

2-13-2009

# Funes v. Aardema Agency's Record Dckt. 35923

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# LAW CLERK

Vol. 1 No. 2

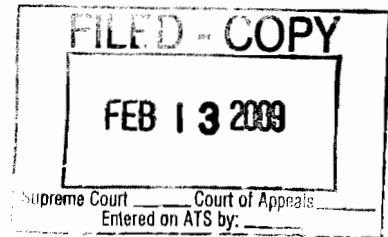
## BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

FILADELFO FUNES, )  
 )  
 Claimant/Appellant, )  
 )  
 v. )  
 )  
 AARDEMA DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants/Respondents. )  
 \_\_\_\_\_ )

**SUPREME COURT NO. 35923**

**AGENCY'S RECORD**

# COPY



Attorney for Appellant:

Emil F. Pike, Jr.  
 PO Box 302  
 Twin Falls, ID 83303-0302

Attorney for Respondents:

Neil D. McFeeley  
 PO Box 1368  
 Boise, ID 83701-1368

# 35923

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

FILADELFO FUNES, )  
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Attorney for Respondents:

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## LIST OF EXHIBITS

Reporter's Transcript taken 12-14-07 will be lodged with the Supreme Court

### Claimant's Exhibits:

1. St. Benedict's Family Medical Center medical records
2. St. Benedict's Family Clinic medical records and reports of Gary Meyers
3. Jerome Physical Therapy and Sports Medicine reports
4. Dr. David Christensen records
5. Dr. David Verst records
6. Dr. K. Cheri Wiggins records
7. Dr. Michael O'Brien records
8. Tax returns for 2003 and 2004
9. Dr. K. Cheri Wiggins medical billings
10. Lyrica pharmaceutical billings
11. Greg Taylor, ICRD Consultant records
12. Claimant's First Supplemental Answer to Defendants' First Set of Interrogatories and Requests for Production to Claimant
13. Claimant's Second Supplemental Answer to Defendants' First Set of Interrogatories and Requests for Production to Claimant
14. Claimant's Third Supplemental Answer to Defendants' First Set of Interrogatories and Requests for Production to Claimant

### Defendants' Exhibits:

1. Dr. Thomas H. Zepeda record
2. Dr. David M. Christensen independent medical examination report
3. Dr. David B. Verst records
4. Dr. K. Cheri Wiggins record
5. Dr. Clinton L. Dillé records
6. Drs. Richard W. Wilson and Eric F. Holt records
7. Magic Valley Regional Medical Center radiology report
8. List of Benefits Paid
9. Dr. K. Cheri Wiggins record
10. Claimant's Answers to Defendants' First Set of Interrogatories and Requests for Production to Claimant

### Depositions:

1. Deposition of David B. Verst, M.D., taken 1-21-08

**WORKERS' COMPENSATION  
COMPLAINT**

Claimant's Name & Address <b>Filadelfo M. Funes</b> <b>320 East Avenue H</b> <b>Jerome, ID 83338</b>	Claimant's Attorney's Name & Address <b>Emil F. Pike, Jr.</b> <b>Attorney at Law</b> <b>P.O. Box 302</b> <b>Twin Falls, ID 83303-0302</b>
---	---

Employer's Name & Address <b>Aardema Dairy</b> <b>2306 East 3600 South</b> <b>Wendell, ID 83355</b>	Workers' Compensation Insurance <u>Carrier's</u> (Not Adjustor's) Name & Address <b>Idaho State Insurance Fund</b> <b>P.O. Box 83720</b> <b>Boise, ID 83720-0044</b>
--	--

Claimant's SSN <b>680-16-9768</b>	Claimant's Birth Date <b>12/6/60</b>	Date of Injury/Manifestation of Occupational Disease <b>1/29/05</b>
--------------------------------------	---	--

State & County in Which Injury Occurred <b>State of Idaho, County of Gooding</b>	When Injured, Claimant was Earning an Average Weekly Wage of <b>\$550.00</b> , pursuant to §72-419, Idaho Code
---	--

Describe How Injury/Occupational Disease Occurred (What Happened)  
**Claimant, while lifting a calf, was struck from the rear by another calf, which blow caused Claimant to sustain pain in his left and right legs and in his neck, with pain also going down his right shoulder and arm.**

Nature of Medical Problems Alleged As a Result of Accident or Occupational Disease  
**Claimant has suffered from continual pain in his neck and shoulders, pain in his lower back, pain in the center of his spine, and pain into both legs.**

What Workers' Compensation Benefits are You Claiming at This Time?

- 1. Continuation of temporary total disability benefits;**
- 2. Compensation for permanent partial impairment and permanent partial disability;**
- 3. Compensation for total and permanent disability; and,**
- 4. Compensation for attorney's fees.**

Date on Which Notice of Injury was Given to Employer <b>1/29/05</b>	To Whom You Gave Notice <b>Supervisor, Rafael</b>
--	--

How Notice Was Given:  Oral  Written  Other, Please Specify

Issue or Issues Involved:

- 1. Claimant's entitlement to continuation of temporary total disability;**
- 2. Claimant's entitlement to permanent partial impairment;**
- 3. Claimant's entitlement to permanent partial disability;**
- 4. Claimant's entitlement to total and permanent disability;**
- 5. Claimant's entitlement to attorney's fees.**

Do You Believe This Claim Presents a New Question of Law Or a Complicated Set of Facts?  Yes  No  
 If so Please state why.

Notice: Complaints against the *Industrial Special Indemnity Fund* must be in accordance with Idaho Code § 72-334 and filed on form I.C. 1002

RECEIVED  
 INDUSTRIAL COMMISSION  
 7909 MAY 18 9 11 AM '05

Physicians Who Treated Claimant (Name & Address)

Dr. Wiggins, P.O. Box 2790, Twin Falls, ID; Dr. David Verst; Dr. David Christensen, Twin Falls, ID; Dr. Zepeda, Jerome, ID.

What Medical Costs Have You Incurred To Date? Uncertain

What Medical Costs Has Your Employer Paid? Employer has paid all medical costs incurred to date.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ( ) Yes ( ) No

Date	Signature Of Claimant or Attorney
------	-----------------------------------

**Please answer the set of questions immediately below only if claim is made for death benefits**

Name and Social Security Number of party filing Complaint	Date of Death	Relation to deceased Claimant
---	---------------	-------------------------------

Was filing party dependent on deceased? ( ) Yes ( ) No	Did filing party live with deceased at time of accident? ( ) Yes ( ) No
---	--

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

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16 day of May, 2006, I caused to be served a true and correct copy of the foregoing Complaint upon:

**Employer's Name & Address**  
Aardema Dairy

**Surety's Name & Address**  
Idaho State Insurance Fund

2306 East 3600 South

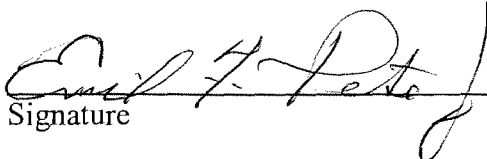
P.O. Box 83720

Wendell, ID 83355

Boise, ID 83720-0044

Via: ( ) Personal Service of Process  
(X) Regular U.S. Mail  
( ) I have not served a copy of the Complaint on anyone.

Via: ( ) Personal Service of Process  
Via: (X) Regular U.S. Mail

  
Signature

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

**Further information may be obtained from: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000 (208) 334-6000.**



INDUSTRIAL COMMISSION  
P.O. BOX 83720  
BOISE, ID 83720-0041

Patient Name: \_\_\_\_\_  
Birth Date: \_\_\_\_\_  
Address: \_\_\_\_\_  
Phone Number: \_\_\_\_\_  
SSN or Case Number: \_\_\_\_\_

(Provider Use Only)  
Medical Record Number: \_\_\_\_\_  
( ) Pick Up Copies ( ) Fax Copies  
( ) Mail Copies  
ID Confirmed by: \_\_\_\_\_

**AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION**

I hereby authorize \_\_\_\_\_ to disclose health information as specified:  
*Provider Name – must be specific for each provider*

To: \_\_\_\_\_  
*Insurance Company/Third Party Administrator/Self-Insured Employer/ISIF, their attorneys or patient's attorney*

Street Address

City

State

Zip Code

Purpose or need for data: WORKERS' COMPENSATION CLAIM  
(e.g. Workers' Compensation Claim)

Information to be disclosed: \_\_\_\_\_ Date(s) of Hospitalization/Care: \_\_\_\_\_

- ( ) Discharge Summary
- ( ) History & Physical Exam
- ( ) Consultation Reports
- ( ) Operative Reports
- ( ) Lab
- ( ) Pathology
- ( ) Radiology Reports
- ( ) Entire Record
- ( ) Other: Specify \_\_\_\_\_

I understand that the disclosure may include information relating to (check if applicable):

- ( ) AIDS or HIV
- ( ) Psychiatric or Mental Health Information
- ( ) Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

X FILADELFO Funes  
Signature of Patient

5/15/06  
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act Date

Ernest G. P... Attorney  
Signature of Witness Title

5/15/06 3  
Date

# ANSWER TO COMPLAINT ORIGINAL

I.C. NO. 05-502836

INJURY DATE January 29, 2005

CLAIMANT'S NAME AND ADDRESS Filadelfo M. Funes 320 East Avenue H Jerome, Idaho 83338	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Emil F. Pike, Jr. Attorney at Law P.O. Box 302 Twin Falls, Idaho 83303-0302
EMPLOYER'S NAME AND ADDRESS Aardema Dairy 2306 East 3600 South Wendell, Idaho 83355	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS State Insurance Fund P.O. Box 83720 Boise, Idaho 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Neil D. McFeeley Eberle, Berlin, Kading, Turnbow, McKlveen & Jones, Chtd. 300 North Sixth Street P.O. Box 1368 Boise, ID 83701	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

2006 JUN 15 P 4:39 RECEIVED INDUSTRIAL COMMISSION

- The above-named employer or employer/surety responds to Claimant's Complaint by stating:  
 The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> Not Applicable
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> Not Applicable
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>

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

10. What benefits, if any, do you concede are due Claimant?  
 Those previously paid and PPI payments currently being paid.

4

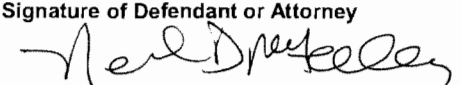
11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny each and every allegation of the Complaint not specifically admitted herein.
2. Defendants contend that the condition of which Claimant complains may be attributable, in whole or in part, to a subsequent, intervening cause for which Defendants, and each of them, are not responsible, such that Defendants' liability, if any, is thereby reduced or extinguished.
3. Defendants deny that they have acted unreasonably and Claimant is therefore not entitled to an award of attorney fees pursuant to the provisions of Idaho Code § 72-804.
4. Defendants contend that Claimant has refused to seek suitable work or refused or neglected to work after suitable work was offered to, procured by or secured for him and that he is therefore not entitled to workers' compensation insurance benefits, pursuant to the provisions of Idaho Code § 72-403.
5. Defendants deny that Claimant is entitled to an award of disability above impairment or additional TTD benefits.
6. Defendants deny that Claimant is totally and permanently disabled.
7. Defense counsel has just received Claimant's Complaint and has not had sufficient opportunity to fully investigate the relationship of Claimant's condition to his/her work activities with the Employer. Defendants reserve the right to amend this Answer and allege further affirmative defenses as discovery is conducted.

