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Oliveros v. Rule Steel Tanks, Inc. Clerk's Record v. 1 Dckt. 45782

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Vol. 1 of 3

LAW CLERK

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN OLIVEROS,

Claimant/Appellant,

v.

RULE STEEL TANKS, INC., employer, and,
ADVANTAGE WORKERS
COMPENSTATION INSURANCE CO.,

Defendants/Respondents

SUPREME COURT NO. 45782

AGENCY'S RECORD
VOLUME 1

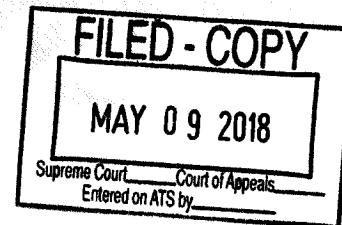
BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

Wm. Breck Seiniger, Jr.
947 W. Myrtle St.
Boise, ID 83702

Attorney for Respondents

R. Daniel Bowen
PO Box 1007
Boise, ID 83701-1007



45782

COPY

TABLE OF CONTENTS

EXHIBITS LIST i

WORKERS' COMPENSATION COMPLAINT, filed February 16, 2010 1, VOL 1

ANSWER TO COMPLAINT, filed March 1, 2010 4, VOL 1

STIPULATION ON ISSUES FOR HEARING, filed November 23, 2011 6, VOL 1

NOTICE OF FILING, filed January 30, 2012..... 8, VOL 1

MOTION TO TAKE TELEPHONIC REBUTTAL DEPOSITION OF MACJULIAN LANG
CPO AND MEMORANDUM, filed March 20, 2012 18, VOL 1

ATTORNEY CERTIFICATE IN SUPPORT OF MOTION TO TAKE TELEPHONIC
REBUTTAL DEPOSITON OF MACJULIAN LANG, CPO, filed March 20, 2012.....
..... 29, VOL 1

OBJECTION TO MOTION TO TAKE TELEPHONIC REBUTTAL DEPOSITION OF
MACJULIAN LANG, filed March 22, 2012..... 32, VOL 1

MEMORANDUM IN SUPPORT OF OBJECTION TO MOTION TO TAKE TELEPHONIC
RBUTTAL DEPOSITON OF MACJULIAN LANG, filed March 22, 2012 .. 34, VOL 1

ORDER DENYING MOTION TO TAKE POST-HEARING REBUTTAL DEPOSITION, filed
April 9, 2012 40, VOL 1

MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST
FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE
PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE
ALTERNATIVE TO RECONSIDER, filed April 30, 2012..... 44, VOL 1

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND
MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL
FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT
PREDJUDICE OR IN THE ALTERNATIVE TO RECONSIDER,
filed April 30, 2012 46, VOL 1

AFFIDAVIT OF WM BRECK SEINIGER, JR. IN SUPPORT OF MOTION TO DISMISS
WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL
OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO
IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE ALTERNATIVE TO
RECONSIDER, filed April 30, 2012..... 58, VOL 1

SECOND AFFIDAVIT OF WM BRECK SEINIGER, JR. IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE ALTERNATIVE TO RECONSIDER, filed April 30, 2012.....	58, VOL 1
DEFENDANTS' OBJECTION TO CLAIMANT'S MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION TO WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES WITHOUT PREDJUDICE, filed May 1, 2012.....	82, VOL 1
MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION TO CLAIMANT'S MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION TO WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES WITHOUT PREDJUDICE, filed May 1, 2012.....	85, VOL 1
AFFIDAVIT OF BRYAN OLIVEROS IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE, filed April 30, 2012.....	90, VOL 1
ORDER DENYING MOTION TO DISMISS AND MOTION FOR RECONSIDERATION, filed July 11, 2012.....	125, VOL 1
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER, filed November 2, 2012.....	129, VOL 1
CLAIMANT'S MOTION FOR RECONSIDERATION AND MEMORANDUM, filed November 21, 2012.....	143, VOL 1
MOTION FOR COMMISSION TO REHEAR CASE EN BANC OR IN THE ALTERNATIVE TO CONSIDER MOTION TO RECONSIDER EN BANC AND MEMORANDUM, filed November 21, 2012	152, VOL 1
DEFENDANT'S RESPONSE TO CLAIMANT'S MOTION FOR RECONSIDERATION AND MOTION TO REHEAR CASE EN BANC, filed November 27, 2012	156, VOL 1
ORDER ON ALTERNATICE MOTIONS TO RECONSIDER OR TO REHEAR CASE EN BANC, filed December 14, 2012.....	160, VOL 1
CLAIMANT'S PREHEARING STATEMENT, filed February 21, 2017	169, VOL 1
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION, filed August 25, 2017.....	195, VOL 2
ORDER, filed August 25, 2017	216, VOL 2

CLAIMANT’S MOTION FOR RECONSIDERATION, filed September 14, 2017 218, VOL 2

RESPONSE TO CLAIMANT’S MOTION FOR RECONSIDERATION AND OBJECTION TO CLAIMANT’S MOTION FOR EXTENTION OF TIME TO FILE A SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION, filed September 21, 2017 220, VOL 2

ORDER ON CLAIMANT’S MOTION FOR RECONSIDERATION, filed January 5, 2018 222, VOL 2

NOTICE OF APPEAL, filed February 15, 2018..... 231, VOL 2

CERTIFICATE OF APPEAL, dated February 16, 2018..... 248, VOL 2

CERTIFICATION OF APPEAL, dated February 16, 2018 250, VOL 2

DEFENDANTS/RESPONDANTS REQUEST FOR ADDITIONAL AGENCY RECORD, filed February 22, 2018 251, VOL 2

CERTIFICATION OF RECORD, dated March 27, 2018..... 254, VOL 2

NOTICE OF COMPLETION, dated March 27, 2018..... 255, VOL 2

INDEX

AFFIDAVIT OF BRYAN OLIVEROS IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE, filed April 30, 2012..... 90, VOL 1

AFFIDAVIT OF WM BRECK SEINIGER, JR. IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE ALTERNATIVE TO RECONSIDER, filed April 30, 2012..... 58, VOL 1

ANSWER TO COMPLAINT, filed March 1, 2010 4, VOL 1

ATTORNEY CERTIFICATE IN SUPPORT OF MOTION TO TAKE TELEPHONIC REBUTTAL DEPOSITION OF MACJULIAN LANG, CPO, filed March 20, 2012 29, VOL 1

CERTIFICATE OF APPEAL, dated February 16, 2018..... 248, VOL 2

CERTIFICATION OF APPEAL, dated February 16, 2018 250, VOL 2

CERTIFICATION OF RECORD, dated March 27, 2018..... 254, VOL 2

CLAIMANT’S MOTION FOR RECONSIDERATION AND MEMORANDUM, filed November 21, 2012..... 143, VOL 1

CLAIMANT’S MOTION FOR RECONSIDERATION, filed September 14, 2017 218, VOL 2

CLAIMANT’S PREHEARING STATEMENT, filed February 21, 2017 169, VOL 1

DEFENDANTS/RESPONDANTS REQUEST FOR ADDITIONAL AGENCY RECORD, filed February 22, 2018 251, VOL 2

DEFENDANT’S RESPONSE TO CLAIMANT’S MOTION FOR RECONSIDERATION AND MOTION TO REHEAR CASE EN BANC, filed November 27, 2012 156, VOL 1

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MEMORANDUM IN SUPPORT OF DEFENDANTS’ OBJECTION TO CLAIMANT’S MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION TO WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES WITHOUT PREDJUDUCE, filed May 1, 2012.....	85, VOL 1
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE ALTERNATIVE TO RECONSIDER, filed April 30, 2012.....	46, VOL 1
MEMORANDUM IN SUPPORT OF OBJECTION TO MOTION TO TAKE TELEPHONIC REBUTTAL DEPOSITION OF MACJULIAN LANG, filed March 22, 2012	34, VOL 1
MOTION FOR COMMISSION TO REHEAR CASE EN BANC OR IN THE ALTERNATIVE TO CONSIDER MOTION TO RECONSIDER EN BANC AND MEMORANDUM, filed November 21, 2012	152, VOL 1
MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE ALTERNATIVE TO RECONSIDER, filed April 30, 2012.....	44, VOL 1
MOTION TO TAKE TELEPHONIC REBUTTAL DEPOSITION OF MACJULIAN LANG CPO AND MEMORANDUM, filed March 20, 2012	18, VOL 1
NOTICE OF APPEAL, filed February 15, 2018.....	231, VOL 2
NOTICE OF COMPLETION, dated March 27, 2018.....	255, VOL 2
NOTICE OF FILING, filed January 30, 2012.....	8, VOL 1
OBJECTION TO MOTION TO TAKE TELEPHONIC REBUTTAL DEPOSITION OF MACJULIAN LANG, filed March 22, 2012.....	32, VOL 1
ORDER DENYING MOTION TO DISMISS AND MOTION FOR RECONSIDERATION, filed July 11, 2012.....	125, VOL 1
ORDER DENYING MOTION TO TAKE POST-HEARING REBUTTAL DEPOSITION, filed April 9, 2012	40, VOL 1

ORDER ON ALTERNATICE MOTIONS TO RECONSIDER OR TO REHEAR CASE EN BANC, filed December 14, 2012.....	160, VOL 1
ORDER ON CLAIMANT’S MOTION FOR RECONSIDERATION, filed January 5, 2018	222, VOL 2
ORDER, filed August 25, 2017	216, VOL 2
RESPONSE TO CLAIMANT’S MOTION FOR RECONSIDERATION AND OBJECTION TO CLAIMANT’S MOTION FOR EXTENTION OF TIME TO FILE A SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION, filed September 21, 2017	220, VOL 2
SECOND AFFIDAVIT OF WM BRECK SEINIGER, JR. IN SUPPORT OF MOTION TO DISMISS WITHOUT PREDJUDICE AND MOTION WITHDRAW REQUEST FOR A TRIAL OF THE SILICON PARTIAL FINGER PROSTHESES MADE PURSUANT TO IDAHO CODE § 72-432 WITHOUT PREDJUDICE OR IN THE ALTERNATIVE TO RECONSIDER, filed April 30, 2012.....	58, VOL 1
STIPULATION ON ISSUES FOR HEARING, filed November 23, 2011	6, VOL 1
WORKERS’ COMPENSATION COMPLAINT, filed February 16, 2010	1, VOL 1

EXHIBITS LIST

REPORTER'S TRANSCRIPT:

The Appellant did not request the Reporter's transcript from December 7, 2011. This transcript will not be filed with the Supreme Court.

Reporter's Transcript taken February 27, 2017, will be lodged with the Supreme Court.

Claimant's Exhibits:

1. Vocational evaluation records from Doug Crum, CDMS, dated November 18, 2009
2. Vocational evaluation records from Doug Crum, CDMS, dated April 7, 2016
3. Pictures of Bryan Oliveros' right extremity and hand
4. Milan Institute Enrollment Agreement, Page 1
5. Milan Institute Financial Aid Information Estimate
6. Milan Institute AR Student Ledger
7. Milan Institute Student Transcript
8. Milan Institute Certificate of Completion
9. Screen Shot of Bryan Oliveros' Idaho State Board of Pharmacy Active License
10. Deposition of Bryan Oliveros, dated January 24, 2017
11. Calculation of Total Temporary Benefits during retraining
12. Summary of Requests for authorization and Reimbursement for Retraining
13. Pinnacle Risk Management claims file (to be supplied by Defendant)
14. Douglas N. Crum, CDMS, CV
15. Notice of service (Labeled Exhibit 15)

16. Interrogatories and Requests for Production to Defendants
- 1a. Vocational evaluation records from Doug Crum, CDMS, dated November 18, 2009
- 2a. Pertinent correspondence from May 2009- November 2011

Defendants' Exhibits:

1. Form 1
2. Medical records from Canyon County Paramedics
3. Medical records from St. Alphonsus Regional Medical Center
4. Medical records of Dominic Gross, M.D. / Katherine Laible, PA-C
5. Medical records from St. Luke's Idaho Elks Rehab
6. Medical records of Beth Rogers, M.D.
7. Medical records of Michael McClay, PH.D.
8. Advanced Arm Dynamics report of April 1, 2011
9. Industrial Commission Rehabilitation Division Records
10. Transcript of Claimant's deposition taken September 1, 2011
- 1a. Transcript of Claimant's deposition taken July 5, 2013
- 2a. Transcript of Claimant's deposition taken January 24, 2017

Depositions:

1. Deposition of MacJulian Lang, taken December 15, 2011
2. Deposition of Dominic Gross, M.D., taken February 22, 2012
3. Deposition of Bryan Oliveros, taken September 1, 2011
See Defendant's Exhibit 10

11. Transcript of Claimant's deposition taken July 5, 2013
See Defendants' Exhibit 1a
12. Deposition of Bryan Oliveros, dated January 24, 2017
See Claimant's Exhibit 10 and Defendants' Exhibit 2a

Additional Documents:

1. Claimant's Opening Brief, filed August 7, 2012
2. Defendant's Post-Hearing Brief, filed August 29, 2012
3. Claimant's Reply Brief, filed September 12, 2012
4. Claimant's Opening Post-Hearing Memorandum, filed April 24, 2017
5. Defendants' Post-Hearing Brief, filed May 17, 2017
5. Claimant's Post-Hearing Reply Memorandum, filed June 5, 2017
6. Memorandum in Support of Claimant's Motion for Reconsideration, filed September 14, 2017
7. Memorandum in Support of Defendants' Response to Claimant's Motion for Reconsideration and in Support of Defendants' Objection to Claimant's Motion for Extension of Time to file a Supplemental Memorandum in Support of Motion for Reconsideration, filed September 21, 2017
8. Reply Memorandum in Support of Claimant's Motion for reconsideration, filed October 18, 2017

ORIGINAL

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

WORKER'S COMPENSATION COMPLAINT

CLAIMANT Bryan Oliveros 349 Copper Tree Nampa, ID 83651		CLAIMANT'S ATTORNEY Andrew Marsh SEINIGER LAW OFFICES, P.A. 942 W. Myrtle St. Boise, ID 83702	
EMPLOYER RULE STEEL TANKS, INC. 11299 BASS LN. Caldwell, ID 83605		WORK COMP INSURANCE CARRIER Pinnacle Risk Management 960 Broadway, Ste. 160 P. O. Box 6768 Boise, ID 83704	
		DATE OF INJURY OR OCC. DISEASE 7/30/2008	
COUNTY & STATE WHERE OCCURRED Canyon County, Idaho		AVG. WEEKLY WAGE AT DOI \$300.00 (approx.)	
HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Heavy machinery to stamp logo on metal crushed right hand			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR DISEASE Amputation of right hand fingers (index, long, ring, small).			
WHAT WORK COMP BENEFITS ARE BEING CLAIMED Medical benefits, TTD/TPD, PPI, PPD, retraining, attorney fees			
DATE OF INJURY NOTICE TO EMPLOYER 7/30/2008		TO WHOM NOTICE WAS GIVEN Supervisor	
HOW NOTICE WAS GIVEN		Oral and Written	
ISSUES INVOLVED Right to medical benefits, TTD/TPD, PPI, PPD, retraining, attorney fees			
DOES CLAIM PRESENT A NEW QUESTION OF LAW OR COMPLICATED SET OF FACTS? No			

RECEIVED
INDUSTRIAL COMMISSION
2008 FEB 16 1 P 3:53

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

1

PHYSICIANS WHO TREATED CLAIMANT Michael McClay, Boise, ID; Dominic L. Gross, Meridian, ID; Saint Alphonsus Regional Medical Center, Boise, ID; Beth Rogers, Boise, ID; Idaho Elks Rehabilitation.	
MEDICAL COSTS INCURRED TO DATE	unknown
MEDICAL COSTS PAID BY EMPLOYER	unknown
MEDICAL COSTS PAID BY CLAIMANT	unknown
I AM INTERESTED IN MEDIATING, IF THE OTHER PARTIES AGREE. Yes	

SIGNATURE OF CLAIMANT OR ATTORNEY

DATE 2/16/2010

Andrew Marsh

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

NAME OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION TO DECEDENT
WAS FILING PARTY DEPENDENT ON DECEDENT?	DID FILING PARTY LIVE WITH DECEDENT AT DOI?	

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

CERTIFICATE OF SERVICE

I CERTIFY that on February 16, 2010, I caused a true and correct copy of the foregoing Complaint to be served as follows:

EMPLOYER

RULE STEEL TANKS, INC.
11299 BASS LN.
Caldwell, ID 83605

SURETY

Pinnacle Risk Management
960 Broadway, Ste. 160
P. O. Box 6768
Boise ID 83704
Fax: (208) 336-5958

U.S. Mail

Fax

Andrew Marsh

Andrew Marsh, Attorney for Claimant

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, P.O. Box 83720, Boise, ID 83720-0041, (208) 334-6000.

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

Patient Name: Bryan Oliveros

Address: 349 Copper Tree, Nampa, ID 83651

Phone: 461-9464

(Provider Use Only)

Medical Record Number _____

Pick up copies Fax No. _____ Mail

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 Co./Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City State Zip Code

Purpose or need for data: _____
(e.g. Worker's 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 related 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 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..

Signature of Patient (or his legal representative & authority) Bryan Oliveros Date Mar 2/16/00

Signature of Witness (including Title) _____ Date _____

ORIGINAL

ANSWER TO COMPLAINT

I.C. NO. 2008-024772

INJURY DATE 07/30/2008

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

CLAIMANT'S NAME AND ADDRESS BRYAN OLIVEROS 349 COPPER TREE NAMPA, ID 83651	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS ANDREW MARSH, ESQ. SEINIGER LAW OFFICES 942 W. MYRTLE ST. BOISE, ID 83702
EMPLOYER'S NAME AND ADDRESS RULE STEEK TANKS, INC. 11299 BASS LN. CALDWELL, ID 83605	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS ADVANTAGE WORKERS COMPENSATION INSURANCE CO. C/O PINNACLE RISK MANAGEMENT SERVICES PO BOX 6768 BOISE, ID 83707
ATTORNEY REPRESENTING EMPLOYER/SURETY (NAME AND ADDRESS) R. DANIEL BOWEN (ISB #2673) BOWEN & BAILEY, L.L.P. 1311 W. JEFFERSON STREET BOISE, IDAHO 83702	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

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

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly entirely by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That the notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ 7.00 per hour.
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

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 INDUSTRIAL COMMISSION
 2008 MAR 11 P 2:26

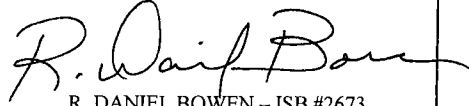
9. What benefits, if any, do you concede are due Claimant?.

IMPAIRMENT OF 32% OF THE WHOLE PERSON, WHICH IS CURRENTLY BEING PAID.

(Continued from front)

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.
- I. WHETHER CLAIMANT IS ENTITLED TO PERMANENT PARTIAL DISABILITY BEYOND THE 32% WHOLE PERSON IMPAIRMENT RATING HE RECEIVED;
 - II. WHETHER CLAIMANT IS IN NEED OF RETRAINING BENEFITS IN ORDER TO RESTORE HIS WAGE EARNING CAPACITY.
 - III. WHETHER CLAIMANT IS IN NEED OF FURTHER MEDICAL TREATMENT.
 - IV. WHETHER PROTHESES ARE REASONABLE AND NECESSARY UNDER IDAHO CODE. § 72-432.

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

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. YES NO X				
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
NO.				
Amount of Compensation paid to date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
\$14,955.60	\$8,174.20	\$83,727.74	3/11/10	 R. DANIEL BOWEN - ISB #2673

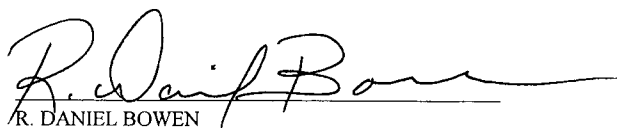
PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2010, I caused to be served a true and correct copy of the foregoing Answer upon:

ANDREW MARSH, ESQ.
SEINIGER LAW OFFICES
942 W. MYRTLE ST.
BOISE, ID 83702
FAX: (208) 345-4700

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


R. DANIEL BOWEN

ORIGINAL

Wm. Breck Seiniger, Jr. (ISB # 2387)
Andrew C. Marsh (ISB # 6588)
SEINIGER LAW OFFICES, P.A.
942 W. Myrtle Street
Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

2011 NOV 23 P 4: 26
RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

**Bryan Oliveros,
Claimant,**

vs.

**RULE STEEL TANKS, INC.,
Employer,**

and

Pinnacle Risk Management,

**Surety,
Defendants.**

L.C. No. 08-024772

**STIPULATION ON ISSUES FOR
HEARING**

COME NOW the Claimant by counsel Andrew Marsh, and Defendants by counsel Daniel Bowen, and subject to the approval of the Commission, hereby stipulate as follows:

1. At the hearing in this matter on Dec. 7, 2011, the issue to be heard will be Claimant's entitlement to prosthetic rehabilitation benefits and Claimant's entitlement to attorney fees thereon.
2. The issue of permanent partial disability benefits, and attorney fees thereon, will be reserved for a subsequent hearing to be scheduled after the Commission's decision on the prosthesis issue, for the reason that the Commission's decision may impact the nature and degree of evidence relating to disability beyond impairment. All other issues

6

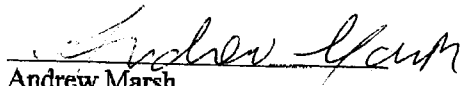
including without limitation retraining benefits, attorney fees thereon, and TTDs during retraining, will also be reserved for said subsequent hearing.

3. The parties agree to exchange discovery responses on the reserved issues subsequent to the Commission's decision on the prosthesis issue and prior to the hearing on the reserved issues.
4. The parties reserve the right to supplement their Rule 10 filings prior to the hearing on the reserved issues.

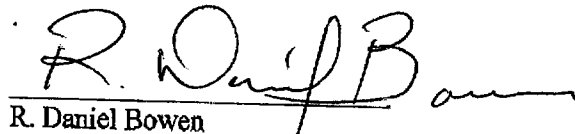
Pursuant to the foregoing, the parties hereby request the Commission to issue an order approving the stipulation herein.

Dated November 23, 2011.

SEINIGER LAW OFFICES, P.A.


Andrew Marsh
Attorney for Claimant

BOWEN & BAILEY


R. Daniel Bowen
Attorney for Defendants

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Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
 v.)
)
 RULE STEEL TANKS, INC.,)
)
 Employer,)
 and)
)
 ADVANTAGE WORKERS)
 COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)

I.C. No.: 2008-024772

NOTICE OF FILING

FILED
JAN 30 2012
INDUSTRIAL COMMISSION

NOTICE IS HEREBY GIVEN that on the 30th day of January, 2012, a copy of the claims adjuster's diary notes with redactions as to privileged matters, along with a copy of this Notice of Filing, have been filed with the Industrial Commission and served upon Claimant, by and through counsel of record, by placing said documents in the United States mail, postage prepaid, and addressed as follows:

ORIGINAL

2

R. DANIEL BOWEN (ISB #2673)
BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
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2012 JAN 31 A 11: 09

RECEIVED
INDUSTRIAL COMMISSION

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
v.)
)
RULE STEEL TANKS, INC.,)
)
 Employer,)
and)
)
ADVANTAGE WORKERS)
COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)
_____)

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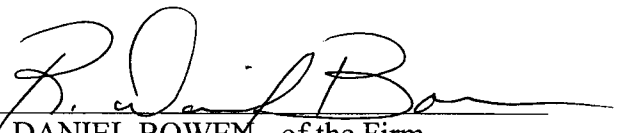
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W BRECK SEINIGER ESQ
ANDREW MARSH ESQ
SEINIGER LAW OFFICES
942 W MYRTLE ST
BOISE ID 83702

DATED this 30th day of January, 2012.

BOWEN & BAILEY, L.L.P.


R. DANIEL BOWEN - of the Firm
Attorneys for Defendants

Claim Comments [WCAWC2008562800 * AWC * Oliveros Bryan]

8/8/2008 04:25 PM (ccarr) **don't know what happened to original notes, I thought I had entered info. below on 8-1-08....redoing them now....

LOSS DESCRIPTION18 male laborer was operating a small press and he got 4 of his 5 fingers (excluding thumb) crushed and severed 7-30-08. DOH 7-29-08 \$7.00 per hr. full time.

*8-1-08 we recvd claim and I called and spoke with Les Pollard, he wasnt sure what happened no one saw it. Clmt is new only 1 day on the job, his father also works for them in same department. Clmt. was only going to work there one month and then go back to school. He stated the machine he was inj. on you do not use your hand in it, machine doesn't come with guards, OSHA had looked at this machine in the past apparently there is no way to use the machine and have guards on it. He had a electrician come out and inspect the machine immed. after accident and it checked out ok, he has hired Rick Robertson a safety consultant to do an investigation on it as well. He will get me a copy of their reports when available. Apparently you use foot peddles not your hands to operate. As soon as clmt. was able he wanted to talk w/him about what happened.

*8-1-08 I assigned nurse Susan Kennon to go to hosp. and get me medical info. find out Drs, extent of injuries etc. She got back to me and I have since recvd. a copy of the op rpt. Dr. Gross took him to surgery 7-30-08 he presented with in the ER with the distal tips in the ER of his rt hand for his index, long, ring and small fingers. The tips were unreconstructable, he had degloving injuries as well to the proximal to the PIP jts. Dr. took him to surgery to clean them up and see if soft tissue could be addressed to help maintain the length or he would have to have revision amputations of these fingers. At surgery Dr. stated the damage to the soft tissues were very significant and he was unable to cover the areas. He irrigated and debrided the open fractures, did d PIP fusion of the long finger, open treatment proximal phalanx fractures of the index and ring, and revision amputation small finger, as well as doing a radial forearm flap.

*Talked w/Nurse today, clmt. was in Drs office he is out this week his PA doing dressing changes, she stated so far no infections etc. he will see Dr. Gross in office next week.

*Called emp. today left Les voice mail to call me to see what he found out from clmt. regarding what happened

8/15/2008 03:50 PM (ccarr) *Called emp. Les again today left him voice mail, need to get a copy of the safety consultants report on the accid., etc.

*Called clmt. he's telling me he lost about 1/2 of each finger still middle knuckles each finger just shorter and his thumb is normal. Expects one more surgery in 2-3 months. Healing fine at this time with no signs of infection etc. Plans to start school next month will be in 12th grade. Verified with him he only planned to work for our insd. 30 days and then go back to school. Lives with both parents, one sister younger. Claims to be good student, planned on going to community college, 1st choice was to be personal trainer or do something in business. Denied smoking or drugs. I explained w.c. benefits to him.

8/19/2008 09:31 AM (ccarr) *Talked w/emp. about how accid. happened and clmt. tells him he actually slipped and when he was going down his foot pressed the peddle and his arm reached out to grab when the bar was coming down and that is how the accid. happened. I asked him if he had the safety consultants report back and to get me copy.

*Recvd some additional medicals from Dr. Gross office his PA saw him 8-4-08 clmt in for follow up, doing pretty well, in fairly good spirits, had quite a bit of pain last night but overall appears to be doing well, using norco. Dr. wanted to leave the dressing on to leave pressure on the skin graft until 8-8-08. Clmt returned to clinic again seeing PA 8-8-08 tells them pain improved since last visit, only taking 1 norco every 4 hrs instead of 2. Dressing was taken down, donor site on his thigh looked fantastic. The radial forearm flap site looked good and skin flap taking. Flap at finger looked goo, capillary refill good, no signs of infection. They redressed and splinted neck 8-13-08. *Seen 8-13-08 this time by Dr. Gross Dr. stated he has a very difficult problem with a crush inj. to his fingertips where he lost the ends. The wounds showed extensive injuries which required a flap he did and they looked viable. He did have to do a little debridement to remove some of the blister that was present but was very happy with the way it was going. He would neck 8-18 to neck progress, needed to remove some of his sutures and that was difficult problem and eventually he would need to remove the pins from his finger that are holding it together

and would plan on doing that this week after he removed pins would start him on therapy, that he would need to have some local wound care but at this time looking pretty good.

*8-18-08 nurse reports he started p.t. would need 3 times a week for a month, he would need another surgery to separate the fingers in a month or two, they referred clmt. to psych for PTSD. Clmt. will be returning to school next week for his senior year.

8/22/2008 03:09 PM (ccarr) *8-20-08 Recvd call at home in the evening from nurse, seems clmt's graft died and Dr. Gross had him on surgery schedule next day 8-21-08 9:00 to do another graft from his groin. Next day learned Dr. Gross had talked with another Ortho. and what he decided to do for the best chance he felt of the graft taking was to attach his hand to the skin on his groin for 3 weeks as there is alot of blood supply etc. in that area, he claims he has done two of these in the past with success. Spoke w/nurse today clmt. will go home from hosp. tomorrow 8-23. He will be in a mitten type unit and will have fingers separated in 3-6 months.

Meanwhile clmt. and parents became upset and hired an atty. by the name of Todd Joyner.

*Called emp. spoke with Les Pollard again, asked him to get me copy of electricians rpt and pictures of machine and the safety consultants rpt. He stated the safety guy didnt actually do a report but came and saw it and talked with them about it.

8/22/2008 03:42 PM (ccarr) ***Need more info. to set reserves I just put up max for now \$10,000 ind. \$12,500 meds until I can get a handle on what med bills are now and est future meds. Even the disability is difficult right now, I think we are likely looking at any where from 9-12 months before he is MMI, and PPI is somewhat easier to estimate unless he gets infection etc. and they have to take down fingers lower....Right now from what I am told he lost the distal portions of the 4 fingers but amputation sites are just above the proximal interphalangeal jts. The scheduled ratings for those fingers at that jt. is 130 weeks, he would likely get more impairment for the loss of function of the hand as well, I would probably suggest we put up somewhere in the neighborhood of 200 wks (200 x's \$339.90 = \$67,980.00) probably a year of TTD @ \$285.58 x's 52 = \$14,850. Medicals are just a guess now we are probably in the neighborhood of \$50,000 spent with the treatment to date, possibly another \$35-50,000 more....will get some est. from Dr and hosp. and review again before setting and doing loss report

9/3/2008 02:23 PM (ccarr) *Recvd. most recent op rpt and bill from Dr. Gross for 8-21-08 skin graft hand to groin... Recvd 8-25-08 post op visit clmt. 4 days post op clmt tells him yesterday was in quite a bit of pain, felt like fingers were being smasked together, Dr. stated they actually are in order to get good coverage. He took the dressings down, stated skin looked great and was viable (heard that before)... He was cleaned and redressed stated they would have wound dressed every day by home health. Reck in office one wk. felt he was doing quite well, parentys told Dr. he didnt need any pain meds at this time but they would refill when ready. Had nurse arrange home health care needs. Clmt. will see r. McCaly for pscy. counseling 9-11-08 and seeing Dr. Gross every Freiday. Plan at 3 wks to separate the groin flap and put clmt. in mitten type apparatus and then separate four fingers in 3-6 months pending on the healing process.

Nurse found out clmt. hadnt registered for high school, he was supposed to graduate last year but didnt so apparently he had some educational issues before this injury. School stated he hadnt registered in time for Fall semester. Will assign voc. rehab. given scenario.

9/3/2008 02:51 PM (ccarr) ****RESERVES****
52 wks @ \$285.58 = \$15,000 TT
est PPI any where from 130 to 200 wks @ \$339.90 = \$68,000 PP
Total ind. \$83,000

Including both surgeries to date ortho bills are just under \$25,000.
Both hosp. bills one was \$26,043.15 and 2nd \$10,450.45
above = \$61,450.

We anticipate couple more surgeries minor one to separate flap from groin and then finger separation likely more extensive. We have home health care for next few weeks. nurse manager costs, likely extensive p.t., some pscy. counseling, I would hope another \$50,000. would cover, maybe put up \$125,000 for some cushion.
Total ind. and meds \$208,000.
Allocated \$3,500.

9/11/2008 03:38 PM (ccarr) *Recvd some updated chart notes 8-29-08 now 8 days post op from groin flap, groin flap healthy, viable and no issues of ischemia. Dr. very satisfied, changed dressing reck 1 wk. wait 2-3 more

weeks then separate flap and cover those fingertips. *9-3-08 clmt. in for recheck regarding sutures at the site to cover the exposed bone. Dressing taken down, skin still looked great, no evidence of infection, flap still very much alive and looked very good. Put him in long arm splint to keep elbow bent and having him place the arm strap at his elbow to keep his elbow at sides to take pressure off the flap and cause him less pain. *9-8-08 In for recheck Dr. felt he looked fairly depressed, had referred him to counselor. Clmt tells him not in much pain, RX working clmt anxious to get separated. Dr. evaluated the hand and felt flap looked great and waiting 3 more days wasn't necessarily going to change the outcome so they scheduled him for 9-9 to take down the groin flap and place the flap over the exposed bone.

Clmt. was supposed to see pscy. today but no showed so rescheduled for 9-25 at 4:00 pm.

9/12/2008 11:56 AM (dstephens) Reserves adjusted per adjuster request. Approved by Vic.

9/26/2008 11:04 AM (ccarr) *Dr. Gross did separate the flap and also at same time separated his fingers which is different than his original plan of doing this in 3-6 months. Clmt then followed up in office 9-18-08 and was doing very well, in much better spirits, dressing taken down and debrided a bit and placed back in a splint. His mother was shown how to do wet to dry dressings on both the index and long fingers as well as his groin site and she stated she was comfortable doing that they gave her supplies and would recheck 4 days he was to continue. Keflex until gone.

So then nurse calls me yesterday after his next dr appt. 9-24-08 and although his mother was taught to do the dressing changes and said she was comfortable doing then didn't do one of them! Started crying was too scared so bandages were stuck on wounds etc. a mess. Plan now is clmt. is coming in the office twice a week for dressing changes and to start occupational therapy. Dr. estimates MMI in 6 wks and do impairment rating? Diary for add'l follow up.

9/26/2008 02:47 PM (ccarr) Had Mary Morgan to special bill review of St. Lukes hosp. bill for DOS 8-21/8-23-08 \$10,450.45 faxed to her 9-10-08 she completed her review and recommended we pay \$4,278.53 gave to Sandy to pay bill

10/13/2008 10:34 AM (ccarr) *Recvd Dr. Gross 9-24-08 chart notes he notes mothers falling down on the job for dressing changes but fortunately on phys. exam he still had 100% of the groin flap to the index finger and 95% to the ring finger. He had about 50% take to the long finger but he debrided this to healthy tissues. Stated he wasn't going to need any add'l surgery. He individually tube gauze each of his 3 digits. Start pt and for the 1st week do dressing changes in office then could do once a week. Should have therapy 2 times a week for one month, felt he should have a good functional outcome. *9-26-08 clmt. in for wound care, having him start moving hand both actively and passively, donor sites looked good, stated pt was happy w/outcome. *9-26-08 same day clmt. sees Dr. McClay for psych. eval. clmt denied street drug use or alcohol, jail time. Noted in school he barely had passing grades before inj. and after. Tells him does have sleep problems and disturbed thoughts wakes up with a kind of fear reaction in the middle of the night for unexplained reasons. Clmt. single broke up w/girlfriend that he initiated recently. Family supportive. Pts judgement and verbal skills intact. Dr. felt his affect was blunted and somewhat depressed he denied suicidal or aggressive intent. When Dr. did the validity test he felt clmts answered suggested his depression was high, and showed suicidal ideation even though clmt. denied in his eval. ...He was going to see him again 10-15. *Talked w/nurse today she would talk w/Dr. McClay after his eval. on the 15th, she stated if Dr. really thought clmt was suicidal he would have had him admitted.

10/28/2008 12:30 PM (ccarr) *Clmt to RTD 10-29-08 diary for his rpt. Clmt now showed for his follow up appt. with pscy. McClay 10-14, guess they rescheduled but told him if he missed another appt. he would be billed.

11/5/2008 11:04 AM (ccarr) *Nurse rpts clmt saw Dr. Gross 10-29-08 and they are quite pleased with his surgical outcome, does have use of his partially amputated fingers and Dr. anticipates he won't have any perm. lifting restrictions but will have difficulty with fine motor hand manipulation. Plan is to continue 6 more wks of p.t. and he est. MMI on next appt 12-10-08. He would rate at that time. Pay TTD thru 12-9-08, diary for his final rpt 12-10

12/15/2008 03:46 PM (ccarr) *Talked w/nurse following clmts appt he had a small bone spur that Dr. just removed in office and also req. 6 lazer hair treatments as the ends of his fingers apparently growing hair...Clmt. to RTE in 2 wks then Dr. stated would be MMI.

12/23/2008 09:52 AM (dstephens) E-mail from Susan, clmt no showed for f/u appt with Dr Gross on 12/22. They are contacting him to reschedule.

12/30/2008 09:25 AM (ssouthar) Clmnt no showed for his appt with Dr Gross on 12-22 Susan Kennon called atty and they are suppose to be getting him an appt asap.

1/5/2009 12:10 PM (dstephen) Clmt saw Dr Gross on Friday, he is recommending that clmt have a debulking procedure on his ring fgr and a Z plasty on long finger to release scar tissue so he gets more ROM. I auth both procedures. She will let the drs office know and let us know when it is scheduled.

1/6/2009 09:14 AM (dstephen) Paid TTD today. Clmt not released.

1/8/2009 02:55 PM (dstephen) VM from Susan K., Dr Gross' office wanted to schedule clmt for surgery on 1/29/09. Apparently clmt leaving for Mexico on 1/28.

1/12/2009 11:25 AM (dstephen) Note from Susan, clmt is scheduled for surgery with Dr Gross on 1/29/09. I guess he decided to not go to Mexico.

1/13/2009 01:11 PM (ccarr) *Reviewed above notes, recvd Dr. Gross 1-2-09 chart notes, stated flaps and hand looked good, area of opening is quite healed, had scar on index finger that prevented full extension of finger and flap on his ring finger is quite big and he could benefit from debulking of decreasing the size of it and they wanted to proceed with that. Dr. stated woudl only be about a 40 min. procedure out pt. very small...scheduled for 1-29-09. Meanwhile given this we cont. to pay TTD

1/19/2009 02:40 PM (ccarr) *Recvd word from nurse that clmt. did end up cancelling his 1-29-09 going is going to go to Mexico....Called his atty. Todd Joyner last week left him voice mail that I would consider clmt. obstructing medical care and disc. TTD until he had his last finger surgery. We shouldn't have to cont. to pay TTD while he goes on vacation, we were anticipating MMI right after this last little surgery. Don't know if that will change anything now, lets hold off paying further disability until confirmed if he stayed or went to Mexico.

2/2/2009 03:59 PM (ccarr) *Talked w/clmt. atty. last week states clmt. is going to Mexico for vacation and will see Dr. when he gets back. Leaving 1-24 and returning 2-14-09. Told him I would restart TTD when he RTD. He seemed confused I was paying TTD wanted copies of print out I faxed him over copy.

2/24/2009 03:13 PM (ccarr) Clmt. having his surgery today on finger so will restart TTD today, expect MMI about 4 wks following. Atty. sent mileage req. paying that as well

3/9/2009 10:52 AM (ccarr) Recvd 2-24-09 op rpt dr did a z-plasty on the 2nd web space, with skin graft, and a ring finger defat graft with revision of the finger tip. *2-26-09 in post op doing good, no pain. Dressing change, pleases with the look of the finger. Started him in flexion, noted in OR they were able to get him fully extended so with time that would be their goal. Leave splint one more week, then remove stitches and start p.t. *Nurse noted had appt 3-5

3/20/2009 01:29 PM (ccarr) *Recvd 3-5-09 chart notes in for reck not having hardly any pain, doing much better, hasnt taken any pain meds past week, drssing was taken down skin looked great. Sutures removed and cleaned up and sent directly to p.t. to begin ROM reck 2 wks. Nurse rpts has follow up appt 3-25 she will find out anticipated MMI date.

4/9/2009 09:30 AM (ssouthar) VI clmnt is still off work issuing TTD

6/8/2009 10:22 AM (ccarr) Clmt. was deemed MMI 4-6-09, there was much confusion over his restrictions, nurse clarified with Dr. Gross, he then wrote letter 5-6-09 stated for rt upper extremity he could grip/carry 5 lbs, push 75 lbs, pull 50 lbs, 20 lbs lifting and no fine manipulation based on the FCA. He gave him 54% upper extremity or 32% whole person. Nurse had another Dr. Rogers using 6th edition and she thought 25% whole person. I asked Susan to get formal IME on rating because that is almost \$12,000 difference. Pay 2 prmts PPI, hold off scheduling monthly because cim. will likely settle. Clmt. retained new atty. fired Goicoe chea law office and hired Selniger Law office.

6/8/2009 10:30 AM (ccarr) PPI rating taking rating closest to hand would be upper extremity 54% of 300 wks = 162 wks \$55,063.80 but think we can get lowered with IME

6/8/2009 01:49 PM (ccarr) Got clmt. into see Dr. Rogers 6-23-09 9:30 faxed copy of appt. letter w/copy of print out of whats paid out on claim to his new atty. sent original to clmt. Dr. Rogers will address PPI and restrictions

6/23/2009 02:15 PM (ccarr) appt had to be changed because clmts atty. claimed he has to have them after 3:00 p.m. so we changed to 6-25-09 3:30...on 6-15-09 I asked Darrell Holloway w/IC voc. rehab. to get me updated status of claimant...working? future plans, did he ever graduate from H.S.???? He was repeating his senior year before the injury I think there were some issues w/his education before, we can get copies of his grades/transcripts before inj. that may be helpful. Clmts impairment is so large it's going to eat up most disability issues anyway.

8/11/2009 04:07 PM (ccarr) So clmt saw Dr. Rogers for 2nd opinion on PPI and restrictions she concurred with Dr. Gross findings. She agreed 54% of upper extremity and could do what the FCE stated medium duty work 8 hr day, with occasional rt hand fine grasp.

Sending copy to clmt. atty. with PPI schedule for next year out, I expect him to come back with a high settlement offer and then will likely see complaint and litigation. I had asked voc. rehab. to redouble their efforts and see if clmt. graduated from H.S. and if he was working....they report he didnt graduate yet and is taking summer school. They told his atty. they wanted to meet with clmt.

I entered a year of PPI pmts, sent copy to clmt. atty. with copy 2nd opinin. we have paid out \$5,438.40 thus far balance remaining \$49,625.40

12/4/2009 11:18 AM (ccarr) So recvd. LSS offer from clmt atty. Alan Marsh, he had Doug Crum private voc. do a review of disability, they are claiming clmts 75% disabled... he recommends a retraining program of \$52,774. Also wants to throw in a trying a prosthetic hand? Sending file over to our atty. to review. As far as I knwo clmt still hasnt graduated from high school, that makes him a 5th year senior? now he wants to go to college, doesnt hold a valid drivers license, I don't know what that is about. Will see what our atty's review is about LSS value etc.

