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Clark v. Cry Baby Foods, LLC Respondent's Brief Dckt. 40016

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

<p>JAMES W. CLARK, Claimant-Appellant, v. CRY BABY FOODS, LLC, Employer, Defendants and IDAHO STATE INSURANCE FUND, Surety, Defendant-Respondents.</p>	<p>Supreme Court Docket No. 40016-2012 Industrial Commission No. 2008-13505</p>
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RESPONDENTS' BRIEF

Appeal from the Idaho Industrial Commission

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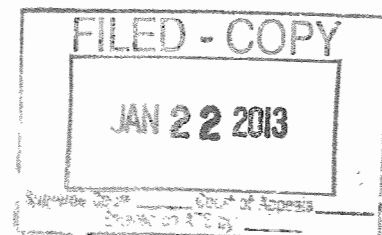


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I. STATEMENT OF THE CASE

A. Introduction.

The present matter involves an appeal of a worker's compensation decision following hearing before the Industrial Commission on November 19, 2010, during which James Clark (hereinafter "Claimant") through counsel sought the following benefits: additional medical and time loss benefits, impairment, and disability including total permanent disability related to an accident April 17, 2008. Following post-hearing depositions and briefing, the three Industrial Commission Commissioners issued their Findings of Fact, Conclusions of Law, and Order (hereinafter "Commission's Decision") on May 2, 2012, holding that Claimant suffered a compensable accident for which he was entitled to medical treatment through the date of hearing, temporary disability benefits through the date of his medical stability of April 17, 2009, PPI rated at 10% of the whole person, and permanent partial disability rated at 25% of the whole person (without apportionment and inclusive of PPI). The Commissioners further held that Claimant failed to show that he is totally and permanently disabled and/or that he qualifies as an odd-lot worker, and that he failed to show he was entitled to an award of attorney fees. Claimant appealed to this Court following a failed attempt at a motion for new hearing, asserting the Commission erred in its findings (presumably that the Commission's findings were not supported by substantial competent evidence), and rearguing the facts presented to the Referee below.

As was expressed in prior filings on this matter, this case is an excellent example of why the record must be limited to the exhibits and evidence properly considered by the Referee and the Commission in arriving at the Commission's Decision. The presiding Referee and the Commissioners had available to them substantial medical and psychological records detailing Claimant's long and complicated medical history both before and after the incident in question.

At the hearing on this matter, Claimant was ably represented by his then Counsel, Lynn Luker. Claimant had the opportunity to testify in person and he answered questions from all counsel and the Referee. Following the hearing, Claimant was represented by his attorney at the post-hearing deposition of the Surety's Claims Examiner and his treating physician Dr. Robert Hansen. Thereafter, upon the withdrawal of his attorney, Claimant participated *pro se* in three (3) post-hearing expert witness depositions taken by Defendants which were conducted at the Industrial Commission in the presence of the presiding Referee, the Honorable Douglas Donohue.

Claimant submitted his post-hearing brief on March 31, 2011, and thereafter numerous post-hearing filings which included references to and documents consisting of medical records that were not included in the Commission hearing exhibits and/or were generated after the hearing. In Defendants' Post-Hearing Brief filed May 13, 2011, Defendants objected to any reference to or use of any records that were not admitted at the hearing as exhibits, or to any issues raised by Claimant in his Brief or filings to the extent he raised issues not properly before the Commission. Defendants submit that the Industrial Commission had ample evidence to consider the issues in this case, including Claimant's entitlement to additional medical and time loss benefits, and the issues of impairment and disability. Notwithstanding Claimant's attempts to introduce new argument and evidence, the Commission issued a sound and reasoned decision supported by overwhelming evidence admitted through the hearing process, which should not be disturbed on appeal.

B. Course of Proceeding Proceedings Before the Industrial Commission.

Claimant asserts that he suffered right arm injuries when his arm was caught in the rollers of an onion processing machine on April 17, 2008. He also claims he suffers from depression and PTSD as a result of the claimed accident. Defendant Employer prepared a Form 1 Report of Injury or Illness on April 21, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 1. On July 2, 2008,

Claimant filed a Complaint with the Idaho Industrial Commission alleging entitlement to total temporary disability (TTD) benefits in the amount of \$317.83 for the time period June 5, 2008, through June 12, 2008. *See R.*, Vol. 1, pp. 1-3. As will be discussed in greater detail herein, TTD benefits had been terminated effective June 5, 2008, based upon a return-to-work release by treating physician Dr. Dominic Gross. However, benefits were reinstated and Claimant was paid TTD benefits for the time period June 5 through 12, 2008, based upon a new report by Dr. Robert Hansen. Both physicians are hand surgeons. On August 1, 2008, Claimant requested a hearing on the TTD issue, as well as issues relating to his disagreement with a return-to-work release and Job Site Evaluation approved by Dr. Gross. *See R.*, Vol. 1, pp. 12-13. Defendants filed Notice of Substitution of Counsel on August 6, 2008. *See R.*, Vol. 1, pp. 15-16. On August 15, 2008, Defendants served Notice of Filing of discovery requests to Claimant, (*See R.*, Vol. 1, pp. 17-18), as well as an Objection to Request for Calendaring based upon the need for Defendants' new counsel to investigate and conduct discovery. *See R.*, Vol. 1, pp. 19-20. The Commission issued an Order on Calendaring, denying Claimant's request for a hearing until such time as Claimant responded to Defendants' discovery requests. *See R.*, Vol. 1, pp. 21-22. Claimant failed to respond to Defendants' discovery requests, and refused to sign medical and employment releases to allow Defendants to investigate the claim, but by letter dated August 22, 2008, Claimant again requested hearing. *See R.*, Vol. 1, p. 26, pp. 35-37, p. 42, pp. 52-61, pp. 62-67. Unanswered discovery requests and medical and employment releases were the subject of a telephone conference held on September 11, 2008. On October 2, 2008, the Industrial Commission issued an Order compelling Claimant to sign medical releases and provide complete discovery responses on or before October 24, 2008. *See R.*, Vol. 1, pp. 164-165. Claimant did not comply with the Order, but instead he requested a continuance, and then on October 17, 2008, Claimant requested dismissal of his Complaint. *See R.*, Vol. 1, pp. 166 and 169. Pursuant

to a telephone conference conducted by the presiding Referee on November 7, 2008, the Commission issued its Order Dismissing Complaint Without Prejudice on November 26, 2008. *See R.*, Vol. 1, p. 179.

On November 30, 2008, while the claim was no longer in litigation, Claimant requested a hearing on the issues of outstanding medical bills and transportation reimbursement for non-medical appointments between September 8 through 18, 2008. *See R.*, Vol. 1, pp. 183-186. In a series of letters dated December 1, 2008, Claimant requested the hearing include issues relating to the return-to work release approved by Dr. Gross. *See R.*, Vol. 1, pp. 187-198. By letter dated December 29, 2008, Claimant requested the hearing also include the issue of his entitlement to additional medical treatment, specifically, surgery recommended by Dr. Hansen. *See R.*, Vol. 2, p. 209.

Defendants filed a Complaint to accommodate Claimant's request for hearing, and filed Defendants' Request for Hearing on January 6, 2009. *See R.*, Vol. 2, pp. 211-216. Defendants also raised the issue of Claimant's entitlement to additional TTD benefits, additional medical benefits, mileage reimbursement, permanent impairment (PPI), permanent disability (PPD), and retraining so all pertinent issues could be litigated. *Id.* By letter dated January 16, 2009, Claimant requested the Commission re-file his Complaint that was previously dismissed. *See R.*, Vol. 2, p. 232. The Commission scheduled hearing on March 13, 2009, to address only the issues of whether and to what extent Claimant is entitled to medical care and travel reimbursement. *See R.*, Vol. 2, p. 217.

Pursuant to a telephone conference conducted by the presiding Referee on March 4, 2009, the hearing was vacated and the matter stayed until Claimant complied with Defendants' discovery requests and other matters addressed by the Commission's Orders regarding discovery and execution of medical and employment releases. *See R.*, Vol. 3, pp. 408-409. In addition, a

sanction of \$300.00 was levied against Claimant for his failure to comply with the Commission's prior Orders, but enforcement of the sanction was reserved and added as an issue at the hearing in the matter. *Id.* Rather than complying with the Commission's Orders, Claimant filed additional motions, including a Motion to Cease and Desist on June 5, 2009, seeking to prevent Defendants from conducting discovery of Claimant's medical records. *See R.*, Vol. 3, pp. 460-464. By Order dated June 10, 2009, the Industrial Commission denied Claimant's motion to "cease and desist," and as a sanction for his repeated failure to comply with Commission Orders, the Referee issued Notice of Intent to Recommend Dismissal. *See R.*, Vol. 3, pp. 471-472. Following additional filings by Claimant, the Industrial Commission issued a second Notice of Intent to Recommend Dismissal on June 29, 2009. *See R.*, Vol. 3, pp. 525-526. The Commission issued its Order Dismissing Complaint, without prejudice, on July 28, 2009. *See R.*, Vol. 3, pp. 552-553.

Claimant filed a motion to reconsider dismissal of his Complaint filed August 3, 2009. *See R.*, Vol. 3, pp. 554-563. On August 4, 2009, Claimant filed an Amended Complaint, which consisted of a total of twenty (20) pages including signed medical releases. *See R.*, Vol. 3, pp. 574-594. Claimant sought in his new Complaint all benefits available pursuant to the Idaho Worker's Compensation Act. *See R.*, Vol. 3, p. 578. Also on August 4, 2009, Claimant submitted multiple motions to consider certain records "moot," including records from the Idaho Department of Corrections and SAIF Corporation. *See R.*, Vol. 3, pp. 596-599. The Commission denied Claimant's Motion for Reconsideration, but also held that Claimant was in compliance with the Commission's prior Order regarding medical releases as of November 18, 2009, and therefore Claimant's Amended Complaint and Defendants' Answer and Amended Answer were deemed filed as of November 18, 2009. *See R.*, Vol. 4, pp. 717-718.

