BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY W. ANDERSON, Claimant,	)	**IC 98-500445**
v.	)	**98-503467**
HARPERS, INC., Employer,	)	**02-504327**
and	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**
LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	)	Filed April 22, 2005

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 Coeur d'Alene, Idaho, on October 5, 2004. Louis Garbrecht of Coeur d'Alene represented Claimant. David P. Gardner of Pocatello represented Defendants. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on February 3, 2005 and is now ready for decision.

ISSUES

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

1. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

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

3. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;

4. Whether Claimant is entitled to retraining benefits under Idaho Code § 72-450, and the extent thereof; and

5. Whether Claimant is entitled to attorney fees due to Defendants' unreasonable denial of benefits as provided for by Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant contends that he sustained a work-related injury to his neck on January 29, 1998 that ultimately necessitated anterior discectomy and fusion (ACDF) at C5-C6; that he sustained a work-related crush injury to his left thumb on November 5, 1998 that ultimately led to loss of some use of his thumb, entitling him to a whole person impairment of 1% for his thumb injury; and that he sustained a work-related injury to his neck on February 21, 2002 that ultimately led to a second ACDF at C6-C7. Claimant avers that as a result of the second cervical fusion, he suffered a pulmonary embolism that required hospitalization and lengthy treatment with prescription blood thinners and that Defendants have refused to pay for the medical care necessitated by the pulmonary embolism. Claimant also argues that as a result of the second cervical surgery he developed a tremor and spasms in his upper extremities for which Defendants have denied medical treatment. Claimant asserts that he is totally and permanently disabled as a result of the February 21, 2002 industrial injury. Finally, Claimant contends that an award of attorney fees is appropriate because of Defendants' initial refusal to provide reasonable medical care for injuries resulting from the February 21, 2002 accident, Defendants' initial refusal to pay

TTD benefits following the February 21, 2002 accident, the subsequent delay in paying medical and income benefits once Defendants determined that the February 21, 2002 accident was compensable, and Defendants' continuing refusal to pay medical bills related to the treatment of the pulmonary embolism and the diagnosis and treatment of Claimant's upper extremity tremor and spasm.

Defendants dispute that Claimant sustained any impairment as a result of his thumb injury. Defendants contend that Claimant's upper extremity tremor and spasm are not the result of the February 21, 2002 industrial injury, the subsequent cervical surgery, or its sequelae, and, therefore, are not compensable. Defendants do not believe that Claimant is entitled to any disability in excess of his total impairment rating and is not totally and permanently disabled either as a combination of medical and non-medical factors, or under the odd lot doctrine. Finally, Defendants assert that their initial denial of medical and time-loss benefits resulting from the February 21, 2002 accident was not unreasonable, and that benefits were paid promptly once the claim was determined to be compensable; therefore, an award of attorney fees pursuant to Idaho Code § 72-804 is not justified.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Terrill A. Anderson taken at hearing;
2. Claimant's Exhibits 1 through 18 admitted at hearing (which included the pre-hearing depositions of Berni Seever and Tom Moreland);
3. Defendants' Exhibits 1 through 6 admitted at hearing; and
4. The post-hearing deposition of J. Robert Clark, M.D.

All objections made during the course of the depositions of Bernie Seever and Dr. Clark are overruled. After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 35 years of age, married, and living in the Spokane Valley, Washington, with his wife and their blended family of seven minor children.

EDUCATIONAL AND VOCATIONAL BACKGROUND

2. Claimant attended high school in Coeur d'Alene. He did not graduate but subsequently obtained his GED. Claimant worked summers on a family farm, baling and bucking hay, working in the grain harvest and tending livestock. He also worked for his brother-in-law doing auto-body repair.

3. After high school, Claimant briefly attended Salt Lake Community College before dropping out and joining the U.S. Coast Guard. Claimant served in the Coast Guard for three years. He sustained service-related injuries to his knees and received an honorable discharge in 1991 on medical grounds. He was given a 20% disability rating for his knee injuries.

4. Upon his discharge from the service, Claimant relocated to Yuma, Arizona, and went to work part-time for his stepfather who owned a security business. In addition, Claimant went to school to get his commercial drivers' license, and also worked for a military subcontractor testing military vehicles at the Yuma proving grounds.

5. When the military testing work dried up, Claimant went to work as a long-haul trucker, working for a number of firms before relocating to the Spokane/Coeur d'Alene area in

1996. Claimant's first job in the panhandle region was for a construction company driving truck, hauling gravel and operating heavy equipment.

6. Claimant went to work for Employer in 1997 working in the "burn-off" area where accumulated paint was burned off of assembly line components. Claimant was on the swing shift where he usually worked without assistance. His supervisors reported to Dirk Darrow, Industrial Commission Rehabilitation Division (ICRD) in Coeur d'Alene, that Claimant was a valuable employee who accomplished a great deal of work during his shifts. Claimant frequently worked overtime, and with Employer's incentive pay provisions Claimant earned between $12.00 and $13.00 per hour. Employer also provided medical coverage, paid vacation, long and short-term disability and dental coverage.

7. In the nine months that Claimant worked for Employer in 1997, he earned $18,000.00. In 1998, the year he had the first two industrial accidents at issue in this proceeding, Claimant earned almost $21,000.00. In 1999, Claimant earned almost $33,000.00. In 2000, Claimant earned wages of almost $22,000.00.[1] In 2001, Claimant earned over $31,500.00. Claimant did not return to work following his February 21, 2002 industrial accident and was terminated by Employer in September 2003.

JANUARY 1998 ACCIDENT AND SUBSEQUENT MEDICAL CARE

8. On January 29, 1998, Claimant was removing a loaded cart from the burn-off oven when he felt his neck pinch. He stated:

> It wasn't just once or twice. I felt it a couple of times, but the one that was significant, you know, kind of made my ears ring a little bit, too, and I just kind of shook it off. You know, it stunned me a little bit, but I just shook it off. And I went back to work, finished my job, and went home.

Tr., p. 40. The next morning Claimant awoke with numbness in his hands. Subsequently, the

[1] At hearing, Claimant attributed the reduction in income to slowed production.

numbness extended into his arms and fingers. Claimant continued to work. On February 5, Claimant sought medical attention from his family physician, Rolf Nesse, M.D. Dr. Nesse suspected some problem with the cervical spine, recommended a cervical collar, advised against returning to work until he had an MRI, and noted that because it was a work-related injury, Claimant needed to seek care and treatment through North Idaho Immediate Care (NIIC).

9. Claimant was seen at NIIC on the same day, February 5. An MRI was ordered. Claimant was referred to Ernest C. Fokes, Jr., M.D., a neurosurgeon, by Dr. Nesse.[2] Dr. Fokes saw Claimant on February 13 and recommended surgical decompression of Claimant's cervical spine. Claimant returned to work against the advice of Dr. Fokes while he considered his options. Ultimately, Claimant decided to have the surgery. A few days before his scheduled surgery, Claimant's symptoms worsened at work. He went to NIIC and was taken off work. Dr. Fokes performed a successful ACDF at C5-C6 on March 9. Dr. Fokes released Claimant to return to modified work on April 16. Claimant worked reduced hours in a modified position, then full hours in the modified position and eventually returned to work in the burn-off area. He continued to complain of neck pain, and pain and numbness in his upper extremities.

10. On July 1, Claimant was seen at NIIC reporting "very significant neck pain with tingling down his right arm and to a lesser degree down his left arm." Claimant's Ex. 1, p. 6. Claimant was taken off work for a month to recuperate from his surgery.

11. In late July 1998, because of Claimant's continued complaints, Dr. Fokes ordered an MRI. It indicated an excellent result with the fusion, and showed a small annular bulge at C6-C7—insignificant and unchanged from the February 1998 MRI. Dr. Fokes released Claimant

[2] In light of Surety's position regarding chain of referral, it is interesting to note that Claimant's referral to Dr. Fokes was made outside the chain of referral and was accepted without comment by Surety.

on July 30, 1998 and provided no further treatment for his neck.

12. On July 31, Claimant was seen at NIIC at the end of this thirty-day work release. He stated that the day-to-day pain was improved, but demonstrated limited range of motion, pain, and stiffness in his neck. In light of the IME report and the results of the most recent MRI, Claimant was released to return to modified work.

13. When Claimant returned to work, he was reassigned from the burn-off area because Employer was concerned that Claimant would be susceptible to exceeding his restrictions. Claimant worked in a number of different areas of the plant and learned many different parts of the production process.

14. Claimant returned to NIIC in October 1998, complaining of swelling in his right hand and right arm and shoulder pain. Claimant described the same symptoms that he had with his first cervical disc injury. He was referred to Dr. Fokes who determined the problem was actually a shoulder problem and referred him on to Kent Pike, M.D.

