-L1. He underwent a fusion surgery at this level in January of 2003, performed by Dr. Ganz. Dr. Ganz released Claimant without restrictions referable to the T12-L1 fusion in 2004. However, both Dr. Dirks and Dr. Ludwig testified that permanent medical restrictions against bending and lifting would be appropriate following Claimant's fusion, such that he should avoid heavy and very heavy work, like logging, following the surgery. In September of 2006, Dr. Stevens opined that Claimant's pre-existing conditions precluded him from heavy and very heavy work.

287. The Commission concludes that Claimant is likely entitled to an impairment rating referable to the T12-L1 fusion and residuals. However, the record altogether fails to establish what that impairment rating might be.

Cervical Spine

288. Among Claimant's complaints following the 1987 skidder accident were complaints of neck, jaw, and bilateral upper extremity symptoms. Some of Claimant's medical providers felt he was chronically disabled due to pain following the 1987 accident, even though there was little to no objective evidence of injury. Although it was recommended that Claimant not return to logging, he did anyway, even though he was afforded the opportunity through the

1988 lump sum settlement to retrain as a truck driver. Claimant continued to work as a logger until 2004, evidently without any ongoing cervical spine complaints.

289. In 2004, Claimant sought treatment after he hit his head getting into his Cat. MRI imaging did not identify evidence of neurological injury, but did reveal some degeneration in Claimant's cervical spine. No physician ever assessed any PPI related to this injury, and he settled his workers compensation claim for the 2004 accident via a 2005 lump sum settlement, which failed to reference any PPI referable to the cervical spine.

290. The evidence fails to establish that Claimant had any pre-existing permanent physical impairment referable to his cervical spine.

291. **Manifest:** "Manifest" means that either the employer or employee was aware of the condition so that the condition can be established as existing prior to the injury. *See Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 294, 647 P.2d 746, 750 (1982). Here, Claimant was diagnosed with a thoracic spine injury in 2002 for which he underwent fusion surgery in 2003, and his residual S1 radiculopathy was diagnosed following an EMG nerve conduction study in November 2004. Claimant, who is also the Employer, knew of his pre-existing sacral and thoracic spine conditions prior to July 2006.

292. **Subjective hindrance:** ISIF disputes that Claimant had any pre-existing condition that constituted a subjective hindrance prior to his final industrial injuries. The "subjective hindrance" prong of the test for ISIF liability is defined by statute:

> "Permanent physical impairment" is defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. **This shall be interpreted subjectively as to the particular employee involved, however, the mere fact**

> **that a claimant is employed at the time of the subsequent injury shall not create a presumption that the preexisting permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.**

Idaho Code § 72-332(2) (emphasis added).

293. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 686 P.2d 557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the pre-existing condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

Id.

294. *Archer* makes it clear that an injured worker's attitude towards a pre-existing condition is but one factor to be considered by the Commission in determining whether or not the pre-existing physical impairment constituted a subjective hindrance to Claimant. After *Archer*, the Commission is required to weigh a wide variety of medical and nonmedical factors, as well as expert and lay testimony, in making the determination as to whether or not a pre-existing condition constituted a hindrance or obstacle to employment for the particular claimant.

295. With respect to his thoracic spine injury, Claimant has offered conflicting testimony from which one could conclude either that this condition was or was not a hindrance to

Claimant after he returned to work following the thoracic spine surgery. We are more persuaded by the medical testimony, particularly that of Drs. Dirks and Ludwig, which establishes that Claimant reasonably did have permanent medical restrictions on bending and lifting such that Claimant should avoid heavy and very heavy work following his thoracic fusion surgery.

296. Regarding Claimant's pre-existing S-1 radiculopathy, we note that the limitations/restrictions attached to this condition do not appear to be any different than those given to Claimant for his prior thoracic spine injury. As such, it is difficult to understand how the S-1 radiculopathy could be deemed to constitute a subjective hindrance to Claimant prior to the 2006 accident. If the condition did not materially decrease Claimant's functional ability, would Claimant or anyone else consider the condition to constitute a hindrance to his employability? Probably not, but as developed below, we need not come to a resolution of this question, because we find that Claimant's S-1 radiculopathy does not satisfy the "combining with" element of the *prima facie* case against the ISIF.

Combining With:

297. As part of its prima facie case, Employer/Surety bears the burden of establishing that both Claimant's pre-existing S-1 radiculopathy and his pre-existing thoracic spine condition combined with his accident produced impairments to cause total impairment and disability. Employer/Surety bears the burden of demonstrating that but for the pre-existing conditions, Claimant would not be totally and permanently disabled following the work accident. *See Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 1973 (1989); *Bybee v. State Industrial Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

298. ISIF argues that Claimant's 2006 industrial accident, standing alone, rendered him totally and permanently disabled. Therefore, the claim against the ISIF must be dismissed because the requisite "combining with" elements of the *prima facie* case is not met. In making this argument, the ISIF relies heavily on the 2006 Safety Video, and certain portions of Claimant's testimony, which tend to establish that Claimant was unhampered by any of his pre-existing conditions prior to the 2006 accident. Therefore, the 2006 accident, standing alone, left him totally and permanently disabled. As noted above, we assign little weight to Claimant's conflicting testimony concerning his pre-injury and post-injury abilities. More persuasive to us is the testimony of Mr. Brownell and Dr. Collins, both of whom opined that Claimant's pre-existing conditions, in particular, the thoracic spine injury, limited his ability to engage in gainful activity in his labor market.

299. We have also concluded that as of his date of medical stability following the 2006 industrial accident, Claimant is an odd-lot worker via the path of futility. The remaining question is whether this result obtains solely from the combined effects of the work accident and Claimant's pre-existing physical impairments. We find the records of Drs. Ganz and McNulty particularly instructive on this question. In his report of October 1, 2008, Dr. Ganz offered the following comments on the impact of the thoracic spine fusion on the injuries attributable to Claimant's work accident:

> The patient specifically asked me whether I would recommend that he return to logging again, and my recommendation is that he should not return to logging or heavy labor again because of his prior lumbar fusion and then the fusion that I performed for the central disc herniation of T12-L1. The only motion segment that remains in his back is at L1-2 and L2-3, and with heavy work, those will certainly begin to fail and most likely will require surgery in the future.
>
> JE-21, p. 309.