Claimant's counsel, Lynn Luker, filed Notice of Appearance on January 7, 2010. *See R.*, Vol. 4, pp. 732-733. Counsel filed an Amended Complaint on June 17, 2010, setting forth the issues, including Claimant's entitlement to additional medical and time loss (TTD) benefits, determination of permanent impairment (PPI), permanent disability (PPD) including total permanent disability, and attorney fees. *See R.*, Vol. 4, pp. 747-748. Also on June 17, 2010, Claimant requested hearing on the above-listed issues, including a determination as to whether Claimant was still in a period of recovery related to Post Traumatic Stress Disorder (PTSD). *See R.*, Vol. 4, pp. 749-751.

Claimant was ably represented by Counsel during discovery depositions. *See R.*, Exhibits, Additional Documents No. 1, Deposition of James W. Clark taken October 18, 2010, and Additional Documents No. 2, Deposition of Larry Robb taken November 15, 2010. In anticipation of hearing, Defendants filed Notices of Intent to take post-hearing expert depositions, including, Doug Crum, C.D.M.S., Craig Beaver, Ph.D., J. Harrison Whitcomb, LCSW, Si Steinberg, M.D., Richard Wilson, M.D., Eric Holt, M.D., Robert Hansen, M.D., and James Morland, M.D. *See R.*, Vol. 5, pp. 826-838, and pp. 848-851. The matter proceeded to hearing on November 18, 2010, at which time Claimant presented live testimony. *See Tr.*, 11/18/10. Admitted into the record at hearing were Joint Hearing Exhibits 1- 40 and the discovery depositions. Pursuant to the Commission's Order dated November 10, 2010, Defendants' witness Jewel Owen, Claims Examiner for Defendant Idaho State Insurance Fund, provided testimony pursuant to a telephone deposition following the hearing. *See R.*, Vol. 5, p. 845; *See also, R.*, Exhibits, Additional Documents No. 3, Deposition of Jewel Owen taken December 9, 2010. Claimant was represented by Counsel during hearing, and during the post-hearing depositions of Jewel Owen, and thereafter at the deposition of Dr. Hansen on December 17, 2010. *See R.*, Exhibits, Additional Documents No. 4, Deposition of Robert Hansen, M.D.

taken December 17, 2010. Thereafter, on December 20, 2010, Claimant's attorney filed a Motion to Withdraw as Counsel and Affidavit in Support of Motion to Withdraw. *See R.*, Vol. 5, pp. 886-889. The Commission issued its Order Granting Withdrawal of Attorney on December 21, 2010. *See R.*, Vol. 5, pp. 890-891. Former Counsel filed his Attorney's Lien and Motion for Approval of Lien, as well as a supporting Affidavit on December 23, 2010. *See R.*, Vol. 5, pp. 910-916.

On January 12, 2011, Claimant filed a Motion for a new hearing, on the grounds and basis that he misused prescription medication on the date of the Commission hearing in this matter. *See R.*, Vol. 5, pp. 949-954. The Commission denied Claimant's Motion for new hearing by Order dated January 14, 2011. *See R.*, Vol. 5, pp. 956-957. Thereafter, Claimant participated *pro se* in the additional post-hearing depositions, each of which was conducted in the presence of the presiding Referee and made part of the Commission's record, including the depositions of Dr. Beaver (*See R.*, Exhibits, Additional Documents No. 5, Deposition of Craig W. Beaver, Ph.D. taken February 24, 2011), Doug Crum (*See R.*, Exhibits, Additional Documents No. 6. Deposition of Douglas N. Crum, C.D.M.S. taken February 24, 2011), and Dr. Wilson (*See R.*, Exhibits, Additional Documents No. 7, Deposition of Richard W. Wilson, M.D. taken March 2, 2011). Defendants vacated the remaining noticed depositions pursuant to J.R.P. Rule 10(E)(2). *See R.*, Vol. 5, pp. 892-897.

On March 7, 2011, Claimant attempted to file a new Workers Compensation Complaint, which was returned to Claimant without being filed by the Commission. *See R.*, Vol. 6, pp. 1030-1032. Post-hearing briefing occurred during March, April and May of 2011. Claimant filed his Brief on March 31, 2011, and an Amended Brief on April 1, 2011. *See R.*, Exhibits, Additional Documents Nos. 8 and 9. Defendants filed their Post-Hearing Brief on May 13, 2011. *See R.*, Exhibits, Additional Documents No. 10. Claimant then filed a reply brief on May

27, 2011. *See R.*, Exhibits, Additional Documents No. 11. Thereafter, Claimant filed two additional briefs. *See R.*, Exhibits, Additional Documents No. 12, Claimant's Responsive Post-Hearing Brief, filed May 31, 2011, and *R.*, Additional Documents No. 13, Claimant's Brief, filed May 31, 2011.

On April 10, 2012, the Referee filed his Findings of Fact, Conclusions of Law and Recommendation (hereinafter "Referee's Recommendation"). *See R.*, Vol. 6, pp. 1074-1125. The Industrial Commission Commissioners reviewed the Referee's Recommendation, and issued their own Findings of Fact, Conclusions of Law, and Order, dated May 2, 2012 (hereinafter "Commission Decision"). *See R.*, Vol. 7, pp. 1126-1179. Thereafter, Claimant and Claimant's former Counsel submitted filings in connection with the attorney's lien. Claimant filed a notice of appeal on June 1, 2012. *See R.*, Vol. 7, pp. 1220-1232. The matter is now before this Court for determination.

C. Statement of Facts.

1. Post-Accident Medical and Psychological Treatment.

On April 17, 2008, Claimant suffered a right arm injury when his arm was pulled into an onion processing roller assembly. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 13, p. 1. Claimant was evaluated at Weiser Memorial Hospital and then transported via Life Flight to Saint Alphonsus Regional Medical Center. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 12, pp. 1-22. Following consultation by orthopedic hand surgeon Dr. Dominick Gross, E.R. Physician Dr. Po Y. Huang assessed crush injury to the right forearm and 1.5 cm laceration. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 13, p. 6.

Following his release from Saint Alphonsus, Claimant's medical care for his right arm injury was provided by Dr. Gross through May of 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 2, pp. 1-11. On April 21, 2008, Claimant reported that he had returned to the job site to "confront

the machine,” and he noted loss of sleep and other symptoms that led Dr. Gross’s physicians’ assistant, Katherine Laible, PA-C, to suspect possible Post Traumatic Stress Disorder (PTSD). *See id.* at p. 2. PA Laible suggested rest and additional time may relieve Claimant’s psychological distress, but noted that a referral for counseling may be necessary. On PA Laible’s referral, Claimant began a course of physical/occupational therapy with Kent Taucer, OTR/MPA at Holy Rosary Sports and Orthopedic Rehabilitation of Ontario, Oregon on April 21, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 15, pp. 19-47.

On May 2, 2008, Dr. Gross approved Claimant’s return to modified work with limitations of no use of the right hand. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 2, p. 5. Dr. Gross also suggested referral to Dr. Robert Hansen in Caldwell, Idaho due to Dr. Hansen’s closer proximity to Claimant’s residence. *See id.* at p. 4. Claimant declined, at that time, to change physicians, and he scheduled a follow-up evaluation with Dr. Gross on May 29, 2008, who recommended psychological treatment in connection with Claimant’s suspected PTSD. Prior to his scheduled follow-up appointment, Claimant presented at Dr. Gross’s office on May 9, 2008, requesting a prescription for housekeeping and cooking services. *See id.* at p. 6. PA Laible declined to provide the prescription, stating, “He is on his own and he can perform all of his activities of daily living and thus does not need a housekeeper.” Claimant was again released to modified duty work with no use of the right hand. *See id.* at p. 7.

Claimant underwent an initial behavioral health screening at Lifeways Mental Health Clinic (hereinafter “Lifeways”) on May 6, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, pp. 1-2. Lifeways accepted Claimant for treatment, and the Surety preapproved treatment which began on May 14, 2008. *See id.* at p. 3. Based upon Claimant’s reported history of the accident and aftermath, Jay Whitcomb, LCSW, felt Claimant met the DSM-IV criteria for PTSD. *See id.* at p. 6. The extensive Lifeways’ records are summarized in Dr. Richard Wilson’s SUMMARY OF

MEDICAL RECORDS, and in the Psychological Evaluation report by Dr. Craig Beaver dated April 21, 2010. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 9, pp. 29-51; Joint Ex. No. 10, pp. 11-23. Notably, Lifeways providers, including Jay Whitcomb, LCSW, Dr. Thomas Heriza, and Dr. Si Steinberg, did not have Claimant's pre-accident medical or psychological records, and Claimant's entire history and facts relating to his claim were based completely on Claimant's descriptions of events, conditions, and subjective symptoms. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4.

Despite previously having declined to change physicians, Claimant did not return to see Dr. Gross but transferred his care to Dr. Hansen. Dr. Gross was not initially aware of Claimant's transfer of care, and on May 29, 2008, Dr. Gross responded to an inquiry by the Industrial Commission Rehabilitation Division (ICRD) Consultant Sandy Baskett, wherein he approved a job site evaluation for a line worker position at Cry Baby Foods, and indicated that Claimant could return to the modified/light duty position. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 2, pp. 8-10. On June 3 or June 5, 2008 (the record date is illegible), Dr. Gross provided a light duty release to work from May 9, 2008, but he also indicated Claimant had transferred care to Dr. Hansen. *See id.* at p.11. Pursuant to Dr. Gross' release, Claimant returned to work at Cry Baby Foods for a few hours on June 5, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 20, p. 5. Claimant advised ICRD Consultant Sandy Baskett on that date that the light duty work was hurting his other arm, and he advised Employer that he needed a few days off. Ultimately, on June 20, 2008, Dr. Hansen provided a release from work backdated to the date of the claimed accident. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, p.13; *See also*, Tr., 11/18/10, p. 52, ll. 117-118, p. 239, ll. 22-25, p. 240, ll. 1-4.