15. On November 5, Claimant returned to NIIC for additional follow up on his right hand and arm symptoms. The treating physician observed that Claimant did not present with classic carpal tunnel syndrome (CTS) symptoms, but that he could have CTS. The doctor was more concerned with Claimant's range of motion deficits in his neck following his fusion. He suggested a nerve conduction study and opined that if the study were negative, Claimant should begin an aggressive physical therapy program to rehabilitate his cervical range of motion and improve his hand function.

NOVEMBER 1998 ACCIDENT AND SUBSEQUENT MEDICAL CARE

16. On November 5, 1998,[3] Claimant was working on a weld press when his left thumb got caught in the press and was crushed. Claimant was immediately taken to NIIC where he was diagnosed with crush injury and distal tuft fracture of the left thumb. Claimant's injury was sutured, dressed, and followed closely for a month.

17. Sometime during November, Claimant saw Dr. Pike about his right arm and hand complaints. Dr. Pike ordered nerve conduction studies.

18. As the thumb injury healed, some tissue, described by the treating physician as "exquisitely tender," protruded at the tip of the thumb. Eventually, Claimant was referred to a hand surgeon, Peter C. Jones, M.D., to evaluate whether he would need a surgical revision of the tip of the thumb.

19. The nerve conduction studies ordered by Dr. Pike were done on December 1 and showed mild bilateral carpal tunnel syndrome (CTS), right worse than left. Claimant saw Dr. Jones about his thumb on December 2. Dr. Jones also discussed Claimant's diagnosis of CTS. Claimant chose not to proceed with a carpal tunnel release as his symptoms were relatively mild. He returned to see Dr. Jones several times about his left thumb. His last visit was in March 1999, at which time Claimant opted to continue conservative treatment of his thumb and not have a surgical revision of the digit. Claimant did not receive an impairment rating for his thumb injury from the doctors at NIIC or from Dr. Jones. When he underwent an IME by J. M. McNulty, M.D., in February 2003, Dr. McNulty determined that Claimant had no permanent impairment from the thumb injury.

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[3] The weld press accident occurred just four-and-a-half hours after his earlier visit to NIIC regarding his right hand complaints.

20. At hearing, Claimant described the left thumb as still being tender at the tip and shorter than the right thumb. He stated:

> You know, I have a hard time grabbing things with it, like small objects like nuts and screws and stuff like that. . .
>
> ***
>
> I can't grip things like I can with my right.
>
> ***
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> Just whenever I go to like hold a screw on or something like that, try to get a little nut on the screw, something like that, there's no way. I can't get it.

Tr., pp. 56-57. Apart from the initial trip to NIIC immediately following the thumb injury, Claimant sustained no time loss as a result of the accident. During his recovery, he continued to work for Employer in positions that did not require use of his left thumb. Surety paid Claimant's medical expenses related to the injury.

21. Claimant was seen as a new patient by Gary P. Gleason, D.O., at Group Health Cooperative (Group Health) in Spokane on September 28, 2000. Group Health was Claimant's private medical insurance carrier/provider. Claimant presented complaining of lower back pain, but advised Dr. Gleason that since his cervical fusion he had "chronic problems with numbness which he describes in all the fingers of both hands." Claimant's Ex. 8, p. 1. The chart notes indicate that Dr. Gleason wanted to review Claimant's neurosurgical records.

FEBRUARY 2002 ACCIDENT AND SUBSEQUENT MEDICAL CARE

22. In 2001, Claimant started working as a painter for Employer and was still working in that position in February 2002. Claimant testified that the plant was processing a large order of bookshelves in a color that required particular attention by the paint crew. Claimant stated that when a particularly large order of one item, such as the bookshelves, would come through the production line, there could be a shortage of the proper hardware for hanging the various parts on the production line. When this happened, the crew loading the parts onto the hangers

for painting would use different hardware. This substitute hardware made it difficult to remove the finished panels from the hangers as they came out of the paint line. On February 21, 2002, Claimant noticed one panel was hung on a non-standard hanger. The production line had stopped so Claimant was using the stoppage as an opportunity to remove the panel from its hangar. As Claimant was maneuvering the panel, the production line started up with a jerk and Claimant felt his neck pop. Claimant testified:

> And I was like, "Man, that hurt," so I was just kind of walking around. And, you know, my lead, Mike Fletcher, he goes, "Man, you don't look very good," and I said, "I don't feel very good." And this was just right about lunchtime [5:30 p.m.]. So we all went to lunch. We shut the line down and went to lunch. After lunch, I was even worse. Guys are coming over to me, "Gary, you don't look very hot, man." I said, "I don't feel very good at all."

Tr., pp. 80-81. Claimant stated that he tried to finish out his shift so as not to mar his perfect attendance record, until his superiors told him he needed to seek medical help. Claimant's lead, Mike Fletcher, offered to drive Claimant to Kootenai Medical Center (KMC), but Claimant declined and called his wife to come get him. When Mrs. Anderson arrived, Claimant required assistance in exiting the facility and getting into Mrs. Anderson's vehicle.

23. Claimant admitted at hearing that from the time he got to the hospital until about a month later his recollections are foggy. At hearing, Claimant was able to remember some specific events, but not necessarily their place in time. With the help of the record, and testimony from Claimant's wife, it is possible to reconstruct generally what transpired.

24. Claimant and his wife arrived at KMC at 10:24 p.m. on February 21. Claimant was complaining of acute onset neck pain. Claimant described numbness and heaviness in his arms and hands bilaterally. Emergency room staff were advised of Claimant's prior cervical fusion. Exam notes indicate that Claimant was tender over his lower cervical spine at approximately C7. He exhibited slightly decreased grip and decreased light touch sensation over

the ulnar surface of his left hand. X-rays of the cervical spine were negative except for the prior fusion. The doctor on duty that evening, Henry Amon, M.D., discussed Claimant's situation with the neurologist on call, Dr. Ganz. Dr. Amon's diagnosis was acute cervical strain with radiculopathy. Dr. Amon discharged the Claimant with pain medication and anti-inflammatory medication and advised that he return in one week for a follow-up, or sooner should Claimant experience any neurological problems. Dr. Amon allowed Claimant to return to work on modified duty with no lifting or bending for one week. The discharge papers did not include any referral.

25. Claimant's wife provided substantial additional detail about Claimant's visit to the KMC emergency room on February 21. She described Claimant as being drowsy and "in and out" during his stay at KMC, even though he had not received any pain medication at the time. Mrs. Anderson testified that Claimant's condition visibly deteriorated during his stay. She noted that his temperature was dropping (the medical records indicate that Claimant's temperature dropped from 98.6° F. on admission to 96.7° F. by 12:16 a.m.). She testified that when Claimant returned from x-ray, Dr. Amon said the films looked good. Mrs. Anderson expressed her concerns about Claimant's condition and observed that she didn't know how she was going to get him home in his condition. Dr. Amon told her he'd take another look at the situation and contacted the neurosurgeon on call. Claimant was then returned to x-ray for a second set of films (the second trip to x-ray is noted on the medical records, but there is a report for only one set of x-rays). Mrs. Anderson testified that following the second set of x-rays, Dr. Amon told her Claimant had a "neck sprain." When Claimant was discharged, Mrs. Anderson specifically asked Dr. Amon what she should do if Claimant got worse during the night, noting that she was eight months pregnant and that they lived in Spokane. Dr. Amon told her that she could take him

to the closest emergency room or to his primary physician. The hospital staff helped Mrs. Anderson load Claimant into her vehicle. When she arrived home in Spokane, it required the help of two male family members to get Claimant out of the car and into the house.

26. The next morning when Mrs. Anderson woke Claimant to check on him, he told her that his legs were numb. Mrs. Anderson immediately called Dr. Gleason who advised her to get him to the clinic within the hour. Mrs. Anderson again sought help from her teen-aged son and an adult relative to help her get Claimant into her vehicle and to Dr. Gleason's office.

27. On exam, Dr. Gleason observed tenderness over the spinous processes of the lower cervical vertebrae as well as in the paravertebral muscles. He noted that Claimant had "[v]ery limited range of motion." Dr. Gleason performed some neurologic testing and was unable to elicit biceps or triceps reflexes bilaterally, and noted decreased sensation in the ulnar nerve distribution to the left hand, as well as marked weakness in grip strength and flexion and extension at the elbow. Dr. Gleason stated:

> In light of his previous fusion surgery and the significant symptoms in both extremities, will get an MRI of the cervical spine to rule out any spinal stenosis. . .Work release: no duty, for the next week. Further evaluation and treatment pending results of the MRI and the status of the patient's symptoms. He is advised to be seen in the emergency room again if he has any acute worsening.

Claimant's Ex. 8, p. 4.

28. Berni Seever, the senior case manager at Surety who was handling Claimant's case, contacted Claimant the day after the accident to confirm some of the details and, when told that Claimant had been in to see Dr. Gleason and an MRI had been ordered, indicated that Surety would await the results of the MRI before making further case management decisions. The MRI was done February 26, and showed a large disc herniation at C6-C7.