8/24/2010 03:33 PM (ccarr) *2-18-10 we recvd complaint clmts atty. filed and our atty. Dan Bowen answered the complaint.

*3-29-10 Dan's rpt.

*6-11-10 our atty. got a letter from clmts atty. req. we auth. clmt. to consult with brownfields for prosthetic. As far as we knew they didnt have a drs script for one we don't know if they tried and Dr. Gross refused possibly? They could possibly make an argument with the Inc. Com. w/o a script having a technicians that works at Brownfields provide testimony as to the viability of some of these devices. Dan felt

*6-21-10 Dan reports

*8-24-10 need to enter more PPI payments, to date we have paid out \$21,753.60 leaving a PPI balance of \$33,310.20 Total PPI award was for \$55,063.80

9/3/2010 12:06 PM (alopez) SENT COPY OF 1ST TTD CHECK TO IIC.

10/27/2010 01:33:49 PM (ccarr) Update from our atty. Dan stated clmts atty. once again reiterated his deserse to

have his client worked up for prosthetic fingers. He noted in reviewing the file Dr. Gross hadnt provided the followup letter he told me he would do so he sent him a letter asking him to review the matter in more detail and in writing this time.

Meanwhil we are cont. to pay out PPI award It's taking years unless we LSS claim

2/22/2011 09:20:56 AM (ccarr) So Dan rmts [REDACTED]

Meanwhile we are cont. to pay out PPI, I have payments scheduled thro 7-24-11 and then he has \$16,995. balance remaining.

5/12/2011 03:54:29 PM (ccarr) Seems clmt. atty. took another run at Dr. Gross on these finger tips, clmt. aparently went to this place that sells them called Advanced Arm Dynamics and they submitted 5 pages of info. about why clmt needs this. Dr. Gross's office called me advising me they wanted to let me know about this and Dr. Gross told them he had a functional hand and would not sign a statement of medical necessity. They advised me this outfit got very pushy with him, they called me as well trying push it past me, told them Dr. stated not necessary and they stated Dr. just was confused...not.....

I think mostly this is being pushed by clmt and his atty. to attempt to increase LSS values, these fingers are rediculously expensive I am told and would need to be replaced every so often. Our Industrial Commission has been very firm in the past on these types of things if they are not medically necessary they generally side with the treating Dr. We are still paying out the impairment to date have paid \$33,990. of the PPI award \$55,063.80 leaving a balance of \$21,073.80 [REDACTED]

6/3/2011 08:45:45 AM (ssouthar) T/C Jan Id Elks got her VM left her msg I was returning her call she did not say what she needed.

7/11/2011 09:56:23 AM (ccarr) *nothing new recvd on the finger tip issue or anything else, will schedule the remaining PPI balance of \$16,995.

8/2/2011 02:17:14 PM (ssouthar) Per adj req I called Jan at Elks Rehab regarding a corrected bill dos 01-06-09 they billed us the wrong amount. Advised her it is too old past 30 days to disbute amounts paid. She said she would not her file and write off.

8/30/2011 02:05:34 PM (ccarr) Well finnally got some action on the legal side they requested matter be calendared for hearing it was set for 12-7-11 in Boise.

We are taking clmts depo. 9-1-11 at 2:30 in clmt attys office. Dan wanted me to attend so I can see his fingers and we can talk to him about his plane and what he has been doing with his time. Supposedly he has been going to school at Lewis & Clark in Lewiston and transafared down to CWI this Fall.

8/30/2011 02:17:50 PM (ccarr) We have been paying off clmts 54% upper extremity rating = \$55,063.80 the current balance is \$16,995.

9/2/2011 08:26:36 AM (ccarr) Attened clmts depo yesterday, he is a good looking clean cut 21 year old now that attended college full time last year, has worked since the inj. at a couple fast food joints and recently took a customer service phone job with Verizon making \$8.50 per hr full time and is also going to college part time, he plans on going to school full time again spring semester. He is computer savey can do excell, word, etc. can type. His major is financing would like to work in money like with a banking job, says he likes math. He was making \$7.00 an hr at the time of our injury. He shouldn't have much if any PPD over his impairment.

11/7/2011 09:19:34 AM (ccarr) Talked w/our atty about LSS [REDACTED]

12/6/2011 04:11:50 PM (ccarr) Cltm. atty. rejected our offer, having hearing tomorrow just on the merits of the magic fingers, they are not ready to try all issues until prosthetics resolved or settle. We have treating Dr. stating firmly that the fingers were not necessary or functional and his exp. young people don't end up using them. I will be testifying tomorrow,

Wm. Breck Seiniger, Jr. (ISB # 2387)
 Andrew C. Marsh (ISB # 6588)
 SEINIGER LAW OFFICES, P.A.
 942 W. Myrtle Street
 Boise, Idaho 83702
 Phone: (208) 345-1000
 Fax: (208) 345-4700
 Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,
Surety,
Defendants.

I.C. No. 08-024772

**Motion To Take Telephonic
 Rebuttal Deposition Of Macjulian Lang,
 Cpo and Memorandum**

FILED

MAR 20 2012

INDUSTRIAL COMMISSION

COMES NOW, the Claimant, by and through counsel of record W^m Breck Seiniger, Jr. of Seiniger Law Offices, P.A., and moves this Honorable Commission to enter its order permitting Claimant to take a telephonic deposition of his prosthetics expert, MacJulian Lang, in rebuttal to opinions stated by Dominic Gross, M.D. during his depositions. Claimant learned of these opinions for the first time during the taking of Dr. Gross' deposition by the Defendants as their witness. In that deposition, Dr. Gross testified to conduct on the part of MacJulian Lang that was apparently offered in the nature of character evidence going to the credibility and

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**MOTION TO TAKE TELEPHONIC REBUTTAL
 DEPOSITION OF MACJULIAN LANG, CPO and
 MEMORANDUM**

PAGE 1 OF 9

impartiality of Mr. Lang's testimony in this matter, and Dr. Gross testified that multiple prosthetic fingers such as those sought by the Claimant create problems that single finger prostheses do not. It was apparent from Dr. Gross' emotional and hostile testimony that he had taken umbrage at Mr. Lang's having the audacity to advocate for silicone partial finger prostheses that Dr. Gross opposed prescribing, other than as part of a "settlement". As but one illustration, eating out of Defense counsel's hands in response to a leading question, Dr. Gross characterized Advanced Arm Dynamics as ridiculous for considering using multiply prosthetic fingers.

Q. Okay. Now, do you have concerns that they would actually impede function?

A. If he has these silicone devices, they don't have sensory function at the end, okay. So he's going to have four fingers that are not going to be able to provide sensory feedback to light touch, hot or warm. It's almost like wearing a lead glove. He's not going to be able to do fine manipulation; they're just going to be these numb extensions of finger. It's ridiculous. It's absolutely absurd that someone would actually put in four fingers. And to me, a company that would even suggest that, and I'll go on the record, is ridiculous. It's absolutely ridiculous.

Gross Depo. p. 82 l. 14 to p. 83 l. 11. Presumably, common sense will inform the referee that a young man of marriageable age might well want to obtain cosmetic fingers, even uncomfortable ones, if he were concerned about repulsing those he meets in social and business situations where first impressions can mean everything. Dr. Gross certainly understands this:

Q. Doctor, if you had a child who had these same injuries and that child came to you and said, "Daddy, I want these just because I want to look better. Kids are making fun of me at school," would you support that child in trying to get these?

A. Yes.

Gross Depo. p. 56 ll. 11-16. Because Dr. Gross purports to support Mr. Oliveros' desire to obtain these prosthetics, at least for cosmetic purposes ("But if you're saying it's a cosmetic thing, I don't have a problem with it. And if Bryan wants it for cosmetic, I'm okay with that.")

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PAGE 2 OF 9

Gross Depo. p. 57 ll. 8-10), yet refuses to prescribe these prosthetics unless they are part of a settlement, even when advised that claimant can pay for them out of his own private insurance, claimant should be allowed to have Mr. Lang rebut Dr. Gross' volatile and subjective condemnation of Advanced Arm Dynamics and Mr. Lang.

The issue of whether or not these prostheses are "functional" is not necessarily pivotal from a legal perspective, but the issue of functionality goes to Dr. Gross' credibility because he is using it as the basis for refusing to prescribe them even for cosmetic purposes. Dr. Gross agrees that it is inappropriate to base his decision as to whether or not to prescribe the prosthetics on whether or not Mr. Oliveros will agree to settle, yet he will only write the prescription if he does agree to settle because the fingers are not "functional" notwithstanding his testimony that he will support Mr. Oliveros trying the prostheses if only for cosmetic reasons:

Q. (BY MR. SEINIGER) Would you take a look and see if you can find your letter to me of November 1st, 2011?

A. Yeah, here we go. I have it right here.

Q. Why don't you -- I've found my copy, and let me just read it, and you tell me if I've read correctly from the letter that you wrote to me on November 1st, 2011: "Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as a part of a settlement in this case."

Did I read that correctly?

A. Yeah, but it -- can you read back what he said? He said that I would write the prescription if -- I would write him a prescription for the prosthesis if Bryan settled the case, that's what you asked me.

Q. Is that not what you said in the letter?

A. I don't think it's the same.

Q. What's the difference, please?

A. Well, one, I think it's not the same. I think that -- I think what I'm saying is, is that it's not contingent upon him settling the case. It's if -- if he needs it, accompanying in the case. So it's not contingent upon him settling the case would I -- that I would write the prescription. Is that clear?

Q. Okay. Why don't you take a look at my letter, then, of December 10th, 2011, which was Claimant's Exhibit to your --

A. I don't have it.

Q. -- deposition, No. 6.

A. Okay.

Q. Then take a look at your letter of December 19th, 2011, to me --

MR. SEINIGER: Would you mark this as Claimant's Exhibit No. 14 to Dr. Gross' deposition, please. And then hand it back to me, because it's my only copy.

(Exhibit 14 marked.)]

Q. (BY MR. SEINIGER) Now, would you agree with me that on December 10th, 2011, I wrote you and I said, "In view of this, I request that you write Mr. Oliveros a prescription for the prostheses now, for whatever reason you had in mind in agreeing to do so in connection with the settlement of his workers' compensation case."

And then on December 19th, 2011, you wrote back and essentially declined to do so. Is that a fair characterization?

A. Can I see the letter, please?

Q. Which one?

A. My response to you.

Q. Yeah, here you go.

A. Okay.

Q. And so in that letter you state, "I have reviewed your request, and find I am uncomfortable prescribing the prosthesis prior to the settlement being reached. As I stated earlier, I am happy to write for it should Bryan wish to use his settlement to purchase a set, but I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and do not want my prescription for the prostheses construed as an agreement to the fact that it is medically necessary."

So isn't it your position that with respect to Mr. Oliveros you will only write him this prescription if he settles this case?

A. No. I think my -- my position is, is that I would write the prescription to him if it added function to his hand, you know. And I think what would happen is we're going back and forth with getting to a point where I think it's a cosmetic thing, and we would -- we want a functional part of it. And looking at his hand and then reviewing what they wanted, we didn't feel really comfortable with it. And we just were hopeful that you guys would figure out what you wanted to do.

Q. You'd agree with me, wouldn't you, that whether or not Mr. Oliveros settles this case is not a factor that has anything, whatsoever, to do with medical necessity with respect to these prostheses, correct?

A. Yeah, I don't -- it shouldn't be contingent upon that.

Q. In fact, it is -- without meaning any disrespect by the question, it really is none of your concern whether or not he settles this case, is it?

A. No, it's not.

Gross Depo. p. 67 l. 10 to p. 69 l. 6.

It was clear by the end of the deposition that Dr. Gross was a hostile witness, incensed by Claimant's Counsel's challenge of his opinions, who was willing to say anything that would help the defense. As an example, on cross-examination it was clear that he had testified under a misunderstanding of what constitutes medical necessity:

Q. Doctor, so that my questions and your responses are as meaningful as they can be to the referee, let's start by defining some terms. First of all, the opinion that you gave regarding prosthesis was whether or not it was reasonable and necessary. What do you understand that to mean? First of all, is that a term of art within the medical profession, or do you understand that to be a term of art within the meaning of the law?

A. Well, you know, I think there's percentage points, and I'm not sure, but usually we deal with probabilities that should be more than 50 percent. So that's -- you know, that's where I'm familiar with. But other than that, we want to make sure when we order something that it's really going to be to the benefit of the patient, and that it's not something that we just ordered and the patient doesn't use. So we really have to be more than -- you know, we have to be certain about it. And for me, certain is much higher than 50 percent, so . . .

Q. Okay. So when you use the term "reasonable and necessary," you're talking about your being certain to some undefined level, but well above 50 percent; would that be fair to say?

A. Correct.

Gross Depo. p. 26 l. 16 to p. 27 l. 15. Dr. Gross was easily rehabilitated:

Q. Doctor, early on in the cross-examination there was one question -- there was a question, and in my mind, a bit of confusion as to the standard that we use in our workers' compensation cases. And just to make sure that we have a clear record, I will represent to you, sir, that in workers' compensation cases we use a standard of more probable than not. And by that we mean greater than 50 percent, not substantially greater or anything, it just literally means something more than 50 percent.

With that understanding, sir, do you still hold the opinions within a reasonable degree of medical probability, as I just represented to you, the standard requires as to those opinions you gave to me on direct examination?

A. Yes.

Gross Depo. p. 73 ll. 5-20. Gross was not asked about a single opinion, but all of the opinions stated in the 72 prior pages of his deposition testimony. Gross could not possibly have had all of those opinions in his mind in responding to the question, but he was happy to oblige the Defendants, as he has been all the way along in this case, including by his unethical offer to write a prescription for the prostheses only if claimant is willing to settle his case, and his refusal to do so otherwise.

Dr. Gross viciously attacked Mr. Lang's credentials, description of Claimant's levels of amputation, qualifications, and character. He described Mr. Lang's company and Mr. Lang by implication, as ridiculous. The tantrum thrown by Dr. Gross at his deposition regarding Mr. Lang was actually quite comical, though it does demonstrate the need to give Mr. Lang a fair shot at rebutting his testimony, including Dr. Gross' misunderstanding of the characteristics and properties of the prostheses involved:

A. ... The other thing is, is that this gentleman, with all due respect, is not a hand surgeon and is a salesman, and he's saying these things which are unsubstantiated, unfounded.

Q. Well, when you say he's "a salesman," you -- I understand that -- and I see you're nodding your head -- there are other professions that are honorable besides medicine. The man has a degree in engineering from Cornell. He's a little bit more than just a salesman, isn't he?

A. No, sir.

Q. So in your mind, he really -- he's not a professional, he's just a salesman?

A. Well, I would say that -- it's interesting that just before this meeting, we had a whole box of fruit and all these goodies that were sent to us from this company, which left -- that was left unopened in our office. And I'm not sure why that circumstance had occurred.

Q. So that --

A. I'm not --

Q. -- impairs his character because --

A. No, sir.

Q. -- his company sent you some fruit?

A. No, sir. No, sir. Okay. But he is not an orthopedic surgeon, he's not a hand surgeon, he's not published, and he deals with not only the hands, he's also dealing with the feet. And as a person who has dedicated his life to it, these descriptions are unfounded, unsupported, in my professional opinion, as a board certified and as a hand surgeon that has a certificate of added qualification.

Q. Doctor --

A. And what Cornell has to do with it, I don't understand.

Q. Okay.

A. You're saying that other schools are not as important as Cornell? You think Cornell is the end-all?

Q. I think the University of Idaho College of Law is the end-all. It goes downhill very sharply after that.

MR. BOWEN: Go Vandals.

Gross Depo. p. 32 l. 5 to p. 33 l. 17. Mr. Lang can testify that he specializes solely in upper limb prosthetics and that he is published in a number of journals and a textbook. Of course, he is not a medical doctor, and it is apparent that in Dr. Gross's *weltanschauung* unless one is a medical doctor, or for that matter a "hand surgeon" who is "board certified and as a hand surgeon that has a certificate of added qualification," their opinion, even as to matters of commonsense, counts for little to nothing.

Claimant should have the opportunity to offer Mr. Lang's correction of Dr. Gross's misstatements and misunderstanding of the prostheses involved, as well as to address Dr. Gross's accusation that Mr. Lang misstated the level of the Claimant's amputations, insinuating that this demonstrates Mr. Lang's unreliability as an expert in the field of upper limb prosthetics. Mr. Lang will testify that the levels of amputation described in his communications are consistent with his examination of the Claimant, pictures of the Claimant's hands that he took at the time of

his examination, and the levels of amputation described in the IME report of Dr. Beth S. Rogers, a copy of which is attached hereto.

CONCLUSION

Claimant's counsel's recollection is that during the pre-hearing conference in this matter, he raised the issue of the possible need for rebuttal depositions, and it was agreed that he would raise that at a later time if the need arose. The need has arisen. Dr. Gross' revealed for the first time at the tail end of his two hour deposition, his opinion that no one will actually use multiple prostheses of the type recommended for claimant.

Claimant deserves to have Mr. Lang (condescendingly characterized by Dr. Gross as essentially just a "salesman", but in fact a Cornell University trained engineer with specialized additional training in prosthetics), testify to rebut Dr. Gross's testimony concerning the functionality of multiple prostheses, and the other matters with respect to which Dr. Gross was either uninformed or simply malicious. Claimant could not have anticipated this testimony, since it was not stated by Dr. Gross in his records or written communications with the parties, and was thrown in at the end of Dr. Gross deposition in response to clean up questions asked by Defendants' counsel that were essentially rehabilitation. In fairness, Claimant should be given the opportunity to have Mr. Lang address the issues regarding the functionality of multiple silicone prosthetic fingers raised by Dr. Gross for the first time during the re-direct of his deposition. Dr. Gross testimony on this specific point was given in response to questions which, if not leading, were directed to Dr. Gross with admirable skill by Defense Counsel to rehabilitate Dr. Gross' 1) admission of his complete misunderstanding of the legal standards involved; 2) his forced concession that it is appropriate for Claimant to obtain the prostheses for purely cosmetic purposes; and 3) his forced concession that it was inappropriate for him to condition his

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PAGE 8 OF 9

willingness to prescribe the prostheses even for cosmetic purposes on claimant's willingness to settle his case. Defense Counsel cannot be blamed for doing a skillful job of rehabilitating Dr. Gross; Defense Counsel is an advocate and no criticism of strategy, tactics or questions to Dr. Gross is implied. Nevertheless, Dr. Gross is a witness who has an obligation to be impartial, and his testimony makes it clear that he is not, and that he resents being challenged by Mr. Lang or Claimant's Counsel.

Claimant should be given the opportunity to demonstrate that Dr. Gross' testimony cannot be relied upon. This is particularly true, because Dr. Gross is the treating physician, Claimant has no other physician expert, and Claimant anticipates that the Defendants will continue to argue that the Commission cannot order a trial of the prosthetic fingers absent testimony by the treating physician that they are medically necessary pursuant to Idaho Code § 72-432.¹

DATED March 20, 2012.

SEINIGER LAW OFFICES, P.A.

W^m Breck Seiniger, Jr.
Attorneys for Claimant

¹ Idaho Code § 72-432 requires the employer "the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter."



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Getting you back into life

Joseph M. Verska, M.D.
Samuel S. Jorgenson, M.D.
David Jensen, D.O.
Beth Rogers, M.D.
Edwin Clark, M.D.
Peter Taylor, M.D.
Shannon L. Gardiner, P.A.-C.
Stephanie Dalton, P.A.-C.
Sarah C. Maddux, P.A.-C.

BRYAN OLIVEROS
CLAIM NO: 2008562800
INSURER: Rule Steel Company
DOI: 07/30/2008
[REDACTED]
06/25/2009
[REDACTED]

PERMANENT PARTIAL IMPAIRMENT RATING

HISTORY: Bryan Oliveros is an 18-year-old right-hand dominant gentleman, who sustained a crush injury to the right hand on 07/30/08. He was cared for by Dominic L. Gross, M.D. and underwent four surgeries to the right hand. On 07/30/08, he underwent irrigation and debridement of the open fractures, fusion of the PIP of the long finger, and revision amputation of the small finger, as well as a radial forearm flap. In August, he underwent a second irrigation and debridement of the right hand and a groin flap to the right hand. The groin flap was taken down in September with a groin flap to the index, long, and ring fingers, and ultimately in February of 2009, he underwent ring finger revision full-thickness skin graft and Z-plasty of the second web space. The patient has seen pain psychology, who stated he was actively suicidal and had depression. He has also undergone occupational therapy and a functional capacity evaluation. He presents today for permanent partial impairment rating.

CURRENT COMPLAINTS: The patient understandably states his activity is significantly limited due to right hand injury and he has filled out the quick DASH outcome measure today, which outlines limitations in his activities of daily living. In terms of pain, he states he has occasional paresthesias into the dorsum of the right thumb and he points to an area in his forearm from which these emanate. He is not currently taking any pain medication.

PHYSICAL EXAMINATION: This is a pleasant and cooperative 18-year-old gentleman. He has a well-healed 19cm surgical scar across the dorsum between the thumb and index fingers extending along the radial aspect of the forearm to the skin graft site on the forearm. On opposition of the thumb to the small finger, he lacks 1 cm. The small finger is fused at the PIP joint and is amputated at the DIP joint. He has active motion of the small finger MP joint from 90-60 degrees flexion. The right index finger is amputated at the level of the proximal phalanx. It is immobile at the MP joint with a flexion angle of 85 degrees. The right long finger is amputated through the proximal phalanx. He has approximately two thirds of the proximal phalanx left. It is also at a position of 85 degrees of flexion at the MP joint.

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27

BRYAN OLIVEROS -

06/25/09

Page 2

The right ring finger is amputated at the proximal phalanx. He has 10 degrees of motion at the PIP joint from 80 degrees to 70 degrees flexion. There is a bony prominence noted on the radial forearm with a positive Tinel's sending paresthesias in the distribution of the radial nerve. Forearm girths were measured at the extensor wad. Extensor wad on the left 25.5 cm and on the right 26.5 cm.

IMPRESSION/PLAN: 1) Right index, long, ring, and small finger amputations. 2) Depression.

Using the AMA Guides to Evaluation of Permanent Partial Impairment Sixth Edition, page 460, Table 15-29, amputation impairment, the patient had index and middle finger amputations at the PIP joint, which corresponds to class II an upper extremity impairment between 14% and 18%. The small finger amputation at the DIP joint corresponds to 5% to 7% upper extremity impairment. The ring finger amputation at the PIP joint is 7% to 9% upper extremity impairment. The grade modifiers for functional history were based on the quick DASH outcome measure, which is attached to this rating. The range of motion loss in each digit was incorporated into grade modifier for physical exam. The combined grade modifiers resulted in a net adjustment value of +2 each digit. The corresponding upper extremity impairment for the index, long, ring and small finger was 18%, 18%, 7% and 9% respectively. The total upper extremity impairment is 52%. In addition, on physical exam, the patient has evidence of a mild superficial radial nerve neuropathy. This corresponds to 1% upper extremity impairment. The total upper extremity impairment is 53%. Using Table 15-11 on page 421, upper extremity impairment of 53%, corresponds to a whole person percent of 32%.

The work restrictions outlined in the functional capacity evaluation were for medium duty work, working eight hours a day with occasional right hand fine grasp. I agree with the work restrictions outlined in the functional capacity evaluation. In some instances, the patient's work place may have to accommodate a modified grip.

Please do not hesitate to call me should you have any questions or concerns regarding this permanent partial impairment rating.

Sincerely

Beth S. Rogers, M.D.
BSR/pts

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Pinnacle Risk Management

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 Andrew C. Marsh (ISB # 6588)
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 Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,
Surety,
Defendants.

I.C. No. 08-024772

**Attorney Certificate in Support of Motion
 To Take Telephonic Rebuttal Deposition Of
 MacJulian Lang, CPO**

FILED
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Comes now W^m Breck Seiniger, Jr. and certifies that the attached is an authentic copy of a report that I received from MacJulian Lang, CPO, after providing him with a copy of the deposition of Dominic Gross, M.D. and asking him to review it.

DATED March 20, 2012.

SEINIGER LAW OFFICES, P.A.

W^m Breck Seiniger, Jr.
 Attorneys for Claimant

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**Attorney Certificate in Support of Motion To Take
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PAGE 1 OF 1

29

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Attorneys for Claimant

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,
Surety,
Defendants.

I.C. No. 08-024772

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DATED March 21, 2012.

SEINIGER LAW OFFICES, P.A.



W^m Breck Seiniger, Jr.
Attorneys for Claimant

From: Mac Lang [<mailto:mlang@armdynamics.com>]
Sent: Tuesday, March 20, 2012 5:12 PM
To: Breck Seiniger
Subject: RE: IME report of levels of amputation

Mr. Seiniger,

I would like to take this opportunity to address several concerns I had after reading the deposition of Dr. Gross. As I mentioned to you on the phone, I reviewed my original evaluation of Mr. Oliveros. I do believe that my evaluation was accurate and the levels of his amputations are at the levels that I described. I also read the IME report that you forwarded and this substantiated my assessment. X-ray images of Bryan's right hand would be the definitive means of determining length of bony segments and presence or absence of joints but I am not in possession of those.

I do not know why Dr. Gross chose to describe me the way he did in his deposition as I have not personally met him and don't know how he came to that conclusion. My assumption is that his reaction is due to a previous encounter with a different company or person.

As the lead prosthetist and clinical director of NW Center for Advance Arm Dynamics, I have a clinical practice that consists entirely of upper limb amputees. I am an ABC certified prosthetist but I do not, in fact, see any lower extremity amputees. I am published in peer reviewed prosthetics and orthotics journals, I have co-authored a chapter on Upper Limb Prosthetics in the Care of the Combat Amputee, and I present on the subject of prosthetics rehabilitation nationally and internationally. Although I do bill for my services, as all medical professionals do, I do not "sell" anything.

Dr. Gross is certainly entitled to his opinion about the utility of multiple custom silicone restorations. I do not maintain that they replace all of the function of an amputated finger. No prosthesis does if for no other reason that all prosthetic devices lack sensation. I do however have patients who use multiple custom silicone restorations for unilateral partial finger amputations on a daily basis. A big determinant of that usage is the aesthetic restoration and psychosocial benefit as well as protection of sensitive residual anatomy. If the only motivation for use is to restore hand function then silicone restorations are less likely to be used. If there are multiple factors contributing to usage they will be worn and can improve function, depending on the activity.

I appreciate the opportunity to address my concerns. If you require any additional information please contact me or my office.

Best regards,

MacJulian Lang, CPO
Clinical Director
Advanced Arm Dynamics
Northwest Center of Excellence
(503) 200-5750
www.armdynamics.com

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2012 MAR 22 P 1:55
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Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
v.)
)
RULE STEEL TANKS, INC.,)
)
 Employer,)
and)
)
ADVANTAGE WORKERS)
COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)
_____)

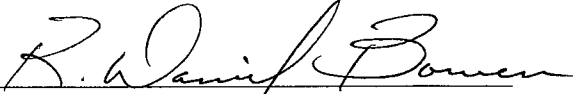
I.C. No.: 2008-024772

**OBJECTION TO MOTION TO TAKE
TELEPHONIC REBUTTAL
DEPOSITION OF MAC JULIAN LANG**

COME NOW Defendants, by and through counsel of record, R. Daniel Bowen of the firm Bowen & Bailey, LLP, objecting to Claimant's Motion to Take Telephonic Rebuttal Deposition of Macjulian Lang. This objection is based upon the Memorandum in Support of Objection to Motion to Take Telephonic Rebuttal Deposition of Macjulian Lang filed herewith.

DATED this 22nd day of March, 2012.

BOWEN & BAILEY, L.L.P.



R. DANIEL BOWEN - of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of March, 2012, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

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ANDREW MARSH ESQ
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- U.S. MAIL
- HAND DELIVERY
- FACSIMILE


R. Daniel Bowen

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Attorneys for Defendants

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
v.)
)
RULE STEEL TANKS, INC.,)
)
 Employer,)
and)
)
ADVANTAGE WORKERS)
COMPENSATION INSURANCE CO.,)
)
 Surety,)
Defendants.)
_____)

I.C. No.: 2008-024772

**MEMORANDUM IN SUPPORT OF
OBJECTION TO MOTION TO TAKE
TELEPHONIC REBUTTAL
DEPOSITION OF MACJULIAN LANG**

The issue as to the propriety of prosthetic fingers for Claimant, Bryan Oliveros, surfaced in the spring and early summer of 2010. Claimant was seen by a gentleman, Macjulian Lang, who provided a report to Claimant's treating physician, Dr. Gross, basically requesting him to authorize the prosthetic devices as reasonable and necessary. Dr. Gross, by means of letter dated

June 17, 2010, declined to recommend the devices. (Defendant's Hearing Exhibit No. 4, p. 78). Claimant's counsel chose to revisit issue with Dr. Gross by means of a letter he sent to Dr. Gross soliciting further opinions as to the propriety of the prosthetic devices, which Dr. Gross responded to in a November 1, 2011 letter, reiterating that he did not feel the prosthetic devices were required for Claimant to improve his functional use. (Defendants' Hearing Exhibit No. 4, p. 79). Claimant's counsel chose to revisit this issue yet one more time with Dr. Gross by means of a post-hearing December 10, 2011 letter. (Dr. Gross Deposition; Claimant's Exhibit 6). Dr. Gross responded to Mr. Seiniger's letter by means of his own on December 19, 2011, stating that while he was willing to prescribe the prostheses for Claimant, he did not want such construed as an admission on his part that such devices were medically necessary. (Dr. Gross Deposition; Claimant's Exhibit 12).

The hearing was held December 7, 2011. Claimant's testimony was taken, as well as that of his father and Carole Carr, the adjuster on the claim. Subsequent to the hearing and pursuant to the rules of the Industrial Commission of the State of Idaho, post-hearing depositions of the experts were taken. Claimant's counsel took the deposition of Macjulian Lang on December 15, 2011, and Defendants took the testimony of Dr. Gross on February 22, 2012. The deposition of Dr. Gross will be filed with the Industrial Commission upon Deponent's review of the same. A copy has been received by the parties. Shortly after review of the same, Claimant's counsel filed his Motion to Take Telephonic Rebuttal Deposition of Macjulian Lang based upon the testimony of Dr. Gross. The crux of his motion is basically that Dr. Gross had some issues with Mr. Lang's company, and Claimant's counsel has some issue with Dr. Gross' credibility, stating that Dr. Gross attacked the character, credentials, and observations of Mr. Lang, and that as such Claimant should have the opportunity to call Mr. Lang to address all these issues.

Workman's compensation proceedings are supposed to be summary and simple. The Industrial Commission has put together some fairly simplified rules for how we proceed in these matters, and those rules do not include mention of rebuttal. Defense counsel has been appearing before the Industrial Commission since the early '80s and does not recall any instance of where rebuttal testimony was allowed. It may have happened, but I sure don't remember it.

Claimant's counsel is concerned that Gross' opinions as expressed in his deposition were new and were a surprise. Keep in mind, this is the treating physician, not Defendants' expert as such. Claimant's counsel was free to consult with Dr. Gross at any time they wanted and to explore with him in as much detail as they wanted in any sort of setting, formal or informal, his opinions and why he held them. Indeed, Claimant's counsel took the opportunity to do so on at least three known occasions. Claimant himself was free to make an appointment with his treating physician and discuss with him the propriety of prosthetic fingers, but chose not to do so. Dr. Gross was on record multiple times saying he did not think these devices were something he would recommend or something he would consider reasonable and necessary. The fact that he offered additional elaboration as to why he held those opinions in the context of a testimonial deposition should come as no surprise to anyone – that is why attorneys do them. If the basis for rebuttal testimony is going to be whether a doctor in a deposition came up with an additional reason or two to support his opinion, we would have to do rebuttal depositions in pretty every case submitted to the Industrial Commission where there is medical testimony involved. That seems to be pretty inconsistent with how the Industrial Commission has traditionally proceeded.

Macjulian Lang thinks that the prosthetic devices are snappy, functional and cosmetically pleasing. Dr. Gross thinks that they are awkward, cumbersome, and that any cosmetic value is outweighed what he views as impedance of a basically functional hand. Claimant's counsel is

concerned that Dr. Gross took issue with the extent of the amputations documented by Macjulian Lang in his deposition. Either of these gentlemen, or both, may be incorrect. Defendants do not understand why that is so central to the outcome of this case. There are pictures of the amputated fingers in the record, and there are probably references to the proximity of the amputations contained in Dr. Gross' records that are elsewhere in the exhibits submitted to the Commission to the extent all of his records have been submitted. Defense counsel did not think the discrepancy was important enough to revisit by having the doctor review all his records during his deposition, and apparently Claimant's counsel did not think so either since he did not bother to ask him to look at these other documents.

Finally, Claimant's counsel is concerned that Dr. Gross has some reservations about Advanced Arm Dynamics' business model. The fact is he does, and he is entitled to his opinion. This does not mean that Advanced Arm Dynamics is a bad outfit or that Macjulian Lang is a bad person. Macjulian Lang had the opportunity to testify as to what he does for a living and he did so. Clearly, he is more than just a salesman, as stated by Dr. Gross, but here again, so what? Dr. Gross' point was more to the effect that Macjulian Lang and the Advanced Arm Dynamic company is not a disinterested party on the question of prosthetics; they are suppliers of such. That is apparent on the face of matters and is not going to change with a re-do deposition of Macjulian Lang.

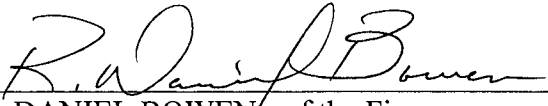
Claimant's final point is that because Dr. Gross is the treating physician and is the only physician to testify in this case, he should somehow have the opportunity to retake Macjulian Lang's deposition, because the Defendants are likely to argue that the claim for prosthetics should be denied under Idaho Code § 72-432, as there is no physician testifying that the prosthetic devices sought are medically necessary under that statute. That of course would be

true even if Macjulian Lang was re-deposed and completely destroyed the credibility of Dr. Gross. Macjulian Lang is not a physician, and Claimant and his attorney for their own reasons chose to not seek out another physician who could provide such testimony. It is not something that will be remedied by rebuttal testimony from Macjulian Lang, because it will not magically make him into a physician.

Regarding the current motion, it would in effect upset the order of proof. That is not something to take lightly and is a feature the parties have a right to rely upon. Defense counsel has the utmost respect for Claimant's counsel, but defense counsel believes that an attempt to alter the order of proof and get the last word has been in the back of Claimant's counsel's mind from the beginning, as evidenced by his inquiry regarding the possibility of rebuttal testimony as far back as the hearing. (Hearing Transcript, p. 107, ll. 10-16). Rebuttal is unnecessary in this case. Basically, the case comes down to weighing Macjulian Lang and his view that the prosthetic fingers would be a good idea against Dr. Gross' belief that they are not a very good idea. These gentlemen have had an opportunity to afford the Industrial Commission their explanation as to why they hold the opinions they hold, the record is fully flushed out and ready for the Industrial Commission to decide. To entertain rebuttal under the current circumstances would simply be to encourage rebuttal testimony in the vast majority of Industrial Commission cases, which in turn, would simply further complicate and drag out the proceedings. If it makes anyone feel better, Defendants note that Macjulian Lang in effect provided rebuttal in the form of a March 20, 2012 letter to Claimant's counsel, which letter Claimant's counsel has seen fit to provide to the Industrial Commission, the second piece of evidence he has generated post-hearing. Defendants would stipulate that the letter can be admitted if it would end this matter and allow the case to proceed.

DATED this 22nd day of March, 2012.

BOWEN & BAILEY, L.L.P.

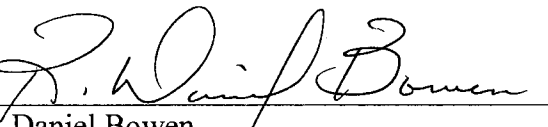

R. DANIEL BOWEN - of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of March, 2012, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

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ANDREW MARSH ESQ
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- U.S. MAIL
- HAND DELIVERY
- FACSIMILE


R. Daniel Bowen

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,
Claimant,

v.

RULE STEEL TANKS, INC.,
Employer,

and

ADVANTAGE WORKERS
COMPENSATION INSURANCE CO.,

Surety,
Defendants.

IC 2008-024772

**ORDER DENYING MOTION TO TAKE
POST-HEARING REBUTTAL
DEPOSITION**

FILED

APR - 9 2012

INDUSTRIAL COMMISSION

PRIOR PROCEEDINGS

Referee Rinda Just held a hearing in the instant case December 7, 2011. The record was left open for the parties to take post-hearing depositions. Claimant took the post-hearing deposition of MacJulian Lang, a prosthesis expert. Defendants took the post-hearing deposition of Dr. Gross, Claimant's treating physician.

POST-HEARING MOTIONS

On March 20, 2010, Claimant filed his Motion to Take Telephonic Rebuttal Deposition of MacJulian Lang, CPO, (Motion) together with a Memorandum in Support. In essence, Claimant asserts that during his deposition, Dr. Gross attacked the character, credentials, and opinions of Mr. Lang. This came as a surprise to Claimant, so Claimant is entitled to an opportunity to rebut Dr. Gross' testimony on such issues.

Defendants filed their Objection to Motion to Take Telephonic Rebuttal Deposition of MacJulian Lang (Objection) together with a Memorandum in Support. The essence of

**ORDER DENYING MOTION TO TAKE POST-HEARING REBUTTAL
DEPOSITION - 1**

Defendants' Objection is that Dr. Gross was Claimant's treating physician, and his antipathy for the prosthetic product that Claimant sought was well-documented. Claimant was aware that Dr. Gross did not recommend the prosthesis promoted by Mr. Lang because on three different occasions Dr. Gross stated as much in a letter. Claimant could have followed up with Dr. Gross at any time to pursue the question of why he would not recommend the prosthesis, but apparently did not do so. Dr. Gross' post-hearing testimony should not have come as a surprise to Claimant.

Defendants also argue that allowing Mr. Lang to provide rebuttal testimony does not resolve a primary stumbling block in Claimant's case-in-chief—the requirement of Idaho Code § 72-432 that a physician's medical recommendation is necessary to finding that medical treatment or devices must be reasonably necessary in order to be compensable.

Finally, Defendants argue that to allow rebuttal testimony would upset the order of proof as established by Rule 10(E)(3) of the Judicial Rules of Practice (J.R.P.). This order of proof is important and the parties should be able to rely on an established order of proof.

DISCUSSION

The Referee has read the Memoranda submitted by the parties in this proceeding. It was apparent at the hearing that a primary point of dispute in the instant claim was the fact that Claimant's treating physician was not on board with the prosthetic recommended by Mr. Lang. In particular, the fact that Mr. Lang was not a physician, but rather a representative of the company marketing the particular prosthetic, seemed to be a factor that spotlighted the underlying views of Mr. Lang and Dr. Gross.

Under the circumstances, it should not have come as any surprise to Claimant that Dr. Gross was rather emphatic in his deposition as to why he did not support the application of the prosthetic in dispute. Dr. Gross was Claimant's treating physician, and Claimant could have explored this issue with him at any time prior to the hearing. Claimant could have obtained an

independent evaluation of the potential efficacy of the prosthesis if they did not like Dr. Gross' opinion. Claimant took neither course in the proceeding, and then professed surprise when they heard what they must have already known or suspected.

Workers' compensation proceedings are intended to be fast, simple, and efficient. The current procedures attempt, but do not necessarily succeed in reaching those noble goals. However, permitting adjudicatory proceedings to run on indefinitely while parties rebut, surrebut, and sur-surrebut testimony is not in the best interests of any of the participants in the system. As Defendants stated in their Memorandum, the order of proof is part of the underpinning of the goal of fast, simple and efficient resolution of claims, and should not lightly be discarded.

CONCLUSION

After a careful review of the Motion, Objection, and Memoranda, and for the reasons set out herein, the Referee hereby DENIES Claimant's Motion.

As this interlocutory decision is not appealable until the Commission issues a final decision in the matter, it appears that it is appropriate at this time to set a briefing schedule. Pursuant to the discussion held at hearing regarding post-hearing briefing, the Referee issues the attached Order regarding post-hearing briefing to this decision.

DATED this 9 day of April, 2012.

INDUSTRIAL COMMISSION



Rinda Just, Referee

ATTEST:



Assistant Commission Secretary

ORDER DENYING MOTION TO TAKE POST-HEARING REBUTTAL DEPOSITION - 3

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of April, 2012, a true and correct copy of **ORDER DENYING MOTION TO TAKE POST-HEARING REBUTTAL DEPOSITION** was served by regular United States mail upon each of the following persons:

W BRECK SEINIGER
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djb

DRostand

2012 APR 30 A 9:35

RECEIVED
INDUSTRIAL COMMISSION

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,

Surety,
Defendants.

I.C. No. 08-024772

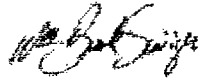
**Motion To Dismiss Without Prejudice and
Motion Withdraw Request For A Trial Of
The Silicon Partial Finger Prostheses Made
Pursuant To Idaho Code § 72-432 Without
Prejudice or In The Alternative To
Reconsider**

COMES NOW the Claimant, by and through counsel of record W^m Breck Seiniger, Jr. of Seiniger Law Offices, P.A., and moves this Honorable Commission to enter its order dismissing his Complaint without prejudice, and for its order permitting Claimant to withdraw his request for prosthetic fingers without prejudice in the interests of justice. This motion is supported by the affidavit of Claimant's Counsel and the memorandum filed herewith. Claimant moves for the reconsideration denying him the right to present rebuttal testimony in the event that this *Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice* is denied.

Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

DATED April 30, 2012.

SEINIGER LAW OFFICES, P.A.



W^m Breck Seiniger, Jr.
Attorneys for Claimant


CERTIFICATE OF SERVICE

On April 30, 2012 I served the foregoing by facsimile transmission on:

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Email: info@bowen-bailey.com

Dated April 130 2012.

SEINIGER LAW OFFICES, P.A.



W^m Breck Seiniger, Jr.
Attorneys for Plaintiffs

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RECEIVED
INDUSTRIAL COMMISSION

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,

Surety,
Defendants.

I.C. No. 08-024772

Memorandum in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

Claimant requests that he be permitted to dismiss his complaint and withdraw his request for a trial of the silicon partial finger prostheses without prejudice. Claimant has filed herewith a *Claimant's Notice Withdrawing Without Prejudice His Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432* and his supporting affidavit.

Claimant requested a hearing limited to his desire that this Commission enter an order pursuant to Idaho Code § 72-432 that the Defendants provide him with a set of

Memorandum in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

silicone partial finger prosthetics as a medical benefit. He did so in good faith based upon the fact that his treating surgeon, Dominic Gross, had indicated to his counsel in writing that he would prescribe those prostheses for Claimant, but that Dr. Gross did not consider them medically necessary because they were cosmetic rather than functional. Claimant reasoned that this Commission had authority to order the Defendants to pay for a trial of these prostheses even if they were only cosmetic (a fact in dispute) under Idaho Code § 72-432.