Claimant had previously been evaluated by Dr. Hansen in 2006 in connection with a right elbow injury suffered while he was employed by Red Apple in Ontario, Oregon. *See R.*,

Exhibits, Vol. 1, Joint Ex. No. 5, pp. 1-8. Dr. Hansen's records reflect Claimant was evaluated on May 30, 2008, in connection with his right arm crush injury. *See id.* at pp. 9-10. Dr. Hanson's records further reflect that Claimant made slow progress through conservative treatment measures, including injections, physical therapy, and pain medications. On June 13, 2008, Dr. Hansen reported "an episode of extreme anxiety" relating to Claimant's return to work. *See id.* at p. 10. Dr. Hansen recommended counseling and vocational rehabilitation for Claimant to avoid returning to the same job at the job site. Dr. Hansen continued to recommend conservative management, including pain management under the direction of Dr. James Morland at the Meridian Pain Center. *See id.* at p. 12; *See also, R.*, Exhibits, Vol. 1, Joint Ex. No. 8, p. 1.

Lifeways providers reported concerns about Claimant's deteriorating mental health, and on July 28 and 29, 2008, police were called to intervene after Claimant made multiple calls to the Lifeways crisis call line threatening suicide. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, pp. 24-32. On August 22, 2008, Claimant was involved in a high speed chase through Ontario, resulting in his arrest for reckless driving and incarceration for approximately two (2) weeks. *See id.* at pp. 39-41. Claimant was arrested for reckless driving and incarcerated for approximately two (2) weeks. *See id.* at pp. 42. Claimant advised Mr. Whitcomb and Dr. Hansen that he thought he was having a medical reaction to voluntarily stopping his pain medications. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, p. 43. Dr. Hansen later noted that Claimant alleged that the incident arose because he was on medication and suffered a reaction to it. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, p. 18. Lifeways records reflect that Claimant struggled with this legal issue in the ensuing months. *See R.*, Exhibits, Vol. 1, Joint Ex. 4, pp. 41-62.

Dr. Hansen initially did not recommend surgical intervention, but ultimately he recommended a neurectomy of the posterior interosseous nerve to eliminate persistent symptoms of pain on the back of the wrist. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, pp. 16 and 26. Prior

to surgical intervention, Claimant was referred by Surety for a second opinion evaluation by Dr. Richard Wilson, and a psychological evaluation by Dr. Eric Holt. *See R.*, Exhibits, Vol. 2, Joint Ex. No. 25.

On October 9, 2008, psychiatrist Dr. Eric Holt evaluated Claimant. *See R.*, Exhibits, Vol. 2, Joint Ex. No. 25, pp. 1-12. Prior the Claimant's physical examination, Dr. Holt reviewed and summarized medical records, including pre-accident medical records obtained by Surety from Oregon worker's compensation surety SAIF and the Idaho Department of Corrections. *See id.* at pp. 13-42. Dr. Holt reported that elevated scores on numerous psychological tests indicated symptom magnification, Dr. Holt opined Claimant had chronic problems with narcissistic, addictive, and acting-out behavior with manipulative maneuvers, emotionalism, and portraying himself as the victim. *See id.* at p. 10. He recommended psychological support during Claimant's transition back to work, but he cautioned against "mothering or smothering" to which Claimant had become dependent, demanding others manage his problems. *See id.* at p. 11. As an example, Dr. Holt pointed out that when Claimant was arrested in August of 2008, his main thought was to get to Lifeways and call his therapist with the goal that they would get him out of trouble. Dr. Holt recommended Claimant be gradually tapered off therapies, physician visits, and medications with the goal of helping Claimant become independent and able to return to the workplace. Dr. Holt further recommended Claimant be tapered off narcotic medications and managed on over-the-counter analgesics, noting Claimant did not require mood stabilizing or antipsychotic medication as a result of the claimed accident. Although he diagnosed PTSD relating to the claimed industrial accident, for which he rated at 5% of the whole person, Dr. Holt indicated the diagnosis would not exclude Claimant from returning to work, and in fact, felt working might be beneficial from the standpoint of Claimant's self-esteem. *See id.* at pp. 11-12.

He also assessed Personality Disorder and Antisocial personality traits, which were unrelated to the claimed industrial accident and were not exacerbated by it. *See id.* at p. 12.

Dr. Richard Wilson, neurologist, evaluated Claimant on November 13, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 9, pp. 1-6. Dr. Wilson's report includes a comprehensive review of post-accident medical records dated April 17, 2008, to October 12, 2008. *See id.* pp. 7-18. Dr. Wilson noted EMG studies showed no evidence of a significant median, ulnar, or radial neuropathy, with mild chronic neuropathic motor unit changes in the extensor indicis proprius that he thought represented a local nerve injury. *See id.* at p. 5. Dr. Wilson opined Claimant had not reached MMI, but with additional time the dysesthesias would lessen and autonomic function would improve. He concluded that given Claimant's underlying personality structure, Claimant was a poor surgical candidate. Furthermore, Dr. Wilson recommended narcotic analgesics as well as amitriptyline be tapered and discontinued within thirty (30) days. With respect to work activities, Dr. Wilson indicated Claimant should not return to the type of work he was performing at the time of injury due to stress issues and PTSD. *See id.* at p. 6.

Claimant returned for evaluation by Dr. Hansen on December 4, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, pp. 29-30. He critically addressed the opinions of Dr. Wilson and Dr. Holt. He continued to recommend pain management for autonomic dysfunction and localized pain, including medications and treatment under the direction of Dr. Morland. He also strongly recommended Claimant continue psychological treatment. *See id.* at p. 30. On December 26, 2008, Dr. Holt again recommended surgery, and he anticipated Claimant would be medically stable and following surgery. *See id.* at p. 32.

With Surety approval, surgery was scheduled. In preparation for surgery scheduled January 29, 2009, Claimant and Surety received a copy of pre-op instructions from West Valley Medical Center. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, p. 33. In response to an inquiry by

Surety, Dr. Hansen advised that the surgical procedure would be performed with a local as opposed to a general anesthetic, thus Claimant would require someone to drive him to and from the surgical facility, but he would not require postoperative care. *See id.* at pp. 33-34. The first surgery scheduled on January 29, 2009, was cancelled because Claimant cut his arm in an attempt to shave the surgical area. *See id.* at p. 35. Surgery was performed by Dr. Hansen on February 19, 2009. *See id.* at pp. 36-37. Dr. Hansen referred Claimant for post-surgery therapy for range of motion and rehab strengthening. *See id.* at pp. 39-41.

On April 1, 2009, Claimant was evaluated at Weiser Memorial Hospital ER for nausea and vomiting. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 12, pp. 23-32. He admitted that he failed to take his prescribed medications as directed, and that he had “smoked a mushroom of some kind” to reduce his gastric symptoms. *See id.* at p. 28.

On April 17, 2009, Dr. Hansen found Claimant MMI with respect to his right arm injuries. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, p. 44. He noted Claimant’s numbness from the resected nerve, as well as dysesthesia and pain in the distribution of the superficial radial nerve were permanent. Using the *AMA Guides*, 5th Edition, Dr. Hansen assessed a 16% whole person PPI, and noted Claimant would be restricted from heavy duty manual type work activity. *See id.* at p. 46. On May 21, 2009, Dr. Hansen clarified that restrictions for use of the right arm included no lifting over 15-20 pounds, limited repetitive activity, limited rotational movement of the hand and forearm, and limited repetitive flexion/extension of the right wrist, but keyboarding and clerical activities were not limited. *See id.* at p. 48. He noted formal physical therapy was no longer necessary, but he recommended a self-directed home physical therapy program to maintain functionality, and over-the-counter medications as needed for pain. *See id.*

Claimant continued therapy at Lifeways before and after surgery. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4. On June 10, 2009, Surety and Counsel received a Tarasoff warning from Mr.

Whitcomb that Claimant had made threats against Surety Claims Examiner Jewel Owen. *See R.*, Exhibits, Additional Documents No. 3 (Owen Deposition) p. 10, ll. 2-25, p. 11, ll. 1-2. Police were called to investigate this incident, and thereafter for an incident on August 3, 2009. *See id.* at p. 11, ll. 3-16. Ms. Owen testified that during her handling of the claim she had difficulty communicating with Claimant, and she was unable to have a meaningful conversation about medical treatment or billings due to Claimant's disruptive and aggressive behavior. *See id.* at p. 12, ll. 1-21, p. 19, ll. 3-16. As further discussed herein, Claimant continued to focus his anger toward Ms. Owen, and in March of 2010, Linda King, PA-C of Lifeways had to provide a Tarasoff warning of an imminent threat to her. *See id.* at p. 11, ll. 17-23; *See also, R.*, Exhibits, Vol. 1, Joint Ex. No. 4, pp. 11-112.

Providers at Lifeways noted Claimant's decreasing mental status in July and August of 2009. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, pp. 92-99. On August 12, 2009, Claimant reported that he had been off his medications for a couple of days because he had been taking more than prescribed. *See id.* at p. 94. On August 20, 2009, Mr. Whitcomb noted that Claimant's "attempts to intimidate the [Surety] have failed," and Claimant was "hysterical" in his refusal to move on. *See id.* at p. 96. On August 26, 2009, Claimant reported that he intended to go to the offices of Surety and "demand to be heard," though he denied any intent to create a disturbance or be violent. *See id.* at p. 97.

Claimant's mental status continued to deteriorate, and he was admitted at Intermountain Hospital on September 3, 2009. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 11, p. 1. Intake notes reflect Claimant came in voluntarily seeking treatment for a number of stressful issues including his worker's compensation claim, the loss of a long time girlfriend, and abuse issues. *See id.* at pp. 6-8. Janet Graf, N.P., assessed anger dyscontrol with possible homicidal ideation and chronic pain. *See id.* at p. 3. Dr. Nicole Thurston noted Claimant was discharged on September

7, 2009, one day earlier than recommended at his request. *See id.* at p. 18. Dr. Thurston's discharge report reflects that Claimant was hostile throughout the hospitalization, did not comply in therapy sessions, demanded excessive time from providers, and he attempted to get them to review paperwork and provide legal advice. Dr. Thurston noted that Claimant voiced having violent thoughts about an unnamed person at the State Insurance Fund, and he needed "to confront Surety "so they know how they have taken my life away from me." *See id.* at p. 19.