In his report of September 8, 2009, Dr. McNulty offered similar observations:

> I have reviewed the FCE and agree with the findings. Mr. Green has a fusion at T12-L1 and at L3-L5. Because of those fusions, he has increased stress between L1 and L3. He should not engage in heavy physical activities such as logging. He is more suited to work in a light job duty category as outlined in the FCE.
>
> JE-23, p. 332.

300. Therefore, per Drs. Ganz and McNulty, the fact that Claimant has a pre-existing T12-L1 fusion increases the risk that he will have further problems from the L3-5 fusion unless he observes certain prophylactic limitations/restrictions. We believe this demonstrates that Claimant's pre-existing thoracic spine condition does combine with the effects of the work accident to contribute to Claimant's total and permanent disability.

301. With respect to Claimant's pre-existing S-1 radiculopathy, we are unable to identify any persuasive evidence of record which would lead us to conclude that this condition is implicated in contributing to Claimant's total and permanent disability. As noted above, the limitations/restrictions referable to the S-1 radiculopathy do not appear to be any different than the limitations/restrictions relating to Claimant's earlier thoracic spine condition. Nor does there appear to be any evidence suggesting that Claimant suffered a worse outcome from the effects of the work accident as a consequence of the S-1 radiculopathy. In short, the evidence is insufficient to demonstrate that the S-1 radiculopathy combined with Claimant's thoracic spine condition and his accident produced conditions to cause total and permanent disability. Rather, the evidence establishes that Claimant's total and permanent disability is a result of the combined effects of Claimant's pre-existing thoracic spine condition and the injuries associated with the 2006 accident.

CAREY FORMULA

302. Determination of the amount of ISIF liability is a matter of calculation set forth by the Idaho Supreme Court. *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984). To establish the amount of ISIF liability, the extent – in percentage of the whole person – of qualifying permanent physical impairments is required.

303. The most persuasive evidence on the question of the extent and degree of Claimant's accident-caused impairment comes from Dr. McNulty. Dr. McNulty proposed that Claimant has a twenty percent PPI rating referable to his lumbar spine condition and a twenty-five percent PPI rating referable to his cervical spine condition, with no impairment to pre-existing conditions.

304. We have found that while Claimant has a long and complicated pre-injury and medical history, only one of these pre-existing conditions combined with the subject accident to cause total and permanent disability. Claimant's pre-existing thoracic spine condition combined with the accident-produced cervical and lumbar spine injuries to cause total and permanent disability. We have also found that the pre-existing thoracic spine condition satisfies all other elements of the *prima facie* case against the ISIF. The problem, of course, is that although we have found that the pre-existing thoracic spine condition was of such a severity to constitute a pre-existing permanent physical impairment, the extent and degree of Claimant's permanent physical impairment for that pre-existing condition has not been quantified by Employer/Surety, who bears the burden of proof in this regard. The Commission recognizes its authority, as discussed in *Hartman v. Double L Manufacturing*, 141 Idaho 456, 111 P.3d 141 (2005), to request evidence on the issue of Claimant's pre-existing thoracic spine impairment, yet we are reluctant to do so when the parties, represented by experienced counsel, had ample opportunity

to marshal such evidence prior to hearing. The issue was clearly noticed and the parties are well aware of the elements required to prove and calculate ISIF liability. However, we believe the facts of this case mandate an assessment of the extent and degree of Claimant's pre-existing thoracic impairment considering the overwhelming proof that Claimant suffered from a pre-existing impairment which would impact Employer/Surety and ISIF's liability. Justice demands that we request that the parties present additional evidence of Claimant's pre-existing thoracic spine condition. As in *Hartman* we deem it necessary to retain jurisdiction of this matter in order to allow the parties to adduce additional evidence on the following question:

(1) What is the appropriate impairment rating for Claimant's pre-existing thoracic spine condition?

305. The parties are directed to conduct such additional discovery and/or investigations that may be needed to provide the Commission with the evidence necessary to address this issue. If necessary, an additional hearing will be scheduled to allow the parties to present evidence and arguments on the issue as they deem fit. The Commission will necessarily defer any assessment of how responsibility for Claimant's total and permanent disability should be apportioned between Employer/Surety and the ISIF under *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) pending additional evidence necessary to apply the *Carey* formula.

TEMPORARY AND TOTAL DISABILITY

306. Pursuant to Idaho Code § 72-408 and § 72-409, during his period of recovery, an injured worker is entitled to temporary total or temporary partial disability benefits calculated, for the first 52 weeks following the subject accident, at sixty-seven percent of his average weekly

wage, and thereafter, at sixty-seven percent of the currently applicable average weekly state wage.

307. Idaho Code § 72-419 identifies the various ways to calculate the average weekly wage of injured workers, the method of calculation depending on whether the worker in question is paid by the hour, week, month or year or by his output. Claimant does not fall into any of the categories specified by the statute. As the sole proprietor of St. Joe Salvage, Claimant has never been paid a "wage", whether it be hourly, weekly, monthly or yearly. The sections which come closest to describing Claimant's situation are Idaho Code § 72-419(5) and Idaho Code § 72-419(10) which specify:

> Idaho Code § 419(5). If at such time the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.
>
> Idaho Code § 419(10). When circumstances are such that the actual rate of pay cannot be readily ascertained, the wage shall be deemed to be the contractual, customary or usual wage in the particular employment, industry or community for the same or similar service.

However, even these methods of calculating an injured worker's average weekly wage provide little guidance under the facts of this case; Claimant is not an employee. Rather, he is a sole proprietor who has elected coverage under the workers' compensation laws of this State.

308. However, that he is entitled to TTD benefits during a period of recovery following a compensable work accident should be beyond cavil. When he elected coverage for himself, Claimant was certainly entitled to expect that he would receive the same classes of benefits as any other injured worker. Certainly, the Surety did not tell Claimant that because he was a sole proprietor, he was not entitled to time loss benefits since he was not a "wage earner". Anecdotally, the average weekly wage of sole proprietors such as Claimant has been calculated

in the past by referring to tax returns and associated schedules. However, we need not decide how Claimant's average weekly wage should be calculated for purposes of this case, since Claimant is entitled, at most, to the payment of temporary partial disability benefits. Under Idaho Code § 72-408, where Claimant has found employment at a lower paying job during his period of recovery, he is entitled to benefits for partial disability, calculated per Idaho Code § 72-408(2) as follows:

> Partial disability. For partial disability during the period of recovery an amount equal to sixty-seven percent (67%) of his decrease in wage-earning capacity, but in no event to exceed the income benefits payable for total disability.