29. On February 28, Claimant returned to KMC as ordered for follow-up. He saw

David R. Barnes, M.D. Dr. Barnes noted that Claimant was still symptomatic and reviewed the MRI. Chart notes indicate that Claimant was to follow up through KMC Occupational Medicine and that he was off work until he was seen by neurosurgery. On his discharge papers, however, there was no mention of a referral to KMC Occupational Medicine.

30. The same day that Claimant returned to KMC, he and his wife also had a follow-up visit to Dr. Gleason to review the results of the MRI. Dr. Gleason told them that Claimant would need to be referred to a neurosurgeon for further treatment, and suggested several names, including that of a Dr. Bronson. Dr. Gleason and his staff were aware that Claimant's injuries were work related. The medical records from Dr. Gleason's office include a referral document, dated February 27, referring Claimant to William E. Bronson, M.D., at 105 W. 8th Avenue, Ste. 200, Spokane, Washington, effective February 28, 2002. Berni Seever's notes indicate that on February 28 she received a request from Dr. Gleason's office for authorization to refer Claimant to Dr. Bronson and denied the authorization, stating that Claimant should be referred to Dr. Ganz who would have all of the records of Claimant's first surgery because he was in the same practice as Dr. Fokes.

31. Claimant and his wife both testified that several days after the appointment with Dr. Gleason, they received a referral to Dr. Ganz in Coeur d'Alene in the mail. The referral to Dr. Ganz clearly resulted from Surety's contact with Dr. Gleason's office on February 28. Claimant contacted Sabrina in Dr. Gleason's office and asked if he could be referred to a neurosurgeon in Spokane. He explained that he could not drive, that his wife was 8 months pregnant, that he had 6 children at home, and that they lived in Spokane and winter weather made the roads difficult. Sabrina indicated that it was possible to refer Claimant to a Spokane neurosurgeon. Claimant and his wife both testified that it was their understanding that Sabrina

was coordinating the referral with Surety. The next day, Claimant received a letter from Group Health with a referral to Jeffrey S. Hirschauer, M.D., in Spokane. Dr. Hirschauer was in practice with Dr. Bronson at Inland Neurosurgery and Spine. When calling to schedule the appointment, Dr. Bronson was able to work Claimant into his schedule sooner, so the appointment was made with Dr. Bronson. When Claimant subsequently received a new patient packet from Dr. Ganz, he disregarded it, believing that it was no longer relevant.

32. Claimant saw Dr. Bronson on March 8, 2002. Dr. Bronson confirmed that Claimant needed a second fusion at the level below his first procedure. Dr. Bronson noted that he would seek authorization for the surgery. Several days later, Claimant received a call from Kelly in Dr. Bronson's office advising him the surgery was scheduled for the following week on March 14. As the result of a conversation with Kelly, it was clear to Mrs. Anderson that Kelly knew this was a workers' compensation claim, and Mrs. Anderson understood that Kelly had been in contact with Ms. Seever.

33. According to the records of Ms. Seever, on March 12 she became aware that Claimant had not attended his scheduled appointment with Dr. Ganz and called Dr. Bronson's office. She spoke to Sara and advised her that Surety would not authorize the surgery by Dr. Bronson. Claimant testified that he received a call from Ms. Seever one or two days before the scheduled fusion advising him that Surety would not authorize the surgery. Claimant immediately contacted Dr. Bronson's office and was advised that he should proceed with the surgery and the issue of who pays would be sorted out later.

34. Claimant underwent an ACDF at C6-7 without complications as scheduled on March 14. After Claimant came out of surgery, Mrs. Anderson left the hospital to attend an appointment with her obstetrician. At this time, Mrs. Anderson was approximately two weeks

from her due date. While at her doctor's office, she received a call on her cell phone. When she saw that it was from Surety, she answered the call. Mrs. Anderson testified that she was told, "You know this [Claimant's surgery] isn't being covered." Tr., p. 222. She was also given information about long and short-term disability.

35. Claimant was discharged from the hospital three or four days after his ACDF procedure. Two or three days later, Claimant began experiencing severe pain in his back and was having trouble breathing. Claimant's wife took him to the ER at Sacred Heart hospital in Spokane where he had had his second fusion. He was diagnosed with pulmonary emboli (PE) and remained hospitalized, receiving treatment for over a week. He was eventually discharged on Coumadin, which required regular monitoring. He remained on the Coumadin for approximately six months.

36. Claimant's recovery from the second ACDF was slow. Both Dr. Gleason and Dr. Bronson followed Claimant closely. In mid-April, he had to return to the hospital to undergo cleaning and debridement of an infection at his graft donor site. On April 22, Claimant saw Dr. Gleason. The chart notes reference "occasional tingling in his right hand and some tremor in both hands." Claimants Ex. 8, p. 7. The same chart note also states that Claimant's PE was the result of his February 21, 2002 work injury. A letter to that effect appears as Claimant's Ex. 8, p. 9.

37. Claimant continued to experience problems with the graft donor site through the end of June. Also in late June Claimant experienced symptoms similar to those he had when he had the PE. He was seen at Dr. Gleason's office and sent by ambulance to Sacred Heart for a spiral CT. The CT was within normal limits and Claimant returned to Dr. Gleason's office and was placed on Lovenox, an injectable blood thinner. On June 27, Claimant returned to Dr.

Gleason's office because he had red streaking on his left arm. Dr. Gleason diagnosed probable thrombophlebitis, prescribed antibiotics, elevation, and warm packs. Claimant returned on July 2 and Dr. Gleason noted the thrombophlebitis was improving. Claimant returned to Dr. Bronson on July 24. Dr. Bronson noted that the graft site had finally healed, and Claimant had completed physical therapy. Claimant continued to complain of neck pain and paresthesias in the upper extremities and showed guarding and spasm in his neck. Dr. Bronson prescribed Neurontin to see if it would help the neurologic symptoms.

38. At the end of September, Claimant returned to Dr. Bronson for a routine follow-up. Claimant still complained of some pain in his neck, but his main complaint was a tremor that had developed and was progressively getting worse. On exam, Dr. Bronson noted a "fine intention tremor in the fingers," and stated, "I am really not sure what to make of it." Claimant's Ex. 10, p. 16. X-rays showed that the second fusion was solid. Dr. Bronson recommended a neurology consult to evaluate the tremor, and released Claimant *p.r.n.* On the same day, Dr. Bronson sent a letter to N. Roger Cooke, M.D., with a referral. In the letter, Dr. Bronson discussed Claimant's two ACDF procedures and stated: "He improved somewhat after his disc surgery. After surgery he developed this fine, somewhat resting tremor in his fingers. I do not think it is related to his cervical disc disease but it seems somewhat odd." *Id.* at p. 17. At that time, Dr. Bronson was most concerned with Claimant's family history of multiple sclerosis (MS), suggesting that one reason for the referral was to rule out MS as the cause of the tremor.

39. Claimant returned to Dr. Gleason on October 4. He complained of right-handed numbness and weakness, tremor in both hands, general fatigue and low energy. Dr. Gleason ordered some blood tests and advised that if Claimant's symptoms didn't improve in three or four weeks, he would seek a neurology consult. Claimant returned on October 28 after

experiencing three days of pain and stiffness in the posterior cervical/upper thoracic back area. The onset of pain occurred when Claimant was lifting an infant car seat. Claimant had no change in the symptoms in his hands, and was still experiencing the tremor, more so in his right hand, and had experienced some swelling in his hands as well. Dr. Gleason reiterated Dr. Bronson's suggestion of a neurology consult and opined that the tremor was not related to Claimant's cervical problems.

40. Claimant saw Charles E. Brondos, M.D., a neurologist and partner of Dr. Cooke, on October 31, 2002. On exam, Dr. Brondos noted that Claimant's neck movement was limited, he had a mild tremor of the third finger bilaterally, and decreased sensation over the left arm. Claimant continued to report neck and arm pain. Dr. Brondos opined that the neck and upper extremity pain was probably residual from the injuries and surgeries. He ordered a brain MRI to rule out intracranial causes of Claimant's symptoms. The MRI was done on November 4, and Claimant returned to Dr. Brondos on November 6 to discuss the results. The MRI was normal and Dr. Brondos prescribed a trial of Neurontin for one week.

41. Claimant did not return to Dr. Brondos until December 20, 2002. He reported continuing discomfort in the upper arm on the left with no noticeable relief from the Neurontin. Additionally, he described a new symptom—a visible, rippling, twitching muscle spasm in the left arm that would last about an hour and made it impossible for him to hold items or use his left arm. There was no spasm present at the time Dr. Brondos examined him. Dr. Brondos could not identify a cause of the spasm based on Claimant's history and ordered a repeat cervical MRI for further evaluation. The cervical MRI was done on December 23, 2002.