Claimant reported to Lifeways on September 10, 2009, that he was discharged because he was "too intense and frightened some of the women there." *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, p. 98. Mr. Whitcomb suggested that Claimant go to West Valley Medical Center, but he did not provide a formal referral. Claimant then presented on September 11, 2009, to Dr. Hansen, who noted Claimant was disheveled and at an acute stage of an anxiety reaction. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, p. 54. Dr. Hansen was concerned that Claimant planned to inflict harm on himself or others, and he encouraged Claimant to report into Saint Alphonsus Behavioral Health Clinic for evaluation of emotional and psychiatric issues. *See id.*

Claimant voluntarily presented to West Valley Medical Center ER on September 11, 2009. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 14, pp. 5-7. Dr. Ryan Heyborne's report reflects Claimant was anxious, depressed, agitated and angry, and he had thoughts of harming himself and others, though he would not name whom he wanted to harm. *See id.* at p. 5. Lab results reflected that Claimant was positive for cannabinoids and amphetamine which had not been prescribed, and did not show the presence of narcotic opioids which had been prescribed. *See id.* at p. 7. Dr. Heyborne assessed suicidal ideation and psychosis. *See id.* at p. 6. Claimant apparently went outside to smoke and eloped after treatment began. *See id.* at p. 8. When Claimant returned later, he was admitted and treated on an inpatient basis through approximately September 20, 2009. *See id.* at pp. 8-9; *See also, R.*, Exhibits, Vol. 1, Joint Ex. No. 33, p. 2.

On October 6, 2009, Dr. Hansen reported that Claimant requested a reevaluation of his PPI based upon the *AMA Guides*, 6th Edition. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, p. 57-58. Dr. Hansen assigned an 18% whole person PPI under the 6th Edition criteria. *See id.* at p. 58.

A few days later, Claimant was referred by Dr. Hansen to Saint Alphonsus Behavioral Health Services. *See R.*, Exhibits, Vol. 2, Joint Ex. No. 33, p. 1. The initial evaluation report dated October 15, 2009, reflected Claimant's difficulties dealing with anxiety and stress, as well as suicidal and homicidal thoughts and disturbing dreams. *See id.* at pp. 1-2. He noted significant alcohol use, and lifetime drug use, with imprisonment for 8 years due to drug crimes. *See id.* at p. 3. He also admitted to recent use of methamphetamine on one occasion, and use of marijuana a couple time per month to help stimulate his appetite. Claimant reported that he had been receiving care from Lifeways but that he felt they could not help him anymore. *See id.* at p. 2. Claimant continued outpatient treatment with Mark A. Jepson, NP-C of Saint Alphonsus Behavioral Health Services through December of 2009. *See id.* at pp. 13-15. The last outpatient progress note by NP Jepson reflects Claimant's increased agitation with no specific trigger. NP Jepson noted Claimant's reluctance to follow up with therapy at Lifeways. *See id.* at p. 14.

Mr. Whitcomb at Lifeways remained Claimant's primary mental health counselor throughout 2009 and 2010. On March 15, 2010, Linda King, PA-C, of Lifeways sought assistance from Mr. Whitcomb after Claimant reported he wanted to amputate his arm and he was having very aggressive feelings towards Surety Claims Examiner Jewel Owen. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, p. 111. Claimant fled when PA King left the room, and she and Mr. Whitcomb notified police in Ontario and Payette. Ms. King notified Ms. Owen that Claimant may pose an imminent threat to her. *See id.* at p. 112. Law enforcement conducted a welfare check, and transported Claimant for evaluation at West Valley Medical Center. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 14, pp. 10-13. A toxicology screen was positive for marijuana

and opiates. *See id.* at p. 12. Claimant was transferred to Intermountain Hospital for inpatient treatment through March 24, 2010. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 11, pp. 21-40. Dr. Katharine Roman indicated in her Psychiatric Evaluation that Claimant had been making angry statements of a threatening nature against the nurse practitioner at Lifeways as well as against worker's compensation, and he had threatened to cut his arm off with a saw. *See id.* at p. 29. Diagnoses from his evaluations included major depressive disorder, severe; nicotine dependence; marijuana abuse; history of methamphetamine abuse; PTSD; rule out cluster B traits (antisocial); history of injury to right arm; chronic pain in right arm; severe, chronic pain; financial; and GAF score of 25 - 40. *See id.* at pp. 30 and 41.

Claimant alleged during his March 2010 hospitalization that he had been off some of his medications due to denial by the insurance company. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 11, p. 29. Claims Examiner Jewel Owen testified that at that time, Surety had not denied any prescriptions, but she was aware that Claimant was having problems getting prescriptions filled due to an administrative problem on the part of StoneRiver, a third-party billing company that worked directly with pharmacies and was in no way affiliated or utilized by Surety. *See R.*, Exhibits, Additional Documents No. 3 (Owen Deposition) p. 13, ll. 3-22, p. 14, ll. 1-3. Ms. Owen testified that she verbally authorized prescriptions from Claimant's treating physicians, but she understood that the pharmacy's contracted billing entity, StoneRiver, caused problems such that she directed Claimant to utilize another pharmacy to avoid StoneRiver and any further delays. *See id.* at p. 14, ll. 9-25.

Claimant returned for evaluation by Dr. Hansen periodically for various complaints. In follow-up visits through 2010, Dr. Hansen opined Claimant required no formal treatment or therapy for his industrial arm injuries, though he commented that it was beyond his level of psychiatric expertise to address Claimant's ongoing psychological issues. *See R.*, Exhibits, Vol.

1, Joint Ex. No. 5, p. 62. Although Claimant's pain complaints shifted over time to include his right shoulder and his left arm, Dr. Hansen repeatedly stated that Claimant's industrial condition was permanent and stationary. *See id.* at p. 68.

On April 1 and 6, 2010, Claimant underwent a panel evaluation by neurologist Dr. Richard Wilson and neuropsychologist Dr. Craig Beaver at Surety's request. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 9, pp. 21-28. Both experts had available to them for review Claimant's entire medical history, and after detailed examinations and records review, Dr. Wilson and Dr. Beaver found Claimant MMI with respect to his industrial injuries. *See id.* at pp. 27 and 87. Each expert recommended Claimant taper and discontinue narcotic medications due to the high risk of addiction and abuse. Dr. Wilson assigned a 5% upper extremity or 3% whole person permanent impairment rating based upon the *AMA Guides*, 5th Edition. *See id.* at p. 28. Dr. Wilson recommended a temporary lifting limit of ten (10) pounds with the right arm, which he expected to be modified over time. *See id.* at p. 27. Dr. Beaver found that Claimant suffered PTSD as a result of the claimed accident on April 17, 2008. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 10, p. 34. He noted, however, that Claimant's multiple pre-existing psychiatric issues, including recurrent major depression, polysubstance dependency, somatization, and borderline personality disorder also acted to exacerbate his psychological difficulties. Dr. Beaver assigned a 10% whole man PPI for mental and behavioral impairments, with 5% (one half) of the rating relating to the claimed industrial injury, and 5% (one half) relating to premorbid difficulties. Regarding future treatment, the panel physicians agreed Claimant should discontinue narcotic pain medications to be substituted by titrating doses of gabapentin for his neuropathic hand and wrist pain. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 9, p. 27. They suggested Claimant be switched from Sertraline and amitriptyline to a broad-spectrum antidepressant that also provides some relief for neuropathic pain, such as Cymbalta. *See id.* at p. 33. They noted that these

medications would be necessary for an additional twelve (12) months for the industrial injuries. They also recommended an independent home exercise program for desensitization. *See id.* at p. 27. Dr. Beaver opined Claimant would benefit from ongoing individual counseling, but no additional counseling was needed for PTSD and future counseling would be on a non-industrial basis. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 10, p. 33.

2. Pre-Accident Medical and Psychological History.

Claimant suffered a back injury in approximately 1988 as a result of a robbery of a store where Claimant was employed as a clerk. *See R.*, Exhibits, Vol. 3, Joint Ex. No. 34, p. 5. Claimant suffered from chronic back pain as a result of this injury, for which he received extensive conservative treatment. Claimant was evaluated at Holy Rosary Medical Center on June 22, 1989, following an attempted suicide by means of an overdose of Flexeril. *See id.* at pp. 1-20. Claimant reported he was recently separated from his spouse and frustrated over dealing with the worker's compensation surety relating to his industrial back injury. *See id.* at p. 5. Dr. Burdick assessed acute depression, back injury (by history), overdose of medication, and suicide attempt. Claimant was hospitalized and then referred for continuing treatment at Malheur Mental Health. *See id.* at p. 3.

Claimant was hospitalized at Holy Rosary Medical Center August 15-17, 1996, following an overdose of Amitriptyline pills prescribed by Dr. Michael Weiss in connection with chronic back pain. *See R.*, Exhibits, Vol. 3, Joint Ex. No. 34, pp. 78-124; *See also, R.*, Exhibits, Vol. 4, Joint Ex. No. 39, pp. 294-295. Dr. Carroll assessed suicide attempt by overdose, severe depression, chronic back pain, strabismus of the left eye, nicotine addiction, and history of drug abuse in the past. *See R.*, Exhibits, Vol. 3, Joint Ex. No. 34, p. 85. Urinalysis was positive for benzodiazepine, marijuana, opiates, and antidepressants. *See id.* at pp. 80. Claimant was transported on August 17, 1996, for admission to Intermountain Hospital. *See id.* at p. 124.

Claimant received medical care during his incarceration by the Idaho Department of Corrections beginning in early 1997. *See R.*, Exhibits, Vol. 4, Joint Ex. No. 39. A Medical History Questionnaire dated March 14, 1997, reflects a history of eye trouble, drug or narcotic habit, recurrent back pain, admission to hospital, and mental illness. *See id.* at pp. 4-6. The Receiving Screening/Inmate Questionnaire reflects Claimant's history of attempted suicide by overdose in August of 1996 with hospitalization at Intermountain Hospital, as well as hospitalization for his back injury at Holy Rosary Medical Center. *See id.* at p. 7. Claimant was prescribed Elavil, Doxepin, Paxil, and /or Ativan for depression and anxiety throughout his incarceration. *See id.* at pp. 20-24. Claimant underwent psychiatric evaluation on January 2, 1998, by Dr. Robert Klamt, who assessed major depression, recurrent, and substance abuse dependency with amphetamines. *See id.* at p. 247.