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

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

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

Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
\$2,919.85	\$18,701.76	\$37,405.60	June 15, 2006	 Neil D. McFeeley

PLEASE COMPLETE

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of June, 2006, I caused to be served a true and correct copy of the foregoing Answer upon:

**CLAIMANT'S NAME AND ADDRESS**

**EMPLOYER AND SURETY'S  
NAME AND ADDRESS**

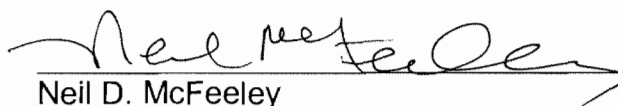
**INDUSTRIAL SPECIAL INDEMNITY FUND  
(if applicable)**

Emil F. Pike, Jr.  
 Attorney at Law  
 P.O. Box 302  
 Twin Falls, Idaho 83303-0302

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

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

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

  
 Neil D. McFeeley

5

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

FILADELFO FUNES, )  
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 Claimant, )  
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 v. )  
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 AARDEMA DAIRY, )  
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 Employer, )  
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 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 Defendants. )  
 \_\_\_\_\_ )

**IC 2005-502836**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

**FILED**

**AUG 12 2008**

**INDUSTRIAL COMMISSION**

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls, Idaho, on December 14, 2007. Emil F. Pike, Jr., of Twin Falls represented Claimant. Neil D. McFeeley of Boise represented Defendants. A translator was present for the benefit of Claimant and one of the witnesses who speak primarily Spanish. The parties submitted oral and documentary evidence. One post-hearing deposition was taken and the parties submitted post-hearing briefs. The matter came under advisement on April 29, 2008, and is now ready for decision.

**ISSUES**

Pursuant to the Notice of Hearing dated November 16, 2007, and by agreement of the parties at hearing, the issues to be decided are:

**RECOMMENDATION - 1**

1. Whether Claimant's condition is due in whole or in part to a subsequent injury or disease or cause not work related;
2. Reimbursement of unpaid medical bills;
3. Whether Claimant is entitled to temporary partial and/or temporary total (TPD/TTD) benefits, and the extent thereof;
4. Whether Claimant failed to work after suitable work was offered such that Idaho Code § 72-403 is applicable;
5. Whether Claimant is entitled to permanent partial impairment (PPI), and the extent thereof;
6. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of impairment, and the extent thereof;
7. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine;
8. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and
9. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

#### **CONTENTIONS OF THE PARTIES**

Claimant was born in Honduras and moved to the United States in the late 1990s. He speaks only Spanish and does not read or write in any language. It is undisputed that Claimant sustained an occupational injury to his low back on January 29, 2005, for which he underwent lumbar surgery on May 2, 2005.

Claimant contends that his lumbar surgery was a failure and that he experiences debilitating chronic pain. Claimant asserts that he is medically disabled from returning to any type of employment. At the very least, Claimant is an odd-lot worker due to his lack of education and English skills combined with his injury-related impairment. In the event that Claimant's permanent disability is found to be less than total, Claimant seeks an award of substantial PPD in excess of PPI. Claimant's PPI is at least 10%, based on the opinion of the treating physician and surgeon, David Verst, M.D. His PPI should be rated as high as 20%, based on the opinion of neurologist Michael O'Brien, M.D. Claimant's injury extends to include his neck which Claimant mentioned at the time of initial medical treatment. His symptoms radiate into his right shoulder and impact the entire right side of his body. Claimant is entitled to reimbursement for unpaid medical and pharmacy bills for treatment received at the direction of K. Cheri Wiggins, M.D. Claimant seeks an award of attorney fees based on Defendant's failure to initiate PPD in excess of Claimant's 10% PPI; failure to acknowledge Claimant's neck symptoms as part of the compensable injury; and for failure to timely pay Dr. Wiggins' bills.

Defendants contend that Claimant's lumbar surgery was a success and that benefits paid for Claimant's 10% PPI rating fairly compensated Claimant for the permanent effects of his occupational injury. The compensable injury is limited to Claimant's low back and does not include the neck or right upper extremity. Employer offered appropriate light-duty work to Claimant in late July 2005, which Claimant voluntarily discontinued after working for two days. Although temporary disability benefits were paid through May 2007, they were paid in error and not owed based on Claimant's refusal of light-duty employment. Claimant has made no efforts to seek employment since declining light-duty work. The medical evidence fails to establish that Claimant is totally disabled. Claimant is capable of returning to work as a driver or in the

restaurant business. Claimant's symptoms are grossly exaggerated and are not explained by objective medical findings. Claimant's symptom magnification and bizarre nature of his complaints have been noted by the majority of physicians who have evaluated him, including Dr. Verst, Dr. Wiggins, and the Independent Medical Examination (IME) panel. Although Claimant's 10% PPI rating is wholly attributable to the compensable low back injury, any permanent disability should be apportioned. Claimant had pre-existing degenerative changes and was previously infected by West Nile virus. Pre-existing conditions impact Claimant's current condition. Defendants rely on the IME panel's opinion that additional medical treatment is not necessary to treat the occupational injury. Defendants have paid what is owed on this case and have likely overpaid temporary disability benefits. There has not been an unreasonable denial of benefits and attorney fees should not be awarded.

#### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant, his former co-worker Javier Ramirez, his wife Maria Christina Funes, and Industrial Commission Rehabilitation Division (ICRD) field consultant Gregory Taylor, taken at hearing.
2. Claimant's Exhibits 1 through 14;
3. Defendants' Exhibits 1 through 10; and
4. The post-hearing deposition of David Verst, M.D., taken by Defendants on January 21, 2008.

All objections made during Dr. Verst's deposition are overruled.

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

## FINDINGS OF FACT

### Background and Injury.

1. Claimant was 47 and resided in Jerome, Idaho, at the time of hearing. Claimant was born in Honduras and moved to the United States in the late 1990s.

2. Claimant completed two years of education and worked as a taxi driver in San Pedro Sula by the time he was a teenager. Claimant speaks only Spanish and does not read or write in any language. He is able to transcribe numbers. Claimant helped his father with dairy cows and also worked as a truck driver in Honduras.

3. Claimant came to Idaho in 1999 where his first job was working for Rite Stuff, lifting baskets of potatoes weighing 50 to 60 pounds. He soon obtained work at a dairy farm after learning that dairies paid better. Claimant worked for multiple dairies in the Twin Falls/Jerome area from 1999 through 2004. His work included bringing cows from the corral into the dairy, milking cows with automatic milking machines, and driving.

4. Claimant began working for Employer in 2003, at their calf ranch. His primary job duty was driving. He picked up milk product, delivered colostrum, and drove new-born calves to various facilities. He was required to lift the calves and load them onto a trailer. The calves weighed between 80 and 150 pounds.

5. On January 29, 2005, Claimant experienced difficulty picking up a large female calf. A male calf simultaneously ran into his left hip. He felt like something "exploded" in his head. He felt pain "like a string" running down his right side to his waist.

### Post-Injury Medical Treatment.

6. Initial medical treatment was sought on February 1, 2005, at St. Benedicts Family Medical Center. Claimant reported pain in the right side of his neck, back, and radiating into his



right leg. Thomas H. Zepeda, M.D., diagnosed a back strain with spasm and radicular symptoms. X-rays were normal.

7. Claimant received follow-up care from St. Benedicts by Gary Myers, PA-C. Claimant received physical therapy from February 16, 2005, through March 28, 2005, without improvement. Lumbar disc pathology was suspected.

8. A lumbar MRI was performed on March 1, 2005, that revealed an extruded disc at L5-S1 with likely L5 nerve root impingement. The MRI demonstrated multilevel mild degenerative disc disease.

9. Claimant was referred to spine surgeon David Verst, M.D., for ongoing care. Claimant's initial visit with Dr. Verst was on March 16, 2005, by which time Claimant was walking with a cane. Dr. Verst diagnosed an acute herniation. Claimant's condition did not improve with epidural steroid injections or other conservative treatment.

10. Dr. Verst performed a right L5-S1 laminectomy and discectomy on May 2, 2005. Claimant underwent a regular course of post-operative care, including 19 physical therapy sessions between June 6, 2005, and August 3, 2005.

11. On May 19, 2005, Dr. Verst noted that Claimant's neurological exam was normal and that Claimant reported only mild back pain. As of June 2, 2005, Claimant's pain was diminished and he experienced improved strength and range of motion. Claimant reported mild back pain at the next visit of June 27, 2005, at which time Dr. Verst released Claimant to return to work, with restrictions.

12. Dr. Verst re-evaluated Claimant on July 21, 2005. This appointment marks the turning point after which Claimant's subjective complaints became inconsistent with objective findings and medical assessment. Claimant felt that he was unable to return to light duty, for

four hours per day. Dr. Verst indicated that Claimant should continue working with the same restrictions, four hours per day.

13. Claimant's subjective complaints were unchanged by the evaluation of August 11, 2005, and he displayed limited motion. Dr. Verst recommended that Claimant be evaluated by orthopedic surgeon, David Christensen, M.D., and ordered a repeat MRI to rule out a recurrent disc herniation. A post-operative lumbar MRI revealed scar tissue, but no evidence of a recurrent herniation. Dr. Christensen evaluated Claimant on August 23, 2005. He diagnosed right sacroiliac (SI) dysfunction and recommended an SI injection. He felt that Claimant's condition was not fixed and stable, but that Claimant could return to light-duty work with a ten-pound lifting restriction, 20-pound push/pull restriction and the ability to change positions every 20 to 30 minutes.

14. On November 10, 2005, Claimant was evaluated by anesthesiologist Clinton Dille, M.D., for an SI injection. Dr. Dille could not identify any definitive neurological deficits and noted that Claimant's pain and other symptoms appeared to be "greatly exaggerated." However, he felt that Claimant could benefit from an SI epidural steroid injection, which he performed on November 14, 2005. The injection was of no benefit and Dr. Dille felt that additional injections would not help.

15. Claimant received additional physical therapy sessions during December 2005. Claimant's complaints of right shoulder pain increased.

16. On February 18, 2006, Dr. Verst responded to a questionnaire from Surety and indicated that Claimant's condition was medically fixed and stable. He assigned a 10% whole person PPI rating, with none of the rating attributable to pre-existing conditions.

17. On July 24, 2006, Dr. Verst opined that Claimant's neck and upper-extremity complaints were unrelated to the occupational injury. He had no additional recommendations for treatment and released Claimant from his care. However, Dr. Verst simultaneously referred Claimant to physical medicine and rehabilitation specialist K. Cheri Wiggins, M.D., for additional treatment.

18. Dr. Wiggins treated Claimant for approximately one year, from March 2006 through February 2007. At the initial visit of March 8, 2006, Dr. Wiggins prescribed Lyrica for pain management and reported that Claimant demonstrated "regionalization and pain behaviors." At the second evaluation on March 30, 2006, Dr. Wiggins noted "some symptom magnification" and described Claimant's abilities to ambulate as improving when he was not conscious of being observed.

19. Dr. Wiggins considered alternate causes for Claimant's symptoms. She ordered diagnostic studies of Claimant's neck and right shoulder which did not display findings that correlated with Claimant's reported pain. Blood work was performed and revealed an old infection of West Nile virus. Dr. Wiggins concluded that the West Nile exposure was at least partly responsible for some of Claimant's symptoms.

20. In May 2006, Claimant described pain from his neck down the back of his right leg. Dr. Wiggins concluded as follows:

At this point I honestly do not know what is going on with [Claimant]. His complaints continue to increase in number. He does not tolerate examination of even superficial palpation. His MRI only shows a significant straightening of the cervical lordosis along with a disc protrusion at C4-5 that contacts the cervical cord. Unfortunately, this does not correspond with any of the complaints that he tells me about. His primary complaint in the neck is at the atlantooccipital junction. He does not really complain of pain specifically in the shoulder and biceps region. He has not done well with physical therapy and I am afraid that I may be missing something due to the difficult [sic] I have in examining him. I think an IME would be helpful.

Claimant's Ex. 6, pp. 1-2.

21. Dr. Wiggins provided varying work restrictions. Claimant was taken off work at the initial visit, but released to light-duty work as of April 3, 2006. Claimant was given a 15-pound lifting restriction and advised to avoid kneeling as well as repetitive bending, twisting, or stooping. Claimant required the ability to alternate sitting, standing, and walking. Claimant was taken back off work on May 25, 2006. Claimant was released to return to two hours of work per day on August 17, 2006. As of October 24, 2006, Claimant continued to be limited to two hours of work per day, but his lifting restriction was raised to 20 pounds. These restrictions were reiterated on November 14, 2006. Claimant was taken off work on November 22, 2006.