42. On January 2, 2003, Claimant saw Dr. Bronson. He reported "significant burning in both upper and lower extremities with muscle 'spasm.'" Claimant's Ex. 11, p. 2. Dr. Bronson

suggested a trial of Zanaflex. Dr. Bronson also noted that the most recent cervical MRI showed postoperative changes at C5-6 and C6-7 with a plate visible at C6-7. He also noted a mild posterior disc bulge at C4-5 with no change in the spinal cord. Claimant saw Dr. Gleason four days later, on January 6, for a recheck of his cervical and upper extremity symptoms. Dr. Gleason noted that no abnormalities were found on any of the head and neck MRIs. On exam, Dr. Gleason noted tenderness over the paravertebral muscles of the cervical spine and the superior trapezius. He advised continuing his medications as prescribed by Dr. Brondos and to return for a recheck in one month.

43. Claimant returned to Dr. Brondos on April 16. He was still complaining of intermittent spasm and cramping of the upper arms. Claimant identified the onset of these symptoms as the date of his last industrial accident on February 21, 2002. Dr. Brondos stated in his chart notes:

> The cause of the intermittent cramping is undetermined. I do not think it is related to the cervical spine involvement. I have suggested laboratory testing to rule out any chemical changes that could be involved.

Id. at 7. Dr. Brondos noted that Flexeril, Zanaflex and Neurontin had all been tried without effect. Dr. Brondos' chart notes reflect that lab results were received on April 29, but do not discuss the results or their significance.

44. Dr. Brondos both conferred with Dr. Gleason and examined Claimant on July 3. Claimant described constant neck pain and pain and contraction of the muscles in the upper portion of both arms, right worse than left. The problem affected his ability to write. Dr. Brondos noted that the most recent MRI was normal and did not indicate the existence of a surgical condition. He also observed that Claimant's cholesterol level was extremely elevated and prescribed Lipitor. On exam, Dr. Brondos observed "slight tremulous movement of the

arms, right greater than left when doing motor testing. *The mechanism of the upper arm symptoms is still not clear but does appear to be relate [sic] to problems in the back.*" *Id.* at pp. 2-3, (emphasis added). Dr. Brondos recommended a retrial of Neurontin. On July 10, Dr. Brondos replaced the Neurontin with Baclofen and indicated that he was seeking a referral to Dr. Weigel for a neurosurgery consultation. On July 16, Claimant reported some symptom improvement, but with drowsiness, and was continued on the Baclofen for two more weeks.

45. Claimant did not return to Dr. Brondos until September 12, 2003. He reported continuing pain in his upper extremities, left greater than right, neck discomfort with burning sensation and fatigue. Claimant also reported the tremor in his hands, right worse than left. He dated all of his neck and upper extremity symptoms as arising shortly after the second fusion. Claimant had discontinued the Baclofen, was continuing to take the Lipitor, and had been prescribed Nortriptyline to see if it helped his pain. Claimant also reported headaches which had sent him to the ER for treatment. Dr. Brondos noted that he would contact Dr. Bronson to seek a referral to Dr. Weigel for pain management evaluation. This was Claimant's last visit with Dr. Brondos.

46. Claimant returned to Dr. Bronson on September 19, 2003. Dr. Bronson noted that Claimant had a thorough neurological workup by Dr. Brondos, but that he did not have the benefit of Dr. Brondos' chart notes. The doctor stated that it appeared Dr. Brondos had ruled out Parkinson's disease and other movement disorders. On this visit, Claimant reported headache, neck pain and bilateral arm pain with left worse than right, and bilateral tremor. Dr. Bronson observed the tremor, noting that the tremor was more pronounced on the left. Dr. Bronson's summary stated:

> Overall he continues to struggle with fairly diffuse nondermatomal pain in the neck and upper extremities with burning as well as this tremor. I would like to

> restudy his neck and I will do a cervical MRI and dynamic x-rays to rule out cervical stenosis or pseudoarthrosis.

Claimant's Ex. 10, p. 19. On October 9, Dr. Bronson prepared an office report of his review of Claimant's MRI. He noted that the arthrodesis was solid at both levels with no significant transitional disease or stenosis, and no deformity of the spinal cord. Dr. Bronson concluded:

> I do not see anything surgical to offer him. He has been through medication management and I think it is basically adapting to the tremor.

Id. at p. 20. Dr. Bronson's medical records on Claimant end with the October 9 office note.

47. Claimant did not seek further medical care for his neck and upper extremity symptoms until July 29, 2004, when he returned to Dr. Gleason's office and was seen by Daniel Myhre, PA. Claimant reported that, several days prior to his visit, he accidentally struck his head against the doorframe of his vehicle and experienced neck pain that subsided within a couple of hours. On the day before his office visit, he had done the same thing but that time the pain persisted, radiating into his shoulders. Claimant was concerned that he had disrupted his prior fusion. PA Myhre ordered x-rays, which were negative, and diagnosed cervical muscle spasm. He gave Claimant an injection of Toradol and prescribed Percocet and a Prednisone taper and advised him to return in a week. Claimant returned on August 4, and in the absence of Dr. Gleason was seen by Thomas A. Kearney, M.D. Claimant reported that he was finishing the Prednisone taper but was still experiencing a lot of spasm and tightness in his neck. His neck and upper extremity examination were unchanged from the previous week. Claimant also complained that his right calf was bothering him, and Dr. Kearney referred him for an ultrasound of the right lower extremity to rule out deep vein thrombosis with Claimant's history of PE. Dr. Kearney directed Claimant to finish the Prednisone taper, drink lots of water, and go back on the Baclofen as previously prescribed.

48. On August 16, 2004, Claimant saw Dr. Gleason to follow up on his recurrence of neck pain. On this visit, Claimant described a problem with his right hand where the third and fourth digits "stick together." Dr. Gleason's notes indicate that Claimant was seen for this problem in July, but the chart notes from July 29 make no mention of the new finger symptom. On exam, Claimant reported decreased sensation in all dermatomes of the right hand as compared to the left. Dr. Gleason was able to separate the third finger on the right hand from the fourth finger, but the third finger would drift back toward the fourth finger. Only with significant effort could Claimant separate the fingers. Dr. Gleason also observed tenderness of Claimant's cervical spine, paravertebral muscles of the neck, and in the superior trapezius bilaterally. He diagnosed idiopathic peripheral neuropathy, discontinued the Baclofen and replaced with Valium.

49. Claimant's last documented treatment for his neck and upper extremity symptoms was August 25, 2004, with Dr. Gleason. Claimant reported continued spasm in his right upper extremity and that he had left hand symptoms as well. Claimant had discontinued the Valium because it made him groggy but did not relieve his pain. On exam, he was essentially unchanged from the previous visit with weakness in the right arm and decreased sensation in all dermatomes of the right hand. The difficulty with the third and fourth fingers on the right hand was now also evident on the left. Dr. Gleason prescribed Tegretol and ordered an MRI of the cervical spine. The MRI was unchanged from December 23, 2003 with the exception of slight foraminal stenosis at C3-4.

INDEPENDENT MEDICAL EXAMS (IMEs) AND EVALUATIONS

50. Claimant underwent an independent medical evaluation (IME) on June 30, 1998 with Alan D. Alyea, M.D., an orthopedic surgeon, and Dr. Clark, a neurologist. The IME

pertained only to his first industrial injury and resultant C5-6 fusion. At the IME, Claimant reported that he was "in more pain than he was before surgery," and that "his neck feels the same and he has continued tingling in his arms." Claimant's Ex. 4, p. 2. The IME panel found Claimant to be medically stable, gave him a temporary lifting restriction of thirty-five pounds, a permanent restriction of fifty pounds, and gave him a whole-person impairment rating of 9%. It was the following day that Claimant was again seen at NIIC with significant neck pain and was taken off work for a month to recuperate, placing the panel's finding of medical stability in question.

51. John M. McNulty, M.D., conducted an IME on December 18, 2003. This IME took into account all three industrial injuries at issue in this proceeding. At the time of the IME, Claimant complained of pain and limited range of motion in his cervical spine, pain and spasms radiating into both upper extremities, tingling in his fingers, and "shaking" in his hands. Pertinent records reviewed by Dr. McNulty as a part of his IME included the report of the IME done by Drs. Alyea and Clark, two clinic notes from Dr. Jones regarding the crushed thumb, KMC ER record and imaging report for the February 21, 2002 accident,[4] and records from Drs. Bronson and Brondos. Dr. Gleason's records were not part of Dr. McNulty's review. On exam, Dr. McNulty noted that Claimant held his neck in a rigid position and had trouble getting on and off the examining table. His cervical range of motion was restricted, as documented by a physical therapy evaluation done on January 8, 2004, results of which are included as part of Dr. McNulty's report. Dr. McNulty observed mild cervical paraspinal muscle tenderness and spasm, slightly reduced grip strength on the right, and slight tremor of upper extremities bilaterally with right worse than left. Dr. McNulty found sensation to light touch intact on both upper

[4] Dr. McNulty's report mistakenly lists the year as 2003, rather than 2002.

extremities. Dr. McNulty diagnosed status post C6-7 ACDF with chronic residual pain and motion loss and a history of PE. He offered no opinion on causation of Claimant's upper extremity symptoms. Using the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition (*AMA Guides*), and based upon the range of motion model, the doctor determined that Claimant had a 19% whole person impairment as a result of his range of motion deficit in his cervical spine. Dr. McNulty awarded an additional 10% whole person impairment based on a single-level ACDF with residual signs and symptoms of the cervical spine (Table 15-7, § IV. D.). The two ratings were combined using the combined values chart on page 604 of the *AMA Guides* to obtain a 27% whole person impairment. Dr. McNulty subtracted the previous 9% impairment given by Drs. Alyea and Clark for the first fusion to obtain an 18% whole person impairment directly resulting from the February 21, 2002 injury. Dr. McNulty opined that Claimant was at maximum medical improvement and limited him to sedentary work only, limited driving, imposed a 10 pound maximum lifting restriction and prohibited any overhead work. In a subsequent letter dated February 17, 2004, Dr. McNulty opined that Claimant sustained no permanent impairment as a result of his thumb injury.