Upon his initial release from jail, Claimant was evaluated at Valley Family Health Care for ongoing depression and syncope episodes. *See R.*, Exhibits, Vol. 4, Joint Ex. No. 39, pp. 297-307. Claimant reported he was recently released from jail, and he was usually on Doxepin, Amitriptyline, and Paxil. *See id.* at p. 297. On follow-up exam on December 7, 1998, Claimant reported significant difficulties with concentration and ongoing depression symptoms. He admitted that he self-treated his depression with methamphetamine in the past. *See id.* at p. 299.

Claimant filed an Oregon worker's compensation claim for a right elbow/arm injury suffered in May of 2005 while employed for Robb Enterprises, dba Red Apple Markets, in Ontario, Oregon. *See R.*, Exhibits, Vol. 4, Joint Ex. No. 38. On January 17, 2007, Dr. Sandefur performed right tennis elbow release with lateral epicondyle exostectomy. Pre- and post-operative treatment included extensive occupational therapy. Despite aggressive treatment and rehabilitation, Claimant complained of residual functional deficits which he claimed caused pain and limitations. *See id.* at p. 98. A Physical Capacity Evaluation was conducted on July 12,

2007, at St. Elizabeth Health Services in Baker, Oregon. Based upon the test results, Flint Stearns, OTR/L concluded Claimant's physical limitations would render him incapable of returning to his date-of-injury position at Red Apple. *See id.* at p. 100.

A February 15, 2007 news article in the Argus Observer reports that police responded to a call that Claimant was pacing on the docks of Centennial Park in Ontario, Oregon, while carrying a large serrated knife. *See R.*, Exhibits, Vol. 4, Joint Ex. No. 40. The article notes that Claimant threatened he would stab himself or jump into the river, and then he asked if the police would shoot him if he ran toward them with the knife. The article further notes that Claimant was taken into custody but not charged with a crime, and was transported to a medical facility for 24-observation. During his treatment at Lifeways, Claimant recalled this event as an attempted suicide by cop. *See R.*, Exhibits, Vol. 1, joint Ex. No. 4, p. 45.

On February 6, 2008, Claimant was evaluated at Holy Rosary Medical Center E.R. by Dr. David Kline following a methamphetamine overdose. *See R.*, Exhibits, Vol. 3, Joint Ex. No. 34, pp. 217-230. Claimant advised that he had been clean for years, but two days prior he "came into some money and he started smoking methamphetamine for two (2) days straight." *See id.* at p. 228. Records reflect that this episode coincided with Claimant's settlement of this May 2005 Oregon worker's compensation claim. He complained of chest pain and shortness of breath, but he was not cooperative with EKG testing and he left the facility against medical advice. *See id.* at p. 222. Dr. Kline assessed methamphetamine abuse and associated anxiety. *See id.* at p. 229.

II. STANDARD OF REVIEW

The Industrial Commission's legal conclusions are freely reviewable by the Idaho Supreme Court; however, the Court will not disturb the Commission's factual findings so long as they are supported by substantial and competent evidence. *See Wichterman v. J.H. Kelly, Inc.*, 144 Idaho 138, 140, 158 P.3d 301, 303 (2007). Substantial and competent evidence is relevant

evidence which a reasonable mind might accept to support a conclusion. *Rivas v. K.C. Logging*, 134 Idaho 603, 607, 7 P.3d 212, 216 (2000). The Court construes the record most favorably to the party prevailing below, and does not try the matter anew. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997). Because the Commission is the fact finder, its conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly erroneous. *Id.* This Court does not weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Id.*

III. ADDITIONAL ISSUES PRESENTED ON APPEAL

Claimant's Notice of Appeal and appellate brief do not comport with the statutory requirements as they contain none of the required sections or information, including issues presented on appeal. To the extent any issue raised in the Notice of Appeal was not raised or argued in Claimant's appellate brief, Defendants assert those issues are waived as argued herein. Claimant's Notice of Appeal and appellate brief set forth numerous complaints and objections to the Commission's Decision and the hearing process. Based thereon, the following issues seem to be presented on appeal:

- A. Was the Commission's decision as to each issue at hearing (Claimant's entitlement to additional medical care, temporary disability benefits, permanent partial impairment, permanent disability, and attorney fees) supported by substantial and competent evidence?
- B. Has Appellant raised sufficient grounds to set aside the Commission's Decision based upon procedural and evidentiary rulings before and during hearing?

IV. ARGUMENT

Idaho Worker's Compensation laws provide the exclusive remedy for an injured worker against his employer and its surety for injuries arising out of and in the course of his

employment. I.C. §72-209. Benefits available to the injured worker include medical and time loss benefits during the claimant's period of recovery. Thereafter, upon a finding that the claimant has reached maximum medical improvement, he may be entitled to an award of permanent physical impairment (PPI), permanent disability (PPD), and/or retraining benefits. In this case, there is no dispute that Claimant suffered a compensable injury. Claimant received medical benefits well beyond Defendants' obligation to provide these benefits. Defendants paid time loss benefits during Claimant's period of recovery, and thereafter paid 15% PPI. Defendants assert that the Commission has awarded to Claimant all benefits to which he is entitled under the Idaho Worker's Compensation Act, and its Decision with respect to each of these benefits is supported by substantial and competent evidence.

A. Claimant has waived any issue not raised in his Notice of Appeal and/or unsupported in his appellate brief.

Claimant's Notice of Appeal raised the following issues on appeal: Whether the Commission erred in finding that Claimant failed to show he is totally and permanently disabled and/or that he qualifies as an odd-lot worker; Whether the Commission erred in its findings of facts that Defendant Surety acted reasonably in the administration of his claim; Whether the Commission erred in its finding that Claimant failed to show he is entitled to an award of attorney fees; Whether the Commission erred in its award of fee and costs to Claimant's former attorney; Whether the Commission erred in its finding that Surety was entitled to a credit for overpayment of PPI benefits; Whether Claimant received ineffective assistance of counsel; and Whether the Commission Decision included material factual errors. Claimant's brief on appeal (hereinafter "appellate brief") failed to denominate any issues to be reviewed as required by I.A.R. 35(a)(4). As such, the Supreme Court must limit its review to issues addressed by

Claimant in his appellate brief through authority or argument. *Everhart v. Washington County Rd. & Bridge Dept.*, 130 Idaho 273, 274, 939 P.2d 849, 850 (1997).

In his appellate brief, Claimant raised additional issues as outlined herein. Claimant's appellate brief provides few references to evidence in the record, and his argument consists of vague complaints about the outcome of the claim. Defendants assert that additional issues raised in Claimant's appellate brief are addressed with insufficient argument and absolutely no authority to support his contentions, and therefore should not be considered on appeal. *See, Jensen v. Doherty*, 101 Idaho 910, 911, 623 P.2d 1287, 1288 (1981); *See also, Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 207 P.3d 988 (2009). Claimant's brief contains no propositions of law or any authority in support of his contention that he is entitled to any additional worker's compensation benefits. He provided no factual or legal support in his vague objections to the Commission's determination of his attorney's fees and costs. He provided no legal support for his procedural objections, specifically, his challenge regarding exhibits admitted into evidence at hearing without objection by his attorney, to witnesses that his attorney did not call to testify at hearing, or to witnesses Claimant declined to call to testify via post-hearing deposition.

B. The Industrial Commission's determination that Claimant was entitled to benefits for medical care to the date of the hearing, but not in the future, was supported by substantial and competent evidence.

An employer is required to furnish medical treatment as may be reasonably required in connection with an industrial injury. I.C. §72-432(1). Medical benefits also include reimbursement for expenses of travel in obtaining medical care. I.C. §72-432(12). Claimant bears the burden of proving that he is entitled to additional medical benefits. In this case, Claimant received medical treatment and Defendant paid medical benefits beyond the date of the hearing and up to the date of the Commission's Decision, a year and a half beyond Defendants'

obligation to pay benefits. Claimant was paid medical benefits in connection with his right arm injuries, as well as benefits relating to his diagnosis of PTSD. Claimant contests the Commission's determination that he is MMI with respect to his PTSD, and claims that the Commission improperly considered the SAIF and Department of Corrections records in arriving at its determination. He also claims that he is still owed additional travel reimbursement in connection with his medical treatment.

1. Claimant's medical records from SAIF Corporation and the Idaho Department of Corrections are relevant to Claimant's entitlement to medical benefits.

Pursuant to I.C. §72-432(10), all medical information relevant to or bearing upon an injury *shall* be provided to the employer and surety, or their attorneys. [emphasis added]. Claimant's objections to certain medical records were considered on multiple occasions by the Commission. In the normal course of the administration of a worker's compensation claim, Surety Claims Examiner Jewel Owen forwarded a written request for medical records to SAIF Corporation and the Idaho Department of Corrections. Her request included a copy of the medical release included in the Worker's Compensation Complaint. Both SAIF Corporation and the Idaho Department of Corrections provided medical records pursuant to the Surety's request. Claimant subsequently objected to Surety obtaining these records, and thereafter, the review of these records by Dr. Holt, Dr. Wilson, Dr. Beaver, and the Industrial Commission. Regardless of Claimant's objections regarding the Surety's request and/or the medical release used to obtain these records, the Industrial Commission ruled on multiple occasions that the Surety was entitled to any medical records relevant to Claimant's claim, and specifically the records from SAIF Corporation and Idaho Department of Corrections.

It is axiomatic that Claimant's pre-injury medical records are relevant to the medical, impairment and disability issues before the Commission and this Court, particularly records

relating to Claimant's right upper extremity, mental health treatment, and physical limitations. The SAIF Corporation records reflect a right upper extremity injury in 2005, and medical treatment related thereto through 2007. Claimant was assigned an impairment rating, and he received a settlement based upon physical limitations in connection with his right upper extremity, thus were relevant to the issues in this claim. Similarly, Claimant's medical records from the Idaho Department of Corrections document treatment and medical management of chronic back pain, depression and anxiety, and detail Claimant's long history of mental health issues, including suicide attempts, thus were relevant to the issues in this claim.