However, unanticipated testimony given by Dr. Gross in his deposition has rendered Claimant request for an order essentially moot. Prior to the hearing in this matter, Claimant's Counsel contacted Dr. Gross and he was advised that Dr. Gross would prescribe these prostheses if Claimant were to wish to obtain them as a part of a "settlement", though he did not consider them to be "medically necessary" because they were not "functional" (a fact in dispute):

Q. (BY MR. SEINIGER) Would you take a look and see if you can find your letter to me of November 1st, 2011?

A. Yeah, here we go. I have it right here.

Q. Why don't you -- I've found my copy, and let me just read it, and you tell me if I've read correctly from the letter that you wrote to me on November 1st, 2011: "Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as a part of a settlement in this case."

Did I read that correctly?

A. Yeah, but it -- can you read back what he said? He said that I would write the prescription if -- I would write him a prescription for the prosthesis if Bryan settled the case, that's what you asked me.

Q. Is that not what you said in the letter?

A. I don't think it's the same.

Q. What's the difference, please?

**Memorandum in Support of Motion To Dismiss Without Prejudice and Motion
Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
Pursuant To Idaho Code § 72-432 Without Prejudice or
In The Alternative To Reconsider**

A. Well, one, I think it's not the same. I think that -- I think what I'm saying is, is that it's not contingent upon him settling the case. It's if -- if he needs it, accompanying in the case. So it's not contingent upon him settling the case would I -- that I would write the prescription. Is that clear?

Q. Okay. Why don't you take a look at my letter, then, of December 10th, 2011, which was Claimant's Exhibit to your --

A. I don't have it.

Q. -- deposition, No. 6.

A. Okay.

Q. Then take a look at your letter of December 19th, 2011, to me --

MR. SEINIGER: Would you mark this as Claimant's Exhibit No. 14 to Dr. Gross' deposition, please. And then hand it back to me, because it's my only copy.

(Exhibit 14 marked.)

Q. (BY MR. SEINIGER) Now, would you agree with me that on December 10th, 2011, I wrote you and I said, "In view of this, I request that you write Mr. Oliveros a prescription for the prostheses now, for whatever reason you had in mind in agreeing to do so in connection with the settlement of his workers' compensation case."

And then on December 19th, 2011, you wrote back and essentially declined to do so. Is that a fair characterization?

A. Can I see the letter, please?

Q. Which one?

A. My response to you.

Q. Yeah, here you go.

A. Okay.

Q. And so in that letter you state, "I have reviewed your request, and find I am uncomfortable prescribing the prosthesis prior to the settlement being reached." As I stated earlier, I am happy to write for it should Bryan wish to use his settlement to purchase a set, but I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and do not want my prescription for the prostheses construed as an agreement to the fact that it is medically necessary."

So isn't it your position that with respect to Mr. Oliveros you will only write him this prescription if he settles this case?

A. No. I think my -- my position is, is that I would write the prescription to him if it added function to his hand, you know. And I think what would happen is we're going back and forth with getting to a point where I think it's a cosmetic

Memorandum in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

thing, and we would -- we want a functional part of it. And looking at his hand and then reviewing what they wanted, we didn't feel really comfortable with it. And we just were hopeful that you guys would figure out what you wanted to do.

Q. You'd agree with me, wouldn't you, that whether or not Mr. Oliveros settles this case is not a factor that has anything, whatsoever, to do with medical necessity with respect to these prostheses, correct?

A. Yeah, I don't -- it shouldn't be contingent upon that.

Q. In fact, it is -- without meaning any disrespect by the question, it really is none of your concern whether or not he settles this case, is it?

A. No, it's not.

Second Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice, Exhibit 3, Deposition of Dominic Gross, p. 65 l. 21 to p. 69 l. 6.

As the affidavits filed herewith demonstrate, prior to hearing, Dr. Gross, while certainly not supportive of the prostheses, never indicated that they would impede Mr. Oliveros' hand function. Indeed, Dr. Gross referred Claimant to Advanced Arm Dynamics to be evaluated for the prostheses, and Claimant traveled to Portland, Oregon to undergo that evaluation -- an evaluation that was clearly a waste of Claimant's time if indeed Dr. Gross actually believed that the prostheses would impede his hand function and that it would be "ridiculous" to prescribe them. See, *Second Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice Or In The Alternative To Reconsider, Exhibit 1*, testimony excerpt of MacJulian Lang regarding referral by Dr. Gross, Exhibit 2, letter reporting on evaluation of Claimant from Lang to Gross.

Memorandum in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

Furthermore, Dr. Gross certainly did not communicate that it would be "ridiculous" to prescribe or use those prostheses. While Dr. Gross contended that the prostheses were not medically necessary because they were not "functional," he advised the Claimant's counsel that he would be happy to write a prescription for the prostheses as a part of a settlement of Claimant's claim. See exchange of correspondence, *Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice Or In The Alternative To Reconsider*, Exhibits A-D. Yet at hearing, Dr. Gross did not limit himself to contending that the prostheses were "not functional and would be only cosmetic in nature, he testified that they would cause harm:

Q. Okay. Now, do you have concerns that they would actually impede function?

A. If he has these silicone devices, they don't have sensory function at the end, okay. So he's going to have four fingers that are not going to be able to provide sensory feedback to light touch, hot or warm. It's almost like wearing a lead glove. He's not going to be able to do fine manipulation; they're just going to be these numb extensions of finger. **It's ridiculous. It's absolutely absurd that someone would actually put in four fingers. And to me, a company that would even suggest that, and I'll go on the record, is ridiculous. It's absolutely ridiculous.**

Gross Depo. p. 82 l. 14 to p. 83 l. 11. Had Dr. Gross advised Claimant or his counsel prior to the hearing that this was his actual position with respect to these prostheses, Claimant would not have gone to hearing on this issue. Dr. Gross expressly stated that he would prescribe the prostheses, and that it appeared that his reason for not doing so was that he believed that Claimant was not entitled to them unless they were "functional":

Memorandum in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

In her *Order Denying Motion To Take Post -Hearing Rebuttal* Referee Just observes that Claimant was not surprised by Dr. Gross' opposition to the prosthetic in dispute, that Claimant could have explored this with him prior to hearing, and that Claimant could have obtained an independent evaluation of the potential efficacy of the prostheses if he did not like Dr. Gross opinion. Notwithstanding the Referee's observation that it would have been a good idea for Claimant to consult with Dr. Gross, the affidavit of Claimant's counsel, filed herewith, makes it clear, that he did consult with Dr. Gross prior to hearing, but that Dr. Gross gave his opinion for the first time at his deposition that it was "absurd" to prescribe multiple prostheses. Referee Just blames Mr. Oliveros for not obtaining an independent medical opinion in this matter given Dr. Gross's opinion that the prostheses are not "medically necessary" because they were not functional. However, Mr. Oliveros has been unemployed or partially employed a lot since Mr. Oliveros' accident, and going to school for some time. Mr. Oliveros lives with his parents, and he is living on very limited on funds. Claimant's counsel is not aware of any statutory or case authority for the proposition that medical treatment or apparatus that is only "cosmetic" and not "functional" is unavailable under Idaho Code § 72-432 -- and Claimant disputes that the prostheses he seeks are "cosmetic" and not "functional." See, *Deposition of MacJulian Lang*.

At the time of hearing, due to reliance upon Dr. Gross' express communications, Claimant's Counsel was unaware that Dr. Gross believed that multiple partial finger prostheses were not viable even for that purpose and that prescribing them would be "ridiculous" to use the term he employed in his attached deposition. Prior to his deposition, Dr. Gross never advised claimant that the prostheses would impede function

**Memorandum in Support of Motion To Dismiss Without Prejudice and Motion
Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
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or that it was "ridiculous" to prescribe them. Indeed, the statement contained in his November 1, 2011 letter that he would be "would happy to write for the prosthesis should [claimant] choose to have them as part of a settlement in this case" led Claimant's counsel to believe that he could in good conscious and consistent with the ethical practice of medicine prescribe the prostheses for cosmetic purposes without impeding Mr. Oliver's' hand function. Claimant proceeded to hearing in the honest belief that since the doctor would apparently prescribe them for cosmetic purposes, his position was not inconsistent with Claimant's request that the Commission order the prostheses in question if only for cosmetic and psychological purposes. The Claimant did not have sufficient funds to hire an independent medical evaluator, and his counsel did not recommend that he do so because he took Dr. Gross at his word, and it certainly did not appear necessary for Claimant to do so. Dr. Gross's deposition testimony makes it clear that he is not likely to prescribe the prostheses even if Mr. Oliveros prevail at hearing. Mr. Oliveros believed that Dr. Gross's opinions were accurately and honestly represented by the statements he made in his letter to Claimant's Counsel of November 1, 2011 and relied on that fact. In view of this, it seems a bit calloused for the Commission to fault Claimant for relying on Dr. Gross' integrity to the extent that Claimant expected him to testify consistently with his written communications. Rare must be the Claimant who can afford to obtain a second opinion and produce the physician offering it as an expert witness at hearing in order to make sure that the record contains rebuttal testimony in case his or her treating physician testifies contrary to the medical opinions contained in letters solicited from the treating physician by his Counsel.

**Memorandum in Support of Motion To Dismiss Without Prejudice and Motion
Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
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More troubling, the implication of Dr. Gross's deposition testimony is that he was simply working with the surety to get Mr. Oliveros to settle Mr. Oliveros' claim by promising to write a prescription for prostheses that his deposition makes clear he considers to be "ridiculous" for all purposes, and that it would "impede existing function." One cannot fathom without inferring the most heinous motives, why Dr. Gross would essentially promise Mr. Oliveros' to write him a prescription for the prostheses he desire "as a part of a settlement in this case" if he believes what he testified to in his deposition. I certainly would not have proceeded as I did with respect to Mr. Oliveros' hearing if Dr. Gross had disclosed these opinions prior to hearing, because there is a vast difference between Dr. Gross statement in his November 1, 2011 letter that the prostheses would not improve upon Mr. Oliveros' function use of Mr. Oliveros' hand, and his statement that they would impede function. Obviously, the fact that Dr. Gross is of the opinion that the prostheses would not improve function is not a disincentive to obtaining the prostheses, even with Mr. Oliveros' own settlement proceeds, simply for cosmetic purposes. However, if the fingers will actually impede function that is another matter.

The Commission clearly has authority to order prostheses for cosmetic purposes whether or not they are "functional" in Dr. Gross' opinion, but it is certainly unlikely that the Commission would issue such an order now that Dr. Gross has essentially testified that it would be "ridiculous" to do so. However, in proceeding to hearing, Claimant reasonably believed that he had a right to the prostheses, notwithstanding Dr. Gross apparently misinformed understanding of the Commission's authority under Idaho Code § 72-432. If this were not the case, no claimant could ever obtain revisionary surgery for

Memorandum in Support of Motion To Dismiss Without Prejudice *and* Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

scars under Idaho Code § 72-432 unless such a claimant could prove that the revisionary surgery would improve function. Clearly, that is not the law. Claimant proceeded to hearing in the reasonable belief that he was entitled to these prostheses under Idaho Code § 72-432, if only because they were of undisputed cosmetic value.

The discrepancy between Dr. Gross stating that he would write a prescription for the four prostheses if the Claimant accepted a settlement, and the position that he took in his deposition, that it was “ridiculous” to prescribe them for any reason and that they would impede function, was not something that Claimant anticipated or should have anticipated.

While it may have been desirable for the Claimant to obtain another opinion, he believed in good faith that he had done so by consulting with Mr. Lang of Advanced Arm Dynamics. Apparently, the Referee is persuaded prior to even taking this matter under advisement that MacJulian Lang, a residency trained Board Certified Prosthetist and Orthotist with a degree in Mechanical Engineering from Cornell University, Certificate Degrees from Cal State University Dominguez Hills in both Prosthetics and Orthotics and advanced training in upper arm prosthetics, *Deposition of MacJulian Lang* pp. 6-7, is simply a “representative of the company marketing the particular prosthetic”¹ and that Claimant is remiss for not obtaining an opinion from a medical doctor concerning this issue. Claimant disputes this reading of Idaho Code § 72-432, but, in any event,

¹ The implication of the Referee’s observation is that a physician must give an opinion regarding medical necessity and that the opinions of Mr. Lang, notwithstanding his considerable experience and education, count for nothing. One expects, or is at least inured to, this view of anyone without a medical degree coming from within the inherently narcissistic and self-aggrandizing culture of the medical profession, but it is discouraging to find it accepted at face value by a judge whose impartiality and objectivity claimants must rely upon.

Claimant and his counsel assumed that since Dr. Gross offered to prescribe these prostheses, he did not believe that it would be "ridiculous" to do so and that they would impede his hand function, or he would not ethically have been able to offer to do so in Dr. Gross' letter of November 1, 2012 to Claimant's Counsel.

Claimant cannot repose any further confidence in Dr. Gross's integrity. One can only reluctantly draw the conclusion that Dr. Gross has taken a partisan position in this matter by concerning himself with the settlement of Mr. Oliveros' case, which he obviously did in his letter of November 1, 2012 when he wrote me "Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case."

The timing of the letter from the Defendants' Counsel of November 8, 2012 attached hereto as Exhibit D to the *Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice Or In The Alternative To Reconsider* offering to pay for a trial of the prostheses "in the context of a settlement" was sent closely upon the heels of Dr. Gross's sending his November 1, 2012 letter in offering to prescribe the prostheses as a "part of a settlement in this case." The letter to Mr. Oliveros' counsel from Dr. Gross does not indicate that it was copied to Defendants Counsel, and Claimant's Counsel does not recall forwarding a copy of the letter to Defendants' Counsel upon receipt, though it appears of record that Dr. Gross and the Defendants have been collaborating on the issue of settlement.

Memorandum in Support of Motion To Dismiss Without Prejudice *and* Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

It would be unwise for Mr. Oliveros to use Dr. Gross as a treating physician even if the Commission was to order the prostheses and Dr. Gross was then to prescribe them, which seems unlikely. Dr. Gross's letter of November 1, 2012 is misleading, and Mr. Oliveros proceeded to hearing in reliance upon the opinions that Dr. Gross stated in that letter. Dr. Gross has betrayed Mr. Oliveros' trust, Mr. Oliveros has no reason to repose any confidence in his objectivity or integrity, and it makes little sense to proceed to have the Commission order a prostheses if he continues to be Mr. Oliveros' physician. Therefore, Mr. Oliveros' present request for these prostheses is essentially moot.

CONCLUSION

The conduct of Dr. Gross mislead the Claimant into believing that he had a valid claim to the prostheses in question, and that whatever else Dr. Gross might opine, Dr. Gross did not believe that the prostheses would impeded Claimant's hand function and that it would be "ridiculous." The interests of justice require that Claimant be permitted to dismiss his complaint without prejudice and withdraw his request for a trial of the silicon partial finger prostheses without prejudice. In the event that Claimant's *Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice* are denied, he requests that the Commission reconsider its order denying him the right to present rebuttal testimony consistent with his attorney's request made during the pre-hearing conference in this matter as reflected in the affidavit of his Counsel filed herewith. Claimant does not waive his right to brief the issues presented at hearing and specifically address them. However, should these motions be denied and no stay granted to permit briefing hereafter,

**Memorandum in Support of Motion To Dismiss Without Prejudice *and* Motion
Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
Pursuant To Idaho Code § 72-432 Without Prejudice or
In The Alternative To Reconsider**

the arguments contained in this and all prior briefing should be considered by the Commission.

DATED April 30, 2012.

SEINIGER LAW OFFICES, P.A.



W^m Breck Seiniger, Jr.
Attorneys for Claimant

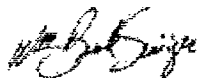
CERTIFICATE OF SERVICE

On April 30, 2012 I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Email: info@bowen-bailey.com

Dated April 30, 2012.

SEINIGER LAW OFFICES, P.A.



W^m Breck Seiniger, Jr.
Attorneys for Plaintiffs

Memorandum in Support of Motion To Dismiss Without Prejudice *and* Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice or In The Alternative To Reconsider

04/30/2012 09:53

(208) 345-4700

Wm. Breck Seiniger, Jr.

Page 2/12

FAX

2012 APR 30 A 10: 07

RECEIVED
INDUSTRIAL COMMISSION

Wm. Breck Seiniger, Jr. (ISB # 2387)
Andrew C. Marsh (ISB # 6588)
Seiniger Law Offices, P.A.
942 W. Myrtle Street
Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,

*Surety,
Defendants.*

I.C. No. 08-024772

**Affidavit of W^m Breck Seiniger, Jr. in
Support of Motion To Dismiss Without
Prejudice and Motion Withdraw Request
For A Trial Of The Silicon Partial Finger
Prostheses Made Pursuant To Idaho Code §
72-432 Without Prejudice**

STATE OF IDAHO)
) ss:
County of Ada)

WM. BRECK SEINIGER, JR. being first duly sworn on oath deposes and states as follows:

1. I am the attorney for the Claimant in the above-entitled action, and as such, have personal knowledge of the facts set forth below.

2. I make this affidavit in support of Claimant's *Motion To Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without*

Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice

Prejudice.

3. Attached hereto as Exhibit A is a letter dated June 17, 2010 provided to me written by Dominic Gross, M.D., Claimant's treating surgeon.

4. Attached hereto as Exhibit B is my letter of August 30, 2011 to Dominic Gross, M.D. requesting a clarification of his position regarding the distinction between prostheses that are functional and those that are cosmetic and requesting a prescription for the silicone partial finger prostheses at issue.

5. Attached hereto as Exhibit C is a letter of November 1, 2011, from Dominic Gross, M.D. responding to my letter of August 30, 2011. In that letter, he offers to prescribe the prostheses as a "part of a settlement in this case."

6. Attached hereto as Exhibit D is a letter that my office received from the Defendants offering to pay for a trial of the prostheses desired by the Claimant "in the context of a settlement".

7. Referee Just has observed in her *Order Denying Motion To Take Post-Hearing Rebuttal Deposition* that the Claimant was not surprised by the testimony of Dr. Gross and that I should have consulted with Dr. Gross prior to hearing and that Claimant should have obtained an independent medical evaluation.

8. As the letters attached hereto demonstrate, I did consult with Dr. Gross. Dr. Gross advised me that he did not think that the silicone partial finger prostheses were functional and therefore were not necessary or reasonable, but that he would prescribe them as a part of a settlement.

**Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice
and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
Pursuant To Idaho Code § 72-432 Without Prejudice**

9. My reading of Idaho Code § 72-432 is that the Commission has authority to order medical procedures and devices that are purely cosmetic for psychological purposes. While it was clear to me that Dr. Gross did not understand Idaho Code § 72-432, or was at least accepting the contention of the Defendants that Idaho Code § 72-432 does not permit such. Consequently, it did not appear to me that it was necessary to obtain an IME. Furthermore, the relief sought at hearing is an order for the prostheses

10. The Claimant did not have sufficient funds to hire an independent medical evaluator, and I did not recommend that he do so because I took Dr. Gross at his word, and it certainly did not appear necessary for Claimant to do so.

11. Prior to his deposition, Dr. Gross never advised me that the prostheses would impede function or that it was "ridiculous" to prescribe them. Indeed, the statement contained in his November 1, 2011 letter that he would be "would happy to write for the prosthesis should [I]choose to have them as part of a settlement in this case" lead me to believe that he could in good conscious and consistent with the ethical practice of medicine prescribe the prostheses for cosmetic purposes without impeded Mr. Oliver's' hand function.

12. I have reviewed my file and database, and I a can find nothing to indicate that I communicated Dr. Gross letter of November 1, 2011 to the Defendants.

13. Dr. Gross's deposition testimony makes it clear that he is not likely to prescribe the prostheses even if Mr. Oliveros prevail at hearing. More troubling, the implication of Dr. Gross's deposition testimony is that he was simply working with the surety to get Mr. Oliveros to settle Mr. Oliveros'

**Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice
and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
Pursuant To Idaho Code § 72-432 Without Prejudice**

claim by promising to write a prescription for prostheses that his deposition makes clear he considers to be "ridiculous" for all purposes, and that it would "impede existing function."

14. I am at a loss to understand why Dr. Gross would essentially promise Mr. Oliveros' to write him a prescription for the prostheses he desire "as a part of a settlement in this case" if he believes what he testified to in his deposition. I certainly would not have proceeded as I did with respect to Mr. Oliveros' hearing if Dr. Gross had disclosed these opinions prior to hearing, because there is a vast difference between Dr. Gross statement in his November 1, 2011 letter that the prostheses would not improve upon Mr. Oliveros' function use of Mr. Oliveros' hand, and his statement that they would impede function. Obviously, the fact that Dr. Gross is of the opinion that the prostheses would not improve function is not a disincentive to obtaining the prostheses, even with Mr. Oliveros' own settlement proceeds, simply for cosmetic purposes. However, if the fingers will actually impede function that is another matter.

15. I am aware that the Referee in this case has blamed Mr. Oliveros for not obtaining an independent medical opinion in this matter given Dr. Gross's opinion that the prostheses are not "medically necessary" because they were not functional. However, Mr. Oliveros have been unemployed or partially employed a lot since Mr. Oliveros' accident, and going to school for some time. Mr. Oliveros lives with his parents, and he is living on very limited on funds. Mr. Oliveros believed that Dr. Gross's opinions were accurately and honestly represented by the statements he made in his letter to me of November 1, 2011 and relied on that fact.

61

16. I was not aware that Dr. Gross believed that multiple partial finger prostheses were not viable even for that purpose and that prescribing them would be "ridiculous" to use the term he employed in his attached deposition.

17. My client cannot repose any further confidence in Dr. Gross's integrity. One can only reluctantly draw the conclusion that Dr. Gross has taken a partisan position in this matter by concerning himself with the settlement of Mr. Oliveros' case, which he obviously did in his letter of November 1, 2012 when he wrote me "Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case."

18. The timing of the letter from the Defendants' Counsel of November 8, 2012 attached hereto as Exhibit D offering to pay for a trial of the prostheses "in the context of a settlement" was sent closely upon the heels of Dr. Gross's sending his November 1, 2012 letter in offering to prescribe the prostheses as a "part of a settlement in this case." The letter to Mr. Oliveros' counsel from Dr. Gross does not indicate that it was copied to Defendants Counsel, and I do not recall forwarding a copy of the letter to Defendants' Counsel upon receipt.

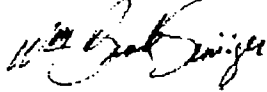
19. It would be unwise for Mr. Oliveros to use Dr. Gross as a treating physician even if the Commission was to order the prostheses and Dr. Gross was then to prescribe them, which seems unlikely. Dr. Gross's letter of November 1, 2012 is misleading, and Mr. Oliveros proceeded to hearing in reliance upon the opinions that Dr. Gross stated in that letter.

20. I believe that Dr. Gross has betrayed Mr. Oliveros' trust, Mr. Oliveros has no confidence in his objectivity or integrity, and it makes little sense to proceed to have the Commission order a

prostheses if he continues to be Mr. Oliveros' physician. Therefore, I consider Mr. Oliveros' present request for these prostheses is essentially moot at this point in time.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated April 13, 2012.



W^m Breck Seiniger, Jr.
Attorney for Claimant

Subscribed and sworn to before me on April 13, 2012.

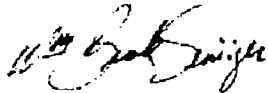
/s/ _____
Cade Woolstenhulme
Notary Public for State of Idaho
Residing at: Nampa, Idaho
My Commission Expires: September 25, 2012

CERTIFICATE OF SERVICE

On April 13, 2012 I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Fax: (208) 344-9670

SEINIGER LAW OFFICES, P.A.



W^m Breck Seiniger, Jr.
Attorneys for Plaintiffs

**Affidavit of W^m Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice
and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made
Pursuant To Idaho Code § 72-432 Without Prejudice**

04/30/2012 09:53

(208) 345-4700

Wm. Breck Seiniger, Jr.

Page 8/12

11/17/2010 02:55 2083449670

BOWEN AND BAILEY

PAGE 02/02

10/13/2010 12:35 2088884296

DR GROSS DR JONES

PAGE 02/02



DOMINIC L. GROSS, MD

Board Certified Orthopedic Surgeon
Certificate of Added Qualification in Hand Surgery

June 17, 2010

RE: Bryan Oliveros

[Redacted]

Claim#: 2008562800

To Whom It May Concern:

We have been informed that Mr. Oliveros has been inquiring about prosthetic devices. In my practice, I know of no prostheses that would improve his function, and do not routinely recommend them should the patient have functional use of the hand.

If I can be of further service, please do not hesitate to contact my office.

Sincerely,

Dominic L. Gross, M.D.

04/30/2012 09:53

(208) 345-4700

Wm. Breck Seiniger, Jr.

Page 9/12

SEINIGER LAW OFFICES

Wm Breck Seiniger, Jr., Atty.
Idaho, Oregon, Washington and
The District of Columbia

A Professional Association

Julie M. Seiniger, Atty.
Idaho, Indiana and
The District of Columbia

Andrew C. Marsh, Atty.
Idaho, Indiana and Missouri
Cade Woolstenhulme, Senior
Paralegal
Eileen DeShazo
Paralegal

August 30, 2011

Dominic L. Gross, MD
311 W. Idaho St.
Boise, ID 83702
O: 208-846-8616 / F: 208-888-4296

RE: Patient: Bryan Oliveros
[REDACTED] [REDACTED]
Date of Loss: 7/30/2008
Your letter of: 6/17/2010

Dear Dr. Gross:

I represent Bryan Oliveros. Having reviewed your letter of June 17, 2010, I am requesting clarification to make certain that I understand your position. My understanding is that you "do not routinely recommend [prosthesis] should the patient have functional use of the hand." I want to make certain that I understand your position so that I know what steps need to be taken on behalf of Mr. Oliveros. I assume that you are not saying that cosmetic measures are not medically necessary, since I am under the impression based on other cases involving mutilated hands that digits are sometimes partially amputated (including in workers compensation cases) for cosmetic purposes when part of a finger has been destroyed. If I am mistaken in that regard would you please so advise me.

This makes sense, since the Workers Compensation Act covers all reasonable treatment including prosthesis and not just that which is functional. (See the attached.) The requirement is one of reasonableness, not functionality. Were this not the case, only scar revision that restored function would be available under the Idaho Workers Compensation Act, which is not the case. That being the case, are you willing to prescribe the prostheses described in the April 1, 2011 letter sent to you by MacJulian Lang, CPO, Clinical Director of Advanced Arm Dynamics? Is there anything that I can do, or that I should have my client/your patient do to cooperate with your office to allow you to answer that question? Please let me know and I will promptly respond. Thank you.

Cordially,

/s/

Wm Breck Seiniger, Jr.
Copy: Dan Bowen, Bryan Oliveros

EXHIBIT B

(1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

(2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

Idaho Code Ann. § 72-432 (West).

EXHIBIT B

04/30/2012 09:53

(208) 345-4700

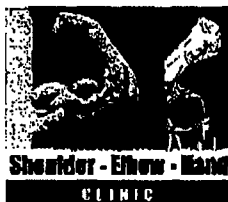
Wm. Breck Seiniger, Jr.

Page 11/12

11/09/2011 09:48 2088884296

HORIZONWOMENS

PAGE 02/02



DOMINIC L. GROSS, MD

**Board Certified Orthopedic Surgeon
Certificate of Added Qualification in Hand Surgery**

Mr. Wm. Breck Seiniger
Seiniger Law Offices
942 W. Myrtle St.
Boise, ID, 83702

RE: Bryan Oliveros

November 1, 2011

Dear Mr. Seiniger,

This letter is in reference to your correspondence dated August 30, 2011. I apologize for the delay, I have been out of town and unusually busy for this time of year in my practice. I have reviewed Bryan's chart and your letters and I stand by my statement; that any prosthesis Mr. Oliveros would get would not improve upon his functional use of the hand. Any prostheses would be for cosmetic purposes only, and while that can be important in a young patient, those patients for whom I have ordered finger prosthetics find them cumbersome, awkward, and time-consuming to use. Despite this fact, a prosthesis is not required for Mr. Oliveros to be able to use his hand. From the deposition I read dated September 1, 2011, Bryan has returned to school and works part-time at Verizon and plans to attend school full time next semester. Based on these facts, I would say that he is doing quite well and does not need prosthetic finger tips to continue school and working at Verizon. If I had felt at any time during his recovery that there were devices or prosthetics that would have improved his outcome and ability use the hand, I assure you I would have prescribed such items as outlined in the Worker's Compensation Act that you so graciously provided to me.

Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case. But I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and, Bryan understands that while it may help him "give some support", it was clear that he knew it would not significantly improve the use of the hand other than for looks.

Sincerely,

Dominic L. Gross, M.D.

04/30/2012 09:53

(208) 345-4700

Wm. Breck Seiniger, Jr.

Page 12/12

11/08/2011 02:45 2083449670

BOWEN AND BAILEY

PAGE 01/01

R. DANIEL BOWEN
ERIC S. BAILEY * also licensed in WY
W. SCOTT WIGLE
NATHAN T. GANDEL * also licensed in OR

LAW OFFICE
BOWEN & BAILEY, LLP
1311 W. JEFFERSON
PO BOX 1007
BOISE, IDAHO 83726-1007

Telephone: (208) 344-7200
Facsimile: (208) 344-9670
Email: info@bowen-bailey.com

November 8, 2011

VIA FACSIMILE

Andrew Marsh, Esq.
Seiniger Law Offices
942 W. Myrtle St.
Boise, ID 83702
Fax: (208) 345-4700

Re: Claim No.: 2008562800
Insured: Rule Steel Co.
Claimant: Bryan Oliveros
Date/Loss: 07/30/2008

Dear Andrew:

In response to your more recent inquiries, my client is not interested in picking up the prosthetic costs, at least on an open-ended basis. We have run this by Claimant's treating physician several different occasions, and he is rather adamant that your client is not in need of these devices, nor would they be reasonable and necessary. However, if it would otherwise avoid the upcoming hearing, we would be willing to pay for a one-time shot of these fingers in the context of a settlement. Basically, we would be willing to offer \$ [redacted] to reflect the cost of the prosthetic devices as laid out by Advanced Arm Dynamics in their April 1, 2011 letter to you. We would also be willing to pay the balance of Claimant's impairment, which as of this moment is \$ [redacted]. Finally, we would be willing to pay an additional [redacted] lump sum consideration, for a total of \$ [redacted] new money.

Please present this offer to your client and advise us of his response at your earliest convenience.

Sincerely yours,

SENT VIA FACSIMILE AND
WITHOUT SIGNATURE

R. Daniel Bowen

RDB:gmh

AK

2012 APR 30 A 10:28
RECEIVED
INDUSTRIAL COMMISSION

Wm. Breck Seiniger, Jr. (ISB # 2387)
Andrew C. Marsh (ISB # 6588)
Seiniger Law Offices, P.A.
942 W. Myrtle Street
Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,
vs.

I.C. No. 08-024772

Rule Steel Tanks, Inc., *Employer, and Pinnacle Risk Management, Surety,*
Defendants.

Second Affidavit of Wm. Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Protheses Made Pursuant To Idaho Code §72-432 Without Prejudice

STATE OF IDAHO)
) ss:
County of Ada)

Wm. Breck Seiniger, Jr., being first duly sworn on oath deposes and states as follows:

1. I am the attorney for the Claimant in the above-entitled action, and as such, have personal knowledge of the facts set forth below.
2. I make this affidavit in support of my client's *Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Protheses Made Pursuant To Idaho Code § 72-432 Without Prejudice.*

Second Affidavit of Wm. Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Protheses Made Pursuant To Idaho Code § 72-432 Without Prejudice

69

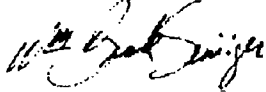
3. Attached hereto as Exhibit 1 is a copy of the page of the deposition of MacJulian Lang referencing the fact that the Claimant was referred to him by Dominic Gross, M.D.

4. Attached hereto as Exhibit 2 is a copy of the letter from Mr. Lang responding to Dr. Gross's referral

5. Attached hereto as Exhibit 3 is a copy of the deposition of Dominic Gross, M.D. I have not included the attachments because I am not in possession of them, but I believe that the exhibits referred to have been included as attachments to my prior affidavits and are in the record.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated April 30, 2012.



Wm. Breck Seiniger, Jr.
Attorney for Claimant

CERTIFICATE OF SERVICE

On April 30, 2012 I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Fax: (208) 344-9670



W^m Breck Seiniger, Jr.
Attorneys for Plaintiffs

Second Affidavit of Wm. Breck Seiniger, Jr. in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice

DEPOSITION OF MACJULIAN LANG - DECEMBER 15, 2011

1 BEFORE THE INDUSTRIAL COMMISSION
 2 OF THE STATE OF IDAHO
 3 ---
 4 BRYAN OLIVEROS,)
 5 Claimant,)
 6 vs.) No. 08-024772
 7 RUIE STEEL TANKS, INC.,)
 8 Employer,)
 9 and)
 10 PINNACLE RISK MANAGEMENT,)
 11 Surety,)
 12 Defendants.)

13
 14
 15 DEPOSITION OF MACJULIAN LANG
 16 December 15, 2011
 17
 18
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 21
 22
 23
 24 REPORTED BY: CHRISTINE E. RHODES, CA CSR NO. 9887
 25 ID CSR NO. SRT-990

1 APPEARANCES
 2
 3 FOR THE CLAIMANT:
 4 Seiniger Law Offices, P.A.
 5 Attorneys at Law
 6 942 West Myrtle Street
 7 Boise, Idaho 83702
 8 By: Wm. Breck Seiniger, Jr., Esq.
 9 and
 10 Andrew C. March, Esq.
 11
 12 FOR THE DEFENDANTS:
 13 Bowen & Bailey
 14 Attorneys at Law
 15 1311 West Jefferson
 16 Boise, Idaho 83701-1007
 17 By: Dan Bowen, Esq.
 18 (Present via telephone)
 19
 20
 21
 22
 23
 24
 25

1 INDEX
 2
 3 Examination by: Page:
 4 Mr. Seiniger 4, 39
 5 Mr. Bowen 32
 6
 7
 8
 9
 10 Exhibits For Claimant:
 11 #13 Color photocopy of a letter,
 12 dated April 1, 2011, consisting of one page
 13 and four pages of attachments 4
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 17 ---oOo---
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1 At the Seiniger Law Offices, 942 West Myrtle
 2 Street, Boise, Idaho, on Thursday, December 15, 2011,
 3 commencing at the hour of 10:10 a.m., thereof, before
 4 Christine E. Rhodes, Certified Shorthand Reporter,
 5 personally appeared via telephone,
 6
 7 MACJULIAN LANG
 8 who having been duly sworn by the Court Reporter,
 9 testified as follows:
 10
 11 (Whereupon, Claimant's Exhibit Number 13 was
 12 marked for identification.)
 13
 14 EXAMINATION
 15 BY MR. SEINIGER:
 16 Q. Mr. Lang, this deposition is being taken for
 17 testimonial purposes in a case in front of the
 18 Idaho Industrial Commission. And as you know, you've just
 19 been sworn and your deposition is being taken pursuant to
 20 oath and under the Idaho Rules of Civil Procedure as
 21 adopted and to the extent adopted by the Idaho Industrial
 22 Commission.
 23 Mr. Bowen, would you like to put anything on the
 24 record before I start my examination?
 25 MR. BOWEN: No, I don't think so, Mr. Seiniger.

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 2012 APR 30 A 10:30

DEPOSITION OF MACJULIAN LANG - DECEMBER 15, 2011

1 has it included within the base code, the custom silicone
2 restoration, and the other does not, because you can have
3 a heavy-duty finger protector that isn't held on by
4 suction.

5 Q. All right. And I think we have all the cost
6 information. That's right in the report.

7 It looks like the total for those is \$17,814.15;
8 is that correct?

9 A. That's correct.

10 Q. Okay.

11 A. And those are usual and customary charges.

12 Q. And then, would Mr. Oliveros need to come over to
13 Portland to be fitted for those?

14 A. Correct. Correct. So, there would be a process
15 that we would go through. I am in Boise on occasion. So,
16 there's a potential that I could take impressions when I
17 was in Boise. But at the very minimum, there would have
18 to be an appointment for impressions, because I took
19 impressions when he was here, but it's been long enough
20 that I would want to take a fresh set of impressions. And
21 then, based off of that, we could, you know, schedule a
22 time for the silicone painting to occur. And then, at the
23 same time, the custom protectors.

24 So, at the minimum, there will be two
25 appointments. And you know, in an ideal world, I have at

1 does have the finger protectors as well as the custom
2 silicone restorations, I would not be surprised if he was
3 to have them last towards the end of that. You know,
4 towards the five-year mark or even past that.

5 Again, there aren't any moving parts within the
6 prosthetic devices or actively moving parts within the
7 prosthetic devices. So, there isn't a lot of stress that
8 gets put across them or, you know, strength or tension
9 across the silicone. But certainly, there is -- You know,
10 they do get worn. And the more he wears them, the faster
11 they'll wear out.

12 But it won't be under three years. And more than
13 likely, it will be on the five-year range, if not longer .

14 Q. Okay. Is there anything else that you think a
15 person, a layman, should know about either the reasons
16 that Mr. Oliveros should get these prostheses or the
17 benefit that he might get from having them that we haven't
18 talked about?

19 A. You know, I think we were fairly comprehensive.
20 So, I don't think I have anything to add specifically, no.

21 Q. Okay. Thank you, sir. Those are my questions.

22 Mr. Bowen will now ask you questions.

23 A. Sure.

24 MR. BOWEN: Thank you very much, Brad.

25

29

31

1 least three appointments where we're doing, you know, the
2 impression, then the fitting and then at least one
3 followup to make sure that everything is working exactly
4 as I intend.

5 One thing that I don't think is really
6 highlighted too much is that the fit and function of the
7 fingers from a, you know, covered standpoint, and suction
8 standpoint and the color matching, all of that is pretty
9 much guaranteed. If it doesn't hold on, if it doesn't
10 look exactly like his other finger, if, you know, for some
11 reason something about it isn't acceptable to either
12 myself or Bryan, you know, there is an issue, you know,
13 that is replaced or redone for free, basically. So,
14 there's a significant amount of guarantee there.

15 And also, repairs are done free of charge within
16 the first two years of the prosthesis. So, you know, if
17 -- It's a lot of money up front, but there's also sort of
18 a lot of background guarantee that what he gets is what
19 he's going to use.

20 Q. Okay. So, how long do these prosthetic fingers
21 usually last?

22 A. We say the usual life of a prosthesis is three to
23 five years. But I have patients, if they are basically
24 kind to their prosthetic devices and take care of them the
25 way that they are instructed to do and they -- And if he

30

EXAMINATION

2 BY MR. BOWEN:

3 Q. Mr. Lang, as a clinical director, what do you do
4 day-to-day there?

5 A. I'm responsible for not only the
6 day-to-day operations of our office, but I'm also the
7 prosthetist, the primary prosthetist, for the office. So,
8 I'm involved in every aspect of our patients' care from
9 initial evaluation to the impressions to the final fitting
10 of a device and followup.

11 Q. Now, with respect to Mr. Oliveros, how did you
12 make contact with him?

13 A. Mr. Oliveros was referred to us by his doctor,
14 Dr. Gross.

15 Q. Okay. And when you met with Bryan back there in
16 March of 2011, did you have his medical records?

17 A. I did not have his full medical record. I had a
18 brief, again, referral from Dr. Gross. And then, I took a
19 full and, like I said, comprehensive, you know,
20 questionnaire and medical history while he was in the
21 office.

22 Q. So, other than the referral letter from
23 Dr. Gross, you haven't reviewed any medical records with
24 respect to Bryan Oliveros or of the treatment he's
25 received for his --

32

72

04/30/2012 10:05

(208) 345-4700

Wm. Breck Seigner, Jr.

Page 6/14

Specializing in Upper Extremity Prosthetic Rehabilitation Worldwide



ADVANCED
ARM
DYNAMICS

April 1, 2011

Dominic L. Gross, MD
311 W. Idaho St.
Boise, ID 83702
O: 208-846-8616 / F: 208-888-4296

Patient: Bryan Oliveros
349 Coppertree Drive
Nampa, ID 83651

Claim # 2008562800
DOB: 07-07-1990
DOI: 07-30-2008
ICD-9: 886.0

Dear Dr. Gross:

Your patient, Mr. Bryan Oliveros or Bryan as he wishes to be called was seen for prosthetic evaluation at Advanced Arm Dynamics of the Northwest, LLC. He presents with a right partial finger level amputations. Based on our evaluation, we recommend that Mr. Oliveros be fit with custom silicone restoration partial finger prostheses and heavy duty finger protectors in order to improve grasping and dexterity and to provide necessary protection for the residual anatomy. The purpose of this letter is to detail a plan for rehabilitation and gain authorization for its implementation.

Your recommendations for prosthetic care and a statement of medical necessity will be essential for the authorization process. Sample documentation has been included for your review. If you concur, please either create a prescription and letter recommending the proposed services or sign the enclosed documents. Kindly fax them back to our administrative office at (310) 372 - 3057. Should you require additional information, please contact me directly at (877) 230 - 5750. Thank you for your prompt attention to this matter.

Sincerely,

MacJulian Lang, CPO
Clinical Director
Advanced Arm Dynamics, Northwest Center of Excellence

www.armdynamics.com
9370 SW Greenburg Road • Suite M • Portland, OR 97223
Toll Free: 877.230.5750 • Tel: 503.200.5750 • Fax: 503.200.5754

Δ π EXHIBIT 13
Depositor Long
Date 7/15/11 Rpt. CR
www.demosocial.com

04/30/2012 10:05

(208) 345-4700

Wm. Breck Seiniger, Jr.

Page 7/14

Specializing in Upper Extremity Prosthetic Rehabilitation Worldwide

ADVANCED
ARM
DYNAMICS

PATIENT NAME: Bryan Oliveros
DIAGNOSIS: Right partial finger level amputations secondary to industrial trauma
DATE: April 1, 2011
REFERRING PHYSICIAN: Dr. Gross

PROSTHETIC REPORT

Mr. Bryan Oliveros was seen recently at Advanced Arm Dynamics of the Northwest, LLC for prosthetic evaluation. He presents with right partial finger level amputations. During the evaluation, the rehabilitation team thoroughly discussed with Mr. Oliveros the available prosthetic options for his amputation level as well as his personal goals and concerns. Mr. Oliveros is three years post injury and has not yet been fit with any type of prosthetic device. He reports that the limb loss impairs his grasping capability and dexterity. He has expressed a desire to recover more effective and comfortable hand function in his activities.



AMPUTATION LEVEL/PRESENTATION

Right partial finger amputations secondary to an industrial trauma; 2nd & 4th digits at Proximal Interphalangeal; 3rd digit through Proximal Phalange and 5th digit at Distal Interphalangeal.