22. Dr. Wiggins assigned 12% whole person PPI based on the 5<sup>th</sup> Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. She felt that Claimant fell within diagnoses-related estimate (DRE) category III. She declined to apportion any amount for the West Nile virus.

23. Dr. Wiggins released Claimant from care on February 7, 2007, to return on an as-needed basis only. She provided Claimant with a prescription for a year's worth of refills of Lyrica.

24. Claimant returned to Dr. Verst for an evaluation in March 2007. Dr. Verst noted that Claimant presented with chronic back and right leg pain. He diagnosed neuropathic pain, secondary to scar tissue around the nerve root. He explained that Claimant's symptoms far outweighed the objective MRI findings and felt that Claimant was not a candidate for future surgeries. He recommended bringing closure to Claimant's case with the assignment of appropriate ratings for impairment and disability.

25. Dr. Verst revisited the issue of a causal relationship between Claimant's neck problems and the low back injury on multiple occasions and provided inconsistent opinions. His initial opinion was that there is no relationship between the two (see paragraph 17, above). Dr. Verst responded to a letter of clarification from Claimant's attorney in November 2006, in which he concluded that Claimant injured his neck at the time of the occupational injury. In January 2007, Dr. Verst attributed 10% of Claimant's neck problems to the industrial injury and 90% to pre-existing conditions. In April 2007, Dr. Verst responded to a request for clarification from Surety and concluded that Claimant's neck pain and degeneration would not be related to the industrial injury.

26. Both Dr. Verst and Dr. Wiggins indicated that an IME would be appropriate. On April 12, 2007, Defendants arranged for Claimant to be evaluated by orthopedic surgeon Joseph Daines, M.D., psychiatrist Eric Holt, M.D., and neurologist Richard Wilson, M.D., (IME panel). Dr. Holt addressed Claimant's presentation of symptoms in detail and described Claimant as "exaggerating his pain symptoms in a naïve and unsophisticated manner and is attempting to portray himself as an invalid so that he would have secondary gain." The IME panel observed prominent pain behavior with muscle tenderness, but no involuntary muscle spasm.

27. The IME panel summarized their findings as follows:

Mr. Funes likely sustained a far right lateral L5-S1 intervertebral disc herniation as a result of his work injury of 1/29/05. He is now status post right L5-S1 laminectomy and discectomy. He has persistent, atypical low back pain with grossly over-determined pain behavior on examination and diminished sensation and giveaway weakness in his right leg and mild anatomic/physiologic pattern. His post-operative diagnostic workup has not shown any evidence of recurrent lumbar herniation nor does his diagnostic workup or current examination support objective evidence for his persistent back and right leg complaints.

Defendants' Ex. 6, p. 7.

28. With regard to extent of injury, the IME panel determined that the compensable injury did not extend beyond the lumbar spine. Claimant's reported symptoms in his head and behind his eye were described as "bizarre" and were without anatomic or physiologic findings. Claimant's upper back complaints were not the result of the low back injury and had no viable medical explanation.

29. The IME panel determined that Claimant could perform light-to-medium type work activities with lifting limited to 50 pounds, 25 pounds on a regular basis, and limited stooping and bending. They stated that no further medical treatment was indicated and suspected that Claimant's symptomology may improve following resolution of his workers' compensation claim.

30. In late May 2007, Dr. Verst responded to a questionnaire from Surety in which he indicated that he agreed with the findings of the IME panel.

31. On August 3, 2007, Dr. Wiggins responded to a questionnaire from Surety in which she indicated that she agreed with the findings of the IME panel.

32. Claimant was evaluated by neurologist Michael O'Brien, M.D., on September 11, 2007, at the request of his attorney. Dr. O'Brien reviewed Claimant's past medical records. Dr. O'Brien agreed that Claimant was medically stable, but disagreed with the 10% PPI rating assigned by Dr. Verst and the 12% rating assigned by Dr. Wiggins. Dr. O'Brien assigned a 20% PPI rating. He acknowledged that either a 10% or 12% impairment rating was consistent with a diagnosis-related estimate (DRE) category III as described in the 5<sup>th</sup> Edition of the *AMA Guides*. However, he felt that Claimant's PPI should be "moved up" one category from DRE III to IV because Claimant's condition continued to be symptomatic.

33. Dr. O'Brien indicated that Claimant presented with "marked spasm in the back which is quite apparent on examination." He described this as a "true organic finding." Dr. O'Brien diagnosed failed low back surgery with residual spasm and pain.

34. Dr. O'Brien completed paperwork for Social Security Disability regarding Claimant's ability to perform work-related activities. He concluded that Claimant could never lift more than 10 pounds, nor carry any amount of weight; that Claimant must use a cane to stand or walk; that Claimant needs to be able to constantly shift positions; that Claimant has limitations on hand movement secondary to low back discomfort; that Claimant is unable to use either foot; that Claimant should never engage in climbing, balancing, stooping, kneeling, crouching, or crawling; that Claimant is unable to drive; and that Claimant should avoid exposure to extreme heat, extreme cold, or vibrations.

35. Dr. Verst testified in his post-hearing deposition that Claimant's lumbar surgery went well and achieved the hoped-for result. Claimant's 10% PPI rating was based on the 5<sup>th</sup> Edition of the *AMA Guides*. Claimant's disc herniation and treatment with subjective complaints was appropriately described as DRE category III impairment. He does not see a basis for the 20% PPI rating assigned by Dr. O'Brien.

36. Dr. Verst admitted having changed his opinion about a causal relationship between Claimant's neck problems and the industrial injury. After a thorough review of his records, he now stands by the opinion that Claimant's neck symptoms are not related to the industrial injury.

37. Dr. Verst explained that Claimant's subjective complaints were out of proportion with objective findings. His experience with Claimant was similar to what was described by Dr.

Wiggins regarding the existence of a fictitious element to Claimant's symptoms. He agrees with the opinions of the IME panel.

38. Dr. Verst agrees that Claimant continues to suffer chronic pain and that pain is a highly individualized situation. In January 2007, Claimant had radiculitis involving the L5 dermatome. Radiculitis is considered to be an objective symptom that is caused by inflammation as opposed to nerve compression. Claimant's post-surgical MRI was negative for nerve root compression.

39. Dr. Verst does not have any reason to believe that Claimant should not be working. Micro-surgery is not a destabilizing procedure and patients are generally allowed to return to their pre-injury abilities once they have healed. Claimant's situation is atypical and complex because of his disproportionate amount of pain that is inconsistent and does not follow a particular dermatomal pattern. Dr. Verst agrees that Claimant's job opportunities are very limited because of his lack of education, inability to speak English, and work history focused on labor.

**Claimant's Perception of His Condition.**

40. Claimant felt as if something exploded in his head at the time of injury. He currently has the feeling of sharp poking between his shoulders. Claimant explained that he is unable to walk because of sharp pain in the low back and right leg. He never "feels O.K." and has difficulty sitting or standing for very long. His left knee is flimsy and locks up. Sometimes he gets numb and needs assistance to stand up. He must use a cane to walk.

41. Claimant's perception of his surgical outcome is not supported by the medical records. Claimant repeatedly testified that Dr. Verst closed him up without reconnecting his nerves and that Dr. Verst "just left [his nerves] one on top of another." Claimant also testified



that his teeth were broken during the surgery, presumably when anesthesia was administered. There is no medical evidence to support these assertions.

**Lay Witness Testimony.**

42. Javier Ramirez worked with Claimant for approximately three years, on overlapping shifts. He observed Claimant to be a good worker who was strong and able to take care of sick calves. Mr. Ramirez is out on disability because he has had two heart attacks.

43. Claimant's wife testified that Claimant was healthy and happy before the accident, but that the accident has changed him. Claimant cannot stand the pain. He is bitter and depressed. She worked weekends prior to her husband's injury, but went to work on a full-time basis in July 2006 to make ends meet. She worked for two weeks, but sustained an on-the-job back injury in August 2006, and has not returned to work since that time.

**Vocational Evidence.**

44. Gregory Taylor is a rehabilitation consultant with ICRD and has held that position for more than 17 years. He is familiar with employment opportunities in Twin Falls and the surrounding areas. He initially met with Claimant on March 23, 2005, at the referral of Surety. He met with Claimant on a monthly basis until closing his case in early 2007.

45. Mr. Taylor's initial efforts were with Employer. He confirmed that Claimant could not return to his time-of-injury job because of medical restrictions, but that Employer offered light duty. The light-duty positions available to Claimant were driving a water truck to calf pens and tagging calves ears with identification tags. Claimant attempted to drive the water truck, but the bouncing and jarring of the truck caused back pain and Claimant did not continue with light duty after two days.

46. Mr. Taylor did not make any referrals to Claimant, beyond light duty with Employer. He did not feel that there was anything that Claimant could do. Claimant felt that he was unable to work. Claimant's restrictions were severe and his labor market was diminished because of his lack of English skills.

47. Mr. Taylor observed Claimant using a cane and having difficulty with balance. He did not perceive Claimant's presentation as deceptive.

48. In February 2006, Mr. Taylor performed a skills analysis and determined that suitable jobs would be dog bather, cow puncher, and horse exerciser. According to Mr. Taylor, these jobs do not exist in the Magic Valley area.

49. Mr. Taylor did not identify which specific restrictions he relied upon, beyond indicating that they were very restrictive. In general, he based his opinions on restrictions given by Dr. Wiggins, as opposed to those assigned by Dr. Verst. Mr. Taylor declined to give an opinion as to whether the light-duty work offered by Employer was medically appropriate, since such opinion would require a medical opinion. However, Mr. Taylor assumed some restrictions that were not identified by medical service providers at the time the skills analysis was performed. For example, Mr. Taylor did not consider truck driving positions because of the need for prolonged sitting and because he felt that Claimant would have difficulty getting into some trucks. Mr. Taylor's opinion regarding Claimant's physical abilities was influenced by Claimant's presentation and Claimant's representations that he was unable to work. For example, Mr. Taylor felt that Claimant required a cane to walk, in spite of Dr. Verst indicating that Claimant could walk "frequently."

50. Mr. Taylor's involvement with the case predated restrictions assigned by either the IME panel or Dr. O'Brien.

51. With the benefit of hindsight, Mr. Taylor testified at hearing that, based on the restrictions given by Dr. Verst and the IME panel, Claimant would qualify for some restaurant positions and some driving jobs, in spite of his lack of English skills.

52. Mr. Taylor encouraged Claimant to take English as a second language (ESL) courses. Claimant attended the course for a couple of weeks, but discontinued attending them secondary to physical difficulty sitting through class. Claimant could have attended ESL classes based either on Dr. Verst's restrictions or if he would have asked permission from the instructor to alternate sitting and standing.

53. Claimant applied for Social Security disability benefits in 2005 and was denied. However, he appealed the decision and was found entitled to those benefits by early 2007.

54. Claimant has not made any efforts to return to work or become more employable beyond attempting light-duty work for two days, participating in ESL classes for approximately ten classes, and meeting with Mr. Taylor one time per month from March 2005 through early 2007.

## **DISCUSSION AND FURTHER FINDINGS**

### **Causation**

A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability, only their plain and unequivocal testimony conveying a conviction that

events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P. 3d 211, 217-218 (2001).

55. In the present case, Dr. Verst ultimately concluded that Claimant's neck and upper extremity complaints are not causally related to the compensable low back injury. Dr. Verst responded to requests by both parties for clarification on this issue. His opinions changed depending on what specific facts were provided to him and based on who was seeking clarification. During his post-hearing deposition, Dr. Verst addressed his inconsistent opinions and confirmed that, based on a complete review of his medical records, he stands by the opinion that there is not a causal relationship between Claimant's neck and left shoulder complaints and the low back injury. He took into consideration the fact that Claimant's initial intake form noted pain in the neck and that injuries to one level of the spine may cause referred symptoms to other areas of the spine and to the body in general.

56. The opinion of the IME panel is consistent with the opinion of Dr. Verst that the neck symptoms are not the result of Claimant's occupational injury. Dr. Wiggins initially opined that Claimant's neck problems were at least partly related to the industrial injury, but she was skeptical about the true nature of Claimant's symptoms. She subsequently concurred with the opinion of the IME panel.