52. On May 17, 2004, Claimant underwent a hand function assessment at the Hand Therapy and Healing Center in Coeur d'Alene. The conclusion was that Claimant had significant deficits in all areas tested. His right hand strength was 54% of normal and left hand was 69% of normal; he had a tremor in both hands that increased with fine motor activities; he had minimum deficits in writing, moderate deficits bilaterally in simulated eating, severe deficits bilaterally in stacking checkers and placing small items, and minimum deficits bilaterally in manipulating larger objects. On the Perdue pegboard manual dexterity tests, he performed at 65% of normal. The tester noted "the pegs were flying off the tabletop, due to his poor finger

control." Claimant's Ex. 13, p. 3. The tester opined that Claimant's tremor was a major contributing factor to his testing deficits. She described Claimant as "motivated" and "cooperative," and felt that he had given maximum effort during the testing. *Id.* She observed that he wanted to return to work and was looking for guidance on what he was capable of doing.

EDUCATION AND VOCATIONAL RECORDS

53. In addition to the educational endeavors described in findings of fact 2 through 4 above, Claimant testified that he attended classes offered through Employer that were designed to familiarize workers with industrial manufacturing systems. Claimant stated that he volunteered to take the classes even though they required him to work overtime to make up the lost time.

54. After the first of the industrial accidents at issue in this proceeding, Claimant self-referred to ICRD-Coeur d'Alene. Consultant Darrow handled the referral and worked with Claimant and Employer until Claimant returned to a modified position with his time-of-injury employer. ICRD closed the file in July 1998.

55. ICRD reopened Claimant's file in October 2001 at the request of Surety. The reason for reopening the file is unclear, but Claimant testified at hearing that after his 1998 cervical injury and before his thumb injury, Employer asked him to sign a document to the effect that if he were to be injured again he would be terminated. Initially, Claimant and Mr. Darrow discussed the possibility of returning to truck driving or using his understanding of the trucking industry in a similar field. By January 2002, Claimant's job search was curtailed somewhat because his wife was having a difficult pregnancy and was on bed rest. Mr. Darrow met with Employer in mid-January 2002 and advised them of Claimant's current home and job search situations.

56. Mr. Darrow spoke with Claimant in early February, and Claimant advised he was actively submitting resumes and a meeting was set for February 13. Mr. Darrow met separately with Claimant and Employer on February 13. He asked Employer to provide a letter of recommendation that Claimant could use in his employment search. Claimant advised Mr. Darrow that he had been turned down at Food Services of America because of his restrictions. He was applying for a fleet manager position, and Mr. Darrow made Claimant aware of a position with a distribution and wholesale company in Spokane.

57. Claimant's February 21, 2002 injury brought a halt to his job search, while at the same time heightening his concern about his future with Employer. Mr. Darrow followed Claimant's progress through his surgery, his rehospitalization for PE, and his recovery. By mid-April 2002, Claimant expressed a desire to look at new vocational options, including retraining, believing his previous job with Employer was "all but nonexistent." Defendants' Ex. 4, p. 14. Mr. Darrow sent job site evaluations for Claimant's job as a paint line worker to Drs. Gleason and Bronson. Both opined that Claimant would not be able to return to his position as a paint line worker. Dr. Gleason estimated that Claimant would have to remain off work for another four months, while Dr. Bronson stated Claimant would be off work for another six months.

58. Claimant and Mr. Darrow spoke again in mid-June. Claimant had looked into retraining as an x-ray technician at Apollo College and was seeking information about the x-ray technician program offered through Holy Family Medical Center. Mr. Darrow provided more information to Claimant about the Holy Family program and what prerequisites he would need to complete to be admitted into the program. Mr. Darrow sought further information from Holy Family and learned that volunteer work in the medical community was a factor in admission to the program. Additionally, Mr. Darrow was advised that Claimant should consult with his

treating physician to determine if Claimant could meet the physical demands of a radiology technician. In early July, Mr. Darrow sent a letter to Dr. Bronson inquiring whether the demands of a radiological technologist would be within Claimant's limitations. Claimant began spending time with a radiological tech as an observer and had the opportunity to interact with other medical professionals and increase his knowledge about the field.

59. On July 25, Mr. Darrow sent a detailed vocational report with recommendations to Surety. The report concluded that without additional training, Claimant would be limited to entry-level positions in non-skilled employment at relatively low wages—certainly nothing approximating his time-of-injury wage. Mr. Darrow also considered on-the-job training or minimal skills training, but found such training was limited in availability and would not return Claimant to his time-of-injury wage. Mr. Darrow opined that with formal training, Claimant would be able to equal or better his time-of-injury wage, and compared the relative costs and time commitment of the two different radiological technician training programs. The hospital-based program would take approximately 22 months to complete and cost approximately $6,200.00. A shorter, 18 month program at a private technical college would cost about $27,000.00. Mr. Darrow noted that job availability was high in the Spokane/Coeur d'Alene market and Claimant could easily better his time-of-injury wage if only he had some marketable skills.

60. In July and August, Claimant worked with Spokane Community College (SCC) to enroll in the prerequisite courses needed for the radiological tech program at Holy Family. By the end of August, Claimant had accumulated over twenty hours of observation in a radiology department, and had enrolled for classes at SCC. Classes were to begin in mid-September. Claimant was paying for his classes himself while he looked into financial aid.

61. Claimant contacted the VA sometime in the summer or fall of 2002 and learned that he qualified for retraining assistance. The VA determined that a radiological tech career would likely require physical capabilities that exceeded Claimant's limitations, and declined to pay for such retraining. Instead, Claimant opted to pursue an AA and BA in hospital administration.

62. In early September 2002, Employer notified Claimant that he had been terminated. Claimant started classes at SCC at his own expense; course fees were ultimately reimbursed by the VA. He enrolled for 15 credit hours, but had to drop the physical education class because of his limitations. Mr. Darrow contacted Surety in late October and advised that Claimant was in school, and that his current studies and vocational direction were appropriate given his limitations. Mr. Darrow also advised Surety that Claimant would benefit from having voice-activated software as his upper extremity tremor made keyboarding difficult. The last ICRD record is dated October 28, 2002 and indicates that the case notes were e-mailed to Surety.

63. Claimant completed his first quarter at SCC. Claimant had difficulty writing and keyboarding but consulted with his professors, accepted typing help from his wife, and persevered. He finished his first quarter with a 3.52 GPA and was on the president's honor roll. Claimant's second quarter was more difficult but he still maintained a 3.10 GPA. Spring quarter Claimant nearly failed an English class. He continued in summer quarter but ended up with incompletes in two classes. At hearing, Claimant testified that Dr. Brondos was trying a variety of drug therapies to control the pain and tremor making it difficult for Claimant to function in the educational setting. The VA warned Claimant that he needed to keep his grades up or his funding would be cut. In the fall quarter 2003, Claimant took advantage of the assistance available to him through the college disabilities office. He was able to stand and walk around

during class and was able to have accommodations for timed tests. The assistance helped and Claimant again made the honor roll. Winter quarter 2004, Claimant was back on his pain medications and couldn't complete his classes; the VA terminated his educational assistance.

64. Claimant then turned to the state of Washington Division of Vocational Rehabilitation (DVR) for assistance. Claimant qualified for retraining assistance—a program where the agency pays the wages while the client works and learns new skills. Because Claimant had substantial limitations, he was at the bottom of the funding priority list and as of the time of hearing, had not yet received any benefits.

65. On his own, Claimant looked into the costs of obtaining voice-activated software to help him work around his tremor problem. He testified that the software was approximately $400.00, and required a computer with sufficient memory to run it; the entire package would run somewhere around $5,000.00.

66. In late June 2004, Claimant retained Tom L. Moreland, a vocational expert, for the purpose of obtaining a vocational assessment as to Claimant's employability. Mr. Moreland interviewed Claimant and reviewed substantial portions of the medical records, as well as correspondence with Claimant's physicians, the Veteran's Administration, and the ICRD case notes. Mr. Moreland did not prepare a written report, but was deposed in September 2004, just a few weeks prior to the hearing. At the time that Mr. Moreland was working with Claimant, Claimant was also working with the VA, with Washington state DVR, and with the disabilities program at SCC.