Affected side considerations:

- Dominant hand affected.
- Limited strength and function in affected hand.
- Mr. Oliveros reports numbness, tingling and occasional stabs of pain in residual digits.
- Evaluation indicates that pinch force and grip strength with the affected hand is significantly reduced as compared to the sound hand.
- Handling objects with the affected hand requires an awkward and uncomfortable grasping pattern which may lead to tendonitis.

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 Toll Free: 877.230.5750 • Tel: 503.200.5750 • Fax: 503.200.5754

74

REHABILITATION GOALS:

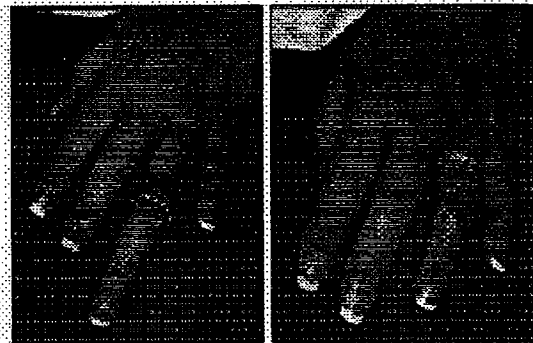
- Improve function in Activities of Daily Living (playing sports and weight lifting); become proficient in bimanual tasks for complete independence.
- Perform necessary tasks at school which requires consistent use of the affected hand to write and type.
- Minimize reliance on the intact hand and potential overuse injuries including carpal tunnel syndrome and tendonitis.

PROSTHETIC REQUIREMENTS:

- Reduction of discomfort on the distal aspect of the affected fingers during manual activity.
- Restoration of the hand's useful surface area and form to provide opposition for improved grasping and fine motor skills.
- 3rd, 4th & 5th digits are necessary in forming the power grasp utilized to handle medium to large objects.
- 2nd & 3rd fingers are necessary in forming precision grasp.
- Durability and cleanliness necessary in all activities.

PROSTHETIC REHABILITATION PLAN:**Custom Silicone Partial Finger Protheses**

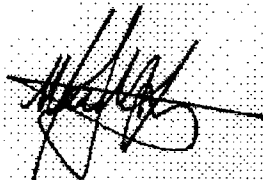
- Restores more normal biomechanical function (grasping, dexterity) to the hand; also reduces the likelihood of complications secondary to maladaptive grasping with the affected hand and/or overuse of the sound hand.
- Protects sensitive residual anatomy -- The total contact suction fit of custom silicone is most effective for functional stability and cushioning of sensitive areas. Other materials utilized in production devices distort under repetitive load, causing discomfort or tissue compromise as they migrate upon the residual limb. Silicone, however, retains the contours of the residuum and provides a secure foundation for moldable fingers that can be prepositioned into common prehension patterns.



- **Kinesthetic feedback** – The custom suction fit allows full mobility in the hand and conducts sensation from the tip of the prosthesis to the residual anatomy, giving the wearer *kinesthetic feedback*. Kinesthesia, or the perception of prosthetic movement and spatial orientation as if it were a part of the body, enhances coordination in manual tasks.
- **Enhanced function and hygiene** – The specially formulated silicone is more durable than alternative materials that stain immediately, become brittle and can fail structurally within one year. It is lightweight, water and stain resistant, and demonstrates a higher coefficient of friction (tackiness) which helps prevent objects from slipping.
- **Natural appearance** – Minimizing the distraction of a prosthetic device has been found to benefit both the wearer's self-image and the quality of professional and social interactions. Enhanced productivity and quality of life also sustain motivation to integrate the prosthesis into one's daily life as indicated for long-term clinical benefits.

Heavy duty finger protector with a custom silicone interface

- **Higher level of protection** – the finger protector is a more utilitarian use of a softer silicone and is reinforced to withstand repetitive motions and abrasion. The softer silicone will provide additional protection to the sensitive residuum. Used in place of the silicone restoration for work and other heavy duty types of manual activities, it will extend the life of the primary custom silicone restoration prosthesis.



MacJulian Lang, CPO
Clinical Director
Advanced Arm Dynamics, Northwest Center of Excellence

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
Claimant,)
vs.) I.C. No.
)
RULE STEEL TANKS, INC.,) 2008-024772
)
Employer,)
and)
)
ADVANTAGE WORKERS COMPENSATION)
)
INSURANCE CO.,)
)
Surety,)
)
Defendants.)
_____)

DEPOSITION OF DOMINIC GROSS, M.D.

FEBRUARY 22, 2012

REPORTED BY:

MARLENE "MOLLY" WARD, CSR No. 704, RPR

Notary Public

Page 2

1 THE DEPOSITION OF DOMINIC GROSS, M.D., was
 2 taken on behalf of the Defendants at Bowen & Bailey,
 3 LLP, located at 1311 West Jefferson Street, Boise,
 4 Idaho, commencing at 10:04 a.m. on February 22, 2012,
 5 before Marlene "Molly" Ward, Registered Professional
 6 Reporter and Notary Public within and for the State of
 7 Idaho, in the above-entitled matter.

8
 9 APPEARANCES:
 10
 11 For the Claimant:
 12 Seiniger Law Offices
 13 BY: MR. WM. BRECK SEINIGER, JR.
 14 942 West Myrtle Street
 15 Boise, Idaho 83702
 16
 17 For the Defendants:
 18 Bowen & Bailey, LLP
 19 BY: MR. R. DANIEL BOWEN
 20 1311 West Jefferson Street
 21 P.O. Box 1007
 22 Boise, Idaho 83701-1007
 23
 24
 25 ALSO PRESENT: Katy Laible

Page 4

1 PAGE
 2 EXHIBITS CONTINUED
 3
 4 10 - Letter to Dr. Gross from Mr. Lang,
 5 Dated April 1, 2011 **
 6 11 - Advanced Arm Dynamics Prosthetic Report **
 7 12 - Letter to Mr. Seiniger from Dr. Gross,
 8 Dated December 19, 2011 **
 9 13 - Deposition of MacJulian Lang **
 10 14 - Letter to Mr. Seiniger from Dr. Gross,
 11 Dated December 19, 2011 67
 12 15 - Update Advances in Upper Extremity
 13 Prosthetics Article 72
 14 E1 - Letter to Mr. Seiniger from Dr. Gross 19
 15 E2 - The Journal of Hand Surgery Article 26
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 3

1 INDEX
 2 TESTIMONY OF DOMINIC GROSS, M.D. PAGE
 3 Examination by Mr. Bowen 5
 4 Examination by Mr. Seiniger 26
 5 Further Examination by Mr. Bowen 72
 6 Further Examination by Mr. Seiniger 74
 7 Further Examination by Mr. Bowen 80
 8 EXHIBITS
 9 (** Indicates premarked.)
 10 1 - Letter to Mr. Marsh from Mr. Bowen,
 11 Dated October 11, 2010 **
 12 2 - Letter from Dr. Gross, Dated June 27, 2010 **
 13 3 - Letter to Dr. Gross from Mr. Seiniger,
 14 Dated August 30, 2011 **
 15 4 - Letter to Dr. Gross from Mr. Seiniger,
 16 Dated November 1, 2011 **
 17 5 - Letter to Mr. Marsh from Mr. Bowen,
 18 Dated November 8, 2011 **
 19 6 - Letter to Dr. Gross from Mr. Seiniger,
 20 Dated December 10, 2011 **
 21 7 - Explanation of Unlisted/Listed Procedures
 22 From Advanced Arm Dynamics **
 23 8 - Advanced Arm Dynamics Document **
 24 9 - Letter to Dr. Gross from Mr. Seiniger,
 25 Dated December 22, 2011 **

Page 5

1 DOMINIC GROSS, M.D.,
 2 first duly sworn to tell the truth relating to said
 3 cause, testified as follows:
 4
 5 MR. BOWEN: Let the record reflect that this is
 6 the time and place set for the taking of Dr. Dominic
 7 Gross' deposition, a testimonial deposition posthearing
 8 in the matter of Bryan Oliveros versus Rule Steel Tanks,
 9 Inc., employer and their surety, Advantage Workers
 10 Compensation Insurance Co.
 11 Let the record reflect that this is being taken
 12 for testimonial purposes posthearing in lieu of the
 13 doctor's appearance at hearing.
 14 Anything to add, Mr. Seiniger?
 15 MR. SEINIGER: No.
 16
 17 EXAMINATION
 18 QUESTIONS BY MR. BOWEN:
 19 Q. Will you please state your full name, sir?
 20 A. Dominic Linus Gross.
 21 Q. What do you do for a living?
 22 A. I'm an orthopedic hand surgeon.
 23 Q. Where do you practice?
 24 A. 311 West Idaho Street, Boise, Idaho.
 25 Q. How long have you been practicing orthopedic

2 (Pages 2 to 5)

1 A. Well, I don't know. Are they going to put
 2 devices on the index, the long and the ring and the
 3 small?
 4 Q. Why don't you take a look at Exhibit 11 and
 5 see what's recommended.
 6 A. It doesn't specifically say. Again, I'll
 7 point that out to you, okay. It doesn't say which
 8 digits they want to replace or add to. So I mean, I've
 9 already looked at this. And so please direct me to
 10 exactly where it says he wants to replace the index,
 11 long and the ring, and the small.
 12 MR. BOWEN: It's in his bid.
 13 THE WITNESS: Oh, okay. Well . . .
 14 MR. BOWEN: Let's find it.
 15 THE WITNESS: Because I have no idea.
 16 MR. BOWEN: It's not in the report.
 17 MR. SEINIGER: The bid is Exhibit No. 7.
 18 MR. BOWEN: Here, Breck. It's Exhibit No. 7,
 19 page 116, Doctor, if you will.
 20 THE WITNESS: So he wants to put four custom
 21 partial-finger prostheses to his fingers. And how long
 22 does it take to put them on and off?
 23 Q. (BY MR. SEINIGER) Well, that's, I think, in
 24 his deposition. I can't tell you right now.
 25 A. Well, I mean if -- let's just say it takes,

1 A. Um-hmm. In my opinion, it's typing.
 2 Q. Okay. In Exhibit No. 6 I quote from your
 3 letter to me, and that letter says -- that's a letter
 4 that I sent you on December 10th, 2011, it says, "In
 5 your letter to me of November 1, 2011, you state:
 6 'Bryan is a delightful young man who has not let his
 7 injury define him. I wish him the best of luck, and
 8 will be happy to write for the prosthesis should he
 9 choose to have them as a part of a settlement in this
 10 case."
 11 Now, first of all, do you recall writing to me
 12 that you'd be happy to write the prosthesis if he chose
 13 to have them as part of a settlement in the case?
 14 A. If -- yes, I recall writing to you. Yes.
 15 Yes. Yes.
 16 Q. Okay. And in response to that, I think you
 17 wrote back and declined to write a prescription,
 18 essentially, unless he settled this case; is that
 19 correct?
 20 A. I'm not -- I can't recall that.
 21 Q. Well, let me ask you this: If Bryan contacts
 22 you today and says, "I'd like you to write a
 23 prescription for this," would you be willing to write it
 24 for him?
 25 A. Would I be willing to write it for him? For

1 what, five minutes or two minutes or what is it for each
 2 finger?
 3 Q. We're getting far afield from the question.
 4 A. No, no. But this is --
 5 Q. Doctor, I get to answer the questions and you
 6 must answer them -- I get to ask the questions and you
 7 must answer them. Okay. This is not a debate. The
 8 question is in terms of the length and leverage of
 9 extending the fingers, is it -- with these prostheses,
 10 would there be any advantage gained in terms of that
 11 particular function at all?
 12 A. What function are you referring to? Typing?
 13 Q. The function of the fingers at all in terms of
 14 extending the length and leverage.
 15 A. Typing.
 16 Q. Anything else you can think of?
 17 A. No, sir.
 18 Q. How about picking up a small object?
 19 A. He can do that with the thumb and the index
 20 finger.
 21 Q. I understand that he can do it, okay. I
 22 understand that he can do it. What I'm saying is: Is
 23 there any advantage? That's a different question. A
 24 man with no legs can move around, it doesn't mean that
 25 he has no disadvantage from not having the legs.

1 Bryan, well, I don't -- I'm not sure -- I'm not so sure
 2 what I'm supposed to be doing at this point. So I
 3 don't -- you know, I'm a physician, and so I want to do
 4 what's right for the patient. And if that's right for
 5 the patient, I will do that. If it's not right for the
 6 patient, I won't do it.
 7 Q. Well, in your letter you wrote and said you
 8 would write the prescription if he settled this case.
 9 And at least, when you wrote that letter, I assume that
 10 you meant it. Did you mean that when you wrote me that
 11 letter, that you'd write the prescription if he settled
 12 this case?
 13 A. I don't recall saying that if he settles the
 14 case we're going to write -- we're going to write him
 15 the prescription; I just don't recall that. I just
 16 don't recall that. But I'll do whatever I feel is right
 17 for Bryan, that's for sure.
 18 Q. Have you got your chart here?
 19 MS. LAIBLE: Here.
 20 MR. SEINIGER: Thank you.
 21 Q. (BY MR. SEINIGER) Would you take a look and
 22 see if you can find your letter to me of November 1st,
 23 2011?
 24 A. Yeah, here we go. I have it right here.
 25 Q. Why don't you -- I've found my copy, and let

1 me just read it, and you tell me if I've read correctly.
2 from the letter that you wrote to me on November 1st,
3 2011. "Bryan is a delightful young man who has not let
4 his injury define him. I wish him the best of luck, and
5 will be happy to write for the prosthesis should he
6 choose to have them as a part of a settlement in this
7 case."

8 Did I read that correctly?

9 A. Yeah, but it -- can you read back what he
10 said? He said that I would write the prescription if --
11 I would write him a prescription for the prosthesis if
12 Bryan settled the case, that's what you asked me.

13 Q. Is that not what you said in the letter?

14 A. I don't think it's the same.

15 Q. What's the difference, please?

16 A. Well, one, I think it's not the same. I think
17 that -- I think what I'm saying is, is that it's not
18 contingent upon him settling the case. It's if -- if he
19 needs it, accompanying in the case. So it's not
20 contingent upon him settling the case would I -- that I
21 would write the prescription. Is that clear?

22 Q. Okay. Why don't you take a look at my letter,
23 then, of December 10th, 2011, which was Claimant's
24 Exhibit to your --

25 A. I don't have it.

1 reviewed your request, and find I am uncomfortable
2 prescribing the prosthesis prior to the settlement being
3 reached. As I stated earlier, I am happy to write for
4 it should Bryan wish to use his settlement to purchase a
5 set, but I stand by my original statement that the
6 prosthetic devices are not required for Mr. Oliveros to
7 improve his functional use of the hand, and do not want
8 my prescription for the prostheses construed as an
9 agreement to the fact that it is medically necessary."

10 So isn't it your position that with respect to
11 Mr. Oliveros you will only write him this prescription
12 if he settles this case?

13 A. No. I think my -- my position is, is that I
14 would write the prescription to him if it added function
15 to his hand, you know. And I think what would happen is
16 we're going back and forth with getting to a point where
17 I think it's a cosmetic thing, and we would -- we want a
18 functional part of it. And looking at his hand and then
19 reviewing what they wanted, we didn't feel really
20 comfortable with it. And we just were hopeful that you
21 guys would figure out what you wanted to do.

22 Q. You'd agree with me, wouldn't you, that
23 whether or not Mr. Oliveros settles this case is not a
24 factor that has anything, whatsoever, to do with medical
25 necessity with respect to these prostheses, correct?

1 Q. -- deposition, No. 6.

2 A. Okay.

3 Q. Then take a look at your letter of
4 December 19th, 2011, to me --

5 MR. SEINIGER: Would you mark this as
6 Claimant's Exhibit No. 14 to Dr. Gross' deposition,
7 please. And then hand it back to me, because it's my
8 only copy.

9 (Exhibit 14 marked.)

10 Q. (BY MR. SEINIGER) Now, would you agree with
11 me that on December 10th, 2011, I wrote you and I said,
12 "In view of this, I request that you write Mr. Oliveros
13 a prescription for the prostheses now, for whatever
14 reason you had in mind in agreeing to do so in
15 connection with the settlement of his workers'
16 compensation case."

17 And then on December 19th, 2011, you wrote
18 back and essentially declined to do so. Is that a fair
19 characterization?

20 A. Can I see the letter, please?

21 Q. Which one?

22 A. My response to you.

23 Q. Yeah, here you go.

24 A. Okay.

25 Q. And so in that letter you state, "I have

1 A. Yeah, I don't -- it shouldn't be contingent
2 upon that.

3 Q. In fact, it is -- without meaning any
4 disrespect by the question, it really is none of your
5 concern whether or not he settles this case, is it?

6 A. No, it's not.

7 Q. What I'm wondering is, how is it that you see
8 it as appropriate to have declined to write this
9 prescription whether or not you've felt that it would
10 improve his function or help him psychologically based
11 on what he decided to do in terms of settling with an
12 insurance company?

13 A. The insurance company -- for what I'm saying
14 is, is I don't want to prevent Bryan from getting
15 whatever he needs, okay. And it's not -- I don't -- I
16 don't have any benefit from either of you guys
17 benefiting in this case. So I don't -- I don't think it
18 should have anything to do with your settlement with
19 Bryan or Bryan's settlement with the insurance company.
20 I don't think it should have anything to do with it.

21 Q. Okay. Good. We're in total agreement on
22 that.

23 Mr. Bowen had asked you whether or not Bryan
24 discussed this with you -- in terms of your
25 determination whether or not this is medically

Page 82

1 MR. SEINIGER: He's covered it all.
 2 THE WITNESS: First of all, you have to put
 3 these devices on, which is -- it's not a simple act.
 4 And you're not just putting on one, you're putting on
 5 four. And you've got -- you have to have this sticky
 6 device, and it takes five minutes per finger. So you're
 7 looking at 20 minutes every single day on a young,
 8 active guy. It's hot, it's sweaty, and no one wants to
 9 get their hands caught up in these devices. And the
 10 biggest concern is that he is going to reject these.
 11 And up to 35 percent will reject these.
 12 Q. (BY MR. BOWEN) What do you mean by rejection?
 13 A. They won't use them.
 14 Q. Okay. Now, do you have concerns that they
 15 would actually impede function?
 16 A. If he has these silicone devices, they don't
 17 have sensory function at the end, okay. So he's going
 18 to have four fingers that are not going to be able to
 19 provide sensory feedback to light touch, hot or warm.
 20 It's almost like wearing a lead glove. He's not going
 21 to be able to do fine manipulation, they're just going
 22 to be these numb extensions of finger.
 23 It's ridiculous. It's absolutely absurd that
 24 someone would actually put in four fingers. And to me,
 25 a company that would even suggest that, and I'll go on

Page 83

1 the record, is ridiculous. It's absolutely ridiculous.
 2 Q. So I gather you think it would impede his
 3 existing function?
 4 A. I do.
 5 Q. Thank you. Is that an opinion you hold within
 6 a reasonable --
 7 A. There's also a standard of care.
 8 Q. Yes.
 9 A. This is not the standard of care for this
 10 community.
 11 MR. BOWEN: Okay. Thank you. I'm done.
 12 COURT REPORTER: Doctor, are you going to read
 13 and sign your transcript?
 14 THE WITNESS: You can send it to my office.
 15 COURT REPORTER: Are you ordering a copy of
 16 this transcript?
 17 MR. SEINIGER: Not right now.
 18 (Deposition concluded at 12:14 p.m.)
 19 (Signature requested.)
 20
 21
 22
 23
 24
 25

Page 84

1 CERTIFICATE OF WITNESS
 2 I, DOMINIC L. GROSS, M.D., being first duly sworn,
 3 depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, consisting of pages 1 through 83; that I
 6 have read said deposition and know the contents thereof,
 7 that the questions contained therein were propounded to
 8 me; and that the answers contained therein are true and
 9 correct, except for any changes that I may have listed
 10 on the Change Sheet attached hereto.
 11 DATED this ____ day of _____, 2012.
 12
 13 _____
 14 DOMINIC L. GROSS, M.D.
 15 SUBSCRIBED AND SWORN to before me this ____ day of
 16 _____, 2012.
 17
 18 _____
 19 NAME OF NOTARY PUBLIC
 20
 21 _____
 22 NOTARY PUBLIC FOR _____
 23 RESIDING AT _____
 24 MY COMMISSION EXPIRES _____
 25

Page 85

1 CHANGE SHEET FOR DOMINIC L. GROSS, M.D.
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 24 Use a separate sheet if you need more room.
 25 WITNESS SIGNATURE



-SAX-

R. DANIEL BOWEN (ISB #2673)
BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
P.O. BOX 1007
BOISE, ID 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
 v.)
)
 RULE STEEL TANKS, INC.,)
)
 Employer,)
 and)
)
 ADVANTAGE WORKERS)
 COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)

I.C. No.: 2008-024772

**DEFENDANTS' OBJECTION TO
CLAIMANT'S MOTION TO DISMISS
WITHOUT PREJUDICE AND MOTION
TO WITHDRAW REQUEST FOR
A TRIAL OF THE SILICON PARTIAL
FINGER PROSTHESES WITHOUT
PREJUDICE**

FILED

INDUSTRIAL COMMISSION

COME NOW Defendants, by and through counsel of record, objecting to Claimant's Motions to Dismiss without Prejudice and to Withdraw his Request for a Trial of Silicon Partial Finger Prostheses. This objection is based upon the memorandum filed herewith.

OBJECTION TO CLAIMANT'S MOTION TO DISMISS WITHOUT PREJUDICE AND MOTION TO WITHDRAW REQUEST FOR A TRIAL OF SILICON PARTIAL FINGER PROSTHESES

ORIGINAL

R. DANIEL BOWEN (ISB #2673)
BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
P.O. BOX 1007
BOISE, ID 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670

2012 MAY -2 P 1:52

RECEIVED
INDUSTRIAL COMMISSION

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
v.)
)
RULE STEEL TANKS, INC.,)
)
 Employer,)
and)
)
ADVANTAGE WORKERS)
COMPENSATION INSURANCE CO.,)
)
 Surety,)
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_____)

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OBJECTION TO CLAIMANT'S MOTION TO DISMISS WITHOUT PREJUDICE AND MOTION TO WITHDRAW REQUEST FOR A TRIAL OF SILICON PARTIAL FINGER PROSTHESES

DATED this 15th day of May, 2012.

BOWEN & BAILEY, L.L.P.




R. DANIEL BOWEN - of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of May, 2012, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

W BRECK SEINIGER
ANDREW MARSH ESQ
SEINIGER LAW OFFICES
942 W MYRTLE ST
BOISE ID 83702
FAX: (203) 345-4700

- U.S. MAIL
- HAND DELIVERY
- FACSIMILE


R. Daniel Bowen

FAY

R. DANIEL BOWEN (ISB #2673)
BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
P.O. BOX 1007
BOISE, ID 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
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 Claimant,)
 v.)
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 RULE STEEL TANKS, INC.,)
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 and)
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 ADVANTAGE WORKERS)
 COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)

I.C. No.: 2008-024772

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' OBJECTION TO
CLAIMANT'S MOTION TO DISMISS
WITHOUT PREJUDICE AND MOTION
TO WITHDRAW REQUEST FOR
A TRIAL OF THE SILICON PARTIAL
FINGER PROSTHESES WITHOUT
PREJUDICE**

FILED

Claimant's counsel filed a Complaint on behalf of his client in February of 2010. Thereafter, there ensued a discussion as to the propriety of prosthetic fingers for Claimant, Mr. Bryan Oliveros, which issue the parties were unable to resolve. Claimant's counsel made a decision to move forward and try the issue of his client's entitlement to the prosthetic fingers, the

MEMORANDUM IN SUPPORT OF DEFENDANTS' OBJECTION TO CLAIMANT'S MOTION TO DISMISS WITHOUT PREJUDICE AND MOTION TO WITHDRAW REQUEST FOR A TRIAL OF SILICON PARTIAL FINGER PROSTHESES

ORIGINAL

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BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
P.O. BOX 1007
BOISE, ID 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670

2012 MAY -2 P 1:52
RECEIVED
INDUSTRIAL COMMISSION

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
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 RULE STEEL TANKS, INC.,)
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 Employer,)
 and)
)
 ADVANTAGE WORKERS)
 COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)

I.C. No.: 2008-024772

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' OBJECTION TO
CLAIMANT'S MOTION TO DISMISS
WITHOUT PREJUDICE AND MOTION
TO WITHDRAW REQUEST FOR
A TRIAL OF THE SILICON PARTIAL
FINGER PROSTHESES WITHOUT
PREJUDICE**

Claimant's counsel filed a Complaint on behalf of his client in February of 2010. Thereafter, there ensued a discussion as to the propriety of prosthetic fingers for Claimant, Mr. Bryan Oliveros, which issue the parties were unable to resolve. Claimant's counsel made a decision to move forward and try the issue of his client's entitlement to the prosthetic fingers, the

parties entered into a stipulation to litigate this issue, which stipulation formed the basis for an Amended Notice of Hearing issued by the Industrial Commission on November 29, 2011 setting the matter of the entitlement to prosthetic fingers to be heard on December 7, 2011. The parties, in fact, proceeded to hearing on the limited issue posed, that being Claimant's entitlement to prosthetic fingers. Subsequent to that hearing Claimant's counsel offered the testimony of Macjulian Lang, and Defendants offered the testimony of Dr. Dominic Gross.

Subsequent to that time, Claimant's counsel sought approval to take further testimony from Macjulian Lang as rebuttal to the testimony offered by Dr. Dominic Gross. The motion was objected to by Defendants and was denied by the Industrial Commission on or about April 10, 2012. An Order Establishing Briefing Schedule was issued the same day. Now Claimant's counsel wishes to withdraw the matter "without prejudice." Were his motion granted, he would obviously be able to re-file and try the issue anew. He would get a re-do, including the opportunity to in effect gain rebuttal testimony from Macjulian Lang, the advantage he sought and was denied.

If Claimant's Motion were granted, he would have tried his case, observed the fact-finder's reaction to his theory, and observed the Defendants' trial strategy only to then retreat and re-try it. To allow Claimant to do such is patently unfair, especially after the resources of Defendants and the Industrial Commission have been so used. To allow Claimant in the current circumstances to do this would simply encourage other litigants to do the same thing. Defendants are entitled to a decision on the issue the matter having gone this far, and Defendants object to Claimant's current motions.


Claimant's counsel, in support of his prior Motion for Rebuttal and in his current motions, argues the substantive merits of the case, he has made all sorts of representations

regarding the facts, some of them erroneous, and he has implied collusion between Dr. Gross and Defendants, which is unfair and untrue. Presumably he invites Defendants to take the bait and argue these matters in the context of the current motion. Defendants decline to do so. That is what the post-hearing briefs are for.

Defendants are asking that the matter proceed, and the issue be decided and disposed of once and for all. If Claimant wants an extension in order to prepare a post-hearing brief, that is fine. (Defendants do not have his motion in this regard). If he is not going to file one, that is fine also. Defendants want to file a post-hearing brief and Defendants want a decision on the substantive issue as to the compensability of the prosthetic fingers which Claimant has litigated. Hopefully the Industrial Commission can see fit to deny the current motions and allow the matter to proceed to decision.

DATED this 15th day of May, 2012.

BOWEN & BAILEY, L.L.P.

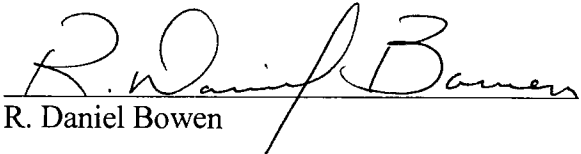

R. DANIEL BOWEN - of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of May, 2012, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

W BRECK SEINIGER
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SEINIGER LAW OFFICES
942 W MYRTLE ST
BOISE ID 83702
FAX: (208) 345-4700

- U.S. MAIL
 HAND DELIVERY
 FACSIMILE


R. Daniel Bowen

ORIGINAL

7/24 ✓
R

Wm. Breck Seiniger, Jr. (ISB # 2387)
Andrew C. Marsh (ISB # 6588)
Seiniger Law Offices, P.A.
942 W. Myrtle Street
Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

RECEIVED
INDUSTRIAL COMMISSION
2012 JUL 10 PM 4:19

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,

Surety,
Defendants.

I.C. No. 08-024772

Affidavit of Bryan Oliveros in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice

STATE OF IDAHO)
) ss:
County of Ada)

Bryan Oliveros, being first duly sworn on oath deposes and states as follows:

1. I am the Claimant in the above-entitled action, and as such, have personal knowledge of the facts set forth below.

2. I make this affidavit in support of my *Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice.*

Affidavit of Bryan Oliveros in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice

3. Attached hereto as Exhibit A is a letter dated June 17, 2010 provided to my attorney written by Dominic Gross, M.D., my treating surgeon.

4. Attached hereto as Exhibit B is my attorney's letter of August 30, 2011 written on my behalf to Dominic Gross, M.D. requesting a clarification of his position regarding the distinction between prostheses that are functional and those that are cosmetic and requesting a prescription for the silicone partial finger prostheses at issue.

5. Attached hereto as Exhibit C is Dominic Gross, M.D.'s letter of November 1, 2011, responding to my attorney's letter of August 30, 2011.

6. As stated in Exhibit C, since Dr. Gross was apparently willing to prescribe the silicone partial finger prostheses recommended by Advanced Arm Dynamics, but was under the impression that they could not be obtained as a benefit under the Idaho Workers Compensation Act, I made the decision to proceed to hearing on my request that the Idaho Industrial Commission order the Defendants to provide at least a trial of those prostheses.

7. I understood that Dr. Gross was not supportive of my desire to try the prostheses, but that he was willing to prescribe the prostheses for cosmetic purposes as a part of a settlement. I desire to obtain the prostheses, primarily for psychological and cosmetic purposes as I elaborated upon in my testimony at hearing.

8. Even though Dr. Gross has been less than supportive, I inferred from his representation that he "would happy to write for the prosthesis should [I] choose to have them as part of a settlement in this case" that he did not believe that they were "ridiculous" and that he would in fact write the

prescription even though he did not believe that the prostheses were “medically necessary” because in his opinion they were not “functional” and “would be for cosmetic purposes only.”

9. Although Dr. Gross states in Exhibit C attached hereto that he “would happy to write for the prosthesis should [I] choose to have them as part of a settlement in this case,” I assumed that he would write the prescription if the Commission entered an order permitting me to obtain them at least for cosmetic and psychological purposes.

10. Attached hereto as Exhibit D is a copy of the Deposition of Dominic Gross, M.D. I do not have copies of the Exhibits attached to the original deposition, which either has been filed with the Commission or is in the possession of the Defendants.

11. Dr. Gross’s deposition testimony makes it clear that he is not likely to prescribe the prostheses even if I prevail at hearing. More troubling, the implication of Dr. Gross’s deposition testimony is that he was simply working with the surety to get me to settle my claim by promising to write a prescription for prostheses that his deposition makes clear he considers to be “ridiculous” for all purposes, and that it would “impede existing function.”

12. I am at a loss to understand why Dr. Gross would essentially promise my attorney to write me a prescription for the prostheses I desire “as a part of a settlement in this case” if he believes what he testified to in his deposition. I certainly would not have proceeded as I did with respect to my hearing if Dr. Gross had disclosed these opinions prior to hearing, because there is a vast difference between Dr. Gross statement in his November 1, 2011 letter that the prostheses would not improve upon my function use of my hand, and his statement that they would impede function. Obviously, the fact that Dr. Gross is of the opinion that the prostheses would not improve function is not a disincentive to

obtaining the prostheses, even with my own settlement proceeds, simply for cosmetic purposes. However, if the fingers will actually impede function that is another matter.

13. I am aware that the Referee in this case has blamed me for not obtaining an independent medical opinion in this matter given Dr. Gross's opinion that the prostheses are not "medically necessary" because they were not functional. However, I have been unemployed or partially employed a lot since my accident, and going to school for some time. I live with my parents, and I am living on very limited on funds. Consequently, I apparently made the mistake of believing that Dr. Gross's opinions were accurately and honestly represented by the statements he made in his letter to my attorney of November 1, 2011.

14. I was not aware that Dr. Gross believed that multiple partial finger prostheses were not viable even for that purpose and that prescribing them would be "ridiculous" to use the term he employed in his attached deposition.

15. I have lost confidence in Dr. Gross's integrity. First, I do not understand why he would concern himself with the settlement of my case, which he obviously did in his letter of November 1, 2012 when he wrote my attorney "Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case."

16. More concerning to me, is the timing of the letter from the Defendants' Counsel of November 8, 2012 attached hereto as Exhibit E offering to pay for a trial of the prostheses "in the context of a settlement" sent so closely upon Dr. Gross's sending his November 1, 2012 letter in offering to prescribe the prostheses as a "part of a settlement in this case." The letter to my counsel from Dr.


Gross does not indicate that it was copied to Defendants Counsel, and I am not aware that a copy of the letter was forwarded to Defendants' Counsel by my attorney upon receipt.

17. I no longer have sufficient trust in Dr. Gross to use him as my treating physician even if the Commission was to order the prostheses and Dr. Gross was then to prescribe them, which seems unlikely. His letter of November 1, 2012 is misleading, and I proceeded to hearing in reliance upon the opinions that Dr. Gross stated in that letter.

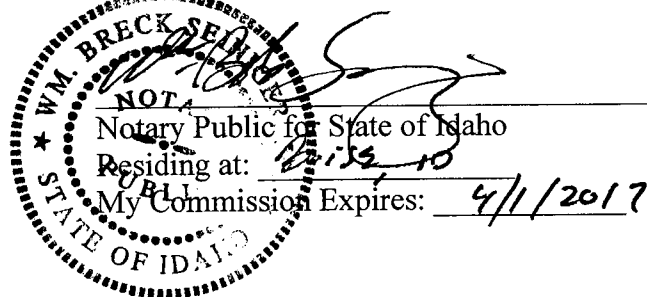
18. I believe that Dr. Gross has betrayed my trust, I have no confidence in his objectivity or integrity, and it makes little sense to proceed to have the Commission order a prostheses if he continues to be my physician. Therefore, I consider my present request for these prostheses is essentially moot at this point in time.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated July 10, 2012.


Bryan Oliveros
Claimant

Subscribed and sworn to before me on July 10, 2012.



CERTIFICATE OF SERVICE

Affidavit of Bryan Oliveros in Support of Motion To Dismiss Without Prejudice and Motion Withdraw Request For A Trial Of The Silicon Partial Finger Prostheses Made Pursuant To Idaho Code § 72-432 Without Prejudice

On July 10, 2012 I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Fax: (208) 344-9670



W^m Breck Seiniger, Jr.
Attorneys for Plaintiffs



DOMINIC L. GROSS, MD

Board Certified Orthopedic Surgeon
Certificate of Added Qualification in Hand Surgery

June 17, 2010

RE: Bryan Oliveros

[REDACTED]
Claim#: 2008562800

To Whom It May Concern:

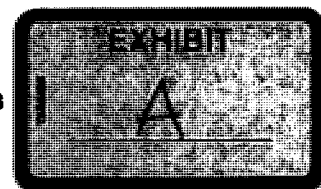
We have been informed that Mr. Oliveros has been inquiring about prosthetic devices. In my practice, I know of no prostheses that would improve his function, and do not routinely recommend them should the patient have functional use of the hand.

If I can be of further service, please do not hesitate to contact my office.

Sincerely,

Dominic L. Gross, M.D.

211 W. Idaho Street • Boise, Idaho 83702 • Phone: 208.346.8910 • Fax: 208.888.4296



OLIVEROS_BATES_NO. 000016

SEINIGER LAW OFFICES

A Professional Association

Wm Breck Seiniger, Jr., Atty.
*Idaho, Oregon, Washington and
The District of Columbia*

Julie M. Seiniger, Atty.
*Idaho, Indiana and
The District of Columbia*

Andrew C. Marsh, Atty.
Idaho, Indiana and Missouri
Cade Woolstenhulme, Senior
Paralegal
Eileen DeShazo
Paralegal

August 30, 2011

Dominic L. Gross, MD
311 W. Idaho St.
Boise, ID 83702
O: 208-846-8616 / F: 208-888-4296

RE:	Patient:	Bryan Oliveros
	[REDACTED]	[REDACTED]
	Date of Loss:	7/30/2008
	Your letter of:	6/17/2010

Dear Dr. Gross:

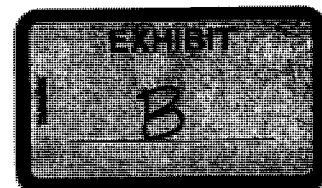
I represent Bryan Oliveros. Having reviewed your letter of June 17, 2010, I am requesting clarification to make certain that I understand your position. My understanding is that you "do not routinely recommend [prosthesis] should the patient have functional use of the hand." I want to make certain that I understand your position so that I know what steps need to be taken on behalf of Mr. Oliveros. I assume that you are not saying that cosmetic measures are not medically necessary, since I am under the impression based on other cases involving mutilated hands that digits are sometimes partially amputated (including in workers compensation cases) for cosmetic purposes when part of a finger has been destroyed. If I am mistaken in that regard would you please so advise me.

This makes sense, since the Workers Compensation Act covers all reasonable treatment including prosthesis and not just that which is functional. (See the attached.) The requirement is one of reasonableness, not functionality. Were this not the case, only scar revision that restored function would be available under the Idaho Workers Compensation Act, which is not the case. That being the case, are you willing to prescribe the prostheses described in the April 1, 2011 letter sent to you by MacJulian Lang, CPO, Clinical Director of Advanced Arm Dynamics? Is there anything that I can do, or that I should have my client/your patient do to cooperate with your office to allow you to answer that question? Please let me know and I will promptly respond. Thank you.

Cordially,

/s/

Wm Breck Seiniger, Jr.
Copy: Dan Bowen, Bryan Oliveros



(1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

(2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

Idaho Code Ann. § 72-432 (West).



HORIZON HEALTH P.A.

Dominic L. Gross, M.D.
Board Certified
Orthopedics and Hand Surgery

Margaret M. Jones, M.D.
Board Certified
Obstetrics and Gynecology

311 W IDAHO
BOISE, ID 83702
Phone 208.888.2080
Fax 208.888.4296

To: *Seiniger Office* Date: *11-9-11*
Fax number: *345-4700* Number of Pages: *2*

Message:

Re: Bryan Oliveros
DOB 7-7-1990

This fax may include confidential health information that is intended only for viewing by the person or organizing named above. If you received this fax in error please contact this office at the phone number above.



**DOMINIC L. GROSS, MD**

Board Certified Orthopedic Surgeon
Certificate of Added Qualification in Hand Surgery

Mr. Wm. Breck Seiniger
Seiniger Law Offices
942 W. Myrtle St.
Boise, ID, 83702

RE: Bryan Oliveros
[REDACTED]

November 1, 2011

Dear Mr. Seiniger,

This letter is in reference to your correspondence dated August 30, 2011. I apologize for the delay, I have been out of town and unusually busy for this time of year in my practice. I have reviewed Bryan's chart and your letters and I stand by my statement; that any prosthesis Mr. Oliveros would get would not improve upon his functional use of the hand. Any prostheses would be for cosmetic purposes only, and while that can be important in a young patient, those patients for whom I have ordered finger prosthetics find them cumbersome, awkward, and time-consuming to use. Despite this fact, a prosthesis is not required for Mr. Oliveros to be able to use his hand. From the deposition I read dated September 1, 2011, Bryan has returned to school and works part-time at Verizon and plans to attend school full time next semester. Based on these facts, I would say that he is doing quite well and does not need prosthetic finger tips to continue school and working at Verizon. If I had felt at any time during his recovery that there were devices or prosthetics that would have improved his outcome and ability use the hand, I assure you I would have prescribed such items as outlined in the Worker's Compensation Act that you so graciously provided to me.

Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case. But I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and, Bryan understands that while it may help him "give some support", it was clear that he knew it would not significantly improve the use of the hand other than for looks.

Sincerely,

Dominic L. Gross, M.D.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
)
 vs.) I.C. No.
)
 RULE STEEL TANKS, INC.,) 2008-024772
)
 Employer,)
)
 and)
)
 ADVANTAGE WORKERS COMPENSATION)
)
 INSURANCE CO.,)
)
 Surety,)
)
 Defendants.)
)
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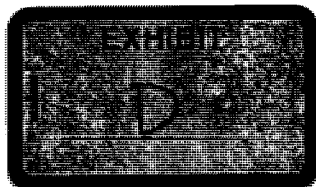
DEPOSITION OF DOMINIC GROSS, M.D.

FEBRUARY 22, 2012

REPORTED BY:

MARLENE "MOLLY" WARD, CSR No. 704, RPR

Notary Public



Page 2

1 THE DEPOSITION OF DOMINIC GROSS, M.D., was
 2 taken on behalf of the Defendants at Bowen & Bailey,
 3 LLP, located at 1311 West Jefferson Street, Boise,
 4 Idaho, commencing at 10:04 a.m. on February 22, 2012,
 5 before Marlene "Molly" Ward, Registered Professional
 6 Reporter and Notary Public within and for the State of
 7 Idaho, in the above-entitled matter.

8
 9 APPEARANCES:

10
 11 For the Claimant:
 12 Seiniger Law Offices
 13 BY: MR. WM. BRECK SEINIGER, JR.
 14 942 West Myrtle Street
 15 Boise, Idaho 83702

16
 17 For the Defendants:
 18 Bowen & Bailey, LLP
 19 BY: MR. R. DANIEL BOWEN
 20 1311 West Jefferson Street
 21 P.O. Box 1007
 22 Boise, Idaho 83701-1007

23
 24
 25 ALSO PRESENT: Katy Laible

Page 4

PAGE
EXHIBITS CONTINUED

1
 2
 3
 4 10 - Letter to Dr. Gross from Mr. Lang,
 5 Dated April 1, 2011 **
 6 11 - Advanced Arm Dynamics Prosthetic Report **
 7 12 - Letter to Mr. Seiniger from Dr. Gross,
 8 Dated December 19, 2011 **
 9 13 - Deposition of MacJulian Lang **
 10 14 - Letter to Mr. Seiniger from Dr. Gross,
 11 Dated December 19, 2011 67
 12 15 - Update Advances in Upper Extremity
 13 Prosthetics Article 72
 14 E1 - Letter to Mr. Seiniger from Dr. Gross 19
 15 E2 - The Journal of Hand Surgery Article 26

Page 3

INDEX

1	TESTIMONY OF DOMINIC GROSS, M.D.	PAGE
2	Examination by Mr. Bowen	5
3	Examination by Mr. Seiniger	26
4	Further Examination by Mr. Bowen	72
5	Further Examination by Mr. Seiniger	74
6	Further Examination by Mr. Bowen	80
7	EXHIBITS	
8	(** Indicates premarked.)	
9	1 - Letter to Mr. Marsh from Mr. Bowen,	
10	Dated October 11, 2010	**
11	2 - Letter from Dr. Gross, Dated June 27, 2010	**
12	3 - Letter to Dr. Gross from Mr. Seiniger,	
13	Dated August 30, 2011	**
14	4 - Letter to Dr. Gross from Mr. Seiniger,	
15	Dated November 1, 2011	**
16	5 - Letter to Mr. Marsh from Mr. Bowen,	
17	Dated November 8, 2011	**
18	6 - Letter to Dr. Gross from Mr. Seiniger,	
19	Dated December 10, 2011	**
20	7 - Explanation of Unlisted/Listed Procedures	
21	From Advanced Arm Dynamics	**
22	8 - Advanced Arm Dynamics Document	**
23	9 - Letter to Dr. Gross from Mr. Seiniger,	
24	Dated December 22, 2011	**
25		

Page 5

1 DOMINIC GROSS, M.D.,
 2 first duly sworn to tell the truth relating to said
 3 cause, testified as follows:
 4
 5 MR. BOWEN: Let the record reflect that this is
 6 the time and place set for the taking of Dr. Dominic
 7 Gross' deposition, a testimonial deposition posthearing
 8 in the matter of Bryan Oliveros versus Rule Steel Tanks,
 9 Inc., employer and their surety, Advantage Workers
 10 Compensation Insurance Co.
 11 Let the record reflect that this is being taken
 12 for testimonial purposes posthearing in lieu of the
 13 doctor's appearance at hearing.
 14 Anything to add, Mr. Seiniger?
 15 MR. SEINIGER: No.
 16
 17 EXAMINATION
 18 QUESTIONS BY MR. BOWEN:
 19 Q. Will you please state your full name, sir?
 20 A. Dominic Linus Gross.
 21 Q. What do you do for a living?
 22 A. I'm an orthopedic hand surgeon.
 23 Q. Where do you practice?
 24 A. 311 West Idaho Street, Boise, Idaho.
 25 Q. How long have you been practicing orthopedic

1 surgery?