The Commission properly found that Defendant Surety was entitled to these records, and if the medical release provided to the medical provider was insufficient or defective, then his objections properly lie with the SAIF Corporation or the Idaho Department of Corrections, not the Surety. Claimant's attempts to prevent Defendants' access to these records, and his defiance of multiple interlocutory orders relating to medical releases and records resulted in delay after delay in this claim. Claimant's actions resulted in the Commission's imposition of a \$300 fine and a stay of proceedings until he complied with the Commission's interlocutory orders regarding discovery and medical releases. Rather than comply, Claimant continued to defy the Commission, and the claim was dismissed. Claimant was permitted to file a new Complaint and proceed with this matter after he finally signed medical releases. However, Claimant continued to dispute Defendants' access to these records, despite the clear relevance of the records to this claim. Notwithstanding his objections to the records, Claimant was not denied medical treatment, and benefits were not apportioned based upon any preexisting conditions. Furthermore, these records were admitted into evidence at hearing without any objection, and therefore Claimant has waived any prehearing objection to the records.

Defendants were entitled to obtain medical records from SAIF Corporation and the Idaho Department of Corrections, and Dr. Holt and Dr. Beaver properly reviewed these records as part of their respective expert analyses.

2. The Commission's determination that Claimant was MMI with respect to his PTSD was supported by substantial and competent evidence.

Psychological injuries, disorders, and conditions are governed by I.C. §72-451. There is no dispute that Claimant suffered PTSD, or that Claimant had a well-documented preexisting psychiatric condition. On appeal, Claimant presents the same factual arguments he presented at hearing in support of his claim that he is not medically stable in connection with his PTSD, or alternatively, that he should be determined to be totally and permanently disabled as a result of his ongoing psychological issues. He also challenges the inclusion in exhibits medical records from SAIF Corporation and the Idaho Department of Corrections, and the inclusion in exhibits the medical reports of Dr. Holt and Dr. Beaver, both of whom reviewed these pre-accident medical records as part of their expert analyses. Claimant has presented no new facts or evidence in this appeal that warrant a reversal of the Commission's findings.

Although Claimant relates his ongoing psychological/psychiatric symptoms to the claimed accident, Claimant has a documented history of mental health issues including multiple suicide attempts and drug abuse. Evidence in this case is replete with examples of his attempts to manipulate the worker's compensation system or the criminal justice system. The Industrial Commission had substantial medical and psychological records detailing Claimant's long and complicated medical history both before and after the incident in question. In support of its finding that Claimant was medically stable, the Commission weighed the evidence, including medical records from Lifeways, as well as the report and testimony of Dr. Craig Beaver.

Dr. Craig Beaver is a licensed psychologist with diplomate status in the area of clinical neuropsychology, which is the study of brain behavior relationships. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 10, pp. 38-48. Dr. Beaver spent two days with Claimant, the first day involved an interview and introductory testing, and the second day was devoted to comprehensive psychological testing. *See id.* at pp. 1-2. Dr. Beaver reviewed with Claimant his medical history, the occurrence of the accident, as well as Claimant's post-accident incarceration and hospitalizations. *See id.* at pp. 23-28. They also discussed all aspects of his life and other significant events occurring before, during and after the industrial accident. In preparation for Claimant's evaluation and testing, Dr. Beaver reviewed Claimant's pre-accident mental health records, as well as the Lifeways records. *See id.* at pp. 2-23. As a result of Dr. Beaver's review of Claimant medical records, and his clinical examination and testing, Dr. Beaver concluded in his report, and testified in his deposition, that Claimant suffered PTSD related to the work injury on April 17, 2008, he was stable in connection with his industrial PTSD, and Claimant's ongoing need for psychiatric/psychological treatment was not industrially related. *See id.* at p. 33; *See R.*, Exhibits, Additional Documents No. 5 (Beaver Deposition), p. 42, ll. 14-19, p. 74, ll. 7-12. Dr. Beaver testified that Claimant's treatment including his hospitalizations in 2009 and 2010 was not related to PTSD. *See* Beaver Deposition at p. 44, ll. 21-24, p. 48, ll. 9-19. He explained that Claimant's documented premorbid Cluster B personality disorder led to his pre- and post-injury hospitalizations, and he would continue to episodically be hospitalized or require treatment as he becomes agitated or suicidal about various life stressors. *See id.* at p. 45, ll. 5-23. Dr. Beaver explained, a Cluster B personality disorder is an "umbrella" for several different personality disorder diagnoses, and in Claimant's case, a borderline (narcissistic) personality disorder. *See id.* at p. 72, ll. 15-23. Dr. Beaver pointed out that anger control, the feeling of being constantly victimized, the need to project blame on to others as an understanding for why

things were happening to you, problems with dependency, reactive and labile emotional states, and suicide attempts are examples of Cluster B personality disorder, all of which were quite consistent with Claimant. *See id.* at p. 13, l. 15 – p. 14, l. 22. Dr. Beaver reasoned that although Claimant may have been focused on Surety or his claim during his treatment, it was not proper to blame the object of the subject's psychosis, because the focus was not the root cause. *See id.* at p. 46, ll. 18-25. Dr. Beaver offered an analogy, it is not the fault of the moon that a telescope is pointed at it; the moon does not cause the pointing.

The records in evidence document Claimant's focus on financial gain and anger over failed attempts to manipulate the system. Although Surety and his claim were the focus of Claimant's paranoia and anger, Dr. Beaver concluded that Claimant's industrial PTSD was not the root cause. For example, Lifeways treatment note of August 20, 2009, reflected Claimant expressed anger and resentment that his attempts to intimidate the surety had failed and his case was dismissed without the settlement he wanted. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 4, p. 96. Claimant was then admitted to West Valley Medical due to his anger and possible homicidal ideation directed at the State Insurance Fund, as well as family issues. Claimant was positive for marijuana and amphetamines at the time of his admission. Similarly, just prior to his hospitalization in 2010, State Insurance Fund Claims Examiner received a Tarasoff warning from Linda King of Lifeways. Once again, Claimant's agitation over his claim, as well as other life stressors, led to police intervention, and ultimately to hospitalization.

The Industrial Commission considered abundant medical and psychological evidence, including records and correspondence from Lifeways providers. The Commission cited numerous instances in which the Lifeways providers improperly relied upon statements or representations by Claimant regarding his medical history or his industrial claim. The Commission properly considered and weighed the evidence before them and made a well

reasoned decision. Based upon substantial and competent evidence, including Dr. Beaver's persuasive testimony, the Commission accepted Dr. Beaver's conclusion that Claimant was medically stable with respect to his PTSD, and ongoing and future counseling and medical management of his psychological and/or psychiatric issues was not related to the claimed industrial accident.

3. The Industrial Commission's denial of additional travel reimbursement benefits was supported by substantial and competent evidence.

Claimant's demand for payment of additional travel reimbursement is without merit, and the Commission's denial of additional benefits was supported by substantial and competent evidence. Throughout the administration of the claim, Claimant was paid travel reimbursement at the statutory rate pursuant to I.C. §72-432(12). *See R.*, Exhibits, Vol. 2, Joint Ex. No. 22. Following Claimant's loss of driving privileges in August of 2008, Surety provided transportation to medical appointments, but denied Claimant's demands for transportation relating to court appointments in connection with his criminal proceedings.

Despite Claimant's arguments to the contrary, Claimant was paid transportation reimbursement for his surgical procedure by Dr. Hansen, as well as post-surgical attendant care. Surety initially agreed to pay for attendant care pursuant to the West Valley Medical Center preoperative instructions. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 14, p. 4. On January 29, 2009, Surety issued payment for travel as well as home care following surgery, even though Dr. Hansen indicated in pre-surgery correspondence that Claimant did not require attendant care following surgery. *See R.*, Exhibits, Vol. 1, Joint Ex. No. 5, pp. 33-34. Notably, Dr. Hansen testified that it is the burden of the treating physician to determine the need for post-surgery care. *See R.*, Exhibits, Additional Documents No. 4 (Hansen Deposition) p. 42, ll. 16-20.

The Commission considered the same factual arguments presented in Claimant's appellate brief regarding his claim for additional travel reimbursement and attendant care. The Commission weighed the ample evidence and determined Claimant was paid all travel and medical reimbursement he was entitled to, and found Claimant's continuing demands disingenuous and unsupported by the evidence or the law. Accordingly, the Commission denied Claimant's claim for additional travel reimbursement and attendant care.

C. The Industrial Commission's decision that Claimant was entitled to temporary disability benefits from the date of the accident to June 5, 2008, and for the period of recovery from February 9, 2009, through the date of medical stability on April 17, 2009, was supported by substantial and competent evidence.

An injured worker is entitled to income benefits during the period of recovery, or thereafter if he is deemed totally and permanently disabled. I.C. §72-408. Upon medical stability (MMI), a claimant is no longer in a period of recovery. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001); *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005).

1. Job Site Evaluation.

In his original Complaint, Claimant sought additional time loss benefits denied for the time period June 5, 2008, through June 12, 2008. Although Claimant was actually paid total temporary disability (TTD) benefits from April 18, 2008, through April 30, 2009, and thus was paid full benefits for the time period in question, Claimant continues in this appeal to complain that he was improperly released back to work pursuant to a release by Dr. Gross.

The Commission thoroughly reviewed the evidence surrounding the submission and approval of the Job Site Evaluation. As noted by the Commission, Dr. Gross was Claimant's primary treating physician at the time he approved the Job Site Evaluation and released Claimant to return to modified work. The Commission found that Claimant's complaints against ICRD

Consultant Sandy Basket and Surety Claims Examiner Carol Garland with respect to preparation of the Job Site Evaluation were unfounded. Claimant subsequently transferred care to Dr. Hansen, who provided a back-dated work release. Surety then reinstated time loss benefits, and paid TTD benefits for the time period June 5 through 8, 2008. Claimant received the same amount in TTD benefits that he would have if Dr. Gross had never authorized light duty work.