67. Based on his review of the medical records and IMEs, Mr. Moreland determined that Claimant was limited to sedentary work. In addition, he had driving restrictions and positional limitations. But Mr. Moreland concluded that Claimant's greatest obstacle to

employment was his pain, the side effects of his medications, and his tremor. Mr. Moreland opined that Claimant, in his current condition, and without retraining, would be looking at entry-level jobs that in no way approximated his time-of-injury wage. Additionally, Mr. Moreland testified that without a resolution of the pain, medication, and tremor issues, Claimant would not be able to "perform full-time, reasonable, continuous employment on a sustained basis." Moreland Depo., p. 13. Mr. Moreland found that Claimant was motivated to seek retraining and return to some meaningful occupation. He cited Claimant's willingness to begin classes at SCC at his own expense and Claimant's ability to perform academically when not impeded by his symptoms and drug side effects. Mr. Moreland stated:

> If we could get him – if he continued if he could go to retraining and get one of these degrees or one of these programs I think he could probably return to his preinjury level wage. . .

Id. at p. 17. As Mr. Moreland noted, the problems caused by the pain and the medications alone made it difficult for Claimant to pursue retraining or additional education. When the tremor was factored in, Claimant would require a number of accommodations to be able to succeed at his educational or retraining goals. Accommodations that would be required included voice-activated software and flexibility with regard to attendance, testing, and sitting in class. Once over the hurdle of retraining, Claimant would require similar accommodations in the workplace with flexible hours, flexible working conditions, and perhaps modifications to the workstation, as well as access to voice-activated computer hardware and software. Mr. Moreland opined that Claimant had sustained a significant loss of access to the labor market, "[w]ay above 50 percent." *Id.* at 18.

DISCUSSION AND FURTHER FINDINGS

CLAIMANT'S ENTITLEMENT TO MEDICAL CARE

68. There is no dispute that Defendants provided Claimant with reasonably necessary medical care for the first ACDF, the crushed thumb, and eventually, the second ACDF. What remains at issue is whether Claimant is entitled to reasonable medical care for the treatment he received as a result of his PE, and for the treatment related to his upper extremity problems.

The burden of proof in an industrial accident case is on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot*, 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994). Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures.

CAUSATION

69. Defendants assert that they have no obligation to pay for the unreimbursed treatment because Claimant has failed to carry his burden on the causation issue. Defendants raise three arguments in support of their position. First, they assert that Claimant's bilateral upper extremity symptoms predate his industrial accidents and state that Claimant "may have a degenerative nerve condition." Defendants' Post Hearing Brief, p. 3. Defendants next argue that Claimant has not provided medical testimony to establish causation because the opinions

expressed by Drs. Brondos and Gleason in the medical records are not sufficient unto themselves to carry the Claimant's burden of establishing causation. Defendants assert that oral medical testimony is necessary to a finding of causation and cite *Jones v. Manor*, 134 Idaho 160, 997 P.2d 621 (2000) in support of their contention. Finally, Defendants argue that the deposition testimony of Dr. Clark establishes to a reasonable degree of medical probability that Claimant's tremor was not related to his February 2002 industrial accident.

Pulmonary Embolism

70. Defendants' arguments on causation focus on the issue of Claimant's upper extremity tremor. Defendants do not address the causation issue relating to Claimant's pulmonary embolism in their briefing. Dr. Gleason's medical record for April 22, 2002 plainly and unequivocally connects Claimant's PE to his February 2002 industrial injury. In a letter Dr. Gleason prepared on the same date for Claimant's counsel and Surety, he reiterated that opinion noting that a pulmonary embolus in a young male with no other risk factors, would have to be attributed to his surgery and inactivity, both of which resulted from the industrial accident; Claimant's pulmonary embolism was a direct result of the second ACDF, which was a direct result of the February 21, 2002 industrial injury. Defendants present no evidence to the contrary. The Referee finds that Claimant's PE was the sequelae of his industrial accident and he is entitled to reimbursement for all costs of treatment and medications related thereto. As of September 16, 2004, the amount owing was $1,942.81, which balance was accruing interest at the rate of 12% per annum.

Upper Extremity Tremor

71. The causal relationship of Claimant's bilateral upper extremity tremor to his industrial injury is the more difficult question. After a close review of the record and a careful

analysis of the applicable case law, the Referee finds that Claimant has met his burden of proof in establishing the required causal relationship to a reasonable medical probability.

72. Defendants' first contention, that Claimant had a pre-existing nerve disease, can be dismissed out of hand. Nothing in the record supports such an argument. The record does reflect that *after* his first industrial injury Claimant was diagnosed with a mild case of CTS that did not require surgery. Although this diagnosis was in the records, none of the physicians who later tried to identify the etiology of Claimant's tremor ever related his symptoms to CTS. Testing for other disorders that might cause the tremor, such as MS or Parkinson's disease were negative as well.

73. Defendants' second contention, that Claimant's medical records--without supporting medical testimony--are insufficient to establish causation, merits closer analysis. *Jones* provided the Idaho Supreme Court a springboard from which to launch a comprehensive review of the case law interpreting the use of medical evidence in establishing causation. In its analysis, the Court cited to *Langley v. State,* 126 Idaho 781, 786-87, 890 P.2d 732, 737-38 (1994) for the proposition that medical records were competent evidence on the question of causation. In *Jones,* the Court repeatedly noted that whether medical evidence met the "substantial and competent evidence" standard required on appeal actually related to the content and reliability of the evidence, rather than its form. Thus, the threshold question in the case at bar should be not whether Claimant presented *any* testimonial medical evidence, but rather whether the medical records that were admitted "establish the cause of injury to a medical probability." *Jones,* 134 Idaho at 162, 997 P.2d at 623.

Neither is it a requirement that the medical records *state* the causation opinion in terms of medical probability. The medical records relied upon do not have to include the magic words

"medical probability" or "more likely than not." What is required is that the medical evidence plainly and unequivocally conveys the opinion that events are causally related. See, *Jensen v. City of Pocatello***,** 135 Idaho 406, 412, 18 P.3d 211, 217 (2000), citing *Paulson v. Idaho Forest Indu*s., Inc., 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). As discussed extensively in *Jensen*, the causation opinion need not be an affirmative finding; it can be reached by excluding other likely causes.

74. That Claimant has a significant tremor is well documented and was observable by the Referee at the hearing. No tremor had been observed by any of Claimant's treating doctors prior to the ACDF on March 14, 2002. Dr. Gleason first observed and noted the bilateral tremor on April 22. On September 27, Dr. Bronson arranged for a neurological consult on the bilateral tremor. On October 31, Claimant saw Dr. Brondos pursuant to that referral. Dr. Brondos observed the tremor and ordered a brain MRI to rule out intracranial causes. The MRI was unremarkable. The following month, December 2002, Dr. Brondos ordered another cervical MRI, which was also unremarkable. Claimant continued to complain of the upper extremity problems. When Claimant next saw Dr. Brondos in April 2003, the doctor was still unable to determine whether the cause of Claimant's tremor was more likely than not the result of his February 2002 accident. Dr. Brondos ordered an additional battery of tests to rule out other causes. Except for elevated cholesterol and triglycerides, Claimant's tests were essentially normal. By July 2003, Dr. Brondos had, through testing, ruled out a number of possible causes for Claimant's tremor, including intracranial process, cord impingements, Parkinson's disease, MS, and whatever else might have been ruled out as a result of the laboratory testing. At that point, Dr. Brondos observed that while the *mechanism* of Claimant's tremor wasn't clear, it did appear to be related to Claimant's cervical problems. Unfortunately, Dr. Bronson had no

surgical or other treatment to offer Claimant and advised Claimant to just adapt to the tremor.

Dr. Gleason also ultimately attributed Claimant's tremor to his cervical injuries after reviewing all of Claimant's test results and following his progress for many months. In the absence of any other findings, he diagnosed a "[h]istory of C6-7 cervical fusion surgery with extremity pain/spasm." Claimant's Ex. 8, p. 42.

75. Whether the medical records in this case, taken as a whole, plainly and unequivocally convey the opinion that Claimant's tremor is causally related to his industrial injury, and do so to a medical probability, is a difficult and close call. The Referee finds *Jensen* particularly helpful in analyzing this issue. Jensen was a sanitation worker for a municipality. He was generally in good health. On the afternoon in question he had a slight headache and took two over-the-counter analgesic tablets from the shop first aid kit in accordance with the package directions. Within minutes he experienced severe stomach cramps. He was taken to the hospital where he was diagnosed with a reaction to the analgesic medication. He was given Benadryl and observed for an hour and discharged home. Jensen was still sick following his discharge and his condition worsened over the next several days. Finally, he returned to the hospital and was diagnosed with renal failure by Richard Hearn, M.D. Eventually Jensen recovered and filed a workers' compensation claim against his employer alleging that his renal failure was work related. The Referee found that the "non-expert evidence and much of the expert evidence herein indicate a causal relationship between claimant's ingestion of Pain-Off at work and his renal failure . . ." The expert testimony alluded to by the Referee was Dr. Hearn's testimony discrediting the defendants' alternative causes of Jensen's renal failure:

> In the list of my speculation of what might have caused the renal failure, then [the Pain-Off] would be at the top of that list of my speculation. I don't know of anything that would be higher, but I have no evidence to support it was the cause."