2 A. Fifteen years, since 1997.

3 Q. How long have you been specializing in hand
4 surgery?

5 A. Since 1997.

6 Q. Briefly, if you could, would you summarize
7 your educational background for me, sir.

8 A. I went to the University of Kansas medical
9 school, and then I went to USC for orthopedic surgery
10 for five years, and then I did a hand fellowship at the
11 University of New Mexico. I then, subsequently, took my
12 certification for orthopedic surgery, which I've
13 recertified twice already. I also took a certificate of
14 added qualification for hand surgery. And I'm part of
15 the American Society for Surgery of the Hand, as well as
16 the American Board of Orthopedic Surgery. I'm also
17 published in the field of hand surgery as well. And
18 that's regarding thumb amputations with team roping.

19 Q. You published an article on thumb amputations,
20 you say?

21 A. With team roping.

22 Q. What does that mean?

23 A. Team roping is a sport where you have a
24 header, a heeler, and you have a horse -- two cowboys
25 trying to ring down a small calf/steer.

1 finger with an amputation distal to the DIP joint of the
2 index finger. He has an amputation of the long finger
3 proximal to the PIP joint. He has an amputation of the
4 ring finger just distal to the PIP joint. And he also
5 has -- it looks like a ring finger, but that looks like
6 it's intact without injury. I haven't seen him, but
7 just based on the creases. He has a PIP joint, a DIP
8 joint, so he has a functional small finger and a thumb
9 and a functional index finger. So the significant
10 extent of his damage is to the long and the ring.

11 Q. When was the last time that you saw
12 Mr. Oliveros?

13 A. I can't recall. Maybe Katy, my PA, can let me
14 know.

15 MS. LAIBLE: April 6th, 2009.

16 Q. (BY MR. BOWEN) You don't have any independent
17 recollection as to when you would have last seen him?

18 A. No. That's -- I mean, we see a lot of people.
19 I haven't seen him since April 6th, 2009.

20 Q. Now, with respect to the treatment that you
21 provided to Mr. Oliveros, when all was said and done,
22 after the multiple surgeries and the therapy and all the
23 things that are attendant with injuries like this, at
24 the end of the day, what function was he left with in
25 the hand?

1 Q. Yes.

2 A. Right. And so there's a header and a heeler,
3 and when they dally, they pop their thumbs off. So when
4 I was in Albuquerque we used to see a lot of people with
5 thumb amputations, and I thought it would be an
6 interesting thing to write about, and it got published.

7 Q. Oh, okay. Do you know a Bryan Oliveros?

8 A. Yes, I do.

9 Q. How did you come to meet this gentleman?

10 A. I was on call for hand surgery, and he came
11 in, and he had a work-related injury where a punch fell
12 onto his hand. He had multiple surgeries to reconstruct
13 and maintain the length of his digits, which included
14 repair of the bone, the tendon, and skin -- soft tissue
15 coverages. He had a radial forearm flap, which didn't
16 do so well, then we had to do a groin flap, which
17 actually did better. So we've done multiple surgeries
18 on Bryan.

19 And I've known Bryan for at least a year. I
20 haven't seen him recently, but I do have a recent
21 picture of his hand -- or in our chart, with regards to
22 what's left of his hand.

23 Q. And if you would, would you briefly summarize
24 the extent of the amputations suffered by Mr. Oliveros.

25 A. Bryan has a working thumb, he has an index

1 A. Well, can you be more specific about that,
2 about the function? I mean, are you saying can he grasp
3 things? Can he hold things? Those are all the things
4 that --

5 Q. All those various kinds of things. What sort
6 of grasp does he have?

7 A. Well, he has a pinch because his index finger
8 is intact. He's able to grasp objects. I think his
9 dexterity is going to be impaired because of the loss of
10 the distal ends of the fingertips. But pinch, grasp and
11 apposition, which is the ability to pull the thumb out
12 of the plane and hold on to the other finger, so that's
13 apposition.

14 Q. Okay.

15 A. Out of the plane. Will he be able to brush
16 his teeth? Yes. Will he be able to put his clothes on?
17 Yes. Will he be able to do activities of daily living,
18 which is cut, answer the phone, work on cell phones,
19 yes. Yes, he will be able to do that.

20 Q. Are there things that this gentleman will not
21 be able to do with his hand that he could do prior to
22 the injury?

23 A. That's a tough question to answer. It's
24 just -- you know, I'm not sure. You know, in order for
25 me to understand that, I would have to say that I think

1 he has a functional hand. I think he can do a lot of
2 things with that hand. Is it the hand that he had
3 before the injury, no, but it is a functional hand.

4 Q. Dr. Gross, I'm going to draw your attention to
5 what had been offered and admitted into evidence as
6 Defendants' proposed hearing exhibits, pages 75, 76, and
7 77. And I'll represent to you that these are consistent
8 comments you made about this gentleman's ability to
9 return to work and undertake work-related tasks that you
10 made at the end of the time you treated him in April of
11 '09. If you could review those three pages, I would
12 appreciate it.

13 A. 75, 76, and . . .

14 Q. Why don't you flip one more.

15 A. Right.

16 Q. Okay. Having reviewed those pages, what do
17 they say?

18 A. They say that he's able to push 75 pounds,
19 pull 50 pounds, lift 20 pounds. He's able to carry and
20 grip 5 pounds, but no fine manipulation. And that's
21 based on a functional capacity evaluation.

22 Q. Do those statements that you made,
23 particularly as to the -- his ability to return to work
24 and his restrictions as contained in your May 6, 2009,
25 letter, admitted as Defendants' Hearing Exhibit page

1 And their claim is, is that it will improve his
2 dexterity and the function of his hand.

3 And I disagree with the evaluation. He has a
4 pretty darn functional hand. And so it's more of a
5 cosmetic issue, as we had dictated in our note, and we
6 feel that while it is a cosmetic thing, we don't believe
7 that it will add any function to his hand.

8 Q. You mentioned that you felt their description
9 of his injury was incorrect?

10 A. That is correct.

11 Q. How so?

12 A. Well, if you go through the notes and you look
13 at the pictures, they say that his second industrial
14 trauma, they said -- let's see, where does it say
15 exactly? Let's see, all right.

16 Okay. Well, if you look at the amputation and
17 level and presentation they say, "Right partial-finger
18 amputation secondary to an industrial trauma. The
19 second and the fourth digit," which is the index and the
20 ring, "amputations are at the PIP joint."

21 Well, according to my picture, that's wrong,
22 actually. And I'll show you -- let's see, it may be
23 underneath all this.

24 Q. You'll find it, it's in there somewhere.

25 A. All right. Let me just go through it all.

1 70 -- Hearing Exhibit 4 page 77, represent your opinion
2 within a reasonable degree of medical probability, sir?

3 A. Yes.

4 Q. Have you received any information subsequent
5 to that time that would lead you to believe that, in
6 fact, Mr. Oliveros' capabilities are different than the
7 capabilities you identified in that document?

8 A. No.

9 Q. And I gather you did release him to return to
10 his time of injury work, sir?

11 A. Yes.

12 Q. Now, at some point in time subsequent to
13 actively treating Mr. Oliveros, I understand that you
14 received some materials from an outfit called Advanced
15 Arm Dynamics, requesting that you prescribe some
16 prosthetic fingertips to Mr. Oliveros?

17 A. Correct.

18 Q. Did you review the materials that Advanced Arm
19 Dynamics provided to you?

20 A. Yes.

21 Q. And what did they send you, sir?

22 A. They sent me an evaluation of Bryan. They
23 gave a description -- an incorrect description of his
24 level of amputations. They, basically, want to fit
25 Bryan with silicone prostheses that are pretty lifelike.

1 Here it is. Okay. So if we look here, what they're
2 defining is this -- is the second and the fourth. Well,
3 the PIP joint is here, demonstrated by this crease here
4 on the front of his finger.

5 Q. Is this a page you need for anything?

6 A. No.

7 MR. BOWEN: Can we make it an exhibit, Breck?

8 MR. SEINIGER: Probably, just let me take a
9 look at it.

10 THE WITNESS: So he doesn't have amputation of
11 the second digit at the PIP joint, it's distal to the
12 DIP joint. It's not at the PIP joint. And the way we
13 define joints is this is DIP, and this is PIP, and this
14 is MP. So if you have an amputation at the PIP joint,
15 you're not going to have this crease here.

16 And what he has is not only this crease, but
17 he has this crease. So they're trying to -- well,
18 they're not trying, but they mislabeled it as being too
19 much of the finger gone for the second.

20 Q. (BY MR. BOWEN) A whole other segment of the
21 finger?

22 A. Right.

23 Q. So it's a considerable discrepancy?

24 A. Yes. And then the other thing is, is that --
25 so he has the DIP joint there. So they're saying the

1 second and the fourth -- so the fourth is another
2 problem because it's not at the PIP joint, it's distal
3 to the PIP joint. So they got those two things wrong.
4 So the second and the fourth length is much longer than
5 what they're describing in their report.

6 The other thing is, is that the third digit,
7 which is the long, is correct. And at the fifth digit
8 that's incorrect because the DIP joint is still present.

9 And so of the four descriptions of the hand --
10 of the four fingers that they're describing, they got
11 three out of the four wrong, only one was correct.

12 Q. And I gather these discrepancies are
13 considerable?

14 A. Well, they're significant because if you
15 had -- if you didn't have as much length as -- for the
16 index finger, you're not able to have a good pinch. You
17 need a good PIP joint, and he has a good PIP joint,
18 which is a very significant thing. If you have a good
19 pinch, that allows you to do a lot of activities.

20 The other thing is, is that he has a PIP of
21 the ring, which allows him to have the ability to flex
22 and grasp small objects. The same thing with the small
23 finger, which allows you to increase the breadth and
24 width of your hand.

25 So he has a pretty -- in my opinion, he has a

1 fitted for a prosthesis, and he didn't like it.

2 Q. What was the nature of his concern about the
3 prosthetic device? Well, no, she can't answer. You're
4 the one being deposed.

5 A. Well, he again --

6 Q. If you know. You may not know why he was
7 dissatisfied with the device, I don't know.

8 A. Well, it just took too much time. And by the
9 time he got ready he was -- you know, he could have
10 already typed the thing up.

11 We had other people that only had a thumb.

12 And he had a severe crush injury. He was a nice
13 Hispanic guy, and we struggled. We struggled to get him
14 a prosthesis. And they have to be custom made. And by
15 the time we got it fitted with Kormylo, he was so upset,
16 and we couldn't get him a functional prosthesis, that we
17 just basically did a wrist disarticulation, which is a
18 wrist amputation.

19 And in my experience -- and this is not
20 unrealistic, that it seems that you want -- there's a
21 fine balance. You want to keep as many fingers and
22 appendages in the hand, but when it gets to a certain
23 point, it may be better just to remove the entire hand
24 and fit them with a hook or a myoelectric prosthesis.

25 Q. So that they have function?

1 pretty darn functional hand. And by their description
2 it would make it very significantly less functional,
3 based on the fact that more is missing than really is.

4 Q. Did you have any other issues with the
5 evaluation from Advanced Arm Dynamics that they supplied
6 you?

7 A. Well, they say that it will improve his
8 function and activities of daily living. They perform
9 necessary tasks at schools, minimize reliance, that's
10 just a lot of generic information with no sort of
11 literature to document that; it's unsupported. And in
12 my experience, and also in the literature, it's
13 unsupported.

14 Q. What does the literature, the professional
15 literature suggest?

16 A. Well, that there is a lot of rejection of
17 these prostheses. You know, they can be arms, elbows or
18 even -- even in the fingers. But in -- you know, people
19 just don't use them that often because it takes a lot of
20 time to put them on, you have to spray it, and you have
21 to put the glue on. And by the time you get everything
22 ready to go, most people don't like it because it's too
23 hot, it smells. Maybe for a single digit, but not
24 multiple digits. But that's what we've noticed.

25 We've had just a patient recently who we got

1 A. Right.

2 Q. Now --

3 A. But in this particular hand, this is a very
4 functional hand, and I would not suggest that his wrist
5 should be amputated. No way.

6 Q. Yeah, of course not. With respect to
7 Mr. Oliveros, after having reviewed the request for the
8 prescription and the results of the evaluation provided
9 to you by Advanced Arm Dynamics, did you develop an
10 opinion within a reasonable degree of medical
11 probability as to whether the prosthetic devices
12 recommended by Advanced Arm Dynamics were reasonable and
13 necessary for Mr. Oliveros? That's a yes or no
14 question, sir.

15 A. Yes.

16 Q. And your opinion was?

17 A. I just felt it seemed to be a lot of headache
18 for something that doesn't need to be done, because he
19 has a functional hand. And I'm not -- and I wasn't
20 convinced, through my experience and my training, that
21 these things that the prosthetic people suggested would
22 even help him, or that he would even use it.

23 Q. And you are familiar with these prosthetic
24 devices?

25 A. Yes.

1 Q. Now, after receiving the Advanced Arm Dynamic
2 literature and the request for prescriptions and your
3 rejection of the same, you documented that in a -- I
4 gather in a June 17th, 2010, letter, which has been
5 admitted as Defendants' Exhibit No. 4, page 78?

6 A. Yes, correct.

7 Q. Okay. And then subsequent to that time, I
8 believe, you have reconsidered this question on several
9 occasions?

10 A. Right.

11 Q. For instance, I'm looking at a November 1st,
12 2011, letter that you authored and sent to Mr. Seiniger
13 reviewing this question again. This has been admitted
14 as Defendants' Exhibit No. 4, page 79. I'd like you to
15 look at that letter for me.

16 A. Yes.

17 Q. Do you recall the question that Mr. Seiniger
18 put to you that led to the authoring of this letter?

19 A. No.

20 Q. What did you share with Mr. Seiniger in the
21 context of the letter? What were you trying to share
22 with him?

23 A. Well, I was, again, reiterating that I don't
24 know of any prosthetic devices that would improve the
25 function of his hand. And I felt that these prosthetic

1 A. Correct.

2 Q. Dr. Gross, are there situations that you've
3 seen in your practice where prescribing or providing a
4 prosthetic device for solely cosmetic purposes was
5 medically necessary?

6 A. I think that -- so because it's cosmetic that
7 it was medically necessary? I'm not sure how to answer
8 that question. If it's not functionally a device that
9 we would see that it improves the function, then we tend
10 to not order that. But as a whole we, you know -- we
11 take everything into consideration. But if it's not a
12 functional -- which is the most important thing, then
13 you have to, you know, take into consideration the
14 patient and, you know, make that determination.

15 I mean, we've dealt with prosthetics, and some
16 of them work real well and some of them don't. In this
17 situation, I don't think they would work well.

18 MR. SEINIGER: I'm going to object. The
19 answer is nonresponsive, move to strike it.

20 Q. (BY MR. BOWEN) I gather even if one were to
21 provide these on a cosmetic basis, your experience has
22 been, over time, that people wouldn't use them anyway?

23 A. Correct.

24 MR. SEINIGER: Objection, lack of foundation.

25 Q. (BY MR. BOWEN) And why is it that you think

1 devices that are being offered are merely cosmetic. And
2 I do not feel that they would add any additional
3 functional benefit to his hand.

4 Q. Okay.

5 A. And while I feel bad about Bryan's injury, I
6 think that he's always been a nice -- a really nice
7 patient to work with.

8 Q. And then, finally, I gather that you authored
9 yet one more letter to Mr. Seiniger further discussing
10 this issue, that being a December 19th, 2011, letter.
11 Do you recall that?

12 A. Can I see it?

13 Q. Well, let's mark it first. How's that?
14 (Exhibit E1 marked.)

15 Q. (BY MR. BOWEN) Dr. Gross, I'm handing you
16 what's been marked as Deposition Exhibit No. E1. I'd
17 like you to review that and identify that document for
18 me.

19 A. Yes, I agree with that letter.

20 Q. Well, I hope so. You authored it.

21 A. Absolutely.

22 Q. Okay. And basically, you reiterated your
23 belief that the prosthetics, as described by the
24 Advanced Arm folks, would not provide functional use
25 and, as such, were not medically necessary?

1 that to be true, sir?

2 A. Because they're hot, they smell, and people
3 don't like to wear it during hot summertimes. And more
4 often than not I see patients without their prosthesis
5 because silicone is a hot, unbreathable material, and
6 they sweat, and they don't like it.

7 Q. Within your practice, what is the general
8 protocol for the provision that these devices do? Do
9 physicians prescribe them like they would a medication
10 or order an MRI; is that how it works?

11 A. What we do is we get a prosthetic person to
12 evaluate it, and those people are Brownfield's, in the
13 community, or Kormylo.

14 We just had a gentleman who accidentally blew
15 his arm off that needs to get fitted with a prosthetic.
16 And so in addition to Brownfield's and Kormylo, we also
17 gave him a referral to look at these people. He had a
18 high above-elbow amputation.

19 Q. Okay.

20 A. So we let the prosthetic people do the
21 shrinkage. They're, you know, skilled in that set. We
22 don't actually fit these prostheses in our office.

23 Q. You don't fit them, but you participate in the
24 making of the decision as to whether they're necessary?

25 A. Right. And so does the patient, because they

1 come in and they say how much they either like it or
2 dislike it. More often than not they dislike it. And
3 so we always have to call the prosthetic person to say,
4 "This patient is unhappy. Can we change it? Can we do
5 something? Is there a neuroma? Is there a" -- you
6 know, a neuroma is a nerve ending at the end of a stump
7 that can be very painful, and that prevents people from
8 using it. So it's a back-and-forth process between the
9 patient, the physician and the prosthetic person.

10 Q. Over the course of the period of time that you
11 provided treatment to Mr. Oliveros, what observations,
12 if any, did you make as to how he dealt with his injury?

13 A. We have a therapist in our office, which is
14 the -- is not -- is nice because we get to see the
15 patient all the time. And we would see Bryan there all
16 the time, and Bryan would always show up well-dressed,
17 well-groomed and clean. So he seemed to be working --
18 you know, working well in society, and that was our
19 opinion.

20 Q. While you treated him?

21 A. Yeah. And he kept his appearance, and he
22 looked like a clean, well-put-together kid that was
23 concerned, you know, about his outward appearance.

24 Q. Did you have an opportunity to review the
25 deposition I took of Mr. Oliveros?

1 A. Yes, I did.

2 Q. Did you learn anything from that deposition in
3 terms of how Mr. Oliveros has done subsequent to this
4 injury and the treatment you provided?

5 A. I think -- well, I reviewed, and I was
6 impressed about how his motivation and his desire to be
7 matriculated to society, how well he has done after this
8 devastating injury. And I was pretty impressed that he
9 has multiple jobs, he was able to go to school, and that
10 he's getting on with his life, which is a success story
11 for these people who have these injuries; some people
12 don't do well. But in this case, Bryan has done very
13 well and, in fact, excelled and has risen above the
14 occasion and used this very well to his life.

15 Q. Has Mr. Oliveros, himself, ever come to you
16 and discussed his desire for prosthetics?

17 A. No.

18 Q. Dr. Gross, when you came in this morning you
19 came in armed with what appears to be a medical journal
20 article authored by Dr. Paul W. Brown of Bridgeport,
21 Connecticut. Was this an article that was of some
22 significance to you in regards to injuries like
23 Mr. Oliveros has suffered?

24 MR. SEINIGER: Let me just interpose an
25 objection. I haven't seen this article before. It

1 hasn't been produced as an exhibit. And I really don't
2 have time to go through and do any research on it. So
3 I'm going to object to its use.

4 THE WITNESS: Well, what I would say to you is
5 that this is a very famous and well-known article. And
6 I tell this to my patients all the time who struggle
7 with a loss of a finger. And it's out there for the
8 record, and every hand surgeon knows about it, and it's
9 a very important article, and I think it goes to the
10 state of Bryan's case. And I would urge you to look at
11 it.

12 Q. (BY MR. BOWEN) What is it about the article
13 that leads you to hold those opinions of it?

14 A. These are very skilled individuals, not just a
15 small amount, but these are surgeons that have had
16 amputations of not one, but sometimes multiple fingers,
17 and that they're able to continue and practice a
18 skillset of surgery, which a lot of us feel that is a
19 very technical and skilled situation. You have people's
20 lives at hand; you can maim them and hurt them.

21 So this is a gentleman that noticed a
22 neurosurgeon and a general surgeon with missing fingers
23 and then came to this -- came to -- for him to evaluate
24 all these surgeons with missing fingers. And people
25 didn't let these injuries prevent them from what they

1 want to do.

2 And so I think this is -- this is where Bryan
3 kind of fits this particular person. He had the
4 mindset, he had the willingness and the desire to not
5 let these injuries affect him, and he's pursuing a
6 wonderful life. None of these patients had prostheses.

7 And so I would just add that it's a very
8 important article, and it basically sums up this entire
9 case.

10 Q. Can the prosthetic devices such as -- or
11 recommended by the Advanced Arm Dynamics people actually
12 impede function of the hand?

13 A. I can't answer that question.

14 Q. All right.

15 MR. BOWEN: We'll go ahead and mark this
16 article as E2.

17 Q. (BY MR. BOWEN) Do you have another copy of
18 it?

19 A. Yeah, we have multiple copies.

20 MR. SEINIGER: Here.

21 MR. BOWEN: You got one, Breck?

22 MR. SEINIGER: Yeah, I got it.

23 THE WITNESS: It's a very famous article. I
24 mean, as a resident when I was at USC and then at -- in
25 Albuquerque -- so I mean, it's -- and I will quote this,

1 "Handicap is a state of mind, not a state of fact." And
2 so that's the key thing with these injuries, and I urge
3 you to read it because it's very interesting.

4 MR. BOWEN: Okay. We'll mark that as 2,
5 Molly.

6 (Exhibit E2 marked.)

7 MR. BOWEN: I don't have any more questions
8 for you. Thank you so much.

9 Mr. Seiniger?

10 THE WITNESS: Before we go into -- let me just
11 be prepared. I need to take a break.

12 (Short recess held.)
13

14 EXAMINATION

15 QUESTIONS BY MR. SEINIGER:

16 Q. Doctor, so that my questions and your
17 responses are as meaningful as they can be to the
18 referee, let's start by defining some terms. First of
19 all, the opinion that you gave regarding prosthesis was
20 whether or not it was reasonable and necessary. What do
21 you understand that to mean? First of all, is that a
22 term of art within the medical profession, or do you
23 understand that to be a term of art within the meaning
24 of the law?

25 A. Well, you know, I think there's percentage

1 is this true?

2 A. I'm not sure what you mean by "passive
3 function."

4 Q. Okay.

5 A. And I have no idea what that means.

6 Q. All right. When you say that you have no idea
7 what that means, my understanding is that -- and let me
8 give -- Dan, I'm going to hand you exhibits that I have
9 marked, and they're labeled, at the bottom, "Gross
10 Deposition Claimant's Exhibits 1 through 13." And I'll
11 identify those for the record as we go along.

12 Doctor, let me give you a set of those. You
13 don't have to look through them right now, but when I
14 refer to them, that's your set right there, and that's
15 the set that will go to the court reporter.

16 Madam Court Reporter, is it necessary for you
17 to mark these independently if I've marked them or are
18 you satisfied with the way I'm doing it?

19 COURT REPORTER: It's fine.

20 MR. SEINIGER: Okay. All right.

21 Q. (BY MR. SEINIGER) If you'll take a look at
22 Exhibit No. 11 in this, my understanding is that this
23 was a prosthetic report that was sent to you by Advanced
24 Arm Dynamics?

25 A. Correct.

1 points, and I'm not sure, but usually we deal with
2 probabilities that should be more than 50 percent. So
3 that's -- you know, that's where I'm familiar with. But
4 other than that, we want to make sure when we order
5 something that it's really going to be to the benefit of
6 the patient, and that it's not something that we just
7 ordered and the patient doesn't use. So we really have
8 to be more than -- you know, we have to be certain about
9 it. And for me, certain is much higher than 50 percent,
10 so . . .

11 Q. Okay. So when you use the term "reasonable
12 and necessary," you're talking about your being certain
13 to some undefined level, but well above 50 percent;
14 would that be fair to say?

15 A. Correct.

16 Q. And that is the way your testimony is to be
17 understood?

18 A. Correct.

19 Q. Now, with respect to your practice, is that
20 also the way that you have used the term "medically
21 necessary"?

22 A. Correct.

23 Q. Let's talk about the term "functional." My
24 understanding is that the digits of the hand play a role
25 in terms of active function and also passive function;

1 Q. Does it look familiar?

2 A. Yes. It's the one that I reviewed and that we
3 talked about.

4 Q. I think I sent you a copy of Exhibit No. 13,
5 which was the deposition of Mr. Lang from Advanced Arm
6 Dynamics. Did you review that deposition?

7 A. No.

8 Q. Is there any particular reason that you
9 reviewed Mr. Oliveros' deposition to prepare to testify
10 today, but not the deposition of the person from
11 Advanced Arm Dynamics explaining his reasons for
12 recommending the prosthetics?

13 A. We just didn't have it.

14 Q. Did you not receive my letter with the
15 deposition?

16 A. I didn't have a chance to -- I didn't review
17 it. I reviewed everything that was provided and did not
18 review it.

19 Q. If you take a look at Exhibit No. 9, you'll
20 see that that's a letter to me dated December -- from
21 me, excuse me, to you, dated December 22nd, 2011. It
22 says, "Enclosed please find a copy of the deposition
23 taken of MacJulian Lang, the clinical director of
24 Advanced Arm Dynamics in Portland, Oregon. Mr. Lang has
25 a degree in mechanical engineering from Cornell and

1 advanced training and certification in prosthetics. I
2 have forwarded his deposition so that you will have it
3 available for your review prior to your deposition,
4 should you wish to look at it. Thank you."

5 Do you know whether you got that letter from
6 me?

7 A. Well, I didn't review the deposition. And I
8 don't know if I got the letter from you; I just can't
9 recall.

10 Q. Okay.

11 A. Is Mr. Lang the same one that sent me this
12 prosthetic report?

13 Q. Yes, sir.

14 A. Okay.

15 Q. Exhibit No. 10 is the cover letter for the
16 prosthetic report from Mr. Lang to you, it's dated
17 April 1st, 2011. Is this the report that you have
18 criticized for being inaccurate?

19 A. That is correct.

20 MR. BOWEN: Which exhibit, Breck?

21 MR. SEINIGER: Well, Exhibit 10 is the cover
22 letter, Claimant's Exhibit 10 to the deposition is the
23 cover letter, and Claimant's Exhibit 11 to Dr. Gross'
24 deposition is the report.

25 MR. BOWEN: Okay. Thank you.

1 The other thing is, is that this gentleman,
2 with all due respect, is not a hand surgeon and is a
3 salesman, and he's saying these things which are
4 unsubstantiated, unfounded.

5 Q. Well, when you say he's "a salesman," you -- I
6 understand that -- and I see you're nodding your head --
7 there are other professions that are honorable besides
8 medicine. The man has a degree in engineering from
9 Cornell. He's a little bit more than just a salesman,
10 isn't he?

11 A. No, sir.

12 Q. So in your mind, he really -- he's not a
13 professional, he's just a salesman?

14 A. Well, I would say that -- it's interesting
15 that just before this meeting, we had a whole box of
16 fruit and all these goodies that were sent to us from
17 this company, which left -- that was left unopened in
18 our office. And I'm not sure why that circumstance had
19 occurred.

20 Q. So that --

21 A. I'm not --

22 Q. -- impairs his character because --

23 A. No, sir.

24 Q. -- his company sent you some fruit?

25 A. No, sir. No, sir. Okay. But he is not an

1 Q. (BY MR. SEINIGER) When you got the report,
2 did you write Mr. Lang or contact him and let him know
3 that there were mistakes in his report?

4 A. No.

5 Q. Do you know if you reviewed the report?

6 A. Yes, I did.

7 Q. If you take a look at Exhibit 11, page 3,
8 under "Prosthetic Rehabilitation Plan" --

9 A. Yes.

10 Q. -- Mr. Lang describes the benefits of the
11 partial-finger prostheses, and the categories are:
12 "Restores more normal biomechanical function (grasping,
13 dexterity) to the hand; Protects sensitive residual
14 anatomy; Kinesthetic feedback; Enhanced function and
15 hygiene; and Natural Appearance."

16 Which, if any, of those categories of benefits
17 do you disagree with?

18 A. "Restores more normal biomechanical function
19 (grasping, dexterity) to the hand." It's unsupported.

20 Q. Okay.

21 A. The silicone is a flexible material, so when
22 you try to do a forceful pinch it will bend on you. So
23 that actually -- going back to Mr. Bowen's thing --
24 impede the function of the hand. So this is a cosmetic
25 purpose here, not a functional purpose.

1 orthopedic surgeon, he's not a hand surgeon, he's not
2 published, and he deals with not only the hands, he's
3 also dealing with the feet. And as a person who has
4 dedicated his life to it, these descriptions are
5 unfounded, unsupported, in my professional opinion, as a
6 board certified and as a hand surgeon that has a
7 certificate of added qualification.

8 Q. Doctor --

9 A. And what Cornell has to do with it, I don't
10 understand.

11 Q. Okay.

12 A. You're saying that other schools are not as
13 important as Cornell? You think Cornell is the end-all?

14 Q. I think the University of Idaho College of Law
15 is the end-all. It goes downhill very sharply after
16 that.

17 MR. BOWEN: Go Vandals.

18 Q. (BY MR. SEINIGER) All right. Let me ask you
19 about this: With respect to his pecuniary interest, are
20 you charging for your testimony today?

21 A. I am charging for my time away from my patient
22 and my practice, which I feel that both of you should be
23 responsible for. Yes, sir.

24 Q. What are you charging?

25 A. I don't know. I mean, per hour, I've already

1 spent chart work to review this, okay, at home to review
2 Bryan's case, not to mention taking time away from my
3 practice and my family and also not being able to cover
4 the emergency rooms here because I forgo taking call,
5 which is time away from me in terms of patients that I
6 can see and treat. So yes, my time is being
7 remunerated, but not at the value that it should be.
8 And I -- and for the record, I would rather not be here.
9 Okay?

10 Q. I understand that, Doctor, and I hear your
11 frustration.

12 When you say -- I guess here's the point, if
13 you don't know what you're charging, what should you be
14 paid, for being here, if you were being fairly
15 compensated?

16 MR. BOWEN: I'll object, relevancy.

17 THE WITNESS: Thank you.

18 Q. (BY MR. SEINIGER) Just so you know, Doctor,
19 that is a typical question that's asked most of the time
20 of any expert witness, so I'm not doing anything that's
21 out of the ordinary in asking you these questions.

22 A. Well, what I would say to you is I have
23 nothing to gain from being here.

24 Q. Did you charge Mr. Bowen for reviewing the
25 deposition of the claimant?

1 an hour or longer the charges can go up. So I don't
2 know what the office is, but we have \$1,500.

3 Q. Okay.

4 MR. BOWEN: I will have no problem providing
5 you a copy of the ultimate bill that Dr. Gross' office
6 sends us, Breck.

7 MR. SEINIGER: Thank you.

8 Q. (BY MR. SEINIGER) Now, Doctor, do you do
9 cosmetic surgery?

10 A. Do you want to define "cosmetic"?

11 Q. Okay. If you don't know what -- let me ask
12 you this: Do you understand what the term "cosmetic
13 surgery" means?

14 A. I do.

15 Q. What does it mean to you?

16 A. It means recreating a thing that's been
17 damaged, to try to make it appear more like it was
18 before the injury. And the answer to your question,
19 yes, I do, with the hands.

20 Q. And when you decide whether or not to do
21 cosmetic surgery, tell me, what are the criteria or
22 factors that you consider in determining whether or not
23 to perform cosmetic surgery?

24 A. Well, it's interesting that you should say
25 that, because I presented a paper in the Idaho Hand

1 A. My office did, yes.

2 Q. Do you know what that charge was?

3 A. This whole time that we've been here, I have
4 been told that we were paid \$1,500, that we have yet to
5 cash.

6 MR. BOWEN: Oh, by the way of -- I'll help you
7 guys out, now I remember, we prepaid Dr. Gross for the
8 deposition, if you will, and it was, I think, a fee -- I
9 don't know whether it's a deposit or it's the entire
10 fee, but it was \$1,500. There was prep, and then we had
11 to cancel the dep or vacate the dep because of weather
12 or something. And so my understanding is that
13 Dr. Gross' office charges for the deposition of \$1,500,
14 if that's helpful to you, Mr. Seiniger.

15 MR. SEINIGER: What I'd like to do is get a
16 copy of -- when you're done, Doctor, if you could submit
17 your bill to Mr. Bowen. And Mr. Bowen, if you could
18 give it to the court reporter, I'd like to make it an
19 exhibit. Since the doctor doesn't know, I wouldn't
20 normally ask you to do this, but apparently you don't
21 know what's charged.

22 Q. (BY MR. SEINIGER) Is that something that you
23 can --

24 A. No. I just -- I think we just told you that
25 there is a deposit of \$1,500, and if the charges go past

1 Meeting last year with regards to flaps, in trying to
2 maintain the length of the fingers so that they appear
3 nice and they look normal. A lot of our colleagues will
4 amputate, and I'm the one that does not do that. So I
5 presented a case of homodigital island flaps, I
6 presented a case on Moberg advancement flaps, I
7 presented cases on first dorsal metacarpal artery flaps.
8 And I reviewed that when you make a decision about
9 people's hands, it's very, very important. Especially,
10 if someone is involved as a teacher or a minister or a
11 physician, you want to try to, you know, address a
12 patient as a whole versus somebody that's a cowboy or
13 somebody that wants to just get on with their work, like
14 a farmer. So you take into consideration the patient's
15 field of profession and you make those determinations,
16 whether you do a very labor-intensive flap or versus
17 just doing a revision amputation to get the patient on
18 with his work.

19 So yes, we do cosmetic surgeries on hands, we
20 do flaps. If we don't have that ability to do flaps, we
21 simply amputate people's fingers. And people don't like
22 to have their fingers amputated. Most -- but other
23 people, like cowboys or farmers, say, "Well, let's just
24 get on with it, and let's get going and amputate it."

25 Q. When you do the cosmetic surgery, I assume you

1 do it only if it's medically necessary. Would that be
2 true?

3 A. I consider both things. I consider cosmetic
4 and medical.

5 Q. Okay. So are you --

6 A. I consider cosmetic and functionality, not
7 medically but, you know, functionality is important,
8 yes.

9 Q. So that we understand the interplay of these
10 two concepts, are there times when you do cosmetic
11 surgery where it's not actually medically necessary?

12 A. I think hand surgery is a balance between both
13 of those, and so we try our best. And in an emergency
14 setting cosmetics is important as well as the function.
15 So both of them, you can't really separate.

16 Q. Okay.

17 A. You really can't.

18 Q. Here's the thing about my questions --

19 A. And I would -- I would submit that cosmetic
20 should be redefined as reconstructive surgery.

21 Q. Okay.

22 A. Because cosmetics brings into the fact that
23 you talk about breast implants, facelifts, and -- and
24 that's kind of the impression I think about cosmetics.

25 But with hand surgery, you want to restore the balance

1 of the hand, you want to make it functional. You don't
2 want to have a painful hand, you don't want to have
3 dysesthesias. You want to have a functional hand. So
4 when you take into account the hand, you have to take
5 both the cosmetic and the functionality of it. So those
6 are very important parts for me.

7 Q. Okay. The thing about my questions is they're
8 like your scalpels. In order to do their job, they have
9 to be answered as is. This is not a debate.

10 A. Well, your questions are abstruse, sir.

11 Q. Right.

12 A. And they're not to the point. And I feel that
13 your lack of knowledge of the field is the problem.
14 Okay? That's just it.

15 Q. Anything else you want to say? You can insult
16 me as much as you want, but you're going to have to
17 answer my questions. So let me know when you're done.

18 Are there occasions when you do reconstructive
19 surgery for cosmetic purposes that you do not consider
20 it also to be medically necessary?

21 A. Yes.

22 Q. Now, with respect to the occasions on which
23 you have, apparently, prescribed prostheses similar to
24 those recommended by Advanced Arm Dynamics, can you give
25 me an estimate of the number of patients involved?

1 A. That I've prescribed prostheses?

2 Q. Similar to those recommended in this case, the
3 silicone prostheses recommended by Mr. Lang.

4 A. Probably five a year. And after over
5 15 years, we're probably looking around 75 patients,
6 give or take.

7 Q. For how long following the period that you
8 would prescribe such prostheses would you normally
9 follow the patient?

10 A. We follow these patients for years, years.

11 And so -- in fact, I had a patient who got his arm
12 caught in a router -- that was when I was in Caldwell --
13 that had just recently come in, and he comes in with his
14 prosthesis, so we follow them for years.

15 Q. Okay.

16 A. And they may have neuromas, or they may not be
17 happy with it, because of that, we follow them for
18 years, yes, we do.

19 Q. When you say you "follow them for years," do
20 you have a normal -- normally speaking, do you -- are
21 they requested to schedule followups on an annual basis,
22 or does it just happen that they contact you, or is
23 there --

24 A. No. Our policy is that if a patient's in our
25 office, they're always part of our office, regardless of

1 the ability to pay or what the circumstances are,
2 they're always guaranteed an appointment, and they're
3 like part of our family. So they're always welcome to
4 come back.

5 And we see patients, and I've had discussions
6 about hand transplants with some patients. I've had
7 discussions about modifying their level of their
8 amputations.

9 We had -- as I was stating, we had a gentleman
10 that just had one thumb. We have multiple people who
11 have suffered amputations, because we do a lot of
12 trauma. We have a book of pictures that show people
13 what ray resections are. We have wonderful expressions,
14 like Mickey Mouse does not have five fingers, he has
15 four fingers; those are important things.

16 And people -- you know, we're very -- we're
17 very close to our patients. And when there is a loss of
18 a digit or a hand, we're very respectful, and we're very
19 empathetic. And we try our best to restore the function
20 in their hand and make sure that they do well.

21 The injuries that we see are very devastating,
22 high-pressure-injection injuries, whether they're
23 table-saw injuries, whether they're infections, whether
24 they're -- anything, we take care of all of our
25 patients, and we do prescribe them prosthetics when they



1 need it. But more often than not, they don't need it,
2 and they go on about, on their own.

3 Q. Doctor, with respect to the 75 patients that
4 you have prescribed similar prostheses for,
5 approximately, five a year, why -- were those
6 prescriptions medically necessary?

7 A. Yes. The ones that have below-elbow
8 amputations or above-elbow amputations, those are the
9 ones that are really, super important because that's
10 where the prosthetic market really does serve a needed
11 purpose. You have devices that can be able to be used
12 by patients that allow them to use their hand. So these
13 are important things.

14 We sometimes do prescribe patients these
15 silicone prostheses. We had recently Mr. Aukamora
16 (phonetic) who didn't like it, so he doesn't want to use
17 that.

18 Q. Well -- excuse me, go ahead.

19 A. Yeah.

20 Q. Well, to dial this in a little bit further, in
21 the 75-patient population you're talking about, it's not
22 limited to patients who simply had partial-finger
23 amputations and had silicone prostheses of the nature
24 recommended by Mr. Lang, but included amputations above
25 the wrist also; is that correct?

1 A. Correct.

2 Q. Okay. In how many cases have you prescribed
3 silicone partial-finger prostheses for partial-finger
4 amputations only?

5 A. Probably around five, maybe higher. I can't
6 recall. We're talking over 15 years.

7 Q. So with respect to how people use these, would
8 you agree with me that your sample size is so small
9 that, statistically speaking, you cannot attach any
10 significant -- statistical significance to your action
11 even if all five didn't like them, statistical
12 significance?

13 A. No, I would not agree with that.

14 Q. Do you understand the concept of statistical
15 significance?

16 A. Yes, I do.

17 Q. Explain to me how a sample size of five can
18 possibly yield a statistically significant result.

19 A. Like I said to you before, I just can't recall
20 the number of patients I've seen. So to clarify your
21 question, it's through the experience and my
22 certification.

23 Q. I understand that. And you are a board
24 certified hand surgeon?

25 A. And orthopedic surgeon.

1 Q. Whatever. But some people, even lawyers, may
2 have some training in its probability in statistics and
3 the scientific method. And you're not -- and if you
4 are, it's fine -- but are you saying that a sample size
5 of five can yield a statistically significant result,
6 based on your training?

7 A. No.

8 Q. Do you think the attitude of the person who
9 prescribes such prostheses can affect the response of
10 the patient in terms of how they perceive the utility of
11 such devices?

12 A. I don't understand your question.

13 Q. Okay.

14 A. Can you rephrase that.

15 Q. Let me rephrase it.

16 A. Yeah.

17 Q. Do you think that your attitude towards the
18 prostheses can affect your patient's perception of the
19 utility of such devices?

20 A. If I thought it was medically -- if it was
21 functionally necessary, then it would not affect my
22 opinion.

23 MR. SEINIGER: Would you read my question
24 back, because that was not an answer to it.
25 (Record read back.)

1 THE WITNESS: I still don't understand your
2 question.

3 Q. (BY MR. SEINIGER) Okay. Do you understand
4 what a double-blind study is?

5 A. Yes, I do.

6 Q. A double-blind study is one in which even the
7 experimenter does not know, essentially, to use an
8 example in pharmaceuticals, what's the real drug and
9 what's the placebo, correct?

10 A. Correct.

11 Q. Why is that?

12 A. Because the bias can make them think that the
13 medicine is working or not working.

14 Q. So with that as background and by way of
15 explanation, does my question make any more sense to
16 you, whether or not you --

17 A. I don't have a bias for or against the
18 prostheses, sir.

19 Q. Okay.

20 A. So your question is null and void.

21 Q. Okay. With respect to the criticisms that you
22 had of Mr. Lang's prosthetic rehabilitation plan and, in
23 particular, the five categories that I spoke to, when
24 you prescribed the prostheses to the five, or over the
25 five individuals that you've advised that were of a

1 similar nature, did you -- what did you tell them about
2 what these prostheses might do for them?

3 A. It might help with typing.

4 Q. Okay.

5 A. To increase the length for typing.

6 Q. And that would be functional, wouldn't it?

7 A. He has a functional hand, okay?

8 MR. SEINIGER: Please read the question back
9 to the doctor. It's a yes-or-no question.

10 (Record read back.)

11 THE WITNESS: Functional for the person with
12 one finger missing, yes.

13 Q. (BY MR. SEINIGER) When we talked about -- I
14 think one of the things you testified to was that you
15 didn't really understand the distinction between the
16 concept of active and passive function. Did I
17 understand you correctly in that regard?

18 A. Yeah. Could you explain to me what passive
19 function is?

20 Q. Let me do this, in Mr. Lang's deposition on
21 that topic he, first of all, says, "Active function" --
22 and I'm reading from page 12 of his deposition,
23 beginning at line 11 -- "Active function is when you're
24 actually putting a cosmetic or a silicone cover over an
25 actively moving prosthetic joint. These do not have

1 was providing testimony, was describing different things
2 he would be hopeful that people could do with the
3 devices that his company provides.

4 This would be page 21 of his deposition,
5 Breck.

6 Mr. Lang testified, "I have many people that,
7 you know, use silicone prosthetics on keyboards. And
8 because there isn't any active motion in the fingers
9 themselves, the positioning is not only effective, but
10 also -- what's the word I'm looking for?

11 "It's very expected or, you know, they know
12 where it's going to be every time.

13 "QUESTION: And when you say there's no
14 active --

15 "ANSWER: Sorry. It's predictable. That's
16 the word I'm looking for.

17 "QUESTION: Okay. But --

18 "ANSWER: There's no active function, meaning
19 that there's no motion within the prosthesis during
20 function.

21 "QUESTION: Right.

22 "ANSWER: Whereas, I mean, he can actively
23 move his finger, which moves the prosthesis, but the
24 prosthesis itself doesn't have an additional joint that
25 then bends when he bends. It moves as one piece. And

1 active function associated with them.

2 "QUESTION: Right.

3 "ANSWER: And passive active function. So
4 they have four out of the five possible of the hand
5 prosthesis."

6 And then -- let me see if I can find something
7 else as he defined it.

8 I guess, let me -- since I can't readily get
9 or find this, let me say this: Everybody has a picture
10 of a pirate in their mind. And the pirate, in often
11 cases, has a pegleg. So the pegleg is a prosthesis; is
12 that correct?

13 A. Are you asking me about the leg?

14 Q. Well, I'm saying that --

15 A. Are you asking me about the leg?

16 Q. I'm asking you about --

17 A. About the leg?

18 Q. Doctor, do you want to do me the courtesy of
19 letting me finish what I'm saying?

20 A. Well, I don't want to answer a question about
21 a leg because that's not my area of expertise. Okay?

22 MR. BOWEN: I think I can help you gentlemen,
23 if -- I think I found what you were looking for.

24 MR. SEINIGER: Go ahead.

25 MR. BOWEN: This gentleman, Mr. Lang, when he

1 then it's, you know, passively positional."

2 So the distinction, I gather, Breck, that
3 Mr. Lang was drawing is where the prosthetic device
4 provides active function versus, in this case, just
5 extends the length of the digit.

6 THE WITNESS: Yeah, that's passive. So active
7 function is the actual ability to bend the prosthesis,
8 okay. Passive, you don't have that ability to bend it,
9 and it's an extension. So there is no ability to bend
10 that prosthesis other than -- than it's just a passive
11 extender.

12 And the interesting thing about it is, is that
13 there is some information coming out from the Academy
14 of -- American Academy of Orthopedic Surgeons that there
15 is a device that is an active thing, but it's pretty
16 cumbersome. And this is something that is an
17 interesting device. And you know, as we were reviewing
18 this, it's called the "X-finger." It's custom fit to
19 patients to allow flexion/extensions, but there are
20 limitations regarding the length of the prosthesis.

21 This is about body-powered prosthesis that is
22 secured with a wrist strap, similar to a watchband,
23 which is not what this Dynamic company is offering, and
24 it's not -- and the stuff that they're offering is not
25 new, it's just, basically, technology that's been

1 available for a long time.

2 Q. (BY MR. SEINIGER) To add to the definition, I
3 did find something additionally specific, Mr. Lang
4 testifies, beginning on page 14, line 12 -- or beginning
5 with line 9.

6 "QUESTION: Okay. With respect to
7 recommendations for Mr. Oliveros, what would the passive
8 active function of these prosthetics be?

9 "ANSWER: So in differentiating between active
10 function and passive active function, passive active
11 function is the ability for him then to move the fingers
12 of the passive prosthesis to aid in grasp and grip. And
13 they have a silicone surface to them. So they are very,
14 very -- they have a high coefficient of friction and
15 they are very tactile.

16 "So picking up smaller objects is very easy,
17 because they grip onto them very readily. And just the
18 added length of the leverage gives him the ability to do
19 things that he is unable to do without that, typing on a
20 keyboard or, you know, doing things where that added
21 length and leverage, as compared to the other fingers
22 that are, you know, still there -- you know, without
23 that, he's unable to do that with the residual fingers."

24 Let me ask you, first of all, with respect to
25 keyboarding, I understand that anybody can probably

1 cosmetic, we try to do it for functionality, to see if
2 it would help. And I'm not -- and I haven't -- I can't
3 recall any certain person that has come back to me and
4 then say that they can either live with that prosthesis
5 or without it. So that's just what we've noticed.

6 Q. How did you anticipate that it might help
7 functionality in this case?

8 A. Well, with typing, we thought that, you know,
9 if the amputation is distal enough and it's not so
10 proximal, that you can -- you can add the stability to
11 it. So if they have a tip that's missing right out
12 here, if you do a prosthesis, then it adds to -- a guy
13 who doesn't have -- he can do his five fingers very
14 quickly without having to bypass that finger. But if
15 the amputations are more proximal -- and that's where
16 the problem runs with Bryan -- is that these proximal
17 amputations, you're at -- what happens is, is that the
18 silicone is not made out of wood, it's made out of this
19 soft plastic thing. So when you're pushing on it, it's
20 going to bend, the more proximal the amputation is.

21 So silicone is a rubber, and so I would only
22 think that that amputation -- or in my professional
23 opinion, would only work for amputations that are way
24 out at the tip of the finger as opposed to the ones that
25 are close to the metacarpal head, like the long; where a

1 hunt-and-peck and use a stylus, but in terms of
2 five-finger touch typing, is he presently able to do
3 that?

4 A. No.

5 Q. With Mr. Lang's testimony and mine, in terms
6 of length and leverage, the point I was making about the
7 pegleg was that somebody that was fitted with,
8 essentially, an artificial stump that reached the
9 ground, that would provide -- have a passive active
10 function in that it would allow them to maintain
11 balance, even though it didn't actively move. Isn't
12 that true?

13 A. Yes.

14 Q. Now, with respect to the individuals for whom
15 you prescribed the five or slightly more -- well, strike
16 that question.

17 In the five or slightly more cases in which
18 you prescribed the silicone prosthesis, for what reason
19 did you prescribe them? Was it purely for cosmetic
20 reasons or were there other reasons involved?

21 A. It's for cosmetic and to see if it would help
22 with their typing. Some people didn't -- there was one
23 guy that was a psychologist that didn't like it, so he
24 had his thumb -- he had a silicone prosthesis. I can't
25 remember his name, but -- so we've prescribed it for

1 silicone prosthesis I am fearful would bend and not
2 allow for a forceful transmission of force between the
3 remaining finger and the prosthesis to effectively
4 depress the key.

5 Q. Okay. I think in response to Mr. Bowen's
6 questions that you talked about -- and in answering this
7 question, without waiving my objection to this article,
8 assuming that the court upholds my objection, the
9 answers to my questions shouldn't be consider -- these
10 particular questions. But I think you testified that
11 the doctors involved didn't let the injuries stop them.
12 And then you said none of the doctors had prosthesis.
13 Are you sure that's what that article says?

14 A. They didn't mention it.

15 Q. And in fact, you don't know whether or not the
16 doctors in these articles -- in this article had
17 prostheses that they wore on social occasions for
18 psychological reasons, do you?

19 A. No.

20 Q. One of the things that you said -- and you may
21 have read it from something -- was that handicap is a
22 state of mind. That's an encouraging observation to
23 make to someone who has a handicap, and it's not
24 entirely true, is it?

25 A. It's not my area of expertise. That's just

1 quoted out of the article, so there you go.

2 Q. Okay. In fact, one of the reasons that you
3 have prescribed similar devices is for the psychological
4 benefit of the individual; would that be true?

5 A. Yes.

6 Q. And someone who has become disfigured has
7 every right to try and improve their appearance for
8 psychological reasons, don't they?

9 A. Yes, they do.

10 Q. And I assume you would have no criticism of
11 someone for doing that?

12 A. No, I do not.

13 Q. In fact, you and I -- and I'm sure this is
14 true, you have given a paper, and you make every effort
15 to try and restore as pleasing a cosmetic appearance as
16 possible for your client, not to satisfy their vanity,
17 but in the recognition that a person's appearance is
18 important to their function in society, correct?

19 A. Correct.

20 Q. You don't have any criticism of Mr. Oliveros
21 for wanting to have as pleasing appearance as he can, as
22 he goes about the day-to-day challenges of trying to
23 find work, trying to meet a spouse, things like that, do
24 you?

25 A. No.

1 Q. Okay. In fact, you've complimented him. And
2 it sounds like one of the things that you find admirable
3 about him is that he makes that attempt, correct?

4 A. Correct.

5 Q. If you had a child -- and I realize that the
6 implication, I guess, is that surgeons are above this
7 sort of thing -- but if you had a family member who had
8 a devastating injury -- I think was your term -- that
9 disfigured them, you'd be fully supportive of their
10 trying to have restorative surgery to restore their
11 appearance to the maximum extent possible, wouldn't you?

12 A. Yes.

13 Q. Now let me ask you: What's the difference
14 between Mr. Oliveros and your advocacy on his behalf and
15 what you would advocate for your own family?

16 A. What you're proposing is not a reconstructive
17 surgery; what you're proposing is prosthetic devices,
18 which we feel are not functionally helpful. And I'm
19 fearful that he may not even use them.

20 Q. Well, I understand that. But that's his
21 choice to make, isn't it?

22 A. Yeah, but I'm answering your question.

23 Q. Okay.

24 A. Okay.

25 Q. So --

1 A. So to get back to your question, I don't have
2 a problem with -- and I support Bryan, to have any
3 reconstructive procedure to -- and that's surgical to,
4 you know, restore whatever he has lost. But in my
5 professional opinion, and based on his hand and a review
6 of the prosthetic report, and it's in my heart that I
7 feel that he -- in my training, that he has a functional
8 hand and these devices are not going to add to his
9 function. And I'm fearful that he'll reject it. And I
10 think that the cost of these devices are very expensive.

11 Q. Doctor, if you had a child who had these same
12 injuries and that child came to you and said, "Daddy, I
13 want these just because I want to look better. Kids are
14 making fun of me at school," would you support that
15 child in trying to get these?

16 A. Yes.

17 Q. I can tell -- despite the fact that you and I
18 have grave differences of opinion, and despite -- well,
19 despite that, you strike me as a person that would fight
20 like a cougar if your insurance company said, "We're not
21 paying for these things because they're purely
22 cosmetic," to get your child that, wouldn't you?

23 A. You know, I think that that question is an
24 interesting question. And you know, I am a father, and
25 I don't -- I don't see why you're making it so personal,

1 but I'm a physician, I was asked to comment about the
2 functionality of it. And if this is -- and I've said
3 this before -- if this is a cosmetic thing, I'm not the
4 one that wants to stand in his way with regards to
5 getting those devices. But if we're talking about
6 function and we're talking about this prosthetic report,
7 which is clearly wrong, then we have an issue with that.
8 But if you're saying it's a cosmetic thing, I don't have
9 a problem with it. And if Bryan wants it for cosmetic,
10 I'm okay with that.

11 Q. Okay. In these five cases that you talked
12 about -- well, let's start with this. Take a look at
13 Exhibit No. 1, please. And I've highlighted -- and when
14 I say "Exhibit No. 1," it says, "Gross Deposition
15 Claimant's Exhibit 1." This is Mr. Bowen's letter to my
16 firm, and he represents that an individual by the name
17 of Katy told him that -- well, I'll read it: "Katie
18 told me that they did not prescribe these type of
19 prosthetic devices for people such as Mr. Oliveros and
20 that she would provide me a letter to that effect."

21 Is Katy the lady that has joined us for the
22 deposition today?

23 A. She's my PA.

24 Q. So to the extent that she told Mr. Bowen that,
25 that that would be inaccurate, based on your testimony

1 regarding the five or so cases in which you have
2 provided these kinds of -- or prescribed these kinds of
3 devices; is that true?

4 A. That's true. We've prescribed these type of
5 devices. I'm not sure of the exact conversation, but,
6 yes, we do -- we will prescribe devices. And we
7 don't -- we don't have reservations prescribing them.

8 Q. If you look at Gross Deposition Claimant's
9 Exhibit No. 2, in that letter, which is a "To Whom it
10 May Certain" letter, dated June 17, 2010, it says, "In
11 my practice, I know of no prostheses that would improve
12 his function, and do not routinely recommend them should
13 the patient have functional use of the hand."

14 A. And your question?

15 Q. Okay. My question is: When you say that you
16 know of no prostheses that would improve his function,
17 are you saying that the prostheses described in the
18 article entitled "Update on Advances in Upper Extremity
19 Prosthetics" would, in fact, improve the function of the
20 hand?

21 A. I'm not certain what that -- I think -- what
22 I'm saying is, is that I know of no prostheses for
23 Bryan's hand that would improve his function.

24 Q. Well, at least we -- with respect to typing,
25 it would improve the function of his hand, wouldn't it?

1 Q. So he has to at least get a pair -- in order
2 to test the functional applicancy he needs at least a
3 set that he can try?

4 A. I would say that's fair.

5 Q. Okay. And with respect to -- and again I'm
6 not asking you to --

7 A. And I'm not so sure it should be from this
8 company.

9 Q. Well, I understand that at this point you have
10 taken a view of this company; is that true?

11 A. I'm not so familiar with this company.
12 There's a lot of prosthetics out there. And I don't
13 know where this company is from, so I don't -- I don't
14 have a view on them whether or not -- other than the
15 fact that the fruit basket that came to our office
16 caused me to have some concern. But I don't have an
17 opinion as to what they do and what they don't do.
18 They're out of Portland, so they're not a local group.
19 So I'm familiar with Kormylo and Brownfield's
20 Prosthetics.

21 Q. You mentioned the fruit basket a couple of
22 times. Do pharmaceutical reps continue to provide -- I
23 know they can't provide the gifts the way they used to,
24 but do they still provide gifts to doctors' offices,
25 pens and office articles, and things of that nature?

1 A. Well, I don't know if that's true or not.

2 Q. With respect to the length of his digits,
3 assuming one -- I mean, most of us understand the
4 concept of an opposable thumb and the ability to grasp
5 things. And while it's still possible to grasp things
6 even with partial amputations, having the full length of
7 the digits there would, in some cases, improve his
8 ability to grasp things, wouldn't it?

9 A. Well, he's got pinch because of his PIP joint
10 being -- so pinch is a very important function. He's
11 also able to grab with the ring and the small finger. I
12 mean, he's not -- he doesn't have a perfectly functional
13 hand, but it's not like he lost the thumb, which is a
14 very important part of his hand. He still has the index
15 finger, which is also a very important part of his hand.
16 He also has the actual palm where he's able to grab and
17 hold things, like a hammer or a telephone, toothbrush.
18 So those are still available to him to use, where other
19 people don't.

20 Now, with regards to whether or not his
21 function has improved with typing, I think what you do
22 is you set him before a type machine, you put one of
23 those devices on, not one, but two and let him go. Let
24 him see what he can do. And I think that's the way to
25 test it out.

1 A. Yes, they do. But this was quite a large
2 fruit basket, quite large. And that included more than
3 just fruit. It included nuts, candies; it was pretty
4 large.

5 Q. Okay.

6 A. Even for like the pharmaceutical people.

7 Q. So without quantifying the improvement and
8 function -- and I understood that -- I understood, I
9 think, the way your sentence to be -- or your response
10 to be a comment, essentially, on the extent to which
11 function is improved by increasing the length of the
12 fingers with these prosthetics, but would you -- at
13 least can see that they do improve it to some extent?

14 A. Again, the level of his amputation on his
15 hand, okay -- and this is a concern that I have, okay.
16 The index finger is long, the ring finger is relatively
17 long. If you put -- if you're saying -- and let me get
18 this straight. What fingers do they want to put these
19 devices on?

20 Q. Well, it's -- whatever's in the report, I
21 guess.

22 A. It's not in the report.

23 Q. It's not in --

24 A. No.

25 Q. -- Exhibit 11?

1 A. Well, I don't know. Are they going to put
2 devices on the index, the long and the ring and the
3 small?

4 Q. Why don't you take a look at Exhibit 11 and
5 see what's recommended.

6 A. It doesn't specifically say. Again, I'll
7 point that out to you, okay. It doesn't say which
8 digits they want to replace or add to. So I mean, I've
9 already looked at this. And so please direct me to
10 exactly where it says he wants to replace the index,
11 long and the ring, and the small.

12 MR. BOWEN: It's in his bid.

13 THE WITNESS: Oh, okay. Well . . .

14 MR. BOWEN: Let's find it.

15 THE WITNESS: Because I have no idea.

16 MR. BOWEN: It's not in the report.

17 MR. SEINIGER: The bid is Exhibit No. 7.

18 MR. BOWEN: Here, Breck. It's Exhibit No. 7,
19 page 116, Doctor, if you will.

20 THE WITNESS: So he wants to put four custom
21 partial-finger prostheses to his fingers. And how long
22 does it take to put them on and off?

23 Q. (BY MR. SEINIGER) Well, that's, I think, in
24 his deposition. I can't tell you right now.

25 A. Well, I mean if -- let's just say it takes,

1 A. Um-hmm. In my opinion, it's typing.

2 Q. Okay. In Exhibit No. 6 I quote from your
3 letter to me, and that letter says -- that's a letter
4 that I sent you on December 10th, 2011, it says, "In
5 your letter to me of November 1, 2011, you state:
6 'Bryan is a delightful young man who has not let his
7 injury define him. I wish him the best of luck, and
8 will be happy to write for the prosthesis should he
9 choose to have them as a part of a settlement in this
10 case.'"

11 Now, first of all, do you recall writing to me
12 that you'd be happy to write the prosthesis if he chose
13 to have them as part of a settlement in the case?

14 A. If -- yes, I recall writing to you. Yes.
15 Yes. Yes.

16 Q. Okay. And in response to that, I think you
17 wrote back and declined to write a prescription,
18 essentially, unless he settled this case; is that
19 correct?

20 A. I'm not -- I can't recall that.

21 Q. Well, let me ask you this: If Bryan contacts
22 you today and says, "I'd like you to write a
23 prescription for this," would you be willing to write it
24 for him?

25 A. Would I be willing to write it for him? For

1 what, five minutes or two minutes or what is it for each
2 finger?

3 Q. We're getting far afield from the question.

4 A. No, no. But this is --

5 Q. Doctor, I get to answer the questions and you
6 must answer them -- I get to ask the questions and you
7 must answer them. Okay. This is not a debate. The
8 question is in terms of the length and leverage of
9 extending the fingers, is it -- with these prostheses,
10 would there be any advantage gained in terms of that
11 particular function at all?

12 A. What function are you referring to? Typing?

13 Q. The function of the fingers at all in terms of
14 extending the length and leverage.

15 A. Typing.

16 Q. Anything else you can think of?

17 A. No, sir.

18 Q. How about picking up a small object?

19 A. He can do that with the thumb and the index
20 finger.

21 Q. I understand that he can do it, okay. I
22 understand that he can do it. What I'm saying is: Is
23 there any advantage? That's a different question. A
24 man with no legs can move around, it doesn't mean that
25 he has no disadvantage from not having the legs.

1 Bryan, well, I don't -- I'm not sure -- I'm not so sure
2 what I'm supposed to be doing at this point. So I
3 don't -- you know, I'm a physician, and so I want to do
4 what's right for the patient. And if that's right for
5 the patient, I will do that. If it's not right for the
6 patient, I won't do it.

7 Q. Well, in your letter you wrote and said you
8 would write the prescription if he settled this case.
9 And at least, when you wrote that letter, I assume that
10 you meant it. Did you mean that when you wrote me that
11 letter, that you'd write the prescription if he settled
12 this case?

13 A. I don't recall saying that if he settles the
14 case we're going to write -- we're going to write him
15 the prescription; I just don't recall that. I just
16 don't recall that. But I'll do whatever I feel is right
17 for Bryan, that's for sure.

18 Q. Have you got your chart here?

19 MS. LAIBLE: Here.

20 MR. SEINIGER: Thank you.

21 Q. (BY MR. SEINIGER) Would you take a look and
22 see if you can find your letter to me of November 1st,
23 2011?

24 A. Yeah, here we go. I have it right here.

25 Q. Why don't you -- I've found my copy, and let

1 me just read it, and you tell me if I've read correctly
2 from the letter that you wrote to me on November 1st,
3 2011: "Bryan is a delightful young man who has not let
4 his injury define him. I wish him the best of luck, and
5 will be happy to write for the prosthesis should he
6 choose to have them as a part of a settlement in this
7 case."

8 Did I read that correctly?

9 A. Yeah, but it -- can you read back what he
10 said? He said that I would write the prescription if --
11 I would write him a prescription for the prosthesis if
12 Bryan settled the case, that's what you asked me.

13 Q. Is that not what you said in the letter?

14 A. I don't think it's the same.

15 Q. What's the difference, please?

16 A. Well, one, I think it's not the same. I think
17 that -- I think what I'm saying is, is that it's not
18 contingent upon him settling the case. It's if -- if he
19 needs it, accompanying in the case. So it's not
20 contingent upon him settling the case would I -- that I
21 would write the prescription. Is that clear?

22 Q. Okay. Why don't you take a look at my letter,
23 then, of December 10th, 2011, which was Claimant's
24 Exhibit to your --

25 A. I don't have it.

1 reviewed your request, and find I am uncomfortable
2 prescribing the prosthesis prior to the settlement being
3 reached. As I stated earlier, I am happy to write for
4 it should Bryan wish to use his settlement to purchase a
5 set, but I stand by my original statement that the
6 prosthetic devices are not required for Mr. Oliveros to
7 improve his functional use of the hand, and do not want
8 my prescription for the prostheses construed as an
9 agreement to the fact that it is medically necessary."

10 So isn't it your position that with respect to
11 Mr. Oliveros you will only write him this prescription
12 if he settles this case?

13 A. No. I think my -- my position is, is that I
14 would write the prescription to him if it added function
15 to his hand, you know. And I think what would happen is
16 we're going back and forth with getting to a point where
17 I think it's a cosmetic thing, and we would -- we want a
18 functional part of it. And looking at his hand and then
19 reviewing what they wanted, we didn't feel really
20 comfortable with it. And we just were hopeful that you
21 guys would figure out what you wanted to do.

22 Q. You'd agree with me, wouldn't you, that
23 whether or not Mr. Oliveros settles this case is not a
24 factor that has anything, whatsoever, to do with medical
25 necessity with respect to these prostheses, correct?

1 Q. -- deposition, No. 6.

2 A. Okay.

3 Q. Then take a look at your letter of
4 December 19th, 2011, to me --

5 MR. SEINIGER: Would you mark this as
6 Claimant's Exhibit No. 14 to Dr. Gross' deposition,
7 please. And then hand it back to me, because it's my
8 only copy.

9 (Exhibit 14 marked.)

10 Q. (BY MR. SEINIGER) Now, would you agree with
11 me that on December 10th, 2011, I wrote you and I said,
12 "In view of this, I request that you write Mr. Oliveros
13 a prescription for the prostheses now, for whatever
14 reason you had in mind in agreeing to do so in
15 connection with the settlement of his workers'
16 compensation case."

17 And then on December 19th, 2011, you wrote
18 back and essentially declined to do so. Is that a fair
19 characterization?

20 A. Can I see the letter, please?

21 Q. Which one?

22 A. My response to you.

23 Q. Yeah, here you go.

24 A. Okay.

25 Q. And so in that letter you state, "I have

1 A. Yeah, I don't -- it shouldn't be contingent
2 upon that.

3 Q. In fact, it is -- without meaning any
4 disrespect by the question, it really is none of your
5 concern whether or not he settles this case, is it?

6 A. No, it's not.

7 Q. What I'm wondering is, how is it that you see
8 it as appropriate to have declined to write this
9 prescription whether or not you've felt that it would
10 improve his function or help him psychologically based
11 on what he decided to do in terms of settling with an
12 insurance company?

13 A. The insurance company -- for what I'm saying
14 is, is I don't want to prevent Bryan from getting
15 whatever he needs, okay. And it's not -- I don't -- I
16 don't have any benefit from either of you guys
17 benefiting in this case. So I don't -- I don't think it
18 should have anything to do with your settlement with
19 Bryan or Bryan's settlement with the insurance company.
20 I don't think it should have anything to do with it.

21 Q. Okay. Good. We're in total agreement on
22 that.

23 Mr. Bowen had asked you whether or not Bryan
24 discussed this with you -- in terms of your
25 determination whether or not this is medically

1 necessary, is that a factor? Is it a -- in other words,
2 is your opinion with respect to whether or not he needs
3 or whether it's reasonable to prescribe prostheses, of
4 the nature that we're discussing here, contingent in any
5 way on whether or not you've had that conversation with
6 Bryan?

7 A. I don't understand your question. Can you
8 rephrase it?

9 Q. Sure, yeah. You, at one point, testified that
10 it wasn't reasonable and necessary for him to have the
11 prostheses that he desires. And you testified that
12 you've not discussed this with him. And my question is:
13 Is your opinion, as expressed in the direct portion of
14 this deposition, contingent in any way on whether or not
15 you've had a discussion with Bryan regarding the reasons
16 that he may want these prostheses?

17 A. You already answered your question. I didn't
18 discuss it with Bryan; so, therefore, whether or not I
19 had prescribed that prosthesis, it wasn't based on any
20 conversation, it's based on looking at his hand and what
21 he has.

22 Q. Well, I guess what I'm saying is --

23 A. So if Bryan had asked me that he wanted these
24 prostheses, I might -- my first response would be to,
25 you know -- if the patient wants it, I just give it to

1 MR. BOWEN: He didn't use this in response to
2 any of mine.

3 MR. SEINIGER: Okay. Well, let's go ahead and
4 mark it, in any event. I think the record will --

5 MR. BOWEN: I don't mind it being marked. For
6 instance, I haven't offered the other one that he
7 referenced, I just wanted it marked to the extent that
8 he utilized it in providing testimony. I don't have any
9 objection to this being marked, no.

10 MR. SEINIGER: If I'm wrong, I'm wrong, but
11 we'll mark it as Claimant's Exhibit -- Doctor, is that
12 your only copy?

13 THE WITNESS: Yeah, it is.

14 MR. SEINIGER: We'll get you a copy before you
15 leave.

16 MR. BOWEN: Yeah. We can get you one here and
17 get everybody squared up.

18 (Exhibit 15 marked.)

19 MR. BOWEN: So you're done?

20 MR. SEINIGER: We're done.

21

22 FURTHER EXAMINATION

23 QUESTIONS BY MR. BOWEN:

24 Q. Doctor, having gone through the riggers of
25 cross-examination, has anything that Mr. Seiniger has

1 him.

2 Q. You'd prescribe it?

3 A. Right.

4 Q. Okay. And you'd prescribe it, essentially,
5 for the same reasons, I gather, that you did in the
6 other cases that you've prescribed similar prostheses,
7 correct?

8 A. Correct.

9 Q. Okay.

10 MR. SEINIGER: Let's take a short break. I
11 need a glass of water, but I think I'm done, Dan.

12 (Recess held.)

13 MR. SEINIGER: That's all the questions I
14 have. I'll note that Exhibit 14 is the same as
15 Exhibit 12. I couldn't find it, but since I referred to
16 it, I'll leave it in there.

17 And then, Dan, do you have any objection to
18 having a copy of this article entitled, "Update on
19 Advances in Upper Extremity Prosthetics" marked as an
20 exhibit?

21 MR. BOWEN: What is it?

22 MR. SEINIGER: It's the article that the
23 doctor pulled out during his examination, and he
24 testified concerning it, I think, in response to your
25 questions.

1 brought to your attention through his cross-examination
2 changed the opinions that you provided to me in your
3 direct exam, sir?

4 A. No.

5 Q. Doctor, early on in the cross-examination
6 there was one question -- there was a question, and in
7 my mind, a bit of confusion as to the standard that we
8 use in our workers' compensation cases. And just to
9 make sure that we have a clear record, I will represent
10 to you, sir, that in workers' compensation cases we use
11 a standard of more probable than not. And by that we
12 mean greater than 50 percent, not substantially greater
13 or anything, it just literally means something more than
14 50 percent.

15 With that understanding, sir, do you still
16 hold the opinions within a reasonable degree of medical
17 probability, as I just represented to you, the standard
18 requires as to those opinions you gave to me on direct
19 examination?

20 A. Yes.

21 Q. And I gather, ultimately, that you don't have
22 a problem, per se, if Mr. Oliveros would come to you and
23 give you some reasons why he wanted these devices
24 prescribed as such?

25 A. Correct.

1 Q. You do continue to have an issue as to whether
2 they are reasonable and necessary, as you use that term
3 in your -- those terms in your practice?

4 A. Correct.

5 Q. And you continue to hold the opinion that as
6 to these particular devices proposed, those being the
7 Advanced Arm Dynamics, and as to this particular
8 patient, Mr. Oliveros, and the problems that he has with
9 respect to the hand, you don't believe that the devices
10 are reasonable and necessary?

11 A. Correct.

12 Q. And that is your opinion within a reasonable
13 degree of medical probability, sir?

14 A. Yes.

15 MR. BOWEN: That's it.

16
17 FURTHER EXAMINATION

18 QUESTIONS BY MR. SEINIGER:

19 Q. Well, in light of that, I'm a little confused.
20 I understand that your responses have validated, I
21 guess, the defendant's position, but what you're saying
22 is that even on the basis of 51 percent or greater
23 likelihood, you don't think that it's reasonable for
24 Mr. Oliveros to get these prosthetic devices; is that
25 correct?

1 A. That is correct.

2 Q. Okay. And so using that standard, do you
3 think it was reasonable for the other five people that
4 you prescribed them for to have gotten them?

5 A. It's a different injury. Those are single
6 digits, these are multiple digits. So this is a
7 different type of hand injury.

8 Q. So they were much less disfigured than this
9 gentleman, Mr. Oliveros, correct?

10 A. That is correct. But that doesn't mean
11 that -- it may mean that the burden on these prostheses
12 is too great for a hand that's more injured than one
13 that's less injured.

14 Q. What do you mean by the burden on these
15 prostheses?

16 A. Well, you're asking too much of it. It's like
17 having your analogy of the pirate and having the pirate
18 having two peglegs, it's not going to work, because he's
19 missing two legs. If he had one leg that's okay, but
20 because the injury is so bad and he has two legs
21 missing, and you have two peglegs, it's unreasonable for
22 a guy to walk around with two peglegs.

23 It's the same analogy with your hand. You
24 have many fingers missing, so you're going to have to
25 try to get these nonnatural fingers to compensate for an

1 injury that only -- that can -- it's just not possible,
2 it's just asking too much of the prostheses because of
3 the amount of missing and the -- what you're asking of
4 it.

5 Q. What, are they more likely to fail, the
6 prosthesis?

7 A. They're just not going to work as well. As
8 you add something more complex to a function, you're
9 going to require these things -- more demand to be
10 utilized in a more functional thing. It's easier to
11 augment something that's one digit that's missing than,
12 say, multiple digits. So that's why I think this is
13 unrealistic, because you're asking too much of these
14 prostheses to recover what function Bryan is required
15 of. It just doesn't make sense.

16 Q. Well, cosmetically speaking, he certainly
17 has -- your analysis wouldn't hold true for their
18 cosmetic function, would it?

19 A. For the appearance, that is -- that's correct,
20 but not functionally.

21 Q. Okay.

22 A. Functionally, it doesn't make sense --
23 mechanically and functionally it doesn't make sense.

24 Q. So what you're saying is that in the
25 single-digit case, there was functional benefit to be

1 gained, correct?

2 A. Correct.

3 Q. I mean, that appears to be the -- the dividing
4 line. And that functionally, one prosthesis would be
5 helpful, but there's a -- but having more than one
6 wouldn't work. Can you cite me to any literature that
7 supports that?

8 A. I would defer to Dr. Brown's article.

9 Q. Dr. Brown's article on the doctors that don't
10 use these things, it discusses that, does it?

11 A. It doesn't discuss prosthetic use. That
12 doesn't mean that there isn't, but there isn't -- I
13 don't know if there's any literature out there, either,
14 for support or no support of using multiple fingers
15 prosthetics, but it doesn't make sense.

16 Q. Okay. But you're speculating? You're not
17 relying on any studies, are you?

18 A. No.

19 Q. Okay.

20 MR. BOWEN: "No" you're not speculating or
21 "no" you're not relying on other studies?

22 THE WITNESS: I'm not relying on -- I don't
23 know of -- I don't know of any studies. But it just,
24 functionally, doesn't make sense. I mean -- and he has
25 a -- it just doesn't make sense. I mean, you look at

1 it, and it just doesn't make sense to have four
 2 fingers --
 3 Q. (BY MR. SEINIGER) Do you have any idea of the
 4 number of these --
 5 A. -- prosthetics.
 6 Q. -- prostheses that are prescribed across the
 7 country?
 8 A. What's that?
 9 Q. Do you have any idea of the number of similar
 10 prostheses that are prescribed for similar purposes
 11 across the country?
 12 A. No.
 13 Q. Do you have any idea of the number prescribed
 14 in this community?
 15 A. No. But I have a pretty busy hand practice,
 16 very busy, and a lot of trauma.
 17 Q. I understand that. And generally you don't
 18 prescribe them?
 19 A. The finger prosthesis?
 20 Q. Yeah.
 21 A. I said I do, but not for multiple. This is a
 22 unique injury.
 23 Q. Okay.
 24 A. And out of the hand surgeons in the community,
 25 which are seven, I take the most amount of trauma. So

1 Q. What do you base that belief on?
 2 A. My training and my review of this person's
 3 injury.
 4 Q. But what have you reviewed to determine what's
 5 being done across the country with respect to multiple
 6 finger amputations?
 7 A. I have -- I review, in my training, my
 8 recertifications, all those.
 9 Q. But --
 10 A. And it's an area that I find very interesting.
 11 Q. I understand that you are well trained, you
 12 review literature, but to -- there is an extent to which
 13 that's a little bit irrelevant, because my question
 14 doesn't ask about your training. I'm not impugning your
 15 training, I'm not questioning your certification, I'm
 16 asking you -- you're providing me with an opinion, and
 17 I'm trying to find out the data on which it's based.
 18 A. I don't think there's data out there that
 19 would suggest that it's reasonable or unreasonable.
 20 Q. Okay. Thank you.

21
 22 FURTHER EXAMINATION
 23 QUESTIONS BY MR. BOWEN:

24 Q. Doctor, given the extensiveness of the injury,
 25 that one of your concerns is that to provide and to

1 my practice is based out of trauma. So I carry a lot of
 2 experience and credentials that this is a unique injury.
 3 And what you're asking, to fit him with not one, not
 4 two, not three, but four silicone prostheses makes one
 5 want to scratch their head about it for function.
 6 Q. Have you fit other people with more than one
 7 digit, partial amputations, with similar prostheses?
 8 A. No.
 9 Q. So you have no personal experience with how
 10 multiple similar prostheses would work, correct?
 11 A. But I have experience with mutilating hand
 12 injuries.
 13 Q. Okay.
 14 A. More than one, and I know how the hand
 15 functions. And I haven't had patients or the need for
 16 them to use that.
 17 Q. I understand you strongly hold this opinion,
 18 but my question is: You have no empirical data -- you
 19 can't cite me any studies on how multiple -- on multiple
 20 devices like this for multiple-function amputations or
 21 -- and you have not had any clinical experience having
 22 prescribed multiple prostheses for multiple
 23 partial-finger amputations; is that correct?
 24 A. The answer to that is that is correct, but I
 25 believe no one in the country has.

1 prescribe four fingers to Bryan Oliveros might actually
 2 work -- very well work a disservice, to the extent it
 3 would impede function that he has with the existing
 4 hand?
 5 A. Correct.
 6 MR. SEINIGER: Objection, leading.
 7 THE WITNESS: No, I agree.
 8 MR. BOWEN: Yeah. Well, he's just concerned
 9 about the form of my question, and I can reask it.
 10 Q. (BY MR. BOWEN) Basically, Mr. Oliveros, if we
 11 were to provide him these prosthetic devices as
 12 recommended by Advanced Arm Dynamic, what impact, if
 13 any, would it have on the function that he otherwise
 14 enjoys in the injured hand, sir?
 15 A. He has a functional hand which he can do
 16 activities of daily living. I am convinced that if you
 17 fit him with four fingers, those four fingers are going
 18 to be sitting on a shelf. I am convinced.
 19 Q. We went over the sweating and all those other
 20 issues some time ago, do you have some additional
 21 concerns as to the utilization of these prosthetic
 22 devices, from a functional standpoint?
 23 MR. SEINIGER: I'm going to object. It's
 24 beyond the scope of recross.
 25 MR. BOWEN: You can answer the question.

1 MR. SEINIGER: He's covered it all.
 2 THE WITNESS: First of all, you have to put
 3 these devices on, which is -- it's not a simple act.
 4 And you're not just putting on one, you're putting on
 5 four. And you've got -- you have to have this sticky
 6 device, and it takes five minutes per finger. So you're
 7 looking at 20 minutes every single day on a young,
 8 active guy. It's hot, it's sweaty, and no one wants to
 9 get their hands caught up in these devices. And the
 10 biggest concern is that he is going to reject these.
 11 And up to 35 percent will reject these.
 12 Q. (BY MR. BOWEN) What do you mean by rejection?
 13 A. They won't use them.
 14 Q. Okay. Now, do you have concerns that they
 15 would actually impede function?
 16 A. If he has these silicone devices, they don't
 17 have sensory function at the end, okay. So he's going
 18 to have four fingers that are not going to be able to
 19 provide sensory feedback to light touch, hot or warm.
 20 It's almost like wearing a lead glove. He's not going
 21 to be able to do fine manipulation; they're just going
 22 to be these numb extensions of finger.
 23 It's ridiculous. It's absolutely absurd that
 24 someone would actually put in four fingers. And to me,
 25 a company that would even suggest that, and I'll go on

1 CERTIFICATE OF WITNESS
 2 I, DOMINIC L. GROSS, M.D., being first duly sworn,
 3 depose and say:
 4 That I am the witness named in the foregoing
 5 deposition, consisting of pages 1 through 83; that I
 6 have read said deposition and know the contents thereof;
 7 that the questions contained therein were propounded to
 8 me; and that the answers contained therein are true and
 9 correct, except for any changes that I may have listed
 10 on the Change Sheet attached hereto.
 11 DATED this ____ day of _____, 2012.
 12 _____
 13 DOMINIC L. GROSS, M.D.
 14 SUBSCRIBED AND SWORN to before me this ____ day of
 15 _____, 2012.
 16 _____
 17 NAME OF NOTARY PUBLIC
 18 _____
 19 _____
 20 NOTARY PUBLIC FOR _____
 21 RESIDING AT _____
 22 MY COMMISSION EXPIRES _____
 23 _____
 24 _____
 25 _____

1 the record, is ridiculous. It's absolutely ridiculous.
 2 Q. So I gather you think it would impede his
 3 existing function?
 4 A. I do.
 5 Q. Thank you. Is that an opinion you hold within
 6 a reasonable --
 7 A. There's also a standard of care.
 8 Q. Yes.
 9 A. This is not the standard of care for this
 10 community.
 11 MR. BOWEN: Okay. Thank you. I'm done.
 12 COURT REPORTER: Doctor, are you going to read
 13 and sign your transcript?
 14 THE WITNESS: You can send it to my office.
 15 COURT REPORTER: Are you ordering a copy of
 16 this transcript?
 17 MR. SEINIGER: Not right now.
 18 (Deposition concluded at 12:14 p.m.)
 19 (Signature requested.)
 20
 21
 22
 23
 24
 25

1 CHANGE SHEET FOR DOMINIC L. GROSS, M.D.
 2 Page ___ Line ___ Reason for Change _____
 3 Reads _____
 4 Should Read _____
 5 Page ___ Line ___ Reason for Change _____
 6 Reads _____
 7 Should Read _____
 8 Page ___ Line ___ Reason for Change _____
 9 Reads _____
 10 Should Read _____
 11 Page ___ Line ___ Reason for Change _____
 12 Reads _____
 13 Should Read _____
 14 Page ___ Line ___ Reason for Change _____
 15 Reads _____
 16 Should Read _____
 17 Page ___ Line ___ Reason for Change _____
 18 Reads _____
 19 Should Read _____
 20 Page ___ Line ___ Reason for Change _____
 21 Reads _____
 22 Should Read _____
 23 Page ___ Line ___ Reason for Change _____
 24 Reads _____
 25 Should Read _____
 26 Use a separate sheet if you need more room.
 27 WITNESS SIGNATURE _____

1 REPORTER'S CERTIFICATE

2 I, MARLENE "MOLLY" WARD, CSR No. 704,
3 Registered Professional Reporter, certify:

4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth, at
6 which time the witness was put under oath by me;

7 That the testimony and all objections made
8 were recorded stenographically by me and transcribed by
9 me or under my direction;

10 That the foregoing is a true and correct
11 record of all testimony given, to the best of my
12 ability;

13 I further certify that I am not a relative or
14 employee of any attorney or party, nor am I financially
15 interested in the action.

16 IN WITNESS WHEREOF, I set my hand and seal
17 this 12th day of March, 2012.

18
19
20
21 MARLENE "MOLLY" WARD, CSR, RPR
22 Notary Public
23 P.O. Box 2636
24 Boise, Idaho 83701-2636

25 My Commission expires July 11, 2014

R. DANIEL BOWEN
ERIC S. BAILEY * also licensed in WY
W. SCOTT WIGLE
NATHAN T. GAMEL * also licensed in OR

LAW OFFICE
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Email: info@bowen-bailey.com

November 8, 2011

VIA FACSIMILE

Andrew Marsh, Esq.
Seiniger Law Offices
942 W. Myrtle St.
Boise, ID 83702
Fax: (208) 345-4700

Re: Claim No.: 2008562800
Insured: Rule Steel Co.
Claimant: Bryan Oliveros
Date/Loss: 07/30/2008

Dear Andrew:

In response to your more recent inquiries, my client is not interested in picking up the prosthetic costs, at least on an open-ended basis. We have run this by Claimant's treating physician several different occasions, and he is rather adamant that your client is not in need of these devices, nor would they be reasonable and necessary. However, if it would otherwise avoid the upcoming hearing, we would be willing to pay for a one-time shot of these fingers in the context of a settlement. Basically, we would be willing to offer \$17,814.15 to reflect the cost of the prosthetic devices as laid out by Advanced Arm Dynamics in their April 1, 2011 letter to you. We would also be willing to pay the balance of Claimant's impairment, which as of this moment is \$14,275.80. Finally, we would be willing to pay an additional \$5,000.00 lump sum consideration, for a total of \$37,089.95 new money.

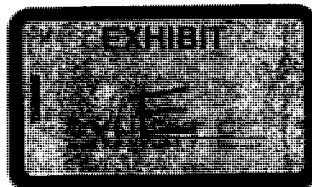
Please present this offer to your client and advise us of his response at your earliest convenience.

Sincerely yours,

SENT VIA FACSIMILE AND
WITHOUT SIGNATURE

R. Daniel Bowen

RDB:gmh



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,
Claimant,

v.

RULE STEEL TANKS, INC.,
Employer,

and

ADVANTAGE WORKERS
COMPENSATION INSURANCE CO.,

Surety,

Defendants.

IC 2008-024772

**ORDER DENYING
MOTION TO DISMISS
AND MOTION FOR
RECONSIDERATION**

FILED

JUL 11 2012

INDUSTRIAL COMMISSION

On April 30, 2012, Claimant filed a motion to dismiss or, in the alternative, a motion for reconsideration. Claimant asks that his complaint in the above-captioned case be dismissed without prejudice, on the grounds that he was unfairly surprised by the testimony of Dr. Dominic Gross at deposition. Claimant avers that, in light of Dr. Gross's testimony, which was contrary to opinions stated pre-hearing, it would be fruitless to proceed on the current complaint. Claimant argues that the interests of justice require dismissal of the complaint without prejudice. Should the Commission deny the motion to dismiss, Claimant asks for reconsideration of the Referee's order denying Claimant's request to present rebuttal evidence.

Defendants object to the motion. They argue that the case has already been heard and that it would be unfair to allow Claimant the opportunity for a "do-over."

I.

MOTION TO DISMISS

Unless the interests of justice require otherwise, the Commission shall grant a motion for dismissal when made by the party filing the complaint. J.R.P. 12(C). However, the "dismissal of

the complaint by the claimant is not automatic under this rule. The Commission is permitted to consider additional circumstances that may warrant the case to proceed through litigation.”
Comment to J.R.P. 12(C).

Here, Claimant filed both the complaint and the motion to dismiss. However, we find that the interests of justice require retaining the complaint. Though Claimant characterizes Dr. Gross’s testimony as a radical departure from a previously-stated opinion, the evidence in the record does not support such a contention. The issue at hearing, and currently pending before the Commission, is whether Claimant is entitled to prosthetic fingers under Idaho Code § 72-432. Prior to hearing, Dr. Gross opined that he did not believe that prosthetic fingers were required or necessary for Claimant, on the grounds that the prosthetics would not improve Claimant’s function and would be merely cosmetic. This opinion did not change at deposition. Dr. Gross certainly provided a more detailed and expanded opinion at deposition; however, his fundamental position remained the same, and Claimant was or should have been aware, pre-hearing, that Dr. Gross’s opinion did not favor his position. If Claimant believed it was necessary to bolster his position by developing evidence contrary to Dr. Gross’s opinion, then Claimant should have done so prior to hearing. It is unfortunate that Claimant now believes that the evidence in the record is insufficient to support his claim, but Claimant should have considered the implications of Dr. Gross’s unfavorable opinion before proceeding to hearing. Defendants are correct that it would be unjust to require them to litigate the same case twice because Claimant, post-hearing, is concerned that there is insufficient evidence in the record to support his claim.

Claimant’s motion to dismiss without prejudice is DENIED.

II.

MOTION FOR RECONSIDERATION

Commission review of a Referee’s order may be sought by means of a motion for reconsideration. See *Wheaton v. ISIF*, 129 Idaho 538, 928 P.2d 42 (1996) and *Simpson v.*

Louisiana-Pacific Corp., 134 Idaho 209, 998 P.2d 1122 (2000). Here, Claimant asks the Commission to reconsider the Referee's Order Denying Motion to Take Post-Hearing Rebuttal Testimony, filed April 9, 2012.

Following Dr. Gross's deposition, Claimant filed a motion seeking to present rebuttal evidence. Defendants objected, and the Referee denied the motion, observing that "it should not have come as any surprise to Claimant that Dr. Gross was rather emphatic in his deposition as to why he did not support the application of the prosthetic in dispute." The Referee reasoned that Claimant, being well-aware of Dr. Gross's opinion, "could have explored this issue...at any time prior to hearing."

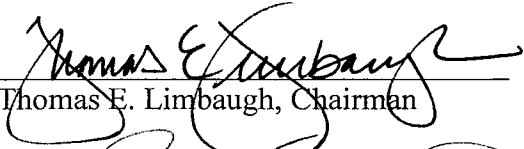
We agree. Claimant has not presented facts or argument sufficient to justify reconsideration. Therefore, the motion for reconsideration is DENIED.

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

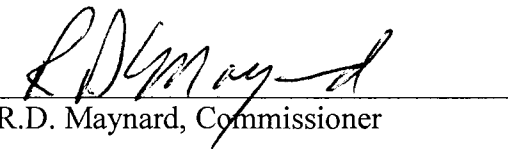
1. Claimant's motion to dismiss is DENIED.
2. Claimant's motion for reconsideration is DENIED.
3. Because the briefing schedule in this case was stayed while Claimant's motion was considered by the Commission, the Referee shall issue a new briefing schedule.

DATED this 11th day of July, 2012.

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman

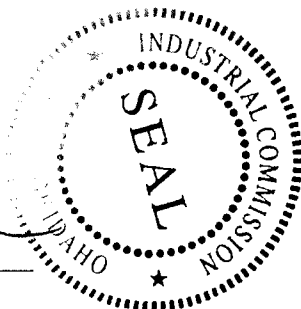

Thomas P. Baskin, Commissioner


R.D. Maynard, Commissioner

ATTEST:



Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2012, a true and correct copy of the foregoing **ORDER DENYING MOTION TO DISMISS AND MOTION FOR RECONSIDERATION** was served by U.S. mail upon each of the following:

W BRECK SEINIGER
ANDREW MARSH
942 W MYRTLE ST
BOISE ID 83702

R. DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

eb



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,
Claimant,

v.

RULE STEEL TANKS, INC.,
Employer,

and

ADVANTAGE WORKERS
COMPENSATION INSURANCE CO.,
Surety,
Defendants.

IC 2008-024772

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

FILED

NOV - 2 2012

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on December 7, 2011. W. Breck Seiniger of Boise represented Claimant. R. Daniel Bowen of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing, took post-hearing depositions, and submitted post-hearing briefs. The matter came under advisement on September 14, 2012 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

ISSUES

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

1. Whether Claimant is entitled to prosthetic rehabilitation benefits for his right hand finger amputations; and
2. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant asserts that he is entitled to prosthetic silicone fingers as part of the reasonable medical care necessitated by his industrial injury, and attorney fees for Surety's unreasonable denial of the prosthetics.

Defendants argue that no physician has opined that prosthetic fingers are medically necessary for Claimant because they do not improve, and may actually impede, the residual function of Claimant's dominant hand. Since no physician has recommended the prosthetics, there is no basis for an award of attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, his father Alfredo Oliveros, and claims examiner Carole Carr taken at hearing;
2. Claimant's exhibits 1 and 2 admitted at hearing;
3. Defendants' exhibits 1 through 10 admitted at hearing;
4. The post-hearing depositions of MacJulian Lang taken December 15, 2011, and Dominic Gross, M.D., taken February 22, 2012.

All pending objections are overruled.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2

FINDINGS OF FACT

BACKGROUND

1. At the time of hearing, Claimant was twenty-one years of age and lived in Nampa with his parents and his younger sister.

2. At the time of his industrial accident, Claimant had not yet graduated from high school. In addition to his high school studies, Claimant worked part-time in a fast-food restaurant.

ACCIDENT

3. During his summer vacation in 2008, Claimant started a summer job at Rule Steel Tanks, Inc., where his father also worked. Claimant's job was operating a metal press that shaped pieces of steel. On Claimant's second day of work, July 30, 2008, he caught the fingers of his right hand in the metal press, resulting in a traumatic amputation of portions of all four fingers on his dominant hand, associated crush injuries, and some degloving injuries on what remained of his fingers.

MEDICAL CARE

4. Claimant was transported by ambulance to the emergency room, where Dominic Gross, M.D., a hand surgeon, was on call. Although the severed fingertips were recovered, they were not replantable because of significant soft tissue and bone damage in the residual fingers. Dr. Gross considered two options for treatment. The simplest approach would have been to perform a revision amputation of all four digits (the index, long, ring, and small fingers) just distal to the MP joint, but this would leave Claimant with a working thumb but no digits to work in opposition to the thumb to hold objects. A more difficult approach, but one that, if successful, would leave Claimant with some function in his right hand, was to preserve the remaining length

of his residual fingers by using skin grafts to rebuild the damaged digits. Claimant's parents opted for the latter approach.

5. Dr. Gross took Claimant to surgery where he debrided the open fractures, fused the PIP joint on the long finger, repaired proximal phalanx fractures on the index and ring fingers, and revised the amputation of the small finger. Dr. Gross used a skin flap from Claimant's forearm to cover the injured fingers. The radial forearm flap did not take, and Dr. Dominic then performed a procedure involving a right groin flap. This second procedure was successful, and following several additional surgeries, Claimant emerged with a right hand that includes an uninjured thumb, and portions of each of his four fingers.¹

6. By April 6, 2009, Claimant was medically stable, and Dr. Gross gave Claimant an impairment rating and imposed permanent restrictions related to the use of his right hand.

7. During his course of treatment Claimant did not ask Dr. Gross about prosthetic fingers and Dr. Gross did not raise the subject with Claimant.

PROSTHETICS

8. In December 2009, Claimant's counsel contacted defense counsel regarding how Claimant should proceed in order to acquire and trial appropriate prosthetic fingers. Claimant's counsel renewed this request in a number of letters and telephone conversations over the next several months. In October 2010, defense counsel advised Claimant's counsel that based on a conversation with Dr. Gross's PA, Dr. Gross would not prescribe the type of prosthesis Claimant was seeking. Several weeks later, defense counsel received a letter from Dr. Gross stating: "In

¹ Looking at the palm side of an intact right hand, there are three creases in each finger. The crease where the finger meets the palm is the MP joint, the next crease moving away from the wrist is the PIP joint, and the third crease is the DIP joint. Claimant has all three joints of his pinkie, the first two joints of his ring finger, one joint on his long finger, and two joints up to, but not including his DIP joint on his index finger.

my practice, I know of no prostheses that would improve his function, and do not routinely recommend them should the patient have functional use of the hand.” CE2, p. 16.

9. In March 2011, Claimant’s counsel initiated contact with Advanced Arm Dynamics (AAD), a company in Portland, Oregon, specializing in upper extremity orthotics and prosthetics. Counsel sought “an independent expert evaluation to determine if [Claimant] might be a candidate for prosthetic rehabilitation.” *Id.*, at p. 17. That same month, Claimant traveled to Portland to meet with MacJulian Lang, clinical director for AAD, for an evaluation.

10. Although Mr. Lang testified that he saw Claimant on a referral by Dr. Gross’s office, no other testimony or evidence of record supports this assertion. Mr. Lang met with the Claimant on one occasion, March 18, 2011. He examined Claimant, evaluated his functional use of the right hand, and eventually issued recommendations that Claimant be fitted with four silicone rubber finger prostheses. He transmitted these recommendations to Ms. Carr for approval. The anticipated cost of the finger prostheses, along with two heavy duty finger protectors, was estimated to be \$17,814.15. In his testimony, Mr. Lang speculated that the life span of the prostheses should be anywhere from three to five years before replacement was required.

11. In late August 2011, Claimant’s counsel wrote Dr. Gross seeking clarification of the doctor’s position regarding the medical necessity of prosthetic fingers for Claimant. Counsel noted that purely cosmetic procedures could be compensable under workers’ compensation statutes, inquired as to whether the doctor had reviewed Mr. Lang’s April report, and asked what counsel could do to facilitate a positive result for his client. Dr. Gross did not respond, and Claimant’s counsel contacted him again by letter dated November 1, 2011.

12. By letter dated November 1, 2011, Dr. Gross responded to Claimant's prior correspondence, stating:

I have reviewed [Claimant's] chart and your letters and I stand by my statement; that any prosthesis [Claimant] would get would not improve upon his functional use of the hand. Any prostheses would be for cosmetic purposes only, and while that can be important in a young patient, those patients for whom I have ordered finger prosthetics find them cumbersome, awkward, and time-consuming to use. Despite this fact, a prosthesis is not required for [Claimant] to be able to use his hand.

* * *

If I had felt at any time during his recovery that there were devices or prosthetics that would have improved his outcome and ability [to] use the hand, I assure you I would have prescribed such items as outlined in the Worker's [sic] Compensation Act that you so graciously provided to me.

[Claimant] is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case. But I stand by my original statement that the prosthetic devices are not required for [Claimant] to improve his functional use of the hand, and, [Claimant] understands that while it may help him "give some support", it was clear that he knew it would not significantly improve the use of the hand other than for looks.

Id. at p. 33.

13. On November 8, 2011, Defendants advised Claimant that they were not going to pay for the requested prosthetics as part of Claimant's medical benefits because his treating physician was "rather adamant" that they were not reasonably medically necessary. By way of an offer of settlement, however, Defendants offered to pay Claimant the initial cost of the prosthetics, the remainder of his impairment, and an additional consideration to resolve the matter via a lump sum settlement. Presumably Claimant declined the offer as the matter went to hearing the following month.

DISCUSSION AND FURTHER FINDINGS

14. In this proceeding, Claimant asks the Commission to order Defendants to pay for prosthetic fingers for Claimant now, and to maintain, repair, and replace the prosthetics throughout the course of Claimant's life. Claimant asserts that this care is of the type which an employer is required to provide under Idaho Code § 72-432. That section provides, in pertinent part:

(1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

(2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

It is to be noted that an employer's obligation to provide medical treatment to an injured worker is stated in the disjunctive. The first sentence of Idaho Code § 72-432(1) obligates employer to provide "reasonable" treatment of two kinds: 1) care required by an employee's physician, and 2) care needed immediately following an injury, and for a reasonable time thereafter. (*See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989); *Richan v. Arlo G. Lott Trucking, Inc.*, 2011 IIC 0008 (2011)).

15. The first question presented by the facts of this case is whether Mr. Lang, as the individual making the treatment recommendation, qualifies as "employee's physician." The term "physician" has a specific meaning under the Idaho workers' compensation laws. Idaho Code § 72-102(25) defines "physician" as follows:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 7

"Physician" means medical physicians and surgeons, ophthalmologists, otorhinolaryngologists, dentists, osteopaths, osteopathic physicians and surgeons, optometrists, podiatrists, chiropractic physicians, and members of any other healing profession licensed or authorized by the statutes of this state to practice such profession within the scope of their practice as defined by the statutes of this state and as authorized by their licenses.

The state of Idaho does not license prosthetists and has no statutory framework that authorizes the profession within the meaning of Idaho Code § 72-102(25). Although Claimant asserts that Idaho does authorize prosthetists, Claimant fails to cite the Commission to any Idaho statute which "authorizes" this healing profession. Therefore, setting aside the question of whether Lang could be considered to be "employee's physician," it is clear that he cannot, in the first place, even qualify as a "physician" for the purpose of requiring certain treatment for Claimant as a physician under the first sentence of Idaho Code § 72-432.

16. Since Mr. Lang is not "employee's physician" under the first portion of Idaho Code § 72-432(1), Employer's responsibility for the payment of the care recommended by Mr. Lang must be evaluated under the second portion of Idaho Code § 72-432(1). Therefore, the question becomes whether the prospective care that has been recommended by Mr. Lang is "reasonable" care "needed" immediately following the injury, and for a reasonable time thereafter. The second portion of Idaho Code § 72-432(1) does not specify that "needed" care is restricted to care required by a physician. As we stated in *Richan, supra*, care that is "needed" is that care necessary to cure or treat an injured worker's injury and restore the injured worker's ability to engage in gainful activity. There is no reason to exclude cosmetic procedures/devices from the care that an employer could be required to provide, since even purely cosmetic treatment may be of assistance in restoring an injured worker's ability to engage in gainful activity. Here, notwithstanding the fact that Mr. Lang is assuredly not a physician, Lang's opinion on the efficacy of finger prostheses is one that he is qualified to give (See Lang Depo.,

pp. 5-9) and one that the Commission is entitled to consider in assessing Claimant's entitlement to this type of care. Mr. Lang is clearly of the view that the treatment he has recommended for Claimant is "needed" as we have construed that term, and for the purpose of further analysis, the Commission will assume that Claimant has met his burden of establishing that the care recommended by Mr. Lang is needed.

17. The next step in the process of determining whether Claimant is entitled to the needed care recommended by Mr. Lang, is to determine whether that care is "reasonable." This determination is one that is solely within the province of the Commission. What is meant by the term "reasonable" was addressed by the Court in *Sprague, supra*. In *Sprague*, the care at issue had already been rendered by the time the Industrial Commission heard the case. Under the peculiar facts of that case, the Supreme Court noted that the following facts supported the conclusion that the care in question was reasonable: (1) the treatment was required by claimant's treating physician; (2) claimant made gradual improvement from the treatment that he received; (3) the treatment which had been provided was within the physician's standard of practice, the charges for which were fair, reasonable and similar to the charges in the same profession.

18. The factors which the Supreme Court found important in *Sprague, supra*, are not before the Commission in this matter, since the care at issue is entirely prospective in nature. Whether the care recommended by Mr. Lang is "reasonable" must be judged by other factors, such as whether the proposed care is likely to be efficacious, and is of a type that finds support and acceptance in the medical community. See, *Richan v. Arlo G. Lott Trucking, Inc., supra*.

19. Dr. Gross does not believe that finger prosthetics are a reasonable medical necessity for Claimant. Dr. Gross discussed several reasons for his opinion in his deposition. First, Dr. Gross notes that Claimant retained some portion of all four fingers on his right hand.

His thumb was uninjured, and together with his thumb and his residual digits, he has a functional hand. While it is true that Claimant may not be able to do everything with his reconstructed hand that he did with his uninjured hand, the hand, as it is, is functional for many purposes. Dr. Gross opined that the proposed prostheses might make Claimant's hand *look* better, but they will not help it *function* better. Because the silicone fingers are flexible, they provide little by way of additional leverage and so do not markedly improve pinch or grip strength. They do not have "joints" and so cannot replicate the natural curvature of the fingers.

20. Dr. Gross has experience with many patients who use prostheses. He discussed the medical decision-making that goes into determining when prosthetics are medically necessary and when they are not. In those patients with multiple finger amputations, Dr. Gross has found that prosthetics are cumbersome, uncomfortable, do not improve function, and are often abandoned by the patient. He makes the point that in his medical decision-making, he has to balance both form and function. When a prosthetic provides both cosmetic and functional benefits, he is more likely to consider the prosthetic as reasonable and necessary care. However, on these facts, where form trumps function, a prosthetic is not reasonable or medically necessary.

21. Mr. Lang holds a certification issued by the American Board for Certification in Prosthetics and Orthotics. He is employed by Advanced Arm Dynamics, a national corporation specializing in prosthetic rehabilitation of individuals with upper limb loss. In his current position as clinical director for the company, he provides services as the primary prosthetist at the Portland, Oregon facility. He has extensive experience in evaluating individuals for prostheses, and fitting the same.

22. Mr. Lang testified that the prostheses would assuredly improve Claimant's functional use of the right hand in several areas. By restoring length and leverage, the prostheses

help restore more normal biomechanical function. They also serve to protect sensitive tissue at the amputation sites prone to breakdown. Finally, the devices serve a cosmetic purpose by restoring the hand to a more natural appearance. This final function may be more or less important depending on the psychological make-up of the patient. Mr. Lang expected that once fitted with finger prostheses, Claimant's grip strength would increase anywhere from 20-50%.

23. In determining whether Mr. Lang's recommendation for finger prostheses is "reasonable," it is necessary for the Commission to resolve the conflicting opinions of Dr. Gross and Mr. Lang on the suitability of finger prostheses for Claimant. Having carefully reviewed the testimony of both Dr. Gross and Mr. Lang, the Commission finds the opinion of Dr. Gross to be more credible. Although Dr. Gross has recommended finger prostheses for individuals with one missing digit, he was emphatic in stating his belief that the multiple amputations suffered by Claimant make him a poor candidate for prostheses. Dr. Gross convincingly testified that the devices would not only not improve Claimant's functional use of the right hand; they might even impede the function restored to Claimant's right hand by the surgical treatment provided to date by Dr. Gross. However, it is also true that Dr. Gross could not quarrel with the proposition that the prostheses serve a cosmetic purpose, and that for this reason alone, they might be suitable for an individual to whom appearance is important.

24. Nothing in the provisions of Idaho Code § 72-432 would prohibit the Commission from ordering an employer to provide procedures or prosthetic devices that are purely cosmetic in purpose. As acknowledged by Defendants, it is well within the ambit of Idaho Code § 72-432 to require an employer to provide, for example, scar revision surgery following an industrial burn or a prosthetic eye following an accident caused loss of an eye. Here, however, we are persuaded by Dr. Gross's testimony that the prosthetics in question would not improve, and

might actually impede, Claimant's residual hand function. While we do not doubt that Claimant would prefer to have a more natural looking hand, this is but one factor we must consider in determining the reasonableness of Mr. Lang's recommendation. The record clearly demonstrates that Claimant has thrived since the industrial accident. He has returned to school and to gainful employment, and in both of these settings he has found ways to deal with his severe injury, not only in terms of his loss of function, but also his disfigurement. Dr. Gross convincingly testified that the prostheses are at best useless, and at worse contribute to an even greater loss of function. We deem these factors to be more important than whatever cosmetic advantage the prostheses may offer. For these reason we find that the recommendation made by Mr. Lang for the finger prostheses is not reasonable. Defendants are not obligated to provide the care recommended by Mr. Lang.

ATTORNEY FEES

25. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law. They may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides for an award of attorney fees to a claimant if the employer or surety contest a claim without reasonable ground, refuses to pay compensation provided by law, or discontinues payment of benefits without reasonable grounds. The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

26. As Claimant failed to carry his burden of proving his entitlement to the prosthetics which were the subject of this proceeding, there is no basis for the award of attorney fees.

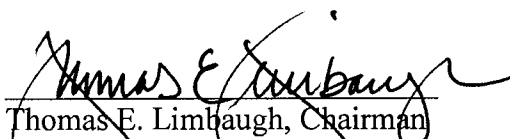
CONCLUSIONS OF LAW AND ORDER

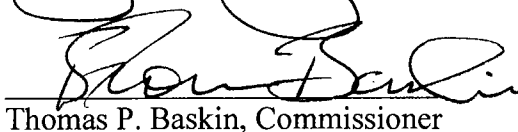
Based on the foregoing, the Commission hereby ORDERS:

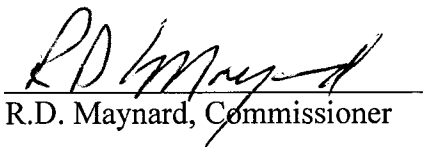
1. The recommendations of Mr. Lang concerning Claimant's suitability for prostheses are not reasonable. Claimant is not entitled to the care proposed by Mr. Lang;
2. Claimant is not entitled to an award of attorney fees; and
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 2nd day of November, 2012.

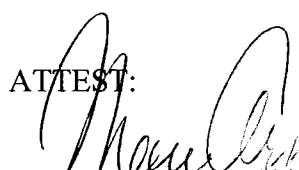
INDUSTRIAL COMMISSION

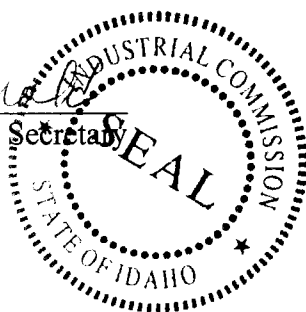

Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R.D. Maynard, Commissioner

ATTEST:


Assistant Commission Secretary



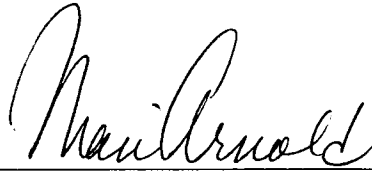
CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER** were served by regular United States Mail upon each of the following persons:

W BRECK SEINIGER
942 MYRTLE STREET
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R DANIEL BOWEN
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ama



Paul Arnold

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,
Surety,
Defendants.

I.C. No. 08-024772

**CLAIMANT'S MOTION FOR
RECONSIDERATION AND
MEMORANDUM**

RECEIVED
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MOTION

COMES NOW the Claimant by counsel, and moves the Idaho Industrial Commission to reconsider its *Findings of Fact, Conclusions of Law, And Order* entered November 2, 2012. This motion is based upon the fact that said relies upon a misstatement of the record and fails completely to either set forth the facts upon which Claimant successfully impeached the credibility of Dr. Dominic Gross or exercise its discretion with respect to that challenge. This challenge was essentially the centerpiece of Claimant's argument that the opinion of Mr. Lang

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**CLAIMANT'S MOTION FOR
RECONSIDERATION AND MEMORANDUM**

PAGE 1 OF 9

should be accepted by the Commission, and it would appear that the referee's opinion was written more to avoid embarrassing Dr. Gross in a published opinion than to address the issue of his credibility upon which Defendant's case and the *Findings Of Fact, Conclusions Of Law, And Order* Commission's depended.

MEMORANDUM

INTRODUCTION

Disappointing as the analysis contained in the referee's findings of fact and conclusions of law is in terms of its conclusions, it is doubly troubling because of its intellectual dishonesty. The referee's findings of fact and conclusions of law purports to evaluate the credibility of Dr. Gross, yet makes no mention of his entirely unprofessional involvement in attempting to coerce the Claimant into settling his case, of Dr. Gross grossly contradictory statements concerning the utility of the prostheses, his willingness to prescribe them, or the fact that he offered to prescribe these prostheses, at least as a part of a settlement, and then changed his position at trial and stated that they would actually be medically contraindicated! Though the referee's findings of fact quotes Dr. Gross' statement "I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case" (*Findings of Fact, Conclusions of Law, And Order*, p. 6) its conclusion declares "Dr. Gross convincingly testified that the prostheses are at best useless, and at worse contribute to an even greater loss of function. We deem these factors to be more important than whatever cosmetic advantage the prostheses may offer." (*Findings of Fact, Conclusions of Law, And Order*, p. 12)

How can the referee possibly accept Dr. Gross testimony in light of this? Particularly in light of the fact that Claimant's motion to present rebuttal testimony was denied, the referee should expressly consider the impeachment of Dr. Gross testimony reflected in the record. At a

minimum, Claimant, a young single male whom the Referee paints with rose colored glasses that do not include a portrayal of Claimant's tearful and wrenching testimony at the social embarrassment that he feels when presenting himself in social situations, deserves to have his claim dignified by an opinion that does not sanitize the sordid nature of Dr. Gross's conduct in this matter and does not present him in a false light. The opinion appears to have been intentionally written to avoid setting forth any of the evidence that supports the reasonableness of Claimant's need for the partial finger prosthetics.

REVIEW OF THE EVIDENCE OF DR. GROSS'S UNRELIABILITY

The Objectivity Of Dr. Gross's Opinion Cannot Be Relied Upon, Because He Has Taken A Partisan Position By Concerning Himself With The Settlement Of Claimant's Case

Unfortunately, Claimant's treating physician, Dr. Dominic Gross, has taken actions to induce Claimant to settle his case, and has apparently allowed his medical judgment to be influenced by his desire to so induce. Prior to Hearing in this matter, Claimant's Counsel contacted Dr. Gross and was advised that Dr. Gross would prescribe these prostheses if Claimant wished to obtain them as a part of a "settlement," though he did not consider them to be "medically necessary" because they were not "functional" (a fact in dispute):

Q. (BY MR. SEINIGER) Would you take a look and see if you can find your letter to me of November 1st, 2011?

A. Yeah, here we go. I have it right here.

Q. Why don't you -- I've found my copy, and let me just read it, and you tell me if I've read correctly from the letter that you wrote to me on November 1st, 2011: "Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as a part of a settlement in this case."

Did I read that correctly?

A. Yeah, but it -- can you read back what he said? He said that I would write the prescription if -- I would write him a prescription for the prosthesis if Bryan settled the case, that's what you asked me.

Q. Is that not what you said in the letter?

A. I don't think it's the same.

Q. What's the difference, please?

A. Well, one, I think it's not the same. I think that -- I think what I'm saying is, is that it's not contingent upon him settling the case. It's if -- if he needs it, accompanying in the case. So it's not contingent upon him settling the case would I -- that I would write the prescription. Is that clear?

Q. Okay. Why don't you take a look at my letter, then, of December 10th, 2011, which was Claimant's Exhibit to your --

A. I don't have it.

Q. -- deposition, No. 6.

A. Okay.

Q. Then take a look at your letter of December 19th, 2011, to me --

MR. SEINIGER: Would you mark this as Claimant's Exhibit No. 14 to Dr. Gross' deposition, please. And then hand it back to me, because it's my only copy.

(Exhibit 14 marked.)

Q. (BY MR. SEINIGER) Now, would you agree with me that on December 10th, 2011, I wrote you and I said, "In view of this, I request that you write Mr. Oliveros a prescription for the prostheses now, for whatever reason you had in mind in agreeing to do so in connection with the settlement of his workers' compensation case."

And then on December 19th, 2011, you wrote back and essentially declined to do so. Is that a fair characterization?

A. Can I see the letter, please?

Q. Which one?

A. My response to you.

Q. Yeah, here you go.

A. Okay.

Q. And so in that letter you state, "I have reviewed your request, and find I am uncomfortable prescribing the prosthesis prior to the settlement being reached. As I stated earlier, I am happy to write for it should Bryan wish to use his settlement to purchase a set, but I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and do not want my

prescription for the prostheses construed as an agreement to the fact that it is medically necessary."

So isn't it your position that with respect to Mr. Oliveros you will only write him this prescription if he settles this case?

A. No. I think my -- my position is, is that I would write the prescription to him if it added function to his hand, you know. And I think what would happen is we're going back and forth with getting to a point where I think it's a cosmetic thing, and we would -- we want a functional part of it. And looking at his hand and then reviewing what they wanted, we didn't feel really comfortable with it. And we just were hopeful that you guys would figure out what you wanted to do.

Q. You'd agree with me, wouldn't you, that whether or not Mr. Oliveros settles this case is not a factor that has anything, whatsoever, to do with medical necessity with respect to these prostheses, correct?

A. Yeah, I don't -- it shouldn't be contingent upon that.

Q. In fact, it is -- without meaning any disrespect by the question, it really is none of your concern whether or not he settles this case, is it?

A. No, it's not. (Deposition of Dominic Gross, p. 65, L 21 to p. 69, L 6, emphasis added)

From Dr. Gross's letters and testimony, it is clear that his opinion about the medical necessity of prostheses was influenced by his desire to induce Claimant to settle the case early without the Defendant Surety having had to pay for the prostheses. As all parties know, the entity paying for Dr. Gross's services in this case is the Defendant Surety. By his own words, Dr. Gross stands convicted of partiality to the Surety, and thus his opinion as to medical necessity carries no credibility.

The Integrity Of Dr. Gross's Opinion Cannot Be Relied Upon

Prior to hearing, Dr. Gross referred Claimant to Advanced Arm Dynamics to be evaluated for the prostheses, and Claimant traveled to Portland, Oregon to undergo that evaluation with Mac Julian Lang. It can be presumed that Dr. Gross would not have made the

referral if he felt that prostheses would impede Mr. Oliveros' hand function. Thereafter, Dr.

Gross gave testimony that was directly contradictory to his referral:

Q. Okay. Now, do you have concerns that they would actually impede function?

A. If he has these silicone devices, they don't have sensory function at the end, okay. So he's going to have four fingers that are not going to be able to provide sensory feedback to light touch, hot or warm. It's almost like wearing a lead glove. He's not going to be able to do fine manipulation; they're just going to be these numb extensions of finger. **It's ridiculous. It's absolutely absurd that someone would actually put in four fingers. And to me, a company that would even suggest that, and I'll go on the record, is ridiculous. It's absolutely ridiculous.** (Deposition of Dominic Gross, p. 82, L 14 to p. 83, L 11, emphasis added)

In other words, at first Dr. Gross advised Claimant's Counsel that he would be happy to write a prescription for the prostheses as a part of a settlement of Claimant's claim, and then at Hearing, Dr. Gross declared that filling his prescription would be "ridiculous" and would impede function.

Even Dr. Gross Admits That He Overstepped His Bounds

Dr. Gross admits that he became a patrician in attempting to get Plaintiff to settle his case in order to him prescribe the vary prosthesis that the Referee has accepted Gross' opinion would be "useless." ("Dr. Gross convincingly testified that the prostheses are at best useless, and at worse contribute to an even greater loss of function. We deem these factors to be more important than whatever cosmetic advantage the prostheses may offer." *Findings Of Fact, Conclusions Of Law, And Order*, p. 12.

10 (BY MR. SEINIGER) So isn't it your position that with respect to
11 Mr. Oliveros you will only write him this prescription
12 if he settles this case?
13 A. No. I think my -- my position is, is that I
14 would write the prescription to him if it added function
15 to his hand, you know. And I think what would happen is
16 we're going back and forth with getting to a point where
17 I think it's a cosmetic thing, and we would -- we want a
18 functional part of it. And looking at his hand and then
19 reviewing what they wanted, we didn't feel really

20 comfortable with it. And we just were hopeful that you
 21 guys would figure out what you wanted to do.
 22 Q. You'd agree with me, wouldn't you, that
 23 whether or not Mr. Oliveros settles this case is not a
 24 factor that has anything, whatsoever, to do with medical
 25 necessity with respect to these prostheses, correct?
 1 A. Yeah, I don't -- it shouldn't be contingent
 2 upon that.
 3 Q. In fact, it is -- without meaning any
 4 disrespect by the question, **it really is none of your**
 5 **concern whether or not he settles this case, is it?**
 6 A. No, it's not.
 7 Q. What I'm wondering is, how is it that you see
 8 it as appropriate to have declined to write this
 9 prescription whether or not you've felt that it would
 10 improve his function or help him psychologically based
 11 on what he decided to do in terms of settling with an
 12 insurance company?
 13 A. The insurance company -- for what I'm saying
 14 is, is I don't want to prevent Bryan from getting
 15 whatever he needs, okay. And it's not -- I don't -- I
 16 don't have any benefit from either of you guys
 17 benefiting in this case. **So I don't -- I don't think it**
 18 **should have anything to do with your settlement with**
 19 **Bryan or Bryan's settlement with the insurance company.**
 20 **I don't think it should have anything to do with it.**
 21 Q. Okay. Good. We're in total agreement on
 22 that. (Gross Deposition, p. 68 Line 9 – p. 69 Line 22, emphasis

added)

Gross' testimony in this regard is conclusive proof that Dr. Gross's so-called medical opinion in this matter is based on factors other than medical factors, and thus Dr. Gross's opinion cannot be viewed as an objective medically-based opinion.

CONCLUSION

The Commission should reconsider the Findings of Fact to insure that due consideration has been given to the impeachment of Dr. Gross' credibility. Dr. Gross forfeited his credibility by taking a partisan position with respect to these benefits and involving himself

in an attempt to pressure Claimant to settle his case. Particularly in light of the fact that Claimant's motion to present rebuttal testimony was denied, the Commission should insist that the referee give serious consideration to the impeachment of Dr. Gross and award Claimant the medical benefits that he has requested.

The integrity of the process is at stake in that the Commission's decision relies upon the opinion of a physician whose own statements are directly in conflict and can only be resolved by concluding that he was willing to act unethically in writing a prescription for prostheses that he believes to be "at best useless, and at worse contribute to an even greater loss of function" in an attempt to urge the Claimant to settle his case.

Respectfully submitted November 20, 2012.



W^m Breck Seiniger, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on November 20, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

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FILED
NOV 21 2012
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,

vs.

Rule Steel Tanks, Inc.,
Employer,

and

Pinnacle Risk Management,
Surety,
Defendants.

I.C. No. 08-024772

**MOTION FOR COMMISSION TO
REHEAR CASE EN BANC OR IN THE
ALTERNATIVE TO CONSIDER
MOTION TO RECONSIDER EN BANC
AND MEMORANDUM**

MOTION

COMES NOW the Claimant by counsel, and moves the Idaho Industrial Commission to rehear this case *en banc* or in the alternative to consider Claimant's motion to reconsider *en banc*.

MEMORANDUM

Claimant moves this Commission to rehear his case *en banc* or to reconsider the referee's findings *en banc*. Because the referee's findings of fact and conclusions of law fail to address almost all of the important evidence impeaching the testimony of Dominic Gross, whose opinion she accepted despite it having been clearly impeached to the point that it would not have been accepted by any reasonable trier of fact, Claimant cannot fault the Commission for signing off of the decision. Claimant believes that a far different result would obtain if the Commission considered all of the evidence impeaching Dr. Gross. Claimant believes that the Commission would never issue an opinion adopting Dr. Gross opinion if his credibility and the challenges made to it were thoroughly discussed.

Disappointing as the analysis contained in the referee's findings of fact and conclusions of law is in terms of its conclusions, it is doubly troubling because of its intellectual dishonesty. The referee's findings of fact and conclusions of law purports to evaluate the credibility of Dr. Gross, yet makes no mention of his entirely unprofessional involvement in attempting to coerce the Claimant into settling his case, of Dr. Gross grossly contradictory statements concerning the utility of the prostheses, his willingness to prescribe them, or the fact that he offered to prescribe these prostheses, at least as a part of a settlement, and then changed his position at trial and stated that they would actually be medically contraindicated! Though the referee's findings of fact quotes Dr. Gross' statement "I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case" (*Findings of Fact, Conclusions of Law, And Order*, p. 6) its conclusion declares "Dr. Gross convincingly testified that the prostheses are at best useless, and at worse contribute to an even greater loss of function. We

deem these factors to be more important than whatever cosmetic advantage the prostheses may offer." (*Findings of Fact, Conclusions of Law, And Order*, p. 12)

Particularly in light of the fact that Claimant's motion to present rebuttal testimony was denied, the referee should expressly consider the impeachment of Dr. Gross testimony reflected in the record. At a minimum, Claimant, a young single male whom the Referee paints with rose colored glasses that do not include a portrayal of Claimant's tearful and wrenching testimony at the social embarrassment that he feels when presenting himself in social situations, deserves to have his claim dignified by an opinion that does not sanitize the sordid nature of Dr. Gross's conduct in this matter and does not present him in a false light. The opinion appears to have been intentionally written to avoid setting forth any of the evidence that supports the reasonableness of Claimant's need for the partial finger prosthetics.

Particularly in light of the fact that Claimant's motion to present rebuttal testimony was denied, the Commission should rehear this case or take up Claimant's motion for reconsideration en banc to insure that Claimant receives the serious consideration of his impeachment of Dr. Gross' testimony that it deserves.

There is more at stake here than this Claimant's right to benefits. The integrity of the process is at stake in that the Commission's decision relies upon the opinion of a physician whose own statements are directly in conflict and can only be resolved by concluding that he was willing to act unethically in writing a prescription for prostheses that he believes to be "at best useless, and at worse contribute to an even greater loss of function" in an attempt to urge the Claimant to settle his case.

Respectfully submitted November 20, 2012.



W^m Breck Seiniger, Jr.

CERTIFICATE OF SERVICE

I CERTIFY that on November 20, 2012, I caused a true and correct copy of the foregoing document to be served as follows:

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INDUSTRIAL COMMISSION

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,)
)
 Claimant,)
v.)
)
RULE STEEL TANKS, INC.,)
)
 Employer,)
and)
)
ADVANTAGE WORKERS)
COMPENSATION INSURANCE CO.,)
)
 Surety,)
 Defendants.)
_____)

I.C. No.: 2008-024772

**DEFENDANTS' RESPONSE TO
CLAIMANT'S MOTION FOR
RECONSIDERATION AND MOTION
TO REHEAR CASE EN BANC**

COME NOW Defendants, by and through undersigned counsel of record, responding to Claimant's Motion for Reconsideration and Memorandum and Claimant's Motion for Commission to Rehear Case *en Banc* or in the Alternative to Consider Motion to Reconsider *en Banc* and Memorandum as follows.

Claimant's Motion for Reconsideration rehashes arguments previously made by Claimant's counsel in various affidavits, motions, and briefs. All these arguments have been considered by the Industrial Commission previously. The bottom line to this case is that the Industrial Commission found Dr. Gross' opinions convincing to the effect that the prosthetic fingers were not compensable. As such, there really is no reason to revisit this matter or for the Industrial Commission to change its opinion.

As to Claimant's Motion for the case to be reheard *en banc*, Defendants view this as nothing more than yet another effort by Claimant to get to retry his case now that he has seen the defense's strategy. Claimant's counsel already attempted to gain this procedural advantage when he tried to alter the order of proof by filing a Motion to Re-Take Macjulian Lang's deposition as a so-called "rebuttal" deposition. When that did not work, and after the briefing schedule was issued, he then filed a Motion to Dismiss Without Prejudice and Motion to Withdraw Request for a Trial of Silicon Prosthetics Without Prejudice. The obvious purpose of this was so that he could turn around and re-file the matter and retry his case. Here again, the Industrial Commission denied these motions for obvious reasons. Now he attempts a Motion for Rehearing *En Banc*, which would, of course, gain him the same result and opportunity to retry the case now that he has had a trial run and understands that it is deficient. As the Industrial Commission noted in denying Claimant's Motion to Dismiss, "Defendants are correct that it would be unjust to require them to litigate the same case twice because Claimant, post-hearing, is concerned that there is insufficient evidence in the record to support his claim." (Order Denying Motion to Dismiss and Motion for Reconsideration, p. 2).

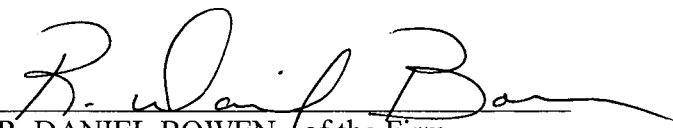
In the current instance, Claimant bases his Motion for Rehearing on his belief that the "Referee's Findings of Fact and Conclusions of Law fail to address almost all the important

evidence impeaching the testimony of Dominic Gross, whose opinion she accepted despite it having been clearly impeached to the point it would not have been accepted by any reasonable trier of fact...". He generously observes that he cannot fault the Industrial Commission for signing off on what he characterizes as the Referee's decision, and goes on to state his belief that had the Industrial Commission considered all the evidence he offered up impeaching Dr. Gross, a different result would have emanated from the Commission.

The problem with his reasoning is, of course, that the Industrial Commission did not accept the recommendations of the Referee, and the decision as written is the Industrial Commission's opinion after having reviewed all the evidence. Thus, Claimant's counsel's issue, in spite of his generosity, is with the Industrial Commission itself, not Referee Just. His reasoning was poor in the first instance when he believed the opinion to be the Referee's, but it is even less compelling in light of the fact that the Industrial Commission reviewed the evidence on their own, as they are required to do by law, and have authored their own opinion in which they found the testimony of Dr. Dominic Gross persuasive. There is no basis for a rehearing, and the current Motion is nothing more than an attempt at another shot at retrying his case now that he knows its shortcomings. The current Motions should be denied.

DATED this 27th day of November, 2012.

BOWEN & BAILEY, L.L.P.

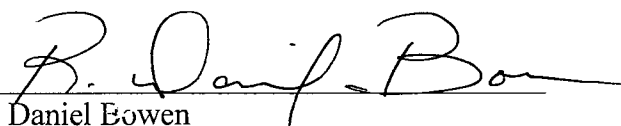

R. DANIEL BOWEN of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of November, 2012, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

W BRECK SEINIGER ESQ
SEINIGER LAW OFFICES
942 W MYRTLE ST
BOISE ID 83702
FAX: (208) 345-4700

- U.S. MAIL
 HAND DELIVERY
 FACSIMILE


R. Daniel Eowen

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS,

Claimant,

v.

RULE STEEL TANKS, INC.,

Employer,

and

ADVANTAGE WORKERS
COMPENSATION INSURANCE CO.,

Surety,

Defendants.

IC 2008-024772

**ORDER ON ALTERNATIVE MOTIONS
TO RECONSIDER OR TO REHEAR
CASE *EN BANC***

FILED

DEC 14 2012

INDUSTRIAL COMMISSION

On or about November 21, 2012, Claimant filed his timely motion for reconsideration of the Commissions' Findings of Fact, Conclusions of Law, and Order filed November 2, 2012. As noted in that decision, the Commission chose not to adopt the Referee's recommendation and to issue its own findings of fact, conclusions of law, and order. In his motion, Claimant argues that in adopting Dr. Gross' opinion, the Commission altogether ignored Claimant's successful impeachment of Dr. Gross. In this regard, Claimant notes that Dr. Gross made the original referral of Claimant to Mr. Lang's clinic for consideration of prostheses, and it is therefore more than a little odd that Dr. Gross is now so vehement in his criticism of the recommendations made by Mr. Lang. More important to Claimant, however, is the fact that Dr. Gross attempted to coerce Claimant into settling his claim against his will by advising Claimant that if he would settle his case, Dr. Gross would relent and write a prescription for the prostheses recommended by Mr. Lang. Per Claimant, Dr. Gross's current insistence that the recommended prostheses are

ORDER ON ALTERNATIVE MOTIONS TO RECONSIDER OR
TO REHEAR CASE *EN BANC* - 1

altogether unnecessary is illustrative of Dr. Gross's desire to induce Claimant to settle the case without Surety being held responsible for the lifetime cost of the prostheses in question. Claimant argues that Dr. Gross's actions are internally inconsistent; he cannot, on the one hand support Claimant's claim for the prostheses in the context of a negotiated settlement, and on the other hand, protest the reasonableness of that treatment when the case goes to hearing. This internal inconsistency is fatal to the credibility of the opinion on which the Commission chose to rely, such as to require the Commission to revisit its decision on reconsideration. We will examine each of these arguments.

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion." Generally, greater leniency is afforded to *pro se* claimants. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920 (2005). On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. *Davison v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided that it acts within the time frame established in Idaho Code

§ 72-718. See, *Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (citing *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

As Claimant has noted, there is testimony of record which supports a finding that it was Dr. Gross who referred Claimant to Mr. Lang for the purpose of evaluating Claimant for prosthetic fingers. In this regard, Mr. Lang testified:

A. (by Lang): I'm responsible for not only the day-to-day operations of our office, but I'm also the prosthetist, the primary prosthetist, for the office. So, I'm involved in every aspect of our patients' care from initial evaluation to the impressions to the final fitting of a device and followup.

Q. (by Bowen): Now, with respect to Mr. Oliveros, how did you make contact with him?

A. Mr. Oliveros was referred to us by his doctor, Dr. Gross.

Q. Okay. And when you met with Bryan back there in March of 2011, did you have his medical records?

A. I did not have his full medical record. I had a brief, again, referral from Dr. Gross. And then, I took a full and, like I said, comprehensive, you know, questionnaire and medical history while he was in the office.

Lang Dep. 32/5-21.

Although this testimony is not directly challenged in the record, there are other facts of record which make it seem unlikely that Dr. Gross perfected the referral of Claimant to Mr. Lang's clinic.

Dr. Gross appears to have released Claimant from care on or about April 6, 2009, when he pronounced Claimant medically stable, gave him an impairment rating, and authored certain

permanent limitations/restrictions. A little over a year later, Dr. Gross authored his letter of June 17, 2010 in which he responded to inquiries he had received from Mr. Bowen concerning the suitability of finger prostheses for Claimant. In that letter, Dr. Gross stated that he knew of no prosthesis that would improve Claimant's function, and did not recommend the same for Claimant. Thereafter, on August 30, 2011, and again on November 1, 2011, Claimant's counsel asked Dr. Gross for clarification of the statements made by Dr. Gross in his letter of June 17, 2010. In his November 1, 2011 reply, Dr. Gross reiterated his position that Claimant was unsuited to the use of prosthetic fingertips. He then stated:

Bryan is a delightful young man who has not let his injury define him. I wish him the best of luck, and will be happy to write for the prosthesis should he choose to have them as part of a settlement in this case. But I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and, Bryan understands that while it may help him "give some support", it was clear that he knew it would not significantly improve the use of the hand other than for looks.

D. Ex. 4, p. 79.

In follow-up, Claimant's counsel wrote Dr. Gross on December 10, 2011, proposing to Dr. Gross that if he felt that it was appropriate to prescribe finger prostheses for Claimant in the context of an anticipated settlement, he should be prepared to make the same recommendation in the context of an ongoing litigated workers' compensation case. On or about December 19, 2011, Dr. Gross authored the following response to the apparent inconsistency noted by Claimant's counsel in Dr. Gross's treatment of the issue of Claimant's suitability for finger prostheses:

This letter is in reference to your correspondence dated December 10, 2011. I have reviewed your request, and find I am uncomfortable prescribing the prosthesis prior to the settlement being reached. As I stated earlier, I am happy to write for it should Bryan wish to use his settlement to purchase a set, but I stand by my original statement that the prosthetic devices are not required for Mr. Oliveros to improve his functional use of the hand, and *do not want my*

prescription for the prostheses construed as an agreement to the fact that it is medically necessary. (Emphasis added).

Gross Dep., Ex. 12.

As noted above, Dr. Gross last saw Claimant for the purposes of treatment/evaluation on or about April 6, 2009. Dr. Gross testified that at no time during his treatment of Claimant did Claimant ever express an interest in finger prostheses. (Gross Dep. 23/15-17). There is nothing in Dr. Gross's notes or reports to belie this assertion. Moreover, Claimant himself has testified that he knew nothing of Advanced Arm Dynamics until he received a call from that facility sometime in the spring 2011 about setting up an evaluation in Portland, Oregon. (C. Dep. 23/14-24/16). Claimant was evidently seen at Advanced Arm Dynamics on March 18, 2011, and it was a result of that visit that Mr. Lang made his recommendations of April 1, 2011. However, prior to the March 18, 2011 exam, Claimant's counsel authored a March 15, 2011 letter to Advanced Arm Dynamics tending to suggest that Claimant was seen at Advanced Arm Dynamics not on the referral of Dr. Gross, but at the request of Claimant's counsel:

Dear Ms. Taylor:

It was a pleasure to speak with you today. As I mentioned, this office represents Bryan, who suffered a workers' compensation injury in 2008 that resulted in the amputation of his right hand fingers (index, long, ring, small).

We seek an independent expert evaluation to determine if Bryan might be a candidate for prosthetic rehabilitation. It is my understanding that you have made arrangements for Bryan to be evaluated at your clinic on 3/18/11, and that the clinic provides the evaluation and travel at its own expense. Following the evaluation, I would appreciate receiving the clinic's expert opinion. A signed medical release is attached.

...

C. Ex. 2, p. 17. Claimant confirmed that or about the time he was contacted by Advanced Arm Dynamics, he also received a call from his attorney concerning the evaluation. (Hr. Tr. 47/25-48/10).

ORDER ON ALTERNATIVE MOTIONS TO RECONSIDER OR
TO REHEAR CASE *EN BANC* - 5

Dr. Gross testified that he has no familiarity with Advanced Arm Dynamics, but acknowledged receipt of Mr. Lang's report sometime in early April 2011. (Gross Dep. 60/9-20; 11/12-17).

Had Dr. Gross made the referral to Advance Arm Dynamics, it seems unlikely that counsel for Claimant would "seek" from that entity "an independent expert evaluation" of Claimant's suitability for finger prostheses. As well, there would have been no need to worry about who would pay for Claimant's travel to and from Portland since a referral by a treating physician would obligate Surety to pay for the cost of travel. Finally, long before the March 18, 2011 evaluation, Dr. Gross had clearly and unequivocally stated his position that Claimant would not benefit from finger prostheses. In view of his conclusion, it seems unlikely that Dr. Gross would make a referral to an out-of-state prosthesis fabricator of whom he had no prior knowledge.

In view of the foregoing, and notwithstanding that Mr. Lang's testimony is to the contrary, we find, on balance, that the record makes it unlikely that Dr. Gross, as Claimant's treating physician, referred Claimant to Advanced Arm Dynamics for evaluation.

Next, Claimant charges that Dr. Gross's insistence that Claimant is a poor candidate for finger prostheses must be weighed against the statement first made in Dr. Gross's letter of November 1, 2011, that as part of a settlement, he would be happy to write a prescription for Claimant for finger prostheses. Claimant contends that Dr. Gross's advocacy on the topic of Claimant's entitlement to finger prostheses vacillates depending on the perceived posture of the underlying claim, thus making the opinion on which the Commission chose to rely inherently untenable.

We have carefully reviewed Dr. Gross's writings and testimony, and fail to appreciate an inconsistency that would cause us to re-evaluate our reliance on his deposition testimony. From the outset, Dr. Gross has consistently opined that finger prostheses are not efficacious for Claimant. Accordingly, he did not feel it appropriate to make a recommendation to Surety that it should authorize such treatment as medically necessary. Claimant has argued that this demonstrates that Dr. Gross is somehow in league with Surety, and will simply say anything that will provide Surety with a medical predicate for denial of the care recommended by Mr. Lang. Our sense, from review of the record, is that no such unsavory relationship between Dr. Gross and Surety is suggested by his actions. We perceive that Dr. Gross has a sincerely and firmly held belief that the care recommended by Mr. Lang will only hinder Claimant, and that Dr. Gross has an equally sincere conviction that the workers' compensation Surety should not be made to pay for such needless care.

However, it is beyond cavil that Dr. Gross did make the statement that, in connection with a settlement, he would be happy to prescribe the care recommended by Mr. Lang. We do not believe that this statement is inconsistent with the general tenor of his aforementioned objection to finger prostheses. Our gestalt is that Dr. Gross simply recognized that Claimant is ultimately entitled to do what he wants to do. If the settlement of his case leaves him with funds to procure the prostheses, coupled with a desire to obtain the same, Dr. Gross would not stand in Claimant's way; notwithstanding that it is Dr. Goss's view that this amounts to throwing good money away. (See Gross letter of December 19, 2011, Gross Depo. Ex. 12). We believe that Ms. Carr came close to getting it right when she said of Dr. Gross's motives:

Q (by Seiniger) Now, it sounds me to [sic] like what he's saying is, well, I will write the prescription if you will settle with the insurance company, but other than that I'm not doing it. How do you read that?

A Well, I don't know – I can't tell you what was going through his brain, but my interpretation seems to be that he thought settlement of the case would enable Bryan to obtain the fingers if he so desired, but it wasn't his opinion to recommend them.

Hrg. Tr. 101/13-21.

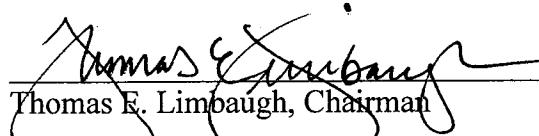
In view of the foregoing, and after carefully reviewing Dr. Gross's writings and testimony, we find no reason to discard his testimony in favor of the views expressed by Mr. Lang. Claimant's motion for reconsideration is, therefore, DENIED.

For the reasons set forth above, Claimant's alternate motion that the Commission rehear the case is also DENIED.

IT IS SO ORDERED.

DATED this 14th day of December, 2012.

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R.D. Maynard, Commissioner

ATTEST:


Assistant Commissioner Secretary

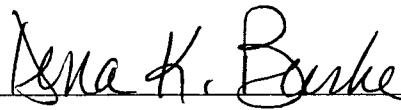

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2012, a true and correct copy of the foregoing **ORDER ON ALTERNATIVE MOTIONS TO RECONSIDER OR REHEAR CASE *EN BANC*** was served by regular United States Mail upon each of the following:

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R DANIEL BOWEN
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cs-m



Wm. Breck Seiniger, Jr. (ISB # 2387)
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Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

FILED

FEB 21 2017

INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros,
Claimant,
vs.

Rule Steel Tanks, Inc., *Employer, and* Pinnacle
Risk Management, *Surety,*
Defendants.

I.C. No. 08-024772

CLAIMANT'S PREHEARING STATEMENT

Comes now the Claimant, by and through his counsel, Wm. Breck Seiniger, Jr. and submits the following with respect to the issues to be heard by the Hon. Brian Harper on February 22, 2017.

Issues To Be Heard On February 22, 2017

1. Is Claimant entitled to be reimbursed for benefits relating to retraining recommended for him by the vocational consultant he retained but denied by Defendants?
2. What Permanent Partial Disability Benefits are due to Claimant?
3. Is Claimant entitled to an award of attorney's fees based on the unreasonable failure of Defendants to pay any benefits for retraining and/or permanent partial disability?

The Results Of The Prior Hearing In This Matter

As the commission is aware, a hearing has previously been held in this matter and *Findings Of Fact, Conclusions Of Law And Order* issued on November 2, 2012. The essential issue to be decided in that case was whether or not Claimant was entitled to prosthetic

CLAIMANT'S PREHEARING STATEMENT

rehabilitation benefits for his right hand finger amputations. The following findings of fact pertinent to the issues presently before the condition were contained in that order, and therefore will not be presented in evidence at the hearing on February 22, 2017:

BACKGROUND

1. At the time of hearing (September 14, 2012), Claimant was twenty-one years of age and lived in Nampa with his parents and his younger sister.
2. At the time of his industrial accident, Claimant had not yet graduated from high school. In addition to his high school studies, Claimant worked part-time in a fast-food restaurant.

ACCIDENT

3. During his summer vacation in 2008, Claimant started a summer job at Rule Steel Tanks, Inc., where his father also worked. Claimant's job was operating a metal press that shaped pieces of steel. On Claimant's second day of work, July 30, 2008, he caught the fingers of his right hand in the metal press, resulting in a traumatic amputation of portions of all four fingers on his dominant hand, associated crush injuries, and some degloving injuries on what remained of his fingers.

MEDICAL CARE

4. Claimant was transported by ambulance to the emergency room, where Dominic Gross, M.D., a hand surgeon, was on call. Although the severed fingertips were recovered, they were not replantable because of significant soft tissue and bone damage in the residual fingers. Dr. Gross considered two options for treatment. The simplest approach would have been to perform a revision amputation of all four digits (the index, long, ring, and small fingers) just distal to the MP joint, but this would leave Claimant with a working thumb but no digits to work in opposition to the thumb to hold objects. A more difficult approach, but one that, if successful, would leave Claimant with some function in his right hand, was to preserve the remaining length of his residual fingers by using skin grafts to rebuild the damaged digits. Claimant's parents opted for the latter approach.
5. Dr. Gross took Claimant to surgery where he debrided the open fractures, fused the PIP joint on the long finger, repaired proximal phalanx fractures on the index and ring fingers, and revised the amputation of the small finger. Dr. Gross used a skin flap from Claimant's forearm to cover the injured fingers. The radial forearm flap did not take, and Dr. Dominic then performed a procedure involving a right groin flap. This second procedure was successful, and following several additional surgeries, Claimant emerged with a right hand that includes an uninjured thumb, and portions of each of his four fingers.

6. By April 6, 2009, Claimant was medically stable, and Dr. Gross gave Claimant an impairment rating and imposed permanent restrictions related to the use of his right hand.

Because of the hideous nature of the disfigurement of Claimant's hand, he sought for your prosthesis as a medical benefit. Defendants declined to provide these for your prosthesis on the grounds that they were cosmetic procedures/devices, but the commission found that there is no reason to exclude cosmetic procedures and devices from the clear that the employer would be required to provide, since even purely cosmetic treatment may be assistance in restoring an injured worker's ability to engage in gainful activity. *Findings of Fact, Conclusions of Law and Order* at 8. Furthermore the commission assumed that the Claimant had met his burden of establishing that the process that is fingers were needed within the meaning of Idaho Code §§72-432(1). *Findings of Fact, Conclusions of Law and Order* at 8-9. Nevertheless, Claimant was betrayed by his physician, Dr. Gross who at one point recommended the prosthetic fingers but at another point in his highly contentious deposition claimed that the prosthetic fingers would be worse than useless in that they might contribute to a loss of function. Claimant attempted to rebut this testimony by taking a rebuttal deposition of the biomechanical engineer who crafted the prosthesis, McMillion Lang, but his ability to do so was opposed by Defendants and sustained by the referee for the commission who heard the case. Consequently, Claimant was not able to effectively rebut this testimony, and failed to carry his burden of proof on that issue. Nevertheless, as the commission noted, "However, it is also true that Dr. Gross could not quarrel with the proposition that the prosthesis Survey cosmetic purpose, and that for this reason alone, they might be suitable for an individual to whom appearance is important."

Claimant's Pre-Retraining Facts and Circumstances

As noted by the commission, Claimant was still in high school when he suffered the traumatic loss of his fingers. Since that time Claimant has married and has two children ages two and three. Prior to the accident in this case Claimant worked at Burger King and Dairy Queen in May between \$7 and \$7.50 per hour. According to Defendant's answer filed in this matter on or about March 12, 2010 Defendant rule steel tanks, Inc., was paying Claimant seven dollars per hour at the time of injury.

Claimant went to college in Lewiston for year or so which did not work out. He returned home and to work for Dairy Queen on a part-time basis. Prior to 2012, Claimant worked for a few months at a Verizon call center throughout the summer and into the winter earning somewhere between \$9.50 and \$10.50 an hour.

Vocational Retraining

To rebuild his life as best he could, Claimant investigated a number of vocational options. At his own expense, Claimant retained vocational rehabilitation counselor Douglas Crum and met with him on September 18, 2009. Mr. Crum's initial report is attached hereto as Exhibit 1.¹ Mr. Crum provided the following analysis, which was in turn provided to Defendant's counsel:

There is no doubt that the severe injuries to Mr. Oliveros' dominant hand will severely impact his vocational options for the rest of his life.

In my opinion, the only way that Mr. Oliveros will be able to successfully mitigate the effects of the July 2008 industrial injury is through education. Ideally, Mr. Oliveros should seek a bachelor's degree. This would give him a better chance of being able to earn a good wage in the future. In his current state, it is my opinion that Mr. Oliveros will

¹ All exhibits attached hereto have been exchanged with Defense Counsel and will be offered into evidence at the hearing on February 22, 2017

probably not be able to find a job in excess of approximately the federal minimum wage which is currently \$7.25 per hour.

In my opinion, under the current circumstances, it is appropriate to propose that Mr. Oliveros be provided with 2 years (104 weeks) of retraining benefits so that he can either complete an associate's degree in a physically compatible career field or use that as a basis to go on to a higher degree.

At this time the College of Western Idaho charges \$119 per credit for classes/\$1,428 for 12-18 credits. Some Associate of Applied Science degree programs at College of Western Idaho that would seem to be vocationally appropriate and physically appropriate would include drafting technology, information technology, information security & forensics, information technology technician, network administration, web development, marketing management, and applied accounting. College of Western Idaho also offers lower division transfer degrees with associate degrees in biology, business, communications, criminal justice, elementary education, English, liberal arts, political science, pre-pharmacy, psychology, and sociology.

The total pre-semester cost of a full-time student at College of Western Idaho (tuition only) for an associate's degree would be \$1,428. According to the College of Western Idaho, additional fees would total approximately \$350 per semester. The total projected cost of a two-year program at the College of Western Idaho is approximately \$7,112.

Assuming retraining benefits at 67% of the average State wage for 2008 injury (\$414.06 per week), total time loss costs would be approximately \$43,000 plus \$9,712 in tuition and materials cost, for a total cost of retraining of approximately \$52,774.

Mr. Crum opined "Without retraining, it is my opinion that Mr. Oliveros' would reasonably experience permanent partial disability, inclusive of impairment, of approximately 75%." The evidence will show that the Defendants did not propose any retraining program. Rather, Defendants chose not to provide any retraining.

Because the Defendants did not offer to support Claimant with respect to the retraining recommended by Douglas Crum, Claimant was not able to follow up on Mr. Crum's retraining recommendations with him. Nevertheless, Claimant attempted to follow up on Mr. Crum's suggestions for retraining. Claimant investigated various possibilities and took out loans to better himself. Claimant spent a month or two studying at Carrington College but that program turned out to be too expensive. Ultimately, Claimant identified and selected a program of

training leading to his becoming a pharmacy tech at Milan Institute in Nampa, Idaho. The Milan Institute program was the cheapest one that Claimant identified. The Milan Institute program was several blocks from Claimant's house.

Claimant entered the Milan Institute program and was awarded a Certificate of Completion on May 21, 2013. Claimant's Milan Institute transcript, attached hereto as Exhibit 2, and Certificate of Completion dated May 21, 2013, Exhibit 3, evidence classes taken by him between September 2012 and May 2013. Claimant was charged \$13,109.83 related to tuition and supplies during this period. See, Milan Institute AR Student Ledger attached hereto as Exhibit 4, and enrollment agreement entered into by the Claimant with Amarillo College of Hairdressing, Inc. – Milan Institute attached hereto as Exhibit 5.

During the summer of 2013, approximately two months after completing his internship, Claimant began work at the Terry Riley Pharmacy. Claimant did not initially pass his test to become nationally certified as a pharmacy tech, but Terry Riley Pharmacy allowed him two years to pass the test. The Idaho Board of Pharmacy allows pharmacy techs to become licensed in two ways. One can work as a pharmacy tech and train for up to two years, or one can hold the national certification. When he had not done so Terry Riley Pharmacy was required to let them go. Claimant then took a job as a sales person for TigerDirect. He worked at that job for two or three months which paid \$14.50 an hour. Claimant passed the national pharmacy tech exam three or four months after he finished working at Terry Riley. Claimant is presently licensed by the Idaho State Board of Pharmacy as a pharmacy tech.

When Claimant left TigerDirect he applied at a number of places to obtain work as a pharmacy tech. He tried to get on with St. Luke's, St. Al's, Rite aid, Walgreens, and Albertson's. However, perhaps due to the disfigurement of his hand, he was unable to find

CLAIMANT'S PREHEARING STATEMENT

employment. He ultimately found employment with KeyBank as a teller in the beginning of 2016 earning \$11.50 an hour. Claimant was let go when a customer filed a complaint against him for letting a receipt get into the wrong hands. Claimant applied for work at Wells Fargo and Idaho Credit Union because the Defendants but found work using his pharmacy tech training with Albertson's.

In December 2016 Claimant was hired by Albertson's to work at their corporate offices as a third-party coordinator. This position requires a pharmacy background and call center work if you have had it. In this position the Claimant works with insurance companies Medicare Medicaid and things of that nature. Claimant is required to hold a pharmacy tech license to do the job. In that capacity Claimant processes claims for third-party pharmacies. Claimant makes \$15.87 an hour and in the future will be entitled to benefits including health, dental, vision, and a 401(k). Claimant believes that he has opportunities for advancement with Albertson's.

In April 2016 Douglas Crum updated his report on the Claimant based on Claimant's retraining. See Ex. 6. Mr. Crum believes that as a result of Claimant's retraining he has not suffered a loss of wage earning capacity, though he still has a 55% loss of labor market access. Taking both into consideration Mr. Crum believes that Claimant has sustained a permanent partial disability of 45%. Mr. Crum believes that Claimant additionally suffers a detriment to his "placeability" resulting from the disfigurement of his hand. Claimant anticipates a Mr. Crum will express the opinion that this detriment to his placeability adds between 10 and 20% to his loss of access to the labor market.

Conclusion

The evidence presented at hearing will justify the commission in awarding Claimant the following benefits:

CLAIMANT'S PREHEARING STATEMENT

1. Direct Retraining Costs = \$13,109.83;
2. 72 weeks of TTD benefits during retraining = Approximately \$32,000;
3. Unpaid PPD benefits (45% less 32% permanent impairment, plus 20% "placeability" factor)
4. Attorneys fees based on no payment of retraining and unreasonable denial of all permanent disability benefits

Respectfully submitted February 19, 2017.



Wm. Breck Seiniger, Jr.
Attorney for Claimant

CERTIFICATE OF SERVICE

On February 19, 2017 I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Fax: (208) 344-9670



W^m Breck Seiniger, Jr.
Attorneys for Plaintiffs
Dated February 19, 2017.

W^m Breck Seiniger, Jr.

DOUGLAS N. CRUM C.D.M.S.

Vocational Rehabilitation Consultant
Crum Vocational Services, Inc.
894 E. Boise Avenue
Boise, ID 83706

November 16, 2009

Mr. Andrew Marsh
Attorney at Law
Seiniger Law Office
942 West Myrtle
Boise, ID 83702

Claimant: Bryan Oliveros, Nampa, Idaho
[REDACTED], Los Angeles, California
Date of injury: July 30, 2008
Employer: Rule Steel, Meridian, Idaho
Occupation: Metal brake operator, seasonal
Date of hire: July 28, 2008

Dear Mr. Marsh:

Thank you for referring Mr. Oliveros for an evaluation of factors that might lead to a finding of permanent partial disability in excess of permanent partial impairment.

For this evaluation I have reviewed records provided by your office. These records were provided on CD. The records include medical reports from Dominic Gross, MD; Beth Rogers, MD; and Katherine Laivle, PAC.

I have reviewed case notes from the Industrial Commission Rehabilitation Division.

I personally interviewed Mr. Oliveros on September 18, 2009.

MEDICAL HISTORY:

At the time of the July 30, 2008, industrial injury, Mr. Oliveros, who had just turned 18 years of age, had been on the job for approximately 2 days, having been hired as a temporary worker during his summer vacation from school.

As a result of the industrial injury, Mr. Oliveros has sustained the traumatic amputation of all the fingers of the *dominant* right hand at or about the MIP joint. Mr. Oliveros has undergone several surgeries and has been declared medically stable by the treating physician and by Beth Rogers, MD.

Mr. Oliveros has been assigned a 32% permanent partial impairment rating of the whole person related to his industrial injury of July 30, 2008.

Mr. Marsh
Re: Bryan Oliveros
Page 2

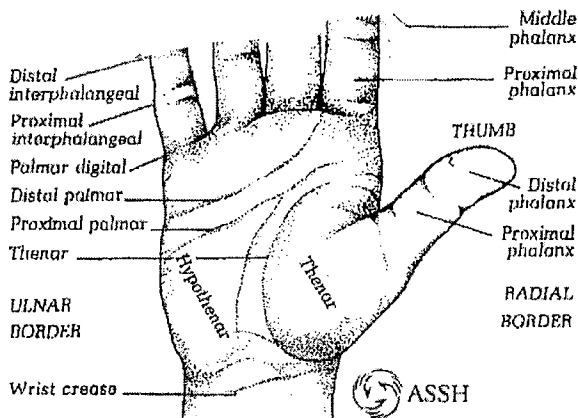
On April 22, 2009, Dr. Gross indicated the following permanent restrictions: 5-pound grip and carry; push 75 pounds; pull 50 pounds; no fine manipulation; 20-pound lifting with the right upper extremity only.

On May 6, 2009, Dr. Gross reiterated those same restrictions, adding that Mr. Oliveros can work 8- to 10-hour shifts with normal breaks "at a medium-duty position."

On June 25, 2009, Dr. Beth Rogers indicated permanent physical restrictions as outlined in a functional capacity evaluation "were for medium-duty work, working 8 hours a day with occasional right hand fine grasp. I agree with the work restrictions outlined in the functional capacity evaluation. In some instances the patient's workplace may have to accommodate a modified grip."

In addition to the above restrictions, Mr. Oliveros has significant problems with pain from inadvertent contact on all fingers. He has altered sensation in all his fingers. He has very limited ability to grip objects of any size with the right hand. He is unable to fully flex or extend the fingers of the right hand.

GRAPHICAL REPRESENTATION OF MR. OLIVEROS POST-INJURY HAND:



SUMMARIZED SELECT MEDICAL RECORDS:

- 10/29/08 Dr. Gross. No lifting, pushing, or pulling greater than 25 pounds with the right hand.
- 10/29/08 Dr. Gross. Patient's last surgery was September 9. "He has had great cosmetic result with regard to his horrible injury. He is going to be having an intrinsic plus hand with regards to these 3 fingers, and we'll have him start doing therapy...2 times a week for approximately 6 weeks time. At that point he'll reach maximum medical improvement and can be rated. His work restrictions would be such that he can lift, push, and pull up to 25 pounds with his hand, but nothing greater."
- 12/10/08 Dr. Gross. Patient is making good gains, except on the ulnar side of the ring finger which doesn't seem to want to heal.
- 1/2/09 Dr. Gross. Patient is 3 months and 3 weeks out from surgery. He had a right hand amputation with a groin flap. Flaps and hand both look good. He does have a scar on the index finger that prevents full extension of the finger. This flap on the ring finger is

quite big and could benefit from debulking or decreasing the size of it. On this date Dr. Gross performed a z-plasty procedure.

- 12/15/08 Dr. Gross. Interval exam.
- 3/5/09 Katherine Laivle, PA. Follow up recheck of the right hand injury with z-plasty and debulking of the ring finger. Patient is having little pain. He is doing much better. He hasn't taken any pain medication in the last week.
- 4/6/09 Dr. Gross. 18-year-old gentleman with a right hand crush injury. "For all intents and purposes, he has had an amputation of the fingers through the MP joint of his right hand. He is right-hand dominant. Claimant has a 54% permanent partial impairment rating of the upper extremity or 32% of the whole person. He does not need additional surgeries. "I believe this is a good impairment rating considering the severity of his injury, and I believe that no further surgeries are needed on this patient." His grip strength is 18 pounds.
- Recommends another month of physical therapy.
- 4/6/09 Dr. Gross. Patient may lift, push, or pull up to 25 pounds with the right hand.
- 5/6/09 Dr. Gross. Patient may work 8- to 10-hour shift with usual and customary breaks at a medium-duty position. Restrictions for the right upper extremity only: 5 pounds grip/carry, 75 pounds push, 50 pounds pull, 20 pounds lifting. No fine manipulation. The patient should be able to comply with these restrictions for a full shift without special breaks or rest periods based on the findings on the FCE.
- 6/25/09 Beth Rogers, MD. Right-handed gentleman sustained injury on 7/30/08. On the date of injury he underwent irrigation and a debridement over the open fractures, fusion of the PIP of the long finger, and revision amputation of the small finger as well as radial forearm flap. In August he underwent a second irrigation and debridement of the right hand with a groin flap to the right hand. The groin flap was taken down in September with a groin flap to the index, long, and ring fingers. Ultimately in February 2009 he underwent ring finger revision, full-thickness skin graft, and z-plasty of the 2nd web space. Patient has seen pain psychology who stated he was actively suicidal and had depression. He has undergone occupational therapy and a functional capacity evaluation.
- "The patient understandably states his activity is significantly limited by the right hand, and he has filled out a quick DASH outcome measure today which outlines limitations in his activities of daily living. In terms of pain, he states he has occasional paresthesias into the dorsum of the right hand and points to an area in his forearm from which these emanate. He is not currently taking any pain medications."
- Patient lacks opposition of thumb to the small finger by 1 cm.
 - Small finger is fused at the PIP joint and amputated at the DIP joint. He has active MP joint range of motion, 90-60 degrees flexion.
 - The right index finger is amputated at the level of the proximal phalanx. It is immobile at the MP joint with a flexion angle of 85 degrees.
 - The right long finger is amputated through the proximal phalanx. He has approximately 2/3 of the proximal phalanx left. It is also at a position of 85 degrees of flexion at the MP joint.

Mr. Marsh
Re: Bryan Oliveros
Page 4

- The right ring finger is amputated at the proximal phalanx. He has 10 degrees at the PIP joint from 70 degrees to 80 degrees flexion.

There is a bony prominence noted on the radial forearm with positive Tinnel's ascending parasthesias in the distribution of the radial nerve.

Forearm girths were measured...22.5 cm left and 26.5 cm right.

Impression: Right index, long, ring, and small finger amputations and depression.

Impairment rating: 32% of the whole person/53% of the upper extremity. "Work restrictions outlined in the functional capacity evaluation were for medium-duty work, working 8 hours a day with occasional right hand fine grasp. I agree with the work restrictions outlined in the functional capacity evaluation. In some instances the patient's workplace may have to accommodate a modified grip."

ADDITIONAL MEDICAL HISTORY:

Based on my interview with Mr. Oliveros and a review of the records, it appears that Mr. Oliveros has no pre-existing physical limitations or chronic conditions that affect his activities other than the subject industrial injury.

EDUCATION HISTORY:

Mr. Oliveros is expected to graduate from Nampa High School in May 2010. He indicates he has good grades "now."

After the injury to his dominant hand, Mr. Oliveros was out of school for 5-6 weeks.

Mr. Oliveros reads well, Spanish and English.

Mr. Oliveros speaks excellent English.

Mr. Oliveros can perform basic mathematics.

Mr. Oliveros used to play basketball, soccer, and football.

Mr. Oliveros has a Windows computer and has taken several computer classes in school. Mr. Oliveros types mostly with his left hand. He uses the right mostly just for the space bar. Mr. Oliveros has some basic word processing experience and training and a little bit of knowledge of spreadsheets.

Mr. Oliveros can load programs. He doesn't have any hardware or repair experience.

Mr. Oliveros knows how to get about on the Internet, and did some of his schoolwork on the computer.

Mr. Oliveros is now in 3 computer classes at Nampa High School: Business Applications, Principles of Marketing (done on computers), and Photoshop. He is also in an entrepreneurship program.

Mr. Oliveros says he likes business classes.

Mr. Oliveros wants to go to college. Before the injury he wanted to be a personal trainer or be in business or marketing or maybe accounting.

Mr. Oliveros does hold a valid driver's license.

Mr. Marsh
Re: Bryan Oliveros
Page 5

Mr. Oliveros has no history of criminal conviction.

WORK HISTORY:

Mr. Oliveros' time of injury wage was \$7.00 an hour. He had understood that he would be working 40 hours a week. This was a temporary job to last about a month until he returned back to high school.

From 4/08 to 7/08 (concurrent with his work at Rule Steel) Mr. Oliveros worked for Dairy Queen in Nampa at the drive through. He also did some cooking and cashiering.

From April 2007 to February 2009, Mr. Oliveros worked at a Nampa Burger King where he was a crew member and worked the drive through. He did cooking and cleaning. He was never in management.

Mr. Oliveros doubts he has the physical dexterity to do fast food work now.

In the summer of 2006, Mr. Oliveros performed some landscaping work. He couldn't recall the name of the employer. The work consisted of mowing grass, repairing sprinklers, doing some sod work, planting trees. It required a good deal of digging and work below-grade.

FUTURE EDUCATIONAL PLANNING:

Mr. Oliveros has been in contact with the College of Western Idaho, thinking that maybe he could do some core classes there. Mr. Oliveros is interested in a business degree. He will be having a campus tour and plans on taking the SAT in December.

PRE- AND POST-INJURY LABOR MARKET ACCESS:

At the time of the July 30, 2008, industrial injury, Mr. Oliveros was in very good health, capable of performing medium and heavy physical-demand activities requiring frequent to continuous use of the bilateral upper extremities for gross and fine work with his hands.

As a result of the industrial injury to his dominant hand, Mr. Oliveros uses the extremity mostly as a helping hand, as he has very little grip or capacity for fine dexterity.

Mr. Oliveros' prior work history had consisted primarily of part-time jobs while attending high school. At the time of the subject injury, Mr. Oliveros was between his junior and senior years. It appears now that he will graduate from high school in May of 2010 rather than May of 2009. At the time of the injury Mr. Oliveros had not established a vocational goal other than he had a general interest in obtaining a business degree or education to become a personal trainer.

Mr. Oliveros is a literate individual and is able to read and write in English and Spanish. Mr. Oliveros is able to perform basic mathematics. Mr. Oliveros has basic computer skills. Mr. Oliveros has no history of supervisory experience. Mr. Oliveros does have some customer service/cashiering experience.

I have performed an evaluation of Mr. Oliveros' pre- and post-injury labor market access, using the Boise metropolitan statistical area labor market. This labor market is comprised of Ada and Canyon Counties.

Based on this analysis, considering Mr. Oliveros' pre-injury education, language skills, vocational skills, work history, and presumed pre-injury capacity for medium to heavy work it appears that Mr. Oliveros had access to approximately 7.3% of the jobs in the labor market.

Repeating the above analysis by factoring in the functional limitations caused by amputation of all 4 fingers of Mr. Oliveros' dominant right hand, considering the

Mr. Marsh
Re: Bryan Oliveros
Page 6

restrictions given by Dr. Gross, it appears Mr. Oliveros has access to approximately 1.4% of the jobs in this labor market. This represents an 80% reduction in labor market access.

PRE- AND POST-INJURY WAGE-EARNING CAPACITY:

At the time of the subject injury, Mr. Oliveros was between his junior and senior years of high school, performing a summer job. Mr. Oliveros' time-of-injury position paid \$7.00 per hour on a full-time basis. As far as I know, Mr. Oliveros did not receive any employer-supported benefits.

In my opinion, it does not make sense to use the time of injury wage Mr. Oliveros as a baseline for a pre- and post-injury wage-earning capacity comparison. According to the US Bureau of the Census, using information from the US Census Department in 2004 the average wage of a high school graduate was approximately \$28,763 for male high school graduates. The average wage for a male worker with a bachelor's degree is \$50,916.

As a result of the subject industrial injury, Mr. Oliveros will not be able to perform jobs similar to the work his father performs, i.e. manual laboring positions. He simply does not have the manual dexterity to do those kinds of jobs.

According to the Minnesota State Department of Health in a study of census 2000 results, the percent of disabled persons households who lived under the poverty level was nearly 3 times that of non-disabled populations (15% vs. 6%); average individual earnings for disabled persons was 22.8% less (\$26,978 vs. \$34,951). The percentage of persons with disabilities who are not working was more than twice as high as individuals with no disabilities. Only 39.4% of people with disabilities worked full time on a year round basis. The poverty rate for person with disabilities was noted to be twice as high as the poverty rate for adults without disabilities. The report goes on to indicate that people with disabilities find it more difficult to complete post-high school education because they have less earning capacity than their peers.

There is no doubt that the severe injuries to Mr. Oliveros' dominant hand will severely impact his vocational options for the rest of his life.

In my opinion, the only way that Mr. Oliveros will be able to successfully mitigate the effects of the July 2008 industrial injury is through education. Ideally, Mr. Oliveros should seek a bachelor's degree. This would give him a better chance of being able to earn a good wage in the future. In his current state, it is my opinion that Mr. Oliveros will probably not be able to find a job in excess of approximately the federal minimum wage which is currently \$7.25 per hour.

In my opinion, under the current circumstances, it is appropriate to propose that Mr. Oliveros be provided with 2 years (104 weeks) of retraining benefits so that he can either complete an associate's degree in a physically compatible career field or use that as a basis to go on to a higher degree.

At this time the College of Western Idaho charges \$119 per credit for classes/\$1,428 for 12-18 credits. Some Associate of Applied Science degree programs at College of Western Idaho that would seem to be vocationally appropriate and physically appropriate would include drafting technology, information technology, information security & forensics, information technology technician, network administration, web development, marketing management, applied accounting. College of Western Idaho also offers lower division transfer degrees with associate degrees in biology, business, communications, criminal justice, elementary education, English, liberal arts, political science, pre-pharmacy, psychology, and sociology.

The total pre-semester cost of a full-time student at College of Western Idaho (tuition only) for an associate's degree would be \$1,428. According to the College of Western Idaho, additional fees would total approximately \$350 per semester. The total projected cost of a two-year program at the College of Western Idaho is approximately \$7,112.

Mr. Marsh
Re: Bryan Oliveros
Page 7

Assuming retraining benefits at 67% of the average State wage for 2008 injury (\$414.06 per week), total time loss costs would be approximately \$43,000 plus \$9,712 in tuition and materials cost, for a total cost of retraining of approximately \$52,774.

DISCUSSION:

In order to arrive at a reasonable and equitable disability opinion, I consider Idaho code 72 – 425 which defines permanent disability as “an appraisal of the injured employees present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by the pertinent non-medical factors provided in section 72-430, Idaho code”, and Idaho code 72-430. The following factors are outlined in Idaho code 72-430 with regard to the determination of percentages of disability:

Cumulative Effect of Multiple Injuries: At the time of the July 30, 2008 industrial injury to his dominant right hand, Mr. Oliveros was in good health, capable of performing his time of injury position, which falls into the medium to heavy category of physical demands. Mr. Oliveros has no significant additional injuries to combine with the industrial injury sustained in July 30, 2008.

Disfigurement If of a Kind Likely to Handicapped the Employee in Procuring or Holding Employment: Mr. Oliveros has a very disfigured right hand.

Diminished Ability of the Afflicted Employee to Compete in