309. Here, during the entirety of his period of recovery from July 4, 2006 through April 25, 2008, Claimant continued to operate St. Joe Salvage. He reported no earnings to Employer/Surety, yet his tax returns reveal that he had adjusted gross income from business profits of $42,321.00 for 2006, $70,295.00 for 2007, and $50,016.00 for 2008. For the period July 4, 2006 through March 13, 2008, Surety paid TTD benefits to Claimant of $28,703.90, representing what Surety thought it was required to pay for Claimant's period of temporary total disability. However, since Claimant continued to operate St. Joe Salvage during the period in question, he was entitled, at most, to temporary partial disability benefits. A review of Claimant's tax returns reveals that in the years following the subject accident, Claimant earned more than he had in the years leading up to his industrial accident. In short, the evidence does not reflect that Claimant suffered a "decrease in his wage earning capacity" following the subject accident, and during the time that he continued to operate St. Joe Salvage. Quite apart from the question of how to calculate Claimant's average weekly wage, Claimant has simply failed to demonstrate that he earned less in his business after the subject accident than before. Claimant

has demonstrated no entitlement to temporary partial disability benefits under Idaho Code § 72-408(2). Employer/Surety has overpaid benefits in the amount of $28,703.90, and is entitled to a credit of $28,703.90 against its obligation to share in responsibility for Claimant's total and permanent disability.

ATTORNEY FEES

310. The final issue is Claimant's entitlement to attorney fees pursuant to Idaho Code § 72-804. 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:

> 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.

311. 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).

312. Claimant asserts that Surety unreasonably delayed payment of his temporary disability benefits. As addressed above, Claimant failed to establish entitlement to TTD benefits because he failed to prove he had any lost wages. Therefore, Claimant is not entitled to an award of attorney fees related to the manner in which Surety paid him TTD benefits. Claimant also sets

forth a laundry list of complaints about Surety's behaviors in adjusting the claim and communicating with the panel experts that he asserts constitute unreasonable practices. Too, Claimant asserts that Surety did not pay bills associated with claims it accepted, and did not pay mileage due. The record and briefing are insufficient to establish Claimant's claims with the specificity necessary to form the basis for an order for attorney fees.

313. Claimant has failed to establish he is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven that he suffered injuries to his cervical and lumbar spine areas as a result of his industrial accident on July 3, 2006.

2. Claimant has proven entitlement to medical care for his cervical and lumbar spine injuries through April 25, 2008.

3. Claimant has failed to establish entitlement to temporary disability benefits. Surety is entitled to a credit of $28,703.90 for its overpayment, such credit to be applied as anticipated by Idaho Code § 72-316.

4. Claimant has proven PPI related to his July 2006 industrial accident of 20% of the whole person related to his lumbar spine condition and 25% of the whole person related to his cervical spine condition.

5. Claimant has proven that he is totally and permanently disabled as of April 25, 2008.

6. Employer/Surety has proven that Claimant's thoracic spine injury warrants the assignment of a PPI rating, was manifest, constituted a subjective hindrance, and combined with the effects of the subject accident to cause permanent and total disability.

7. Employer is liable for its portion of disability as may be established by application of the *Carey* formula and it shall begin paying total and permanent disability benefits immediately, based upon the date of medical stability (April 25, 2008), with opportunity for adjustment with ISIF after relevant pre-existing PPI and *Carey* formula applications have been ascertained.

8. ISIF is liable for its portion of disability as may be established by application of the *Carey* formula.

9. Jurisdiction over this matter is retained for the purpose of requiring Employer/Surety to put on additional proof concerning the extent and degree of permanent physical impairment referable to Claimant's thoracic spine condition.

10. If necessary, the Commission will schedule another hearing for the purpose of taking evidence and argument on the extent of the thoracic spine impairment.

11. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

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

DATED this 29th day of January, 2014.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2014, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, vs. ST. JOE SALVAGE, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**I.C. No.: 06-007698** DEFENDANT EMPLOYER/SURETY'S MOTION FOR CLARIFICATION ON ORDER AND MOTION FOR DEADLINE ON FURTHER PROCEEDINGS

COME NOW Defendants, St. Joes Salvage and Travelers Indemnity Company, by and through their attorneys of record, Bowen & Bailey, LLP, and hereby requests that the Commission address 2 issues in this matter. At this point in time these Defendants are not making a Motion for Reconsideration.

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, vs. ST. JOE SALVAGE, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**I.C. No.: 06-007698** DEFENDANT EMPLOYER/SURETY'S MOTION FOR CLARIFICATION ON ORDER AND MOTION FOR DEADLINE ON FURTHER PROCEEDINGS

COME NOW Defendants, St. Joes Salvage and Travelers Indemnity Company, by and through their attorneys of record, Bowen & Bailey, LLP, and hereby requests that the Commission address 2 issues in this matter. At this point in time these Defendants are not making a Motion for Reconsideration.

Instead, Defendants are making two separate motions for post-order activities from the Findings of Fact, Conclusions of Law, and Order as filed January 29, 2014.

1. The Industrial Commission has ordered ISIF and the Employer/Surety to engage in some additional activity to establish impairment ratings for purposes of addressing the "CAREY" Formula for determining ISIF proportionate responsibility in this matter. Jurisdiction has been retained. Insomuch as it appears that the parties may need to go as far as having a second hearing, these Defendants would like to establish a timeframe for additional activity.

It is proposed that the Industrial Commission issue an Addendum, or subsequent Order indicating that the parties are to have any activity needed to be undertaken completed within 120 days from the date of any such order. It is believed that this would allow both of the parties ample time within which to formulate additional evidence and documentation that may be needed. Withing this period of time, parties can deal with the question of whether another hearing will be required in this matter. Defendants simply do not want this to be an open ended situation where this case now languishes for many more months. It has been going on long enough. As such, Defendants would respectfully request that the Industrial Commission issue an order establishing a 120 day timeline on the parties' ability to generate additional evidence to be submitted to the Industrial Commission.