57. Claimant has failed to establish that his occupational injury extends beyond his low back.

**Medical Bills**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the

treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

58. Dr. Verst referred Claimant to Dr. Wiggins for treatment. Defendants paid for treatment at the direction of Dr. Wiggins through September 2006, but not thereafter. Treatment performed by Dr. Wiggins was reasonable and related to the occupational injury.

59. In April 2007, the IME panel opined that additional treatment was not necessary. However, Dr. Wiggins stopped treating Claimant in February 2007 and did not render treatment to Claimant after April 2007. There is no explanation as to why Defendants failed to pay for medical services provided by Dr. Wiggins from October 2006 through February 2007.

60. Claimant has established that he is entitled to medical benefits for services rendered by Dr. Wiggins from October 2006 through February 2007. The unpaid balance for which Defendants are responsible is \$1,056.

61. Dr. Wiggins prescribed Lyrica to Claimant at the time of her last examination in February 2007 and allowed twelve refills. Claimant refilled his prescription in June and July 2007 at a cost of \$240.11 per prescription. Defendants did not seek the concurrence of Dr. Wiggins with the IME panel's opinions until August 2007. Dr. Wiggins prescribed Lyrica for the effects of the compensable injury. The prescription was reasonable at the time it was issued and at the time the medication was dispensed.

62. Claimant has established that he is entitled to medical benefits in the amount of \$480.22 for prescription medication.

TTD/TPD

Idaho Code § 72-408 provides for income benefits for total and partial disability during an injured worker's period of recovery. "In workmen's [sic] compensation cases, the burden is on the claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability." *Sykes v. C.P. Clare and Company*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). Once a claimant is medically stable, he or she is no longer in the period of recovery, and total temporary disability benefits cease. *Jarvis v. Rexburg Nursing Center*, 136 Idaho 579, 586, 38 P.3d 617, 624 (2001) (citations omitted).

A claimant who has reduced wages attributable to an occupational disease may establish entitlement to partial disability benefits during periods of his or her period of recovery. TPD benefits are paid at an amount equal to sixty-seven per cent (67%) of the decrease in wage-earning capacity, but not to exceed the income benefits payable for total disability.

A claimant who refuses an offer of suitable work risks reduction or denial of temporary disability benefits pursuant to Idaho Code § 72-403, which states:

PENALTY FOR MALINGERING -- DENIAL OF COMPENSATION. If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure.

63. Defendants' records reflect that Claimant was paid TTD/TPD from February 1, 2005, through May 21, 2007, totaling \$40,150.15.

64. There is a factual dispute as to when Claimant became medically stable and was no longer in a period of recovery. Dr. Verst indicated that Claimant's condition was medically

fixed and stable in February 2006. Dr. Wiggins indicated that Claimant's condition was medically fixed and stable in February 2007. The IME panel agreed that Claimant had reached MMI by the time of their examination in April 2007, but did not provide a specific retroactive date. Dr. O'Brien determined that Claimant had been medically stable and without improvement for "many months or even years" by the time of his evaluation in September 2007.

65. TTD/TPD benefits were properly suspended in May 2007. There is no medical opinion that suggest that Claimant had not reached medical stability by May 2007.

66. It is undisputed that Employer made an offer of light-duty employment to Claimant and that Claimant discontinued light-duty work after two half-day shifts. However, there is an absence of evidence that specifies the terms of the light-duty work. It is impossible to determine the amount of wages offered to Claimant while working light duty, the physical requirements of the light-duty work, and/or the duration of time when the light-duty employment would be available. Further, it is unknown whether Employer would have been able to accommodate the fluctuating restrictions assigned by Dr. Wiggins.

67. While there may have been a basis upon which Defendants could have suspended TTD/TPD benefits prior to May 2007, Defendants chose not to do so. The Referee declines to allow Defendants to seek reimbursement from Claimant or assert a credit against future benefits for a claimed overpayment due to error. Defendants have not established a legal basis upon which recoupment of past payments would be appropriate and such a finding would result in an undue hardship and/or financial impossibility to Claimant.

**PPI**

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered

stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

68. Dr. Verst properly calculated Claimant’s PPI rating at 10%. Dr. Wiggins’ assignment of a 12% PPI rating was based on the same medical theory as Dr. Verst’s rating and the difference reflects only a slight discretionary increase that is permitted by *The Guides* which allow a range from 10% to 13% for a DRE category III lumbar injury. The IME panel agrees with the 10% PPI rating assigned by Dr. Verst.

69. The 20% PPI rating assigned by Dr. O’Brien is not supported by the other medical evidence and is disregarded. Dr. O’Brien felt that Claimant should be moved up to a DRE category IV based on Claimant’s subjective complains of pain and radicular symptoms. However, the 5<sup>th</sup> Edition of *The Guides* indicate on page 384 (the same page that Dr. O’Brien references in his opinion) that DRE category IV is appropriate when there is loss of motion segment integrity as verified by comparative radiographs or when there is a fracture with more than 50% of one vertebral body. Neither circumstance applies in this case.

70. Claimant has a 10% whole person PPI as a result of his occupational injury.



**PTD**

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939, P.2d 854, 857 (1997). An odd-lot worker is one “so injured the 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 of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable “in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

71. Claimant has failed to prove he is permanently and totally disabled by either of the above two methods. Claimant has gone through the motions of working with ICRD and attempted light-duty work for two half-day shifts. However, he has effectively sabotaged his return to work opportunities based on his disability presentation. He has not made a genuine effort to attempt work within his actual abilities.

72. There is an absence of credible medical evidence to establish that Claimant is unable to return to work. The IME panel determined that Claimant is able to perform light to

medium type work with permanent restrictions. Claimant is able to lift up to 50 pounds, lift up to 25 pounds on a regular basis, carry 50 pounds on an occasional basis, and limited stooping/bending. Although the IME panel evaluated Claimant on only one occasion, the IME panel's opinion is given significant weight since both Dr. Verst and Dr. Wiggins indicated they agree with the opinions of the IME panel.

73. Although Claimant perceives himself as extremely disabled, the majority of physicians who have evaluated Claimant identified symptom exaggeration and/or fictitious pain behaviors. These doctors include Dr. Verst, Dr. Dille, Dr. Wiggins and the IME panel.

74. Mr. Taylor testified that there are jobs available to Claimant based on the work restrictions imposed by the IME panel, in spite of Claimant's inability to speak English. Specifically, Claimant would qualify for driving jobs without loading/unloading requirements and for various types of restaurant work.

**PPD**

In the event that a claimant's disability is less than total, he or she may be entitled to permanent partial disability benefits. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring

or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

75. It is undisputed that Claimant’s time-of-injury job required him to lift more than 100 pounds. No doctor has released Claimant to lift more than 50 pounds since his injury and surgery. Although Mr. Taylor testified that most men in their 50s do not have jobs that require lifting more than 50 pounds, the limitation is significant to Claimant based on his line of past work and lack of education.

76. Certainly, Claimant has experienced permanent disability in excess of impairment as a result of his occupational injury. The calculation of Claimant’s disability rating is not an exact science in light of the fact that Claimant’s true abilities have been difficult to ascertain.

77. Claimant has established that he has PPD in the amount of 25%, inclusive of his 10% PPI.

**Apportionment**

Idaho Code § 76-406(1) provides:

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

78. The Referee declines to recommend apportioning Claimant's PPD in this case. The evidence fails to establish that either Claimant's mild degenerative disc disease or previous West Nile virus have significantly impacted Claimant's ability to engage in gainful activity.

**Attorney Fees**

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

79. Defendants' refusal to acknowledge Claimant's neck as part of the compensable injury is supported by the medical evidence and is not unreasonable. Defendants' refusal to initiate PPD benefits in excess of PPI was not unreasonable, based on the legitimate factual dispute as to Claimant's actual physical abilities.

80. Defendants' refusal to pay for medical treatment at the direction of Dr. Wiggins was unreasonable. Medical records from Dr. Wiggins and her itemization of unpaid services (Claimant's Exhibit 9) clearly reflect that the \$1,056 balance is for treatment rendered to Claimant from October 24, 2006, through February 27, 2007. Defendants' payment log reflects that payments were made to Dr. Wiggins/Neurology of Twin Falls through September 2006, but not thereafter.

81. Defendants maintain in their post-hearing brief that:

Those bills were all incurred after the IME Panel concluded that the Claimant had no further need for medical treatment and Dr. Verst concurred. Claimant has not shown that any qualified physician had recommended additional medical treatment after the Panel's report of April 12, 2007.

Such representation is incorrect and misleading. Dr. Wiggins did not treat Claimant after February 2007. All of her bills are for services rendered prior to the IME panel's evaluation. Defendants stopped paying Dr. Wiggins' bills in October 2006, approximately four months before obtaining an IME. No reasonable explanation for cutting off Dr. Wiggins' treatment prior to April 2007 has been given.

82. Defendants' refusal to pay for prescription medication (Lyrica) in June and July 2007 was not unreasonable, based on the IME panel opinion and Dr. Verst's May 2007 concurrence with the report. Although the Referee finds that Defendants are liable for the payment for the prescription drugs in question, the Defendants' refusal to pay was not unreasonable at the time denial was made.

83. Claimant has established that he is entitled to attorney fees pursuant to Idaho Code § 72-804 based on Defendants' unreasonable refusal to pay Dr. Wiggins' bills, but not for the other reasons asserted. The amount of attorney fees should be based on the actual amount of time it took Claimant's attorney to pursue payment of Dr. Wiggins' unpaid bills and not necessarily limited to a percentage of the unpaid balance of \$1,056.

#### **CONCLUSIONS OF LAW**

1. Claimant's occupational low back injury of January 29, 2005, does not extend to include his neck or right upper extremity.

2. Claimant is entitled to payment of unpaid medical bills in the amount of \$1,056.00 to Dr. Wiggins and unpaid pharmacy bills in the amount of \$480.22.

3. Claimant has failed to prove entitlement to additional temporary disability benefits.

4. Defendants' are not entitled to reimbursement or a credit pursuant to Idaho Code § 72-403 for temporary disability benefits already paid.

5. Claimant is entitled to whole person permanent partial impairment benefits of 10%.

6. Claimant is not permanently disabled either by the 100% method or as an odd-lot worker.

7. Claimant is entitled to whole person permanent partial disability of 25%, inclusive of his permanent impairment.

8. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

9. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for the unreasonable denial of payment of medical bills.

**RECOMMENDATION**


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

DATED this 15<sup>th</sup> day of August, 2008.

INDUSTRIAL COMMISSION

Michael E. Powers  
Michael E. Powers, Referee

ATTEST:

Carol J. Haggart  
Assistant Commission Secretary  


RECOMMENDATION 27

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILADELFO FUNES, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 AARDEMA DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 )

IC 2005-502836

ORDER

FILED

AUG 12 2008

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee’s proposed findings of fact and conclusions of law as its own.

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

1. Claimant’s occupational low back injury of January 29, 2005, does not extend to include his neck or right upper extremity.
2. Claimant is entitled to payment of unpaid medical bills in the amount of \$1,056.00 to Dr. Wiggins and unpaid pharmacy bills in the amount of \$480.22.
3. Claimant has failed to prove entitlement to additional temporary disability benefits.
4. Defendants are not entitled to reimbursement or a credit pursuant to Idaho Code § 72-403 for temporary disability benefits already paid.

5. Claimant is entitled to whole person permanent partial impairment benefits of 10%.

6. Claimant is not permanently disabled either by the 100% method or as an odd-lot worker.

7. Claimant is entitled to whole person permanent partial disability of 25%, inclusive of his permanent impairment.

8. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

9. Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for the unreasonable denial of payment of medical bills. Unless the parties can agree on an amount for reasonable attorney fees, Claimant's counsel shall, within twenty-one (21) days of the entry of the Commission's decision, file with the Commission a memorandum of attorney fees incurred in counsel's representation of Claimant in connection with these benefits, and an affidavit in support thereof. The memorandum shall be submitted for the purpose of assisting the Commission in discharging its responsibility to determine reasonable attorney fees in this matter. Within fourteen (14) days of the filing of the memorandum and affidavit thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed, or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within seven (7) days after Defendants' counsel filed the above-referenced memorandum, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining attorney fees.