Jensen, 135 Idaho at 410, 18 P. 3d at 215. But the Referee found, and the Commission agreed, that while Jensen had proven that his *initial medical reaction* was work related, he had failed to establish that the *renal failure* was causally related to his work. The Commission reached this conclusion based primarily on the fact that Dr. Hearn "repeatedly and expressly refused to opine to a reasonable degree of medical probability that Claimant's renal failure was caused by his Pain-Off ingestion and/or solvent exposure at work." *Id.*, 135 Idaho at 412, 18 P.3d at 217.

Jensen appealed. On appeal, defendants challenged a number of the Referee's findings and Jensen challenged the Commission's conclusion that he had failed to establish that his renal failure was causally related to his industrial accident. The Court ruled that on the issue of causation, the Commission's conclusion was not supported by substantial and competent evidence. The Court cited to the language in *Paulson* that:

> No special verbal formula is necessary when as here, a doctor's testimony plainly and unequivocally conveys his conviction that events are causally related.

Paulson, 99 Idaho at 901, 591 P.2d at 148.

On these facts, the Court in *Jensen* stated:

> . . . [W]e hold that Dr. Hearn's testimony, coupled with the facts, adequately established a causal connection between Jensen's Pain-off ingestion and his renal failure, when Dr. Hearn indicated that he did "not know of anything that would be higher" on his list of speculation. While his is admittedly a difficult and close call, "we must liberally construe the provisions of the worker's [sic] compensation law in favor of the employee, in order to serve the humane purposes for which the law was promulgated."

Jensen, 135 Idaho at 414, 18 P.3d at 218, citing *Murray-Donahue v. National Car Rental Licensee Ass'n.*, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995).

76. In the case at bar, there is sufficient expert and non-expert evidence in the record to support a finding that Claimant's tremor is the result of his February 2002 industrial accident.

Dr. Gleason observed the tremor just a few weeks after Claimant's second ACDF. None of his several treating physicians had observed the tremor prior to the second surgery, nor had Claimant complained of tremor prior to his second ACDF. Although both Drs. Brondos and Gleason initially opined that the tremor was unrelated to the February 2002 accident, they both changed their opinion after ruling out a number of other potential causes. Dr. Brondos cannot identify the mechanism that is causing the tremor, but the fact of its existence, together with the inefficacy of every attempted treatment, left him with the conclusion that the tremor must be related to Claimant's cervical problems. Dr. Gleason reached a similar conclusion. Considering the record as a whole, and following the principle set out by the Court in *Jensen*, the Referee finds that the medical records, taken as a whole, plainly and unequivocally convey the opinion that Claimant's tremor is causally related to his industrial injury, and do so to a medical probability.

Dr. Clark's Expert Testimony

77. The only medical evidence that Defendants offered on the issue of causation is the deposition testimony of Dr. Clark. Dr. Clark is board certified in neurology. He, together with Dr. Alyea, conducted the 1998 IME for Defendants following Claimant's first ACDF. At that time, Dr. Clark had an opportunity to review all the pertinent records and perform an examination. Based on that information, Dr. Clark assigned an impairment rating of 9% of the whole person for Claimant's cervical surgery. That rating is not in dispute.

Some six years and a second ACDF later, Defendants sought an opinion from Dr. Clark regarding the causation of Claimant's tremor. Defendants provided Dr. Clark with copies of the medical records from the VA, Inland Imaging, Dr. Brondos, Dr. Bronson, and Dr. McNulty. Dr. Clark did not examine Claimant, nor did he have the medical records from Dr. Gleason or Dr. Jones. Dr. Clark was not asked to prepare a written report.

Dr. Clark testified that he had spent about a half an hour to an hour reviewing the records and appearing for the deposition. When questioned by Defendants, he testified that there was nothing in Dr. Brondos' records to connect Claimant's tremor to his industrial accident or his cervical surgery:

> Q. Now, do you see in those records anything from Dr. Brondos that would relate the hand tremors to the cervical spine injury that [Claimant] sustained at work?
>
> A. No.
>
> Q. Is there any indication in those records that the tremors are related to the cervical spine surgery that [Claimant] received?
>
> A. No.
>
> ***
>
> Q. Would you agree that Dr. Brondos, the [C]laimant's own treating physician, did not relate the hand tremors to the cervical spine injuries?
>
> A. There was no statement as to the direct relationship.
>
> ***
>
> Q. He also did not relate the tremors to the cervical spine surgery?
>
> A. No, he didn't. He didn't specifically make that relation - -- or establish that relationship.

Tr., pp. 9-10. This testimony completely ignores Dr. Brondos' chart notes from July 3, 2003, where he states that after extensive testing he still can't identify the mechanism, but believes the tremor is related to Claimant's cervical problems.

Dr. Clark went on to testify that he had treated hundreds of patients with cervical spine injuries and none had ever developed a tremor like Claimant's. In particular, Dr. Clark stated:

> It would be atypical, unless a person had significant sensory changes which might result in a type of tremor, but that would be determined by neurologic exam and the imaging studies. I have personally never seen that, but theoretically it could happen.

Id. at p. 10. On cross examination, Dr. Clark reiterated his belief that neither Claimant's cervical trauma nor the surgery had caused the tremor "because there wasn't any sensory abnormality detected. . . You can get tremor from sensory changes, but nothing was documented." *Id.* In fact, the records of Dr. Gleason, Dr. Bronson, and Coeur d'Alene Hand Therapy and Rehabilitation all document a number of sensory changes in Claimant's upper extremities—notably, parasthesia, temperature changes, and loss of sensation.

Claimant barely cleared the medical probability bar on the causation issue. Even so, Dr. Clark's opinion on causation leaves Claimant's proof practically untouched. Dr. Clark did not examine Claimant and did not have the benefit of all the medical records. More importantly, perhaps, his deposition testimony shows that his review of the records he did receive was superficial. Dr. Clark's testimony rested on two premises: that Dr. Brondos never connected the cervical injury or the cervical surgery with the tremor, and that there was no evidence in the record of sensory changes that might result in tremor. Both premises are contrary to the record in this proceeding. The Referee finds that the medical records are more persuasive on the issue of causation than the deposition testimony of Dr. Clark. Therefore, Claimant is entitled to reasonable medical care for testing and treatment of his bilateral upper extremity tremor.

PPI

78. "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 the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation,

traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

79. **First Cervical Injury and Surgery.** There is no dispute as to Claimant's 9% PPI rating resulting from his first cervical injury and subsequent surgery, and Claimant concedes that those impairment benefits have been paid.

80. **Thumb Injury.** Claimant received no impairment rating for his left thumb injury. The injury was never rated by the initial treating doctors, and only Dr. McNulty addressed the thumb injury in his IME—rating it at no impairment. Claimant seeks a 1% whole person impairment rating for his thumb injury. The Referee finds a 1% whole person impairment rating for the thumb injury reasonable in light of the record in this proceeding. Claimant testified that his left thumb is now shorter, is extremely tender, and that it is difficult for him to manipulate small objects, such as screws and washers. As a point of comparison, the Referee directs attention to Table 16-4 of the *AMA Guides.* Claimant's injury is akin to the amputation of the tip of his left thumb, distal of the IP joint. An amputation at the IP joint is rated at 18% of the upper extremity and 11% of the whole person. Thus, even an amputation of the most distal one fourth of the thumb would be rated at 2.75%.

81. **Second Cervical Injury and ACDF.** Dr. McNulty rated Claimant at 27% permanent impairment of the whole person as a result of the two cervical injuries/surgeries. Dr. McNulty attributed 18% of the PPI to the second cervical injury and surgery. This is the only PPI rating in the record that includes the second cervical injury and subsequent surgery, and Claimant does not dispute the rating.

82. **Total PPI.** The Referee awards permanent partial impairment totaling 28% (or 140 weeks), reflecting 9% for the first surgical injury, 1% for the left thumb injury, and 18% for the second cervical injury and surgery. Defendants have paid a total of 80 weeks of PPI, leaving Defendants responsible for payment of the remaining 60 weeks.

83. **TTD.** Claimant noted in his opening brief that Defendants had paid Claimant's TTD benefits based on an average weekly wage of $460.00 yet had admitted in their Amended Answer that Claimant's average weekly wage was actually $542.32. Claimant sought payment of the additional $1,749.32 in TTD benefits that were underpaid due to Defendants' calculation error. Defendants did not address this issue in their responsive post-hearing brief. Unfortunately, the issue of underpayment of TTDs was not noticed as an issue at hearing. Issues first raised during briefing are excluded from consideration as untimely, regardless of their merit.