2. The Industrial Commission has indicated that ISIF is liable for a portion of disability in this matter. (Order, Section 8). The Industrial Commission has ordered the Defendant Employer/Surety to pay total and permanent disability benefits. Defendants believe that this is an onerous burden upon the Employer and is inconsistent with how the payment of total permanent benefits is undertaken in a case. In fact, in situations of ISIF liability, Defendants are unaware of any case law or statute suggesting such a process.

Obviously, the Industrial Commission has already decided ISIF is liable. What has not been decided is an analysis under the CAREY Formula as to when the Employer's responsibility would end for making any payments, and when ISIF's responsibility for taking over all total perm benefits, (i.e. TTD payments) would start.

In a normal situation where the CAREY Formula analysis has occurred, both the Employer and ISIF are contemporaneously exposed to payment of certain benefits. During the timeframe that the Surety is required to pay out their exposure under that analysis, payments are made essentially at the PPI/PPD rate. Then, during that same period of time that the Surety is making the monthly payments for its portion of the total perm benefits ISIF makes up the differential between what the payment is at the PPD rate, and what the appropriate TTD rate payment would be.

Once the Employer's proportionate responsibility has run and all of the Employer's payments have been made (pursuant to the CAREY Formula), ISIF then takes over full payment of benefits for the remainder of the disabled Employee's life. This is well established, and there is no question as to how that process normally proceeds.

In the current matter, the Commission has issued its Findings of Fact and Order that ISIF is liable to some degree. The exact "degree" is that dispute. Nonetheless, ISIF should be making payments on Claimant's benefits for the differential between the PPD rate and the TTD rate from April 25, 2008 to some indeterminate time in the future. That is absolutely undisputed. That is how the payment system works.

What is up in the air is when the Surety's timeframe ends and ISIF is relegated to taking over the entirety of payments. That is what the issue is about in this case. Since the Industrial Commission has found Claimant to be totally and permanently disabled and ISIF to be liable to some

degree, then ISIF owes those "differential" payments. The Defendants agree that at this point in time there is insufficient evidence to identify when these Defendants' obligation ends. All these Defendants are stating is that no matter how one looks at this case, if Claimant is totally and permanently disabled and ISIF has liability (as per the Industrial Commission's Order) then ISIF should be making the differential payments until such time as the Industrial Commission determines the full extent of the Employer's liability.

If the Employer's liability does not end until many, many months down the line into the future, then there is no harm to ISIF because ISIF would still only be making the differential payments as is required by statute and case low and would not have to pay out money for the full total perm payment erroneously and prematurely. Once again, ISIF should be making that differential payment to the Claimant.

WHEREFORE, these Defendants respectfully request that the Industrial Commission modify the prior Order indicating that ISIF should make immediate payment to the Claimant of the differential amounts not owed by these Defendants for total perm benefits to the Claimant until such time as Defendant Employer/Surety's ultimate liability is ascertained from this next round of litigation.

These Defendants also request an Order from the Industrial Commission establishing a deadline of 120 days to generate additional evidence as previously ordered.

DATED this 18th day of February, 2014.

BOWEN & BAILEY, LLP

ERIC S. BAILEY
Attorneys for Defendant Employer/Surety

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of February, 2014, I caused a true and correct copy of the within and foregoing instrument to be served:

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FAX: (208) 664-6261
(counsel for Claimant)

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Eric S. Bailey

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Plaintiff, vs. ROY GREEN, d/b/a ST. JOES SALVAGE LOGGING, Employer, TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 06-07698 DEFENDANT ISIF'S RESPONSE TO EMPLOYER/SURETY'S MOTIONS FOR CLARIFICATION ON ORDER AND MOTION FOR DEADLINE ON FURTHER PROCEEDINGS

Comes now the Defendant State of Idaho Industrial Special Indemnity Fund, by and through its attorney of record, Thomas W. Callery of Jones, Brower and Callery, PLLC, and responds to the motions filed by the Defendant Employer/Surety on or about February 18, 2014.

1. The Employer/Surety has requested a motion establishing a 120 day timeline in which the parties are to generate additional evidence to be submitted to the Industrial Commission on the issue of impairment and a proposed Carey apportionment. The ISIF believes that the parties can move expeditiously on this issue without the establishment of a deadline. Frankly, the Employer/Surety has had a period in excess of 6 years to obtain an impairment rating for the Claimant's pre-existing thoracic spine condition. Further, the Order of the Industrial Commission indicates that the burden of establishing an impairment rating is upon the Employer/Surety to put on additional proof concerning the extent and degree of impairment for the Claimant's thoracic spine.

Unlike the Employer/Surety, the Fund has not obtained any Independent Medical Evaluations during the pendency of the case. It is the intention of the Fund to review the additional evidence that the Employer/Surety obtains, but would reserve the right to obtain its own Independent Medical Evaluation pending review of the Employer/Surety's additional evidence. The burden of proof in this case remains on the Employer/Surety and the Fund should be allowed sufficient time to rebut that evidence if it so desires.

Further, a hearing, as proposed by the Commission in its Order, can be established on an expedited basis if necessary due to the limited nature of the issue.

2. The second motion of the Employer/Surety appears to be requesting that the Commission enter an order for the immediate payment of the so called differential amount by the ISIF from the date of stability (April 25, 2008) forward. Although the Employer/Surety tries to couch its pleading as not a motion for reconsideration, in essence, the motion is exactly such a motion. It seeks affirmative relief from the original Order of the Commission and is hardly seeking clarification. The Order is not ambiguous.

The Industrial Commission's Order clearly sets forth its intention that the Employer/Surety begin "paying total and permanent disability benefits immediately. The appropriate Carey apportionment is specifically reserved for a later determination. Should it be necessary for an adjustment following a final order on the Carey apportionment, then such action can be taken at that time. It is the Employer/Surety who failed to establish as part of its prima facie case, a pre-existing impairment. The only reason a Carey apportionment is not available immediately is because the Employer/Surety failed to put on proof of a permanent physical impairment with regard to the pre-existing thoracic spine condition.