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

DATED this 12<sup>th</sup> day of August, 2008.

INDUSTRIAL COMMISSION

  
James F. Kile, Chairman

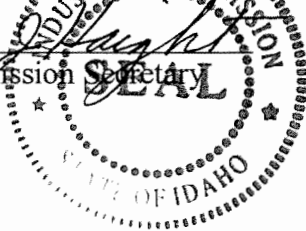


R.D. Maynard  
R.D. Maynard, Commissioner

Thomas E. Limbaugh  
Thomas E. Limbaugh, Commissioner

ATTEST:

Carol J. Haight  
Assistant Commission Secretary



The seal is circular with a dotted border. The text 'INDUSTRIAL COMMISSION' is written along the top inner edge, and 'STATE OF IDAHO' is written along the bottom inner edge. In the center, the word 'SEAL' is written in a bold, serif font, with a small star on either side.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of August, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

EMIL F PIKE JR  
PO BOX 302  
TWIN FALLS ID 83303-0302

NEIL D MCFEELEY  
PO BOX 1368  
BOISE ID 83701-1368

ge

Carol J Haight

**EMIL F. PIKE, JR.**  
 ATTORNEY AND COUNSELOR AT LAW  
 P.O. BOX 202  
 Twin Falls, ID 83703-0202  
 Telephone: 208/734-9960  
 Fax Number: 208/734-9960  
 Idaho State Bar No. 974

SEP 2 2008 1:31  
 RECEIVED  
 INDUSTRIAL COMMISSION

**BEFORE THE INDUSTRIAL COMMISSION**

**OF THE STATE OF IDAHO**

FILADELFO M. FUNES,	)	I.C. No. 05-502836
	)	
Claimant,	)	
	)	
v.	)	
	)	
AARDEMA DAIRY,	)	<b>MEMORANDUM OF</b>
	)	<b>ATTORNEY'S FEES</b>
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	

COMES NOW, Emil F. Pike, Jr., counsel for Claimant herein, pursuant to the Order of this Industrial Commission dated August 12, 2008, wherein it is stated, Claimant is entitled to attorney's fees pursuant to Idaho Code §72-804 for the unreasonable denial of payment of medical bills to wit payment for medical treatment at the direction of Dr. Wiggins from October 24, 2006 through February 27, 2007, in the amount of \$1,056.00. Emil F. Pike, Jr. represented the Claimant, Filadelfo Funes in this action and herein claims an award of attorney's fees in the amount of \$316.80. This Memorandum is supported by the Affidavit of Emil F. Pike, Jr., filed contemporaneously herewith.

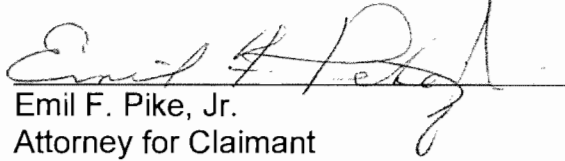
**EMIL F. PIKE, JR.**  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

BEFORE THE INDUSTRIAL COMMISSION  
OF THE STATE OF IDAHO

FILADELFO M. FUNES,	)	I.C. No. 05-502836
	)	
Claimant,	)	
	)	
v.	)	
	)	
AARDEMA DAIRY,	)	<b>MEMORANDUM OF</b>
	)	<b>ATTORNEY'S FEES</b>
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	
	)	

COMES NOW, Emil F. Pike, Jr., counsel for Claimant herein, pursuant to the Order of this Industrial Commission dated August 12, 2008, wherein it is stated, Claimant is entitled to attorney's fees pursuant to Idaho Code §72-804 for the unreasonable denial of payment of medical bills to wit payment for medical treatment at the direction of Dr. Wiggins from October 24, 2006 through February 27, 2007, in the amount of \$1,056.00. Emil F. Pike, Jr. represented the Claimant, Filadelfo Funes in this action and herein claims an award of attorney's fees in the amount of \$316.80. This Memorandum is supported by the Affidavit of Emil F. Pike, Jr., filed contemporaneously herewith.

RESPECTFULLY SUBMITTED this 2 day of September, 2008

  
Emil F. Pike, Jr.  
Attorney for Claimant

**CERTIFICATE OF SERVICE**

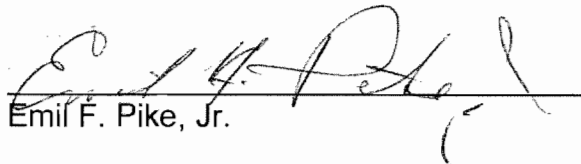
I, the undersigned, hereby certify that I am a resident attorney of the State of Idaho and that on the 2 day of September, 2008, I served a copy of the foregoing document, by depositing a true copy thereof in the United States mail, postage prepaid, upon the following:

By depositing a true copy thereof in the United States Mail, upon the following

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
P.O. BOX 1368  
Boise, ID 83701-1368

By facsimile upon the following:

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
(208) 344-8542

  
Emil F. Pike, Jr.

EMIL F. PIKE, JR.  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

**EMIL F. PIKE, JR.**  
 ATTORNEY AND COUNSELOR AT LAW  
 P.O. BOX 302  
 Twin Falls, ID 83803-0302  
 Telephone: 208/734-9960  
 Fax Number: 208/734-9960  
 Idaho State Bar No. 974

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

FILADELFO M. FUNES, )

Claimant, )

v. )

AARDEMA DAIRY, )

Employer, )

and )

STATE INSURANCE FUND, )

Surety, )

Defendants. )

I.C. No. 05-502836

**AFFIDAVIT OF EMIL F.  
 PIKE, JR. IN SUPPORT OF  
 MEMORANDUM OF  
 ATTORNEY'S FEES**

**FILED**  
**SEP - 2 2008**  
**INDUSTRIAL COMMISSION**

STATE OF IDAHO )

) ss.

County of Twin Falls. )

I, Emil F. Pike, Jr. being first duly sworn and upon oath deposes and states of his own personal knowledge that the matters set forth herein are true and correct as follows:

1. That your affiant herein is attorney of record for the Claimant, Filadelfo Funes, in the above-entitled action.
2. That your affiant did not log specific time for the work involved in presenting the medical billings for Dr. Wiggins, however, your

**Affidavit in Support of Memorandum Of Attorney's Fees - 1**

**EMIL F. PIKE, JR.**  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

FILADELFO M. FUNES, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 AARDEMA DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants. )

I.C. No. 05-502836

**AFFIDAVIT OF EMIL F.  
PIKE, JR. IN SUPPORT OF  
MEMORANDUM OF  
ATTORNEY'S FEES**

06/01/05 11:00 AM

STATE OF IDAHO )  
 ) ss.  
County of Twin Falls. )

I, Emil F. Pike, Jr. being first duly sworn and upon oath deposes and states of his own personal knowledge that the matters set forth herein are true and correct as follows:

1. That your affiant herein is attorney of record for the Claimant, Filadelfo Funes, in the above-entitled action.
2. That your affiant did not log specific time for the work involved in presenting the medical billings for Dr. Wiggins, however, your


affiant would estimate the time involved including preparation of this Memorandum of Attorney's Fees and Affidavit in Support of said Memorandum would not exceed two (2) hours of attorney's time at an hourly rate of One Hundred Thirty Dollars (\$130.00).

3. Your affiant does however have a Contingent Fee Agreement with the Claimant, a true copy of which is attached to this Affidavit as Exhibit A, that according to said Agreement your affiant, for benefits obtained by means of a hearing requests a fee in the amount of thirty (30%) percent. Your affiant herein asserts to this Industrial Commission that thirty (30%) percent is a reasonable fee and therefore requests attorney's fee award in the amount of Three Hundred Sixteen Dollars and Eight Cents (\$316.80).

  
Emil F. Pike, Jr.  
Attorney for Claimant

SUBSCRIBED AND SWORN to before me this 2 day of September, 2008.

MELODY E. KREFT  
Notary Public  
State of Idaho

  
NOTARY PUBLIC FOR IDAHO  
Residing at: Filex, Id  
My Commission Expires: 2/8/13

Affidavit in Support of Memorandum Of Attorney's Fees - 2

EMIL F. PIKE, JR.  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

**CERTIFICATE OF SERVICE**

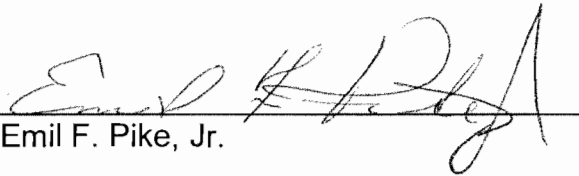
I, the undersigned, hereby certify that I am a resident attorney of the State of Idaho and that on the 5 day of September, 2008, I served a copy of the foregoing document, by depositing a true copy thereof in the United States mail, postage prepaid, upon the following:

By depositing a true copy thereof in the United States Mail, upon the following

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
P.O. BOX 1368  
Boise, ID 83701-1368

By facsimile upon the following:

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
(208) 344-8542

  
Emil F. Pike, Jr.

EMIL F. PIKE, JR.  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974



## **CONTINGENT FEE AGREEMENT FOR WORKERS' COMPENSATION CLAIMS**

IT IS AGREED by and between FILADELFO FERNES hereinafter referred to as Client, and EMIL F. PIKE, JR., engaged in the practice of law, as follows:

1. Emil F. Pike, Jr. agrees to undertake the representation of Client in connection with the following matter: Jan. 29, 2005 (accident). This representation shall continue until the specified work is completed, or until Emil F. Pike, Jr. shall be discharged therefrom or until Emil F. Pike, Jr. shall withdraw therefrom.

2. No settlement of the specified matter may be accepted without the express consent of Client.

3. The Client employs Emil F. Pike, Jr. as his/her attorney in connection with the specified matter, and grants unto him the authority to act in his/her behalf as attorney in connection therewith.

4. The Client agrees to compensate Emil F. Pike, Jr. for his services in said representation in the specified matter in a sum equal to 25% of the benefits obtained for Client by Emil F. Pike, Jr. if Client's claim does not require that a formal hearing on the merits be completed. If Client's claim requires that a formal hearing on the merits be completed, attorney's fees will then be equal to 30% of the benefits obtained for Client by Emil F. Pike, Jr. These attorney's fees are due and payable at the time that the benefits are obtain upon behalf of Client, whether by settlement, payment of judgment or award, or otherwise. Reimbursement of out-of-pocket costs, plus interest thereupon at the rate of ten percent (10%) per annum, shall be due and payable from the amount remaining of said settlement, payment of judgment or award, or otherwise, after the attorney's fees as above set forth and/or as awarded by the Idaho State Industrial Commission have been deducted and paid. Client grants Emil F. Pike, Jr. a lien against any such recovery equal to the amount specified as attorney's fees or as otherwise awarded by the Idaho State Industrial Commission, not to exceed said amount, and for the amount of out-of-pocket costs and interest thereupon as herein specified.

You are hereby advised that, in Idaho, attorney's fees in workers' compensation matters are regulated or governed by the Idaho State Industrial Commission and are subject to Commission approval. In workers' compensation matters, attorney's fees normally do not exceed twenty-five percent (25%) of the benefits obtained for the Claimant by his/her attorney in a case in which no hearing on the merits has been completed. In a case in which a hearing on the merits has been completed, attorney's fees then normally do not exceed thirty percent (30%) of the benefits obtained for a Claimant by his/her attorney.

Depending upon the circumstances of your particular case, you and an attorney may agree to a higher or lower percentage than above stated which would then

be subject to Commission approval. Further, if you and your attorney have a dispute regarding attorney's fees in a workers' compensation matter, either you or your attorney may then petition the Idaho State Industrial Commission to resolve that dispute.