Based on the foregoing, the Commission's findings with respect to the Job Site Evaluation and his release to work in June of 2008 is supported by reasonable and competent evidence and should not be disturbed on appeal.

2. The Findings of the Referee and the Commissioners were supported by the evidence.

Claimant further contends that he is not medically stable, or in the alternative that he is totally and permanently disabled, and therefore entitled to reinstatement of TTD benefits. Dr. Holt evaluated Claimant in October of 2008, and found Claimant was medically stable in connection with his PTSD. However, Surety did not rely upon Dr. Holt's assessment, and continued to pay for mental health treatment at Lifeways. Furthermore, Surety continued to pay time loss benefits during Claimant's period of recovery for his industrial arm injuries. Dr. Hansen found Claimant was medically stable with respect to his industrial arm injuries on April 17, 2009. Dr. Craig Beaver agreed with Dr. Holt's evaluation and assessment, although his findings were based upon the record as a whole. He testified that Claimant was capable of employment, and his hospitalizations and ongoing psychological treatment was related to Claimant's preexisting Cluster B personality disorder as opposed to Claimant's industrial related PTSD.

Based upon reasonable and substantial evidence, the Commission determined that Claimant was medically stable and not in a period of recovery for his industrial conditions, thus

he was not entitled to TTD benefits subsequent to April 17, 2009. Claimant has offered no new facts or evidence in support of his claim for additional time loss benefits. Accordingly, the Commission's findings should not be disturbed on appeal.

D. The Industrial Commission's decision that Claimant was entitled to Permanent Partial Impairment rated at 10% of the whole person, with Defendant Surety entitled to a credit for overpayment to be applied toward permanent disability was supported by substantial and competent evidence.

Permanent impairment (PPI) is defined as the "anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation." I.C. §72-422. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Any voluntary payment by Employer or Surety not due and payable when made, may, subject to the approval of the commission, be deducted from the amount owed and to be paid as income benefits. I.C. §72-316.

In this case, the Industrial Commission considered impairment ratings from multiple physicians with respect to Claimant's right upper extremity as well as PTSD. The Commission noted that Dr. Hansen rated Claimant's right upper extremity impairment at 16% and 18% whole person PPI using the AMA Guides, 5th and 6th editions, respectively. However, the Commission further noted that Dr. Hansen testified that his ratings were augmented to include psychological factors. His rating also did not apportion any of the rating to preexisting conditions, including Claimant's well-documented prior right arm injury or preexisting psychological conditions. The Commission reasoned that Dr. Hansen's PPI assessment was consistent with the combined ratings assigned by the panel IME physicians, Dr. Wilson and Dr. Beaver. Dr. Wilson rated Claimant's physical PPI at 3% of the whole person, and Dr. Beaver provided a whole person PPI rating of 10%, with one-half of the rating referable to Claimant's preexisting psychological

conditions. The Commission also found no evidence to support apportionment for any prior condition.

Having weighed the extensive medical evidence in this claim, the Commission concluded that Claimant suffered a 10% permanent partial impairment in connection with his industrial injuries. In addition, the Commission found that Surety was entitled to a credit for voluntary payments made which resulted in overpayment of PPI benefits. Again, Claimant seeks to reargue the case with no new evidence or legal arguments that warrant a reversal. The Commission properly considered and weighed the evidence by the providers and Lifeways. The records and testimony of the medical experts, especially of the IME panel physicians, was found to be more persuasive. As such, the Commission's conclusions on the credibility and weight of the evidence should not be disturbed on appeal.

E. The Industrial Commission's decision that Claimant was entitled to Permanent Partial Disability, without apportionment, and inclusive of PPI, rated at 25% of the whole person was supported by substantial and competent evidence.

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." I.C. §72-423. It includes the impact an injury has upon the injured work's activities of daily living. I.C. §72-424. Whereas impairment is a medical appraisal, the focus of disability is an appraisal of the claimant's present and probable future ability to engage in gainful activity. *See* I.C. §72-425; *See also, Sund v. Gambrel*, 127 Idaho 3, 6, 896 P.2d 329, 332 (1995). Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). Among the non-medical factors to be considered are Claimant's occupation, his age at the time of the

accident, diminished ability of the employee to compete in an open labor market, and all the personal and economic circumstances of the employee and any other relevant factors. *See* I.C. §72-430; *See also, Boley*, 130 Idaho at p. 281. The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 34, 714 P.2d 1, 3 (1985).

The Commission summarized its review of the records and testimony considered in arriving at its determination of 25% disability. In consideration of medical factors, the Commission took into consideration Claimant's physical impairment, as well as permanent restrictions due to dysesthesia at his radial wrist and at the back of his hand into his fingers. The Commission considered the testimony of multiple physicians regarding physical limitations. Dr. Hansen testified that he observed Claimant had good range of motion and function, and he demonstrated the ability to perform fine manipulation with his right arm. *See R.*, Exhibits, Additional Documents No. 4 (Hansen Deposition) at p. 73, ll. 14-25, p. 74, ll. 1-16. Dr. Wilson testified regarding Claimant's physical capabilities demonstrated in the *sub rosa* video taken six (6) months after the panel IME. *See R.*, Exhibits, Additional Documents No. 7 (Wilson Deposition), p. 27, l. 23 – p. 29, l. 5. Dr. Hansen and Dr. Wilson testified that Claimant's physical restrictions would not preclude him from work, such as operating a forklift or clerical or keyboarding work. *See* Hansen Deposition at p. 58, ll. 14-15, p. 92, ll. 16-19; *See* Wilson Deposition at p. 28, l. 17 – p. 29, l. 5; *See also* Beaver Deposition at p. 43, l. 21 – 44, l. 11. Dr. Beaver further testified that Claimant had no neurocognitive or psychological restrictions based upon the claimed industrial accident, and the Claimant is capable of being employed notwithstanding his preexisting cluster B personality disorder. *See* Beaver Deposition at p. 49, l. 23 – p. 50, l. 10.

The Commission also considered non-medical factors as required by statute. The Commission properly stated that Claimant's criminal history was a non-medical factor relevant

to Claimant's disability. The Commission reviewed Claimant's work history, as documented in Social Security Earnings records, and as summarized by vocational expert Doug Crum, CDMS. Mr. Crum testified that the Social Security Earnings records as well as his interview of Claimant led him to identify transferable skills that include experience as a forklift operator, customer service, restaurant work, production labor work, and convenience store work. *See R.*, Exhibits, Additional Documents No. 6 (Crum Deposition), p. 29, l. 5 – p. 30, l. 3. Based upon the physician-imposed restrictions, Claimant's work history and transferable skills, Mr. Crum concluded that Claimant had a permanent partial disability inclusive of impairment of 40 percent. *Id.* at p. 34, ll. 15-19. The Commission reduced Mr. Crum's assessment and assigned a 25% disability rating, inclusive of impairment, based upon substantial and competent medical evidence.

The evidence unequivocally shows that Claimant is fully capable of gainful activity. The Referee and the Commissioners properly considered and weighed the medical and non-medical evidence before them and made a reasonably sound decision.

F. The Industrial Commission's decision that Claimant failed to show he is totally and permanently disabled and/or that he qualifies as an odd lot worker is supported by substantial and competent evidence.

There are two methods by which a claimant may establish a total and permanent disability. First, a claimant may prove a total and permanent disability if his medical impairment together with the nonmedical factors total 100%. If, however, the claimant has proven something less than 100% disability, he can still demonstrate total disability by fitting within the definition of an odd-lot worker. *Boley*, 130 Idaho at p. 281. 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, ISIF*, 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 superhuman effort on their part.” *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984).

The burden of providing a prima facie case of odd-lot status is on the claimant. *Seese*, 110 Idaho at 34; *Boley*, 130 Idaho at 281. Whether the Claimant is odd-lot status is a factual determination for the Commission. *Id* at p. 280. An employee may prove total disability under the odd-lot doctrine in one of three ways: 1) by showing that he has attempted other types of employment without success; 2) by showing that he or vocational providers have searched for other work and other work is not available; or 3) by showing that any efforts to find suitable employment would be futile. *Id.* at 281.

There is no evidence considered by the Commission that supports Claimant’s contention that he is totally and permanently disabled or that he qualifies as an odd-lot worker. After the hearing, Claimant attempted to introduce into evidence his Social Security Disability determination (“SSD”) in support of his claim for total and permanent disability. This evidence was not admitted as an exhibit at the hearing Commission, and thus should not be considered on appeal. Furthermore, SSD’s have been considered in Commission decisions for the limited purpose of establishing wage history, medical history, and pertinent nonmedical factors under I.C. §72-430, but SSD’s are based primarily on medical grounds and may or may not consider factors in worker’s compensation law. *Cox v. Finke Logging, Inc.*, 1996 IIC 0559, 560.

Claimant’s claim that he is unemployable is unpersuasive. He has not made a reasonable attempt to seek employment since his industrial injury. Dr. Hansen, Dr. Wilson, and Dr. Beaver have all testified that Claimant can work. There is no evidence before the Commission or presented on appeal to support that Claimant is unable to compete in the open labor market. There is no evidence before the Commission or on appeal to support that Claimant has attempted employment without success, that other work is unavailable, or that any efforts to find suitable

employment would be futile. The facts and evidence establish a sound foundation for the Referee and the Commission's determination that Claimant has suffered disability less than total and permanent. Accordingly, the Commission's decision should not be disturbed on appeal.

G. The Industrial Commission's decision that Claimant failed to show he was entitled to an award of attorneys fees was supported by substantial and competent evidence.

Attorney fees are not granted to a claimant as a matter of right under the Idaho worker's compensation law, but may be recovered only under the circumstances set forth in I.C. § 72-804. *Poss v. Meeker Machine Shop*, 109 Idaho 920, 926, 712 P.2d 621, 627 (1985); *Troutner v. Traffic Control Co.*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976). Attorney fees may be awarded where the defendants have unreasonably denied or delayed payment of benefits due a claimant. I.C. §72-804.