Before the Industrial Special Indemnity Fund should be ordered to begin making payments, a prima facie case must be established. It is not prejudicial to the Employer/Surety to make it pay the full total and permanent disability payment at the TTD rate in a situation such as the present case where the Commission is retaining jurisdiction to allow the Employer/Surety an opportunity to present a pre-existing impairment rating. It was the Employer/Surety's obligation to provide that evidence to the Commission and it had ample time in the many years that this litigation has been pending. It is not now an emergency, and payment by the Industrial Special Indemnity Fund can await a proper and fully adjudicated and final Carey apportionment determination.

DATED this 25 day of February, 2014.

JONES, BROWER & CALLERY, P.L.L.C.

THOMAS W. CALLERY
Attorney for State of Idaho Industrial
Special Indemnity Fund

CERTIFICATE OF SERVICE

I, Thomas W. Callery, hereby certify that on the 25 day of February, 2014, I caused to be served a copy of the foregoing by the method indicated below and addressed to the following:

STARR KELSO ATTORNEY AT LAW P.O. BOX 1312 COEUR D'ALENE, ID 83816	☐ ☐ ☐ ☒	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to: (208) 664-6261
ERIC S. BAILEY BOWEN & BAILEY, LLP P.O. BOX 1007 BOISE, ID 83701	☐ ☐ ☐ ☒	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Facsimile transmission to: (208) 344-9670

THOMAS W. CALLERY

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, v. ROY GREEN, dba ST. JOE SALVAGE, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-007698** **ORDER REGARDING CLARIFICATION** FILED INDUSTRIAL COMMISSION

On February 18, 2014, Defendants Employer and Surety ("Defendants") filed two motions in response to the Commission's decision in the above-captioned case. The first motion seeks to limit the time during which the parties may collect additional evidence. The second motion purports to seek "clarification" of the decision, specifically ¶7 of the order, which states:

> Employer is liable for its portion of disability as may be established by application of the *Carey* formula and it shall begin paying total and permanent disability benefits immediately, based upon the date of medical stability (April 25, 2008), with opportunity for adjustment with ISIF after relevant pre-existing PPI and *Carey* formula applications have been ascertained.

Green v. St. Joe Salvage, IC 2006-007698, Findings of Fact, Conclusions of Law, and Order 114 (January 29, 2014).

Defendant State of Idaho, Industrial Special Indemnity Fund ("ISIF") objects to the motions, arguing, first, that a deadline for evidence compilation is not necessary, and second, that the order requires no clarification, because it is not ambiguous. ISIF asserts that Defendants are essentially making a motion for reconsideration.

Regarding the first motion, we agree with ISIF that no deadline is necessary. Defendants bear the burden of proof on the issue of Claimant's permanent impairment referable to his thoracic spine condition. Therefore, the time it takes to compile the necessary evidence will largely be determined by Defendants. ISIF is correct that it should be afforded sufficient time to collect rebuttal evidence, if necessary. The Commission will not at this time presume to estimate how long the compilation of evidence will, or should, take. If, in the future, any of the parties believes that another party is unfairly delaying proceedings in this matter, the Commission will entertain a relevant motion. At this time, however, setting a deadline would be premature.

Regarding the second motion, we likewise agree with ISIF that what Defendants are seeking is not clarification, but reconsideration. The order is unambiguous, and it is clear from their arguments that Defendants understand its requirements. Defendants simply object to the requirements, stating that the order places an "onerous burden" on them. Defendants argue that in a "normal situation...both the Employer and ISIF are contemporaneously exposed to payment of certain benefits." Defendants' Motion, p. 3. This is not, however, a normal situation. The degree of ISIF's liability has not been determined. Defendants have been granted an extraordinary opportunity to put on more evidence relating to *Carey* apportionment, and it is not unreasonable, in the meantime, to require Defendants to pay total and permanent disability benefits to Claimant. The order allows for adjustment, if necessary, after the extent of ISIF's liability has been determined.

Based on the foregoing analysis, Defendants' motions for deadline and clarification are DENIED.

IT IS SO ORDERED.

DATED this 19th day of March, 2014.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2014, a true and correct copy of the foregoing **ORDER REGARDING CLARIFICATION** was served by regular United States Mail upon each of the following:

STARR KELSO
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COEUR D'ALENE ID 83816

ERIC S BAILEY
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THOMAS W CALLERY
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Attorneys for Defendant Employer/Surety

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, vs. ST. JOE SALVAGE, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**I.C. No.: 06-007698** NOTICE OF COMPLIANCE WITH WITH INDUSTRIAL COMMISSION DIRECTIVE

Comes now Defendant Employer/Surety by and through their undersigned counsel of record, and hereby submits the following evidence in compliance with the Industrial Commission's Findings of Fact, Conclusions of Law, and Order as filed on January 29, 2014.

The Industrial Commission, in its Order indicated the following:

> Jurisdiction over this matter is retained for the purpose of requiring Employer/Surety to put on additional proof concerning the extent and degree of permanent physical impairment referable to Claimant's thoracic spine condition.

The Industrial Commission furthermore indicated that if necessary, the Industrial Commission would schedule another hearing for the purpose of taking evidence and argument as to the extent of the thoracic spine impairment. Insomuch as the Industrial Commission indicated that there may be necessity for scheduling a hearing, that also presumes that there was no specific requirement that there be a hearing in this matter.

As such, Defendants have submitted as Exhibit A to this document its additional proof as defined by the Industrial Commission concerning the need for evidence as to extent and degree of permanent physical impairment referable to Mr. Green's thoracic spine condition. By way of this submission, these Defendants believe that they are in compliance with the request of the Industrial Commission to provide it with this additional information.

On the chance that another hearing may be "necessary", Defendants would certainly reserve the right to present additional testimonial evidence from any physician who has either treated Claimant or has rendered opinions as to issues concerning Claimant's thoracic spine.

DATED this 7 day of May, 2014.

BOWEN & BAILEY, LLP

ERIC S. BAILEY
Attorneys for Defendants Employer/Surety

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of May, 2014, a true and correct copy of the foregoing document was delivered to the following party(ies) in the method indicated:

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IMPAIRMENT RATING

DATE: 03/19/2014

PATIENT NAME: GREEN, ROY
[redacted]
DATE OF INJURY: April of 2002

Mr. Green is a 54-year-old male who is known to me through an IME performed on 9/8/2009. Please refer to that report for additional information concerning Mr. Green's medical treatment.

Mr. Green sustained an injury in April of 2002. He had progressive symptoms of lower extremity paresthesias and eventually bladder dysfunction. He was evaluated by Dr. Ganz in January of 2003. Dr. Ganz obtained a myelogram and enhanced CT scan on 1/15/2003. which demonstrated a significant herniated disc at the T12-L1 level. At the time of that appointment, Mr. Green was having lower extremity weakness as well as urinary incontinence. On 1/29/2003, Dr. Ganz performed an anterolateral thoracotomy for approach to the T12-L1 disc space. He performed a microdiscectomy at T12-L1 and an anterior lumbar interbody fusion with allograft bone and hardware. Mr. Green notes a prolonged period of convalescence from that surgery; however, he did eventually return to work.

Subsequent to that injury, he has had cervical and lumbar spine surgery.

Mr. Green was examined on 3/19/2014. He has a well-healed thoracotomy incision on the right side. The incision is well healed and 18 cm in length. He does have decreased peri-incisional sensation on the right side, but not on the left. No pain with thoracic rotation of his spine. No evidence of infection and minimal tenderness over the operative site.

Mr. Green has reached maximal medical improvement concerning his injury and subsequent surgery at T12-L1 level. His surgery was performed in 2004 and the 5th edition of the AMA Guides will be used to calculate an impairment rating.

EXHIBIT A

His symptom complex best falls into DRE thoracic category 4 with a 20% whole person impairment. That impairment is attributable to the fusion at the T12 disc space, incorporating T12 and L1.

Medical records from 2003 through 2004 were reviewed concerning Mr. Green's treatment with Dr. Ganz, Dr. Dirks, and Dr. Luther.

Thank you for allowing me to evaluate Mr. Green.

Sincerely,

John M. McNulty, MD*

JMM:ml

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROY GREEN, Claimant, v. ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2006-007698** **ORDER ON ISIF LIABILITY** FILED NOV 26 2014 INDUSTRIAL COMMISSION

This matter went to hearing before the Industrial Commission on August 21and August 22, 2012. On or about January 29, 2014, the Industrial Commission entered its Findings of Fact, Conclusions of Law, and Order finding, *inter alia*, that Claimant is totally and permanently disabled, and that ISIF shares in responsibility for Claimant's total and permanent disability by virtue of a pre-existing thoracic spine injury. However, because Employer put on no proof that would allow the Commission to quantify apportionment of total and permanent disability between the Employer and the ISIF, the Commission retained jurisdiction over the case for the purpose of adducing additional proof on the extent and degree of Claimant's permanent physical impairment for his pre-existing thoracic spine injury. The Commission's decision specifies that the decision is final and conclusive as to all matters adjudicated pursuant to Idaho Code

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§ 72-718. No party filed a motion for reconsideration within 20 days of the Commission's decision as allowed by Idaho Code § 72-718. By order dated April 22, 2014, the Commission set the following issue for hearing:

> The extent of ISIF liability for total permanent benefits as previously addressed by the Industrial Commission.

As noted, having found that responsibility for Claimant's total and permanent disability should be shared between Employer and the ISIF, the only element remaining to quantify ISIF liability is the identification of the impairment rating related to Claimant's pre-existing thoracic spine injury.

The parties referred this question to physicians of their choosing. Dr. McNulty evaluated Claimant on behalf of Employer while Dr. Sears evaluated Claimant on behalf of ISIF. In rendering their opinions on the extent and degree of Claimant's thoracic spine impairment, both physicians relied on the *AMA Guides to the Evaluation of Permanent Impairment,* 5th Edition (*Guides*). Dr. Sears testified that he thought it more appropriate to rely on the 5th Edition to the *Guides* because the 5th Edition affords an opportunity to rate Claimant's impairment based on a diagnosis-related estimates method, which, according to Dr. Sears, offers a more accurate way to assess Claimant's impairment for his thoracic spine injury under the peculiar facts of this case. (Sears deposition 15/10-17/19).

Following his examination of Claimant, Dr. McNulty proposed that Claimant qualifies for rating under DRE thoracic category IV, which suggests a rating ranging between 20% to 23% of the whole person for individuals with alteration of motion segment integrity or bilateral or multilevel radiculopathy. Dr. McNulty rated Claimant at the lower range of category IV, giving him a 20% whole person rating.

Dr. Sears testified that on exam Claimant had no evidence of bilateral or multilevel radiculopathy, so the only way that category IV status could be entertained for Claimant is if he can be said to have "alteration of motion segment integrity". Dr. Sears testified that Claimant cannot qualify for this diagnosis since alteration of motion segment integrity is identified from flexion and extension radiographs demonstrating translation of one vertebra on another of more than 2.5 mm. Since Claimant is fused at T12-L1, and since the fusion is solid, it follows that he does not have any motion at T12-L1, and cannot, therefore have any translation of one vertebral body on another with flexion and extension.

The complete qualifying criteria for DRE thoracic category IV reads as follows:

> Alteration of motion segment integrity or bilateral or multilevel radiculopathy; alteration of motion segment integrity is defined from flexion and extension radiographs as translation of one vertebra on another of more than 2.5 mm; radiculopathy as defined in thoracic category III need not be present if there is alteration of motion segment integrity; if an individual is to be placed in DRE thoracic category IV due to radiculopathy; the latter must be bilateral or involve more than one level.

AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

Using the definition of alteration of motion segment integrity quoted above, it would not seem that Claimant can qualify for a category IV diagnosis since he has neither radiculopathy, nor alteration of motion segment integrity.

However, as pointed out during the deposition of Dr. Sears, the *Guides* contain expanded definitions of "alteration of motion segment integrity" at several places. At page 378 of the 5th Edition to the *Guides*, the following definition of alteration of motion segment integrity is found:

> Alteration of motion segment integrity can be either loss of motion segment integrity (increased translational or angular motion) or decreased motion resulting mainly from developmental changes, fusion, fracture healing, healed infection, or surgical arthrodesis.

At page 383 of the 5th Edition to the *Guides*, a similar definition of alteration of motion segment integrity is found:

> Motion segment alteration can be either loss of motion segment integrity (increased translational or angular motion) or decreased motion secondary to developmental fusion, fracture healing, healed infection, or surgical arthrodeses.

From these sections, it appears that alteration of motion segment integrity is intended to refer to both alteration and loss of motion segment integrity. Loss of motion due to fusion is specifically included in these definitions of alteration of motion segment integrity.

It is clear that a finding of alteration of motion segment integrity is one of the paths towards obtaining a DRE thoracic category IV diagnosis. What is puzzling is that in defining that term for the purposes of DRE thoracic category IV, the editors of the *Guides* chose to give a narrower definition than that used by the editors to more generally describe what is meant by altered motion segment integrity. From this, it could be argued that the more specific definition described in the qualifying criteria for DRE thoracic category IV should govern. However, as Employer has pointed out, one of the illustrative examples provided by the editors to the *Guides* augers against this conclusion. In example 15-11, at page 391 to the 5th Edition, an individual with a thoracic spine fusion was found qualified for DRE thoracic category V, in part, because he demonstrated "alteration of motion segment integrity given the fusion" under category IV. Therefore, it seems clear that the editors of the *Guides* anticipated that a loss of motion segment integrity can be demonstrated by a successful fusion surgery which produces a decrease in motion.

Dr. Sears testified that he found that Claimant was not qualified for inclusion in category IV because he had no abnormal translation of one vertebral body over another. However, on cross examination, Dr. Sears conceded that the definition of alteration of motion segment

integrity appears to include decreased motion by way of successful fusion. Based on this definition, he acknowledged that an individual with a thoracic spine fusion would qualify for inclusion in category IV.

Even so, Dr. Sears declined to amend his opinion on the appropriate impairment rating for Claimant, who assuredly had a T12-L1 fusion as part of the treatment for his pre-existing thoracic spine injury. Dr. Sears explained that loss of motion segment integrity at this level is not significant, and that an individual with a successful fusion following surgery should be able to return to good function. Accordingly, he testified that he continued to abide by the 16% rating he awarded to Claimant, even though he had previously acknowledged the propriety of applying the 5th Edition to the *Guides* to this situation exactly because it offered a diagnosis-based method of evaluation that would not confuse the contributions of Claimant's various injuries to his complaints.

Having considered the evidence, we conclude that the evaluation performed by Dr. McNulty is more persuasive, and that Employer has met its burden of showing that Claimant suffers from a 20% PPI rating for the effects of his pre-existing thoracic spine injury.

With this conclusion in place, it is now possible to perform the calculations necessary to apportion Claimant's total and permanent disability between the ISIF and Employer.

Claimant's impairments total 65% (20% lumbar spine, 25% cervical spine, 20% pre-existing thoracic spine). This leaves 35% residual disability to apportion between Employer and the ISIF under *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984). Using the formula adopted in that case, Employer's liability for the payment of PPI and PPD is calculated as follows: 45/65 x 35 = 24.23 + 45 or 69.23 of the whole person. This represents Employer's liability for disability, inclusive of the 45% impairment found owing.

Claimant is entitled to the payment of 346.15 weeks of PPI/PPD benefits, at the appropriate rate, commencing on the date of medical stability. Thereafter, Claimant is entitled to the payment of total and permanent disability benefits at the statutory rate by the ISIF.

In its brief, the ISIF has raised a number of challenges to the Commission's January 29, 2014 decision. As noted by Employer, that decision is final and conclusive as to matters adjudicated pursuant to the provisions of Idaho Code § 72-718. Neither party filed a timely motion for reconsideration following the January 29, 2014 decision. As such, the Commission is not authorized to entertain a motion to revisit the matters decided in the original decision.

Idaho Code § 72-718 adopts a version of the doctrine of *res judicata* peculiar to the Idaho workers' compensation system. A decision of the Commission is *res judicata* as to matters actually adjudicated in the absence of a timely motion to reconsider. The decision became final and conclusive as to matters adjudicated therein by the Commission 20 days after the date of the decision. Neither the parties, nor the Commission may disturb such a decision lest the plain meaning of "final and conclusive" be ignored.

As we noted in the recent case of *Powell v. Northwest Cascade, Inc.*, Order Denying Reconsideration, 2007-001470, 2014 IIC 0050 (2014), we are mindful of the fact that in the recent case of *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893 (2014), the Supreme Court observed that an order of the Commission making an award to Claimant of medical benefits in an amount certain was not a "final order", but was, instead, an "interlocutory order", which could have been revisited by the Commission at any time until a final appealable order was issued. In *Powell*, the order at issue was final and conclusive per Idaho Code § 72-718, and no timely motion for reconsideration had been filed. We noted that while *Vawter* might suggest a contrary result, we were unwilling to read that case as broadly as might be suggested,

where the Court did not treat the specific application of the provisions of Idaho Code § 72-718. It is difficult to square *Vawter* with the unambiguous provisions of Idaho Code § 72-718. At present, we will be guided by what we perceive to be the applicable provision of the statutory scheme. We decline to entertain the ISIF's several arguments against the Commission's January 29, 2014 decision.

DATED this 26th day of November, 2014.

INDUSTRIAL COMMISSION

Thomas P. Baskin, Chairman

R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 2014, a true and correct copy of the foregoing **ORDER ON ISIF LIABILITY** was served by regular United States Mail upon each of the following:

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Attorneys for Defendant/Appellant State of Idaho
Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

* * * * * * * *

ROY GREEN, Claimant/Respondent, vs. ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer/Respondent, and TRAVELERS INDEMNITY COMPANY, Surety/Respondent, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Appellant.	I.C. No. 2006-007698 **NOTICE OF APPEAL**

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TO: THE ABOVE-NAMED CLAIMANT, ROY GREEN, AND HIS ATTORNEY, STARR KELSO, P.O. Box 1312, Coeur d'Alene, ID 83816-1312 AND DEFENDANTS ROY GREEN, dba ST. JOES SALVAGE LOGGING AND TRAVELERS INDEMNITY COMPANY AND THEIR ATTORNEY, ERIC S. BAILEY, P.O. Box 1007, Boise, ID 83701 AND THE CLERK OF THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO, NOTICE IS HEREBY GIVEN THAT:

1. The above-named Defendant, STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, appeals against the above-named Claimant, ROY GREEN, and above-named Defendants, ROY GREEN, dba ST. JOES SALVAGE LOGGING AND TRAVELERS INDEMNITY COMPANY to the Idaho Supreme Court from the Idaho Industrial Commission Order and Findings of Fact, and Conclusions of Law entered January 29, 2014, and the Order on ISIF Liability entered November 26, 2014. Commissioner Baskin, Chairman.

2. The issues presented on appeal include:

Whether the Commission erred in sua sponte retaining jurisdiction in this case.

Whether the Commission abused its discretion in sua sponte retaining jurisdiction in this case.

Whether the Commission erred in relieving Employer/Surety from its failure to prove the elements of ISIF liability, which such issues were clearly noticed for hearing.

Whether the Commission's finding that Claimant's thoracic spine condition "combined with" the industrial injuries to render Claimant totally and permanently disabled is supported by substantial and competent evidence.

Whether the Commission erred in concluding as a matter of law that Claimant suffered from a permanent pre-existing physical impairment within the meaning of I.C. section 72-332(2) when no physician had assigned an impairment rating for Claimant's thoracic spine condition.

Whether the Commission erred in applying the Carey Formula when at hearing there was no evidence of any impairment rating for Claimant's thoracic spine condition.

3. Appellant has a right to appeal to the Idaho Supreme Court, and the Judgment or Orders described in Paragraph 1 above are appealable orders under and pursuant to I.A.R., Rule 11(d).

4. A reporter's transcript of the Hearing held on August 21 and 22, 2012, was prepared and used by the parties in post hearing briefing and is requested for inclusion in the record on appeal.

5. The Appellant requests the following documents to be included in the agency's record in addition to those automatically included under Rule 28, I.A.R.:

a. All Exhibits admitted at the hearing held on August 21 and 22, 2012.

b. All Post-Hearing Depositions.

c. All Post-Hearing Briefs of the parties.

d. ISIF Brief on Retained Jurisdiction filed November 10, 2014.

6. I certify:

a. That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Julie McCaughan
M & M Reporting Services
816 Sherman Avenue, #7
Coeur d'Alene, ID 83814
(208) 765-1700

b. That the Appellant is exempt from paying any clerk's fee or filing fee because Appellant is an agency of the State of Idaho.

Respectfully submitted,

Dated: December 23, 2014

Thomas W. Callery
Attorney for Appellant

Dated: December 23, 2014

Kenneth L. Mallea
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of December, 2014, a true and correct copy of the within and foregoing document was served upon:

Starr Kelso
P.O. Box 1312
Coeur d'Alene, ID 83816-1312
Attorney for Claimant

Eric S. Bailey
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P.O. Box 1007
Boise, ID 83701
Attorney for Employer/Surety

Court Reporter

__X__ by U.S. mail
_____ by facsimile

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROY GREEN,

Claimant/Respondent,

v.

ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety,

Defendants/Respondents,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendant/Appellant.

SUPREME COURT NO. 42782

CERTIFICATE OF APPEAL

Appeal From:	Industrial Commission, Thomas P. Baskin, Chairman presiding
Case Number:	IC 2006-007698
Order Appealed from:	Findings of Fact, Conclusions of Law, and Order, filed January 29, 2014, and Order on ISIF Liability, filed November 25, 2014.
Attorneys for Appellant (ISIF):	Thomas W. Callery PO Box 854 Lewiston, ID 83501 Kenneth L. Mallea PO Box 857 Meridian, ID 83680

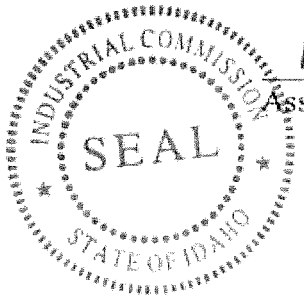
Attorney for Respondent (Claimant):	Starr Kelso PO Box 1312 Coeur d'Alene, ID 83816
Attorney for Respondents (Employer & Surety):	Eric Bailey PO Box 1007 Boise, ID 83701-1007
Appealed By:	Defendant/Appellant (ISIF)
Appealed Against:	Claimant/Respondent (Roy Green) Defendants/Respondents (Roy Green, dba St. Joes Salvage Logging, Employer, and Travelers Indemnity Company, Surety)
Notice of Appeal Filed:	December 23, 2014
Appellate Fee Paid:	No fees paid. Appellant is ISIF, a state agency.
Name of Reporter:	Julie McCaughan, M&M Reporting Services
Transcript Requested:	Standard transcript has been requested. Transcript has been prepared and filed with the Commission.
Dated:	December 29, 2014

Kenna Andrus
Assistant Commission Secretary

CERTIFICATION OF APPEAL

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal, Findings of Fact, Conclusions of Law, and Order, and Order on ISIF Liability, and the whole thereof, in IC case number 2006-007698 for Roy Green.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 29th day of December, 2014.



Kenna Andrus
Assistant Commission Secretary

CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 42782 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 23rd day of January, 2015.

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Kenna Andrus
Assistant Commission Secretary

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROY GREEN, Claimant/Respondent, v. ROY GREEN, dba ST. JOES SALVAGE LOGGING, Employer, and TRAVELERS INDEMNITY COMPANY, Surety, Defendants/Respondents, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Appellant.	**SUPREME COURT NO. 42782** **NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, Clerk of the Courts; and
Thomas W. Callery for Defendant/Appellant;
Kenneth L. Mallea for Defendant/Appellant;
Starr Kelso for Claimant/Respondent; and
Eric Bailey for Employer & Surety Respondents.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Attorney for Appellant:

THOMAS W CALLERY
PO BOX 854
LEWISTON ID 83501

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680

Attorney for Claimant/Respondent:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

Attorney for Employer & Surety/Respondents:

ERIC BAILEY
PO BOX 1007
BOISE ID 83701-1007

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions. In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 23rd day of January, 2015.

Kenna Andrus
Assistant Commission Secretary