5. Client agrees to discuss the facts of this matter only with Emil F. Pike, Jr. or his designated representative, and to give no statement, either written or oral, to persons other than those designated by Emil F. Pike, Jr.

6. In the event of discharge by the Client or upon the withdrawal of Emil F. Pike, Jr., Client agrees to pay to Emil F. Pike, Jr. attorney's fees equal to the percentage of the fee otherwise applicable to the recovery as above set forth multiplied by the percentage of time required and recorded in the achievement of said recovery, plus reimbursement of all out-of-pocket costs incurred by Emil F. Pike, Jr. plus interest thereupon. Recovery and/or benefit shall include medical benefits and/or the costs thereof which had been denied or disputed by the employer and/or its surety.

7. Emil F. Pike, Jr. retains the right to withdraw from the representation of Client to the extent as permitted by the applicable guidelines as set forth by and with reference to the *Idaho Rules of Professional Conduct* and/or by the Idaho State Industrial Commission.

**CLIENT HEREBY CERTIFIES THAT CLIENT HAS READ AND HAS UNDERSTOOD THIS FEE AGREEMENT AND ALL OF THE PROVISIONS THEREOF.**

DATED this 6 <sup>month</sup> day of 28 / June, 2005.

FitAdelFD Funes  
CLIENT

DATED this 6 <sup>month</sup> day of 28 / June, 2005.

Emil F. Pike, Jr.  
EMIL F. PIKE, JR.

**EMIL F. PIKE, JR.**  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

BEFORE THE INDUSTRIAL COMMISSION  
OF THE STATE OF IDAHO

FILADELFO M. FUNES,	)	I.C. No. 05-502836
	)	
Claimant,	)	
	)	
v.	)	
	)	
AARDEMA DAIRY,	)	<b>MOTION FOR</b>
	)	<b>RECONSIDERATION</b>
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	

COMES NOW the Claimant, Filadelfo M. Funes, by and through his attorney of record, Emil F. Pike, Jr., and herein moves this Industrial Commission to reconsider certain of its Findings of Fact and Conclusions of Law as entered in its Decision dated August 12, 2008.

On behalf of the Claimant, it is herein argued that the Claimant has sustained permanent partial disability in excess of this Commission's finding of 25 percent PPD, inclusive of his 10 percent PPI. The record in this case is very clear that Claimant, Filadelfo M. Funes, is a person of very limited education, to wit, 2 years of schooling in Honduras; that he is able only to speak Spanish; can neither read nor write in either Spanish or English; and, does not speak the

**EMIL F. PIKE, JR.**  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

BEFORE THE INDUSTRIAL COMMISSION  
OF THE STATE OF IDAHO

FILADELFO M. FUNES,	)	I.C. No. 05-502836
	)	
Claimant,	)	
	)	
v.	)	
	)	
AARDEMA DAIRY,	)	<b>MOTION FOR</b>
	)	<b>RECONSIDERATION</b>
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	

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On behalf of the Claimant, it is herein argued that the Claimant has sustained permanent partial disability in excess of this Commission's finding of 25 percent PPD, inclusive of his 10 percent PPI. The record in this case is very clear that Claimant, Filadelfo M. Funes, is a person of very limited education, to wit, 2 years of schooling in Honduras; that he is able only to speak Spanish; can neither read nor write in either Spanish or English; and, does not speak the

English language. Before coming to the United States, Mr. Funes made his living driving truck and working as a taxi driver. In the United States, he has made his living working in a potato processing plant and in dairies; all of which work involved heavy labor.

It is undisputed that Mr. Funes, on January 29, 2005, sustained an injury to his lower spine, which was operated upon by Dr. Verst, who found a profound far right lateral disc herniation clogging the neural foramen at the L5-S1 level impinging the L5 nerve root. The operative report dated May 2, 2005, showed that the "The patient presents with severe right leg pain. It has been ongoing now for the past few months." [Defendants' Rule 10, 3-13.] The report further shows, "Once the discectomy was undertaken, the L5 nerve root was freed. The foramen was fully free with no evidence of nerve root compression." [Defendants' Rule 10, 3-14.] Dr. Verst's medical notes for June 2, 2005, note as follows, "[p]ain has diminished. Pain is now to 3/10 with marked functional improvement . . . return to work after four weeks PT." Dr. Verst's notes of June 27, 2005, state, "[c]omplaining of mild back pain. . . return to work with restrictions." Dr. Verst's office notes of July 21, 2005, state, "[c]ontinues to struggle with back pain. Patient has been involved with physical therapy, time and modifications of life style . . . Remaining subjective complaints unchanged. . . . Continue working with restrictions four hours per day." Office notes of August 11, 2005, state, "[c]ontinues to struggle with back. Patient has been involved with physical therapy, time and modifications of life style. Remaining subjective complaints unchanged. Desires to be off work because of pain. Limited motion

E. WILL F. FINE, JR.  
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Fax Number: 208/734-9960  
Idaho State Bar No. 974

within spinal region. . . . Off work until review of MRI." [Defendant's Rule 10, 3-23.] The lumbar MRI exam on August 19, 2005, "[w]as reported to show post-operative changes at L5-S1 with enhancing scar tissue surrounding the right S1 nerve root and the right neural foramen." [Defendants' Rule 10, 6-3.]

In response to a letter from Kathy Proctor, State Insurance Fund, dated January 29, 2007, Dr. Verst, in his diagnosis, stated, "Mr. Funes suffers from chronic lumbar discogenic pain that associated with radiculitis secondary to scar tissue irritating the L5-S1 level." Dr. Verst further noted, "Objective findings correlating to his subjective complaints include radiculitis involving the right lower extremity that tends to travel in the L5 dermatome. He has pain in the lower back with an altered gait secondary to pain." [Defendants' Rule 10, 3-32.] Dr. Verst, in his deposition, responded as follows:

A. and, "he has pain in lower back with altered gait secondary to pain."

Q. Would you explain that sentence please.

A. In east [sic] visit with Mr. Funes he had a cane in his hand, and he walked with a limited stance on his right leg. So when he would walk, he would put as little pressure and move that leg as quickly as possible to avoid any pressure on that leg. That is an abnormal gait that is considered an antalgic gait. I felt that his gait was altered because of pain.

Q. And that would have been – that would relate to the

subject accident would it not doctor?

A. Yes.

Q. Based on medical probability?

A. Yes.

Q. Do you have or do you have an objection to Mr. Funes using a cane?

A. No.

Q. Do you fault, put it this way. Let me rephrase that question. Do you find fault with Mr. Funes using a cane to assist him in walking?

A. No.

**Verst Depo.** P. 32, L. 23 – 25; P. 33, LL. 1-21.

Mr. Funes, when asked to explain why he used a cane testified as follows, "Well, because of the same problems, the weakness in my back and in my leg and especially in my knee and I have had this problem – because of the weakness in my leg and my knee, even before the operation, they were giving me shots in my knee because of that weakness. I feel like it is just flimsy and that it locks up. It locks up and I have problems walking. I can't walk without a cane because if I try to take steps, I would fall." Tr. P.40, LL. 9-19. Dr. Eric Holt, in his report, makes a note that he and his secretary observed Mr. and Mrs. Funes coming and going from his offices, ". . . however, both myself and my secretary observed them coming and going from our offices. I left just after they did and observed Mr. Funes walking with his cane with an antalgic gait and his

wife was walking in a normal manner. He entered the car in a slow and careful manner. His wife entered it in a normal manner." [Defendants' Rule 10, 6-15.]

In paragraph 49 of this Commission's Findings of Fact and Conclusions of Law, it is suggested that the Claimant does not require a cane to walk because Dr. Verst indicated that Claimant could walk "frequently". It is believed that this Finding, is based upon the report of Dr. Verst, which appears in Defendants' Rule 10 disclosure "Functional Capacity Evaluations" dated June 27, 2005; July 21, 2005; December 8, 2005. In the evaluations of June 27, and July 21, Dr. Verst did note that Mr. Funes, with reference to the category "Walk" did check box which would represent "frequently". On this Functional Capacity Evaluation, Dr. Verst made no comment regarding the use by Mr. Funes of a cane. In his testimony as shown above, Dr. Verst did not state that Mr. Funes did not need the use of a cane to assist him in walking but rather, as above noted, and had no objection to the use of the same.

It is herein respectfully submitted that although doctors have stated Mr. Funes, in describing his symptoms, demonstrated symptom magnification; it is submitted that, Mr. Funes does indeed suffer from pain as a result of his industrial accident. This is demonstrated by objective medical evidence as stated above by Dr. Verst. Dr. Christensen, in his evaluation dated August 23, 2005, concluded, "I feel the patient's primary diagnosis resulting in his continued symptoms at this point is right sacroiliac joint dysfunction." [Defendants' Rule 10, 2-5.] Dr. Michael O'Brien, in page 1 of his report, noted, "The patient pointed specifically to certain areas that were in pain and he specifically pointed to the



right sacroiliac joint, the same area that Dr. Christensen commented on in his evaluation two years ago.”

I believe it is important for the Industrial Commission to consider the work history of Mr. Filadelfo Funes and his earnings prior to his industrial accident of January 29, 2005. Mr. Funes’ earnings for the year 2004 from Aardema Dairy were in the amount of \$24,174.85. In 2003, his earnings were \$21,939.33. [Claimant’s Rule 10, 8]. A fellow employee, Javier Ramirez, testified that Mr. Funes, as a worker, “[d]id a good job.” Tr. P. 142, L. 16. He also testified that Mr. Funes was physically strong.

Q. Did you notice that he was having an physical limitations in doing his work?

A. No, because he was strong.

Tr. P. 143, LL. 4-6.

In paragraph 75 of the Commission’s Findings of Fact and Conclusions of Law, it is stated, “It is undisputed that Claimant’s time of injury job required him to lift more than 100 pounds. No doctors release Claimant to lift more than 50 pounds since his injury and surgery. Although Mr. Taylor testified that most men in their 50s do not have jobs that require lifting more than 50 pounds, the limitation is significant to Claimant based on his line of past work and lack of education.” In paragraph 74 of the Commission’s Findings of Fact and Conclusions of Law, it was determined that there are jobs available to Claimant based on work restrictions and specifically Claimant would qualify for driving jobs without loading and unloading requirements and for various types of restaurant

work. Mr. Taylor did, however, state that a person suffering from chronic discogenic pain, vocationally, will suffer from an employment detriment. That is, make the person less employable. **Tr. P. 137, LL. 22-25; P. 138, LL. 7-18.**

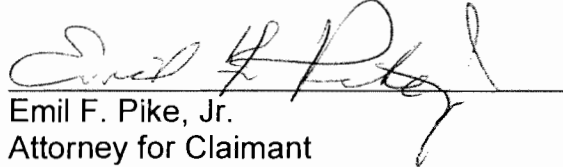
The bottom line for Mr. Funes is that prior to the subject accident, Mr. Funes, although virtually an uneducated person, was able with his body to make a good living. He was able to do all kinds of heavy physical labor without physical limitation and that he enjoyed regular and steady employment. Since the accident, he has not returned to regular employment. He may qualify for driving jobs without loading/unloading requirements and for various types of restaurant work, but, as a practical matter, with his remaining symptomatology of chronic lumbar pain, he will not find employment in these fields absent a business boom, the sympathy of a particular employer or friend, temporary good luck, or a superhuman effort. ***Arnold v. Splendid Bakery*** 88 Idaho 455, 463, 401 P.2d 271, 276 (1965).

It is well established by the Idaho Supreme Court that a worker should not be required to work in the face of significant and constant pain. ***Thompson v. Motel 6*** 135 Idaho 373, 17 P.3d 874 (2001).

It is herein submitted that his record is clear that taking into consideration Claimant's non-medical factors and a life history work record of heavier physical labor, Claimant has now sustained a very marked loss of ability to earn a living. Therefore, this Industrial Commission is respectfully requested to reconsider the issue as to whether or not Claimant, because of his injuries, has been reduced to an odd-lot status and, further, this Commission is requested

to reconsider the disability rating of 25 percent and accordingly increase the same to properly compensate Claimant for his greatly diminished ability to earn a living.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of September, 2008

  
Emil F. Pike, Jr.  
Attorney for Claimant

**CERTIFICATE OF SERVICE**

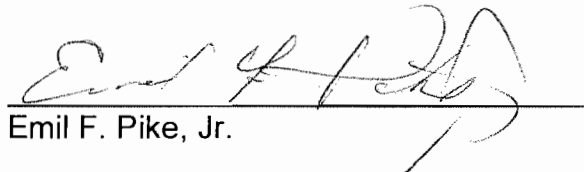
I, the undersigned, hereby certify that I am a resident attorney of the State of Idaho and that on the 2<sup>nd</sup> day of September, 2008, I served a copy of the foregoing document, by depositing a true copy thereof in the United States mail, postage prepaid, upon the following:

By depositing a true copy thereof in the United States Mail, upon the following

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
P.O. BOX 1368  
Boise, ID 83701-1368

By facsimile upon the following:

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
(208) 344-8542

  
Emil F. Pike, Jr.

EMIL F. PIKE, JR.  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
Fax Number: 208/734-9960  
Idaho State Bar No. 974

ORIGINAL

NEIL D. MCFEELEY  
EBERLE, BERLIN, KADING, TURNBOW &  
MCKLVEEN, CHARTERED  
BOISE PLAZA  
1111 W. Jefferson St., Suite 530  
Post Office Box 1368  
Boise, Idaho 83701-1368  
Telephone (208) 344-8535  
Facsimile (208) 344-8542  
Idaho State Bar No. 3564

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INDUSTRIAL COMMISSION

Attorneys for Defendants

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

**FILADELFO M. FUNES,**

Claimant,

v.

**AARDEMA DAIRY,**

Employer,

and

**STATE INSURANCE FUND,**

Surety,

Defendants.

I.C. No. 2006-518506

**DEFENDANTS' NOTICE OF  
NON-OPPOSITION TO  
CLAIMANT'S ATTORNEYS'  
REQUEST FOR ATTORNEY'S FEES**

**COME NOW** the Defendants, Aardema Dairy, Employer, and State Insurance Fund, Surety, by and through their attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and submit this Notice informing the Industrial Commission that they have paid the fees requested in Claimant's Attorneys' Memorandum of Attorney's Fees.

The Industrial Commission found that Claimant was entitled to attorney's fees pursuant to Idaho Code § 72-804. Claimant's attorneys submitted a request for fees in the amount of \$316.80. Defendants do not object to this request and have paid that amount to Claimant's attorneys.

DATED this 11 day of September, 2008.

EBERLE, BERLIN, KADING, TURNBOW  
& McKLVEEN, CHARTERED

By: Neil D. McFeeley  
Neil D. McFeeley, of the Firm  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 4 day of September, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Emil F. Pike, Jr.  
Attorney at Law  
P.O. Box 302  
Twin Falls, ID 83303-0302

- U.S. Mail
- Hand Delivery
- Overnight Mail
- Fax (208-734-9960)

Neil D. McFeeley  
Neil D. McFeeley

ORIGINAL

NEIL D. MCFEELEY, ISB No. 3564  
EBERLE, BERLIN, KADING, TURNBOW &  
MCKLVEEN, CHARTERED  
BOISE PLAZA  
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Post Office Box 1368  
Boise, Idaho 83701-1368  
Telephone: (208) 344-8535  
Facsimile: (208) 344-8542

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INDUSTRIAL COMMISSION

Attorneys for Defendants

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

**FILADELFO M. FUNES,**

Claimant,

v.

**AARDEMA DAIRY,**

Employer,

and

**STATE INSURANCE FUND,**

Surety,

Defendants.

I.C. No. 2006-518506

**DEFENDANTS' OBJECTION TO  
CLAIMANT'S MOTION FOR  
RECONSIDERATION**

**COME NOW** the Defendants, Aardema Dairy, Employer, and State Insurance Fund, Surety, by and through their attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd., and submit this Objection to Claimant's Motion for Reconsideration.

Defendants assert that Claimant has pointed to no reason why the Industrial Commission should change its Decision regarding disability.

The entire basis for the argument by Claimant is that he experiences pain in his low back despite a successful discectomy and despite the fact that the Claimant himself reported that his pain had diminished a month after the surgery. The Claimant quotes the operative report which notes that the "L5 nerve root was freed. The foramen was fully free with no evidence of nerve root compression." (Defendants' Exhibit 3-14.) He later reported that he had increasing pain and told his physician, Dr. Verst, that he wanted to be off work because of that alleged pain.

Neither Dr. Verst nor any other treating physician has found any objective basis for the Claimant's continued complaints of extreme pain. Claimant underwent a full gamut of diagnostic testing and medical evaluations, and yet no credible objective findings ever appeared. The post-operative MRI showed no evidence of recurrent disc herniation. The usually very claimant-sympathetic anesthesiologist, Dr. Clinton Dillé, also could not identify any definitive neurological deficits. He noted that the Claimant's pain symptoms appeared to be "greatly exaggerated." The Claimant was referred to Dr. Cheri Wiggins, a physical medicine and rehabilitation specialist, for additional evaluation and treatment in March 2006. Dr. Wiggins, who is extremely pro-claimant, began to have doubts about Claimant's credibility soon after beginning treatment. At her second evaluation on March 30, 2006, she noted "some symptom magnification." She also concluded that perhaps the West Nile Virus exposure was at least partially responsible for some of Claimant's symptoms, which she noted "continued to increase in number." (Claimant's Exhibit 6, pp. 1-2.)

As neither could identify any reason for Claimant's symptoms, both Dr. Wiggins and Dr. Verst recommended an independent medical examination of the Claimant. That examination was performed by psychiatrist Eric Holt, M.D. and neurologist Richard Wilson, M.D., in April of

2007. Dr. Holt's psychiatric report noted that the Claimant was exaggerating his pain symptoms "and is attempting to portray himself as an invalid so that he would have secondary gain." The IME Panel noted his "grossly over-determined pain behavior" and certain "bizarre" symptoms that defied medical explanation. (Defendants' Exhibit 6.) The Panel noted that Claimant could perform light to medium work activities with no lifting over 50 lbs.

Both Dr. Verst and Dr. Wiggins agreed with the findings of the IME Panel. While acknowledging that the Claimant might be continuing to suffer some pain, Dr. Verst agreed with the IME Panel that there was no reason the Claimant should not be able to return to work.

Pursuant to Dr. Verst's medical evaluation, the Employer had provided light duty work within the Claimant's restrictions in the summer of 2005. The Claimant attempted this extremely light duty work for less than two half days and since then has not worked or even made any attempts to find employment. Indeed, as the Industrial Commission noted, the Claimant has made almost no efforts to become employable since the day of his accident over three and a half years ago. The Claimant also informed Greg Taylor of the Industrial Commission Rehabilitation Division that he was unable to work and Mr. Taylor basically gave up on trying to find employment opportunities. Mr. Taylor, however, at the Hearing testified that in light of the report from the IME Panel and Dr. Verst's modest restrictions, Claimant would be able to find work within those restrictions.

The Claimant does not appear to be really claiming that he is totally and permanently disabled under the Odd Lot Doctrine. He cannot legitimately make such an argument as he has not presented any evidence to make a *prima facie* case of odd lot status. He has not shown any attempt to find other type of employment without success; he has not shown that he or vocational counselors on his behalf have searched for work and that work is not available; and he has not shown that any efforts to find suitable employment would be futile. *See Boley v. State Industrial Special Indemnity*



*Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Not only did he not attempt to work and not only did he not look for work without success, but he actually had employment offered to him within his restrictions that he declined to perform. All of the credible medical evidence shows that Claimant can work and actually should work. As in *Thompson v. Motel 6*, 135 Idaho 373, 17 P.3d 874 (2001), merely because the Claimant is or claims to be in pain does not prove odd lot status. There is no medical or vocational testimony or evidence to suggest that the Claimant cannot work.

Claimant instead appears to be arguing that he is entitled to a greater disability than that awarded by the Industrial Commission. Defendants submit that the Commission's award of disability was not just adequate but was generous in light of the lack of evidence supporting an award of disability in excess of impairment.

It is unfortunate that Mr. Funes suffered an industrial injury and that he apparently continues to have pain, even in light of the successful surgery performed by Dr. Verst and in light of all of the objective medical evidence. But Claimant's pain was taken into account in the impairment rating awarded by the Industrial Commission and there is no medical evidence that the pain complaints should preclude the Claimant from returning to any number of jobs. The Commission did recognize that the Claimant was restricted from lifting more than 50 lbs., either because of his industrial injury and subsequent surgery or because he was over 50 years of age, and took into account in its award that such a restriction was "significant to Claimant based on his line of past work and lack of education." The Commission also noted, however, that there are many jobs available that do not require lifting over 50 lbs. The only vocational expert who testified, Mr. Taylor of the Industrial Commission Rehabilitation Division, noted the multiple job opportunities within the Claimant's current physical limitations provided by the Independent Medical Examination and concurred in by Dr. Verst and Dr. Wiggins, the Claimant's treating physicians. Claimant presented no contrary vocational testimony. Even in his Motion for Reconsideration, he points to no evidence which the

Industrial Commission failed to recognize in its Decision. There is no evidence that the Claimant could not return to driving a truck. There is no evidence that the Claimant could not work in Mexican restaurants or fast food establishments or any number of other jobs.

What the Claimant's Motion for Reconsideration ignores is the medical evidence and testimony casting doubt upon the Claimant's credibility, at least as it relates to his alleged continuing physical problems and pain complaints. It is very seldom that Dr. Dillé or Dr. Wiggins, much less both of them, will even suggest that their patient might be magnifying symptoms for secondary gain. That is what occurred in the present case: both Dr. Dillé and Dr. Wiggins, in addition to Dr. Verst and the IME Panel, have expressed in writing their significant doubts that the Claimant is being forthright with them.

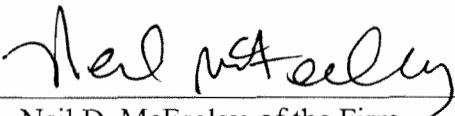
Moreover, Dr. Verst stated that Claimant's pre-existing degenerative disc disease, which was not caused by or aggravated by the accident, was responsible for at least some of Claimant's symptoms and for the physical restrictions he assigned. (Verst Depo at 8-9.) He stated there were no real lifting or activity restrictions based solely on the industrial accident and subsequent surgery. (*Id.* at 17-18.) Dr. Wiggins, too, stated that the West Nile Virus was at least partially responsible for some of Claimant's varying symptoms. (Claimant's Exhibit 6-2 – 7/07 report.)

As the Idaho Supreme Court has recently reiterated, it is the Claimant who must bear the burden of proof in establishing that he is disabled in excess of impairment. *McCabe v. JoAnn Stores, Inc.*, 145 Idaho 91, 96, 175 P.3d 780, 785 (2007); *see also Bennett v. Clark Hereford Ranch*, 16 Idaho 438, 440, 680 P.2d 539, 541 (1984). In the present case, as in *McCabe*, the Claimant failed to produce any substantial evidence bearing on his disability in excess of impairment. Accordingly, the Commission's award of 20% disability inclusive of impairment is appropriate if not overly generous.

Defendants respectfully request the Industrial Commission to deny Claimant's Motion for Reconsideration.

DATED this 12<sup>th</sup> day of September, 2008.

EBERLE, BERLIN, KADING, TURNBOW  
& McKLVEEN, CHARTERED

By:   
Neil D. McFeeley, of the Firm  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12<sup>th</sup> day of September, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Emil F. Pike, Jr.  
Attorney at Law  
P.O. Box 302  
Twin Falls, ID 83303-0302

- U.S. Mail
- Hand Delivery
- Overnight Mail
- Fax (208-734-9960)

  
Neil D. McFeeley

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILADELFO FUNES, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 AARDEMA DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

IC 2005-502836

ORDER DENYING  
RECONSIDERATION

FILED

OCT 21 2008

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-718, Claimant Filadelfo Funes moves for reconsideration of the Commission’s August 12, 2008 decision in the above-referenced case. Claimant contends that he is entitled to a permanent partial disability rating higher than the 25% assigned by the Commission. Claimant further contends that, because of his extraordinary chronic pain, he is totally and permanently disabled under the odd-lot doctrine. Claimant requests that the Commission modify its findings to reflect that Claimant is totally and permanently disabled under the odd-lot doctrine or that Claimant has a higher permanent partial disability rating than 25%. Defendants reply that Claimant has not met his burden of proof to show that he is an odd-lot worker and that the evidence on record supports the Commission’s decision.

Claimant’s motion amounts to a request to reweigh evidence and arguments already considered. The Commission carefully examined Claimant’s evidence and arguments on the issues of permanent partial disability and permanent total disability and remains unpersuaded by

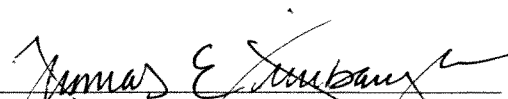
them. The Commission's decision is fully supported by the evidence in the record; consequently, Claimant's motion for reconsideration should be, and is hereby, DENIED.

DATED this 21<sup>st</sup> day of October, 2008.

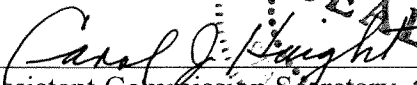
INDUSTRIAL COMMISSION

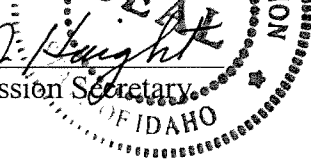
  
James F. Kile, Chairman

\_\_\_\_\_  
R.D. Maynard, Commissioner

  
Thomas E. Limbaugh, Commissioner

ATTEST:

  
Assistant Commission Secretary



The seal is circular with a dotted border. Inside the border, the words "INDUSTRIAL COMMISSION" are written in a circle at the top, and "OF IDAHO" is at the bottom. In the center, the word "SEAL" is written in a stylized font.

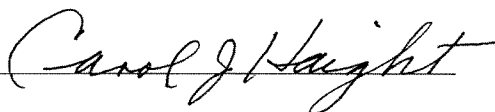
**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of October, 2008, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States mail upon each of the following persons:

EMIL F PIKE JR  
PO BOX 302  
TWIN FALLS ID 83303-0302

NEIL D MCFEELEY  
PO BOX 1368  
BOISE ID 83701-1368

eb



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

FILADELFO FUNES, )  
 )  
 Claimant, )  
 )  
 v. )  
 )  
 AARDEMA DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
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 Defendants. )  
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FILED  
OCT 21 2008  
INDUSTRIAL COMMISSION

IC 2005-502836

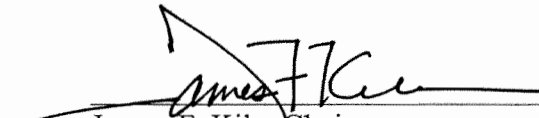
ORDER REGARDING  
ATTORNEY FEES

On August 12, 2008, the Commission issued a decision finding that Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804 for Defendants' unreasonable denial of payment of medical bills. On September 2, 2008, Claimant filed a memorandum and an affidavit of Emil Pike, Claimant's counsel, claiming attorney fees in the amount of \$316.80. On September 11, 2008, Defendants filed a notice of non-opposition to Claimant's memorandum. Defendants represented that they had already paid the amount of \$316.80 to Claimant's attorney.

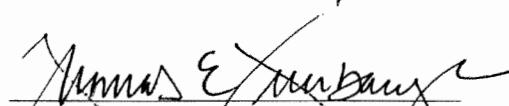
The Commission finds that Claimant's attorney is entitled to a fee of \$316.80. It appears that Defendants have already paid the fee; if, however, the Defendants have not yet paid the fee, IT IS HEREBY ORDERED that Defendants pay to Claimant's attorney the amount of \$316.80 within fourteen (14) days of this order.

DATED this 21<sup>st</sup> day of October, 2008.

INDUSTRIAL COMMISSION

  
James F. Kile, Chairman

\_\_\_\_\_  
R.D. Maynard, Commissioner

  
Thomas E. Limbaugh, Commissioner

ATTEST:

  
Assistant Commission Secretary



INDUSTRIAL COMMISSION  
STATE OF IDAHO

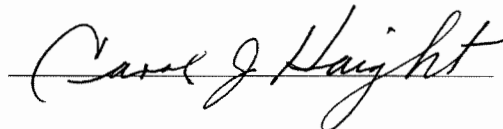
**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of October, 2008 a true and correct copy of **Order Regarding Attorney Fees** was served by regular United States Mail upon each of the following:

EMIL F PIKE JR  
PO BOX 302  
TWIN FALLS ID 83303-0302

NEIL D MCFEELEY  
PO BOX 1368  
BOISE ID 83701-1368

eb/cjh



**ORDER REGARDING ATTORNEY FEES - 2**

EMIL F. PIKE, JR.  
 ATTORNEY AND COUNSELOR AT LAW  
 P.O. BOX 302  
 Twin Falls, ID 83303-0302  
 Telephone: 208/734-9960  
 Fax Number: 208/734-9960  
 Idaho State Bar No. 974

BEFORE THE INDUSTRIAL COMMISSION  
 OF THE STATE OF IDAHO

FILADELFO M. FUNES,	)	I.C. No. 05-502836
	)	
Claimant,	)	
	)	
v.	)	
	)	
AARDEMA DAIRY,	)	<b>NOTICE OF APPEAL</b>
	)	
Employer,	)	
	)	
and	)	
	)	
STATE INSURANCE FUND,	)	
	)	
Surety,	)	
	)	
Defendants.	)	

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 INDUSTRIAL COMMISSION  
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**TO: THE ABOVE-NAMED RESPONDENTS,** Aardema Dairy and State Insurance Fund, and their counsel, Neil McFeeley of the firm, Eberle, Berlin, Kading, Turnbow, McKlveen & Jones, Chartered, P.O. Box 1368 Boise, ID 83701-1368 and the **CLERK OF THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO.**

**NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Appellant, Filadelfo M. Funes, appeals against the above-named Respondents to the Supreme Court of the State of Idaho from the Findings of Fact, Conclusions of Law, and Order entered on August 12, 2008; and, from the Order Denying Claimant's Motion for



Reconsideration entered on October 21, 2008; Chairman James F. Kile, presiding.

2. That Claimant has a right to appeal to the Idaho Supreme Court and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(d), Idaho Appellate Rules.
3. A preliminary statement of the issues on appeal which the Appellant intends to assert in the appeal, but which shall not prevent the Appellant from asserting other issues on appeal, are as follows:

That the Industrial Commission erred in its failure to find that Claimant, Filadelfo M. Funes, has sustained an industrial accident which has rendered him totally and permanently disabled.

4. There has been no order entered sealing all or any portion of the record.
5. Appellant requests the preparation of the following portions of the reporter's transcript, inclusive of:

(a) The evidence presented at the time of hearing, including the testimony of all witnesses;

(b) Documentary evidence presented, inclusive of Rule 10 documents that were admitted into evidence;

(c) Copies of all deposition transcripts, inclusive of the deposition of Dr. Verst.

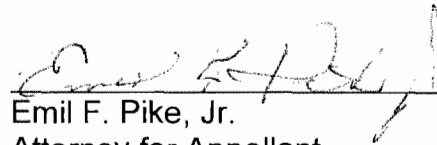
6. I certify:

(a) That the estimated fee for preparation of the Clerk's Record/Reporter's Transcript has been paid in the requested amount of \$100.00;

(b) That the Appellant's filing fee has been paid in the amount of \$86.00;

(c) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 20 day of November, 2008

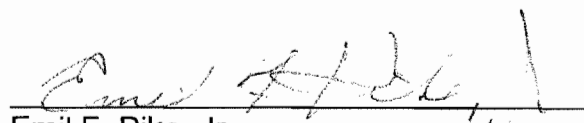
  
\_\_\_\_\_  
Emil F. Pike, Jr.  
Attorney for Appellant

### CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am a resident attorney of the State of Idaho and that on the 20 day of November, 2008, I served a copy of the foregoing document, by depositing a true copy thereof in the United States mail, postage prepaid, upon the following:

By depositing a true copy thereof in the United States Mail, upon the following

Neil D. McFeeley  
EBERLE, BERLIN, KADING, TURNBOW,  
MCKLVEEN & JONES, CHARTERED  
P.O. BOX 1368  
Boise, ID 83701-1368

  
\_\_\_\_\_  
Emil F. Pike, Jr.

EMIL F. PIKE, JR.  
ATTORNEY AND COUNSELOR AT LAW  
P.O. BOX 302  
Twin Falls, ID 83303-0302  
Telephone: 208/734-9960  
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Idaho State Bar No. 974

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IDAHO SUPREME COURT  
COURT OF APPEALS

2008 DEC -4 AM 9:14

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

FILADELFO FUNES, )  
)  
Claimant/Appellant, )  
)  
v. )  
)  
AARDEMA DAIRY, )  
)  
Employer, )  
)  
and )  
)  
STATE INSURANCE FUND, )  
)  
Surety, )  
)  
Defendants/Respondents. )  
\_\_\_\_\_ )

SUPREME COURT NO. 35923

CERTIFICATE OF APPEAL

FILED - ORIGINAL  
DEC - 4 2008  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by *[Signature]*

Appeal From: Industrial Commission, Chairman, James F. Kile, .  
presiding.  
Case Number: IC 2005-502836  
Order Appealed from: Findings of Fact, Conclusions of Law, and  
Recommendation, filed August 12, 2008; Order,  
filed August 12, 2008, and Order Denying  
Reconsideration, filed October 21, 2008.  
Attorney for Appellant: Emil F. Pike, Jr.  
PO Box 302  
Twin Falls, ID 83303-0302

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COMMISSION  
DEC 16 AM 10:39

Attorney for Respondents: Neil D. McFeeley  
PO Box 1368  
Boise, ID 83701-1368

Appealed By: Claimant/Appellant

Appealed Against: Defendants/Respondents

Notice of Appeal Filed: 11/28/08

Appellate Fee Paid: \$86.00

Name of Reporter: M & M Court Reporting

Transcript Requested: Standard transcript has been requested. Transcript has been prepared and filed with the Commission.

Dated: December 3, 2008

*Dina Espinoza*  
Assistant Commission Secretary



**CERTIFICATION**

I, Gina Espinosa, the undersigned Legal Associate of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal, Findings of Fact, Conclusions of Law, and Recommendation, and Order, and Order Denying Reconsideration, and the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 3<sup>rd</sup> day of December, 2008.

*Gina Espinosa*  
Assistant Commission Secretary



**CERTIFICATION OF RECORD**

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 35923 on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the Certificate of Exhibits (i). Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Record herein.

DATED this 12<sup>th</sup> day of January, 2009.

*Gina Espinosa*  
Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

FILADELFO FUNES, )  
 )  
 Claimant/Appellant, )  
 )  
 v. )  
 )  
 AARDEMA DAIRY, )  
 )  
 Employer, )  
 )  
 and )  
 )  
 STATE INSURANCE FUND, )  
 )  
 Surety, )  
 )  
 Defendants/Respondents. )  
 \_\_\_\_\_ )

**SUPREME COURT NO. 35923**

**NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, Clerk of the Courts; and  
 Emil F. Pike, Jr., for the Claimant/Appellant; and  
 Neil D. McFeeley , for the Defendants/Respondents.

YOU ARE HEREBY NOTIFIED that the Agency’s Record was completed on this date and,  
 pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served  
 by regular U.S. mail upon each of the following:

EMIL F. PIKE JR  
 PO BOX 302  
 TWIN FALLS ID 83303-0302

NEIL D MCFEELEY  
 PO BOX 1368  
 BOISE ID 83701-1368

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed within the twenty-eight day period, the Transcript and Record shall be deemed settled.

DATED this 12<sup>th</sup> day of January, 2009.

*Dina Espinoza*  
Assistant Commission Secretary