Claimant seeks to reargue the case with no new evidence or legal arguments. Abundant time and consideration was give to Claimant's arguments, and the Commission found the testimony of Ms. Owen was persuasive, particularly when coupled with Claimant's behavior throughout the claim. Claimant failed to present substantial and competent evidence establishing that Defendants unreasonably denied benefits. Claimant's pre-hearing and hearing procedural objections have no factual or legal support, and therefore do not warrant a reversal of the Commission's Decision.

H. Claimant's pre-hearing and hearing procedural objections have no factual or legal support, and therefore do not warrant a reversal of the Commission's findings.

Claimant's final attacks on the decision in his case focus on specific factual rulings by the Referee and/or Commissioners with respect to procedural matters before and during hearing. Adequate time and consideration were given by the Commission to all of Claimant's allegations. Defendants submit that Claimant's procedural objections have no factual or legal support that would warrant a reversal of the Commission's Decision.

1. The Commission properly admitted into evidence and considered medical records pursuant to J.R.P. Rule 10, including records from SAIF Corporation and the Idaho Department of Corrections.

Claimant had his opportunity to testify through his deposition and at hearing, during which he was represented by counsel. Claimant's objections to medical records admitted as exhibits at hearing are without foundation or merit. Claimant's counsel offered no objection to the admission of the exhibits, and in fact, the exhibits were submitted as Joint Hearing Exhibits. *Tr.* p. 5, l. 12 – p. 6, l. 14. Medical records from SAIF Corporation and Idaho Department of Corrections were included in the joint hearing exhibits submitted at hearing and were admitted without objection by counsel. As argued herein, Claimant's objections to the manner or method in which the Surety obtained these records was considered and rejected by the Industrial Commission. The records were and are relevant to the issues before the Commission and on appeal, and Claimant has no legal or factual basis to object to the admission of these records into evidence at hearing or in this appeal.

2. Claimant had the opportunity to call witnesses at hearing and via post-hearing deposition, and thus his objections regarding witnesses are without merit.

Pursuant to the Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law (J.R.P.), following a hearing the record is to remain open for the submission of expert deposition testimony of physicians and vocational expert witnesses. *See* J.R.P. 10(E)(1). Evidence presented post hearing "cannot include evidence developed, manufactured or discovered following the hearing." Lay witness rebuttal evidence is only admissible post hearing in the event that new matters have been presented. *See* J.R.P. 10(E)(4).

Claimant was represented by competent counsel at hearing, and Counsel declined to call certain witnesses. Specifically, Counsel declined to call ICRD Consultant Sandy Baskett or any Employer witness. Claimant was represented in discovery depositions, as well as the post-

hearing deposition of Claims Examiner Jewel Owen and Dr. Hansen. Although Defendants vacated a number of post-hearing depositions, Claimant had a right to take the post-hearing depositions of any of the witnesses noticed, including Jay Whitcomb or Dr. Steinburg. *See* J.R.P. 10(E)(2). Claimant did not take any post hearing depositions, and the matter was taken under advisement by the Referee.

3. Any factual discrepancies in the Commission's Decision are not material and do not warrant the reversal of the Commission's findings.

Claimant apparently demands the Court overturn the Commission based upon alleged factual discrepancies in the Commission's Decision. Claimant points to miniscule and insignificant alleged factual discrepancies in the Commission's Decision and/or medical records in a last ditch effort to overturn the detailed, well-reasoned decision by the Referee and the Commission. For example, Claimant points out that he did not fire attorney Mr. Brown because he did not like the way he was handling his claim. Claimant's appellate brief pp. 9-10. Claimant was not represented by Mr. Brown during discovery or at the hearing of this matter. The fact that Mr. Brown was or was not involved in the worker's compensation claim has nothing to do with the substantive issues in this claim. In another example, Claimant challenges the statement that he was arrested in Payette, Idaho on August 22, 2008. Claimant's appellate brief, p. 10. And another example, Claimant alleges the Referee and Commissioners misinterpret a statement in the Lifeflight report. Claimant's appellate brief, pp. 7 and 9. Claimant does not correct the alleged factual inaccuracies, if they exist, and provides no evidence in support of his allegations. Furthermore, he provides no argument that suggests that these facts or errors were dispositive regarding any finding of ultimate fact or conclusion of law.

The Referee personally observed Claimant at hearing, and in this unusual case, participated in post-hearing depositions to ensure equality and transparency throughout the

process. Dr. Beaver, Dr. Wilson, and Doug Crum each testified in the presence of the Referee, and each were able to address questions posed by the parties and the Referee regarding their expert findings and conclusions. Defendants contend that any factual discrepancies in the medical records or testimony were addressed by the trier of fact and are irrelevant to the issues actually decided. Furthermore, there is no evidence to suggest or support that the alleged factual discrepancies were dispositive regarding the affect the Commission's Decision.

4. Should the Industrial Commission Hearing Officer have recused himself before the hearing based upon his involvement in the claim prior to hearing?

Industrial Commission Rules provide no basis for recusal of a Referee. Neither Claimant, nor his attorney, objected to the Referee before or during hearing. Claimant did not object to the Referee in his Post-Hearing Brief or Reply Brief. Claimant first raised this issue on appeal with no facts or argument in support of his contention that the Referee should have recused himself before the hearing. We are left to presume that Claimant objects to the Referee because he disagrees with the Commission's Decision.

As demonstrated by Vols. 1-6 of the Agency Record, the Referee made many rulings in the case prior and subsequent to the hearing. To suggest that a presiding Referee cannot make interlocutory orders is wholly unsupported by the law. However, in this case, the three Commissioners issued their own findings of fact, conclusions of law, and order. The Commissioners found no reason to disturb the Referee's findings and observations on Claimant's presentation or credibility. Claimant offers no fact or law to suggest the three Commissioners were somehow prejudiced by the pre-hearing proceedings in this claim. Accordingly, there is no reason to disturb the Commission's Decision on appeal.

5. Claimant's post-hearing filings include medical records and arguments not considered by the Commission, and as such, are not evidence that should be considered on appeal.

Much of Claimant's post-hearing filings raise arguments that the Commission failed to consider evidence at hearing or otherwise abused its discretion. The Commission has repeatedly held that a *pro se* litigant is held to the same standards and rules as those represented by an attorney. *See Everhart*, 130 Idaho at 275. Claimant's numerous post-hearing filings are tantamount to a request for a second hearing. Claimant's request for a new hearing was denied by the Commission. Claimant's appeal is limited to the evidence and issues presented to and decided by the Industrial Commission. This includes the 40 hearing exhibits, seven (7) pre- and post-hearing depositions, and the Commission's legal file up to the date of the hearing. Claimant's non-compliant filings should not be considered on appeal. Any other argument or evidence is outside of the scope of this appeal.

6. Claimant's remaining claims regarding fraud, defamation, ineffective assistance of counsel, and OSHA violations were not within the jurisdiction of the Commission, and thus cannot be considered in this appeal.

Idaho workmen's compensation law provides the exclusive remedy of an employee against his employer for injuries arising out of and in the course of his employment. I.C. §§72-201 and 209; *See also, Yeend v. UPS, Inc.*, 104 Idaho 333, 334, 659 P.2d 87, 88 (1982). The clear intent of the legislature in passing the worker's compensation law was to provide for the exclusivity of the remedy and to provide sure and certain relief for the injured worker. *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1981). The Commission has jurisdiction of questions arising under the worker's compensation law. I.C. §72-707.

Claimant points out OSHA violations and a fine imposed in connection therewith in support of his claim for additional damages or benefits. Fault of a party is not relevant in

worker's compensation cases, and the Commission does not have jurisdiction to consider Claimant's allegations or consider damages regarding OSHA violations.

While such civil actions are outside of the bounds of the jurisdiction of the Commission, Claimant's allegations of fraud and defamation were reviewed by the Commission in the context of his claim for attorney fees. Based upon its thorough review of the evidence in this claim, the Commission found that Surety acted reasonably and promptly throughout the administration of the claim. As argued herein, the Commission considered and rejected Claimant's allegations that Surety fraudulently obtained medical records. The Commission also considered and rejected Claimant's arguments that there was wrongdoing in the Job Site Evaluation provided by Surety and/or ICRD Consultant Sandy Baskett to Dr. Gross. Finally, the Commission reviewed the claim in its entirety, and found that instances of disagreement, discrepancy, and/or error in the records did not justify a punitive award of attorney's fees pursuant to I.C. §72-804.

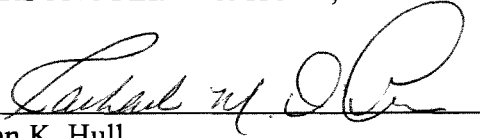
Based upon the foregoing, Defendants contend that there was substantial and competent evidence to support the Commission's findings on all issues raised at hearing, and the Claimant's procedural objections regarding records and witness testimony admitted into evidence were properly considered by the Commission in issuing its Decision and Order. Furthermore, Claimant has no factual or legal support for his objection to the Referee. Finally, any evidence submitted after the hearing in this case, and any evidence in support of claims regarding issues outside of the jurisdiction of the Commission, cannot be considered in this appeal. Notwithstanding Claimant's attempts to manipulate the system and introduce new argument and evidence, the Commission issued its reasoned decision supported by the evidence properly before the commission, which should not be disturbed on appeal.

V. CONCLUSION

For the above and foregoing reasons, the Commission's Decision should not be disturbed on appeal. Claimant offers no new evidence or argument in support of his appeal, but regurgitates the same factual arguments considered and rejected by the Commission. The facts and evidence presented at hearing establish the Industrial Commission had overwhelming evidence in support of its sound and reasoned decision. Defendants respectfully request that the Court deny Claimant's appeal, affirm the decision of the Commissioners below and issue an opinion as to attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 22nd day of January, 2013.

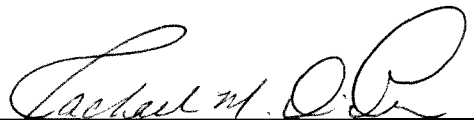
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By 
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Attorneys for Defendant-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2013, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following attorneys of record, by U.S. Mail, postage prepaid, addressed as follows:

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