DISABILITY IN EXCESS OF IMPAIRMENT

84. Claimant asserts that he is totally and permanently disabled as a result of the February 2002 accident using either of the two methodologies available to establish total permanent disability:

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

Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857(1997) (emphasis added). When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

> The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001) citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

> They are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.

Id., 136 Idaho at 584, 38 P.3d at 622. Defendants dispute that Claimant is totally and permanently disabled under either of the two methodologies.

100% Disability

85. Claimant sustained an 18% whole person PPI rating as a result of his February 2002 accident. He argues that his pain, the side effects of his medication, and his inability to control his tremor, together with significant loss of access to the labor market comprise the remaining 82% of the whole person.

Defendants dispute that Claimant is 100% disabled under this test. They assert that in reaching his 18% PPI rating for the last cervical injury, Dr. McNulty included Claimant's tremor and the effects of the medication that he takes to control it. Implicit in this argument is that Claimant's rated 18% PPI together with his loss of access to the job market do not approach 100% disability. Defendants note that Claimant is young, intelligent, and is only five credits from obtaining his associate's degree and that Mr. Moreland believed that Claimant could return to his pre-injury wage if he could complete his degree.

86. The Referee finds that Claimant is, at this time, totally and permanently disabled due to a combination of his impairment and non-medical factors. Mr. Moreland's unrebutted

testimony was that placing Claimant in a sedentary work category resulted in loss of access to the job market *in excess of 50%*. This loss of access was due strictly to his lifting, driving, and positional restrictions. Combining the 50% loss of access to the labor market attributed to his restrictions with his impairments, and Claimant's disability already exceeds 78%. None of Claimant's impairment ratings considered his military service related disability, which the VA rated at 20%. While the VA's rating may not be consistent with a rating based on the *AMA Guides*, Claimant's knee injuries clearly represent some additional level of impairment.

Mr. Moreland went on to observe that Claimant's other limitations, not included in the impairment rating must also be considered. He testified that approximately 90% of all the jobs defined by the Dictionary of Occupational Titles require constant and frequent handling of objects and reaching. Claimant has demonstrated sensory deficits in his hands and fingers. He has coordination problems, poor finger control, and his fine motor skills are below average. His keyboarding is limited to 20 words per minute and duration is limited by positional limitations. Dr. McNulty's impairment rating certainly included the positional limitations, but the hand function assessment that documented the other deficits could not have been included by Dr. McNulty because they were performed after his IME was completed. Take away 90% of the 50% of the labor market that remained to Claimant, and he's lost access to another 45% of the job market. And then there are the issues of Claimant's pain, the side effects of his medications, and the associated fatigue and his loss of ability to concentrate, all of which impact Claimant's ultimate employability.

87. Claimant's case is an extremely difficult one. On the one hand, he is young, he is intelligent, and he is motivated to return to work. The record supports the notion that in his current condition, and with appropriate accommodations, financial aid, and a supportive

environment, Claimant could likely obtain his AA degree and a bachelor's in business with a focus on hospital administration within a reasonable amount of time. Similarly, in his current condition, and with a four-year degree, Claimant would be *qualified* for employment that would equal or exceed his pre-injury wage. But being ready, willing, and qualified for work is not enough. Finding an employer that was disposed to provide the accommodations and flexibility that Claimant's current condition requires could be extremely difficult.

As much as this Referee would like to make a finding that Claimant is not totally and permanently disabled, and require Defendants to provide funding for tuition and such accommodations as might be required for Claimant to complete his undergraduate degree, there is simply too much uncertainty as to whether such efforts and expenditures might ultimately prove futile. If Claimant's condition were to remain the same or continue to deteriorate, it is possible that no amount of financial aid, accommodation, or effort and desire could overcome Claimant's physical and pharmacological obstacles. Unquestionably, if Claimant's condition were to improve, whether through more effective and less debilitating medications, or otherwise, a different result might obtain. But this Referee found nothing in the record to suggest that such substantial and lasting improvement is to be expected.

ODD LOT

88. Because the Referee finds that Claimant's impairment together with other pertinent non-medical factors results in 100% disability, it is not necessary to analyze or discuss whether Claimant is totally and permanently disabled pursuant to the odd lot doctrine.

ATTORNEY FEES

89. Claimant seeks attorney fees for the unreasonable denial of medical bills as well as unreasonable delay in paying TTD benefits pursuant to Idaho Code § 72-804. Defendants

argue that the initial denial of Claimant's claim was not unreasonable and that once Surety had investigated the claim, the benefits were paid in a timely fashion. Further, Defendants assert, Claimant's counsel has already been compensated by negotiating a 25% reduction in the medical fees with the providers.

Attorney fees are not granted to a claimant 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:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety *contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law,* or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. (Emphasis added.)

The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

90. The facts in this case support an award of attorney fees. The sole reason given by Surety for denying Claimant's reasonably necessary medical care following his February 2002 industrial accident was that Claimant had failed to follow the chain of referral. It was not until June 2003 that Surety concluded that it was responsible for the medical care, based on a letter from Dr. Ganz agreeing that the second ACDF was necessary. It is clear from the record that Surety never really disputed Claimant's February 2002 accident, but latched on to the chain of referral issue as a technical reason not to pay the legitimate claim. Having taken the position that

Claimant sought care outside the chain of referral, Surety made no serious effort to investigate the facts and circumstances surrounding Claimant's initial visit to Dr. Gleason and his eventual referral to Dr. Bronson. Surety spent months trying to shift the blame for its lack of action and lack of communication onto Claimant, maintaining that it was his refusal to cooperate that resulted in the denial of the claim. Surety's actions with regard to the underlying claim hardly "serve the humane purposes for which the [workers' compensation] law was promulgated." See *Murray-Donahue v. National Car Rental Licensee Ass'n.*, 127 Idaho at 340, 900 P.2d at 1351. In any event, it should not have taken until June for Surety to correct its error and accept the claim. Further, once Surety accepted the claim and began paying the medical bills, their refusal to pay for Claimant's treatment for his pulmonary embolism defies explanation.

Recently, this Commission determined that a surety was responsible to pay the full amount for medical services invoiced by providers, even though those providers initially accepted a lesser sum from a private insurer that had entered into an agreement with the providers that included a contractual write off. See *Sangster v. Potlatch Corporation*, IC-01-008322, (November 16, 2004). This case presents an analogous situation—here, by agreement with Claimant's counsel, the medical providers were paid less than they invoiced with the difference compensating Claimant's counsel for a portion of his services. Idaho Code § 72-804 is clearly intended to be punitive in nature. To relieve Defendants of a portion of these punitive fees because Claimant's counsel was able to secure some compensation for his services by negotiating with the medical providers defeats the purpose of the punitive fees provision. Of course, Claimant's counsel should not receive a windfall of double recovery on the medical reimbursements either. In fairness to all parties and the providers, and consistent with *Sangster*, the Referee orders that Defendants shall pay attorney fees for all of the medical benefits

recovered, with counsel for Claimant obligated to reimburse the providers for any discounts that were previously negotiated.

Surety's refusal to pay TTD benefits because of the dispute about medical providers is inexplicable. Ms. Seever testified that the reason that Surety denied TTD payments was because no authorized physician had submitted written documentation that Claimant was unable to work. There is no statutory requirement that a physician's order is required to establish that an injured worker is in a period of recovery. In this case, the Surety was well aware that Claimant had undergone an ACDF and would therefore be unable to work for some period of time. Notably, Defendants chose to ignore the issue of the denied, then late, and then incomplete TTD payments in its briefing on the attorney fee issue. Claimant is entitled to attorney fees on all TTD benefits paid as a result of this proceeding.

The issues of additional impairment and Claimant's disability in excess of his impairment were fairly and reasonably at issue in this proceeding and no attorney fees are awarded on these issues.

CONCLUSIONS OF LAW

1. Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432 for treatment for his pulmonary embolism and his upper extremity tremor, both of which are causally traceable to Claimant's February 2002 injury and subsequent surgery.

2. Claimant is entitled to permanent partial impairment (PPI) totaling 95 weeks (19% x 500 weeks). Defendants are entitled to credit for amounts already paid.

3. Claimant is totally and permanently disabled due to the impairment from his last accident together with his loss of access to the labor market, his fine motor and coordination deficits, and the side effects of medication prescribed to control his symptoms.

4. Because Claimant is totally and permanently disabled, he is not entitled to retraining benefits.

5. Claimant is entitled to attorney fees because of Surety's unreasonable denial of medical care and TTD benefits and unreasonable delay in paying for a portion of the medical care and all of the TTDs.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __28__ day of ___March____, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Rinda Just, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __22 day of ___April_____, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

LOUIS GARBRECHT
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djb __/s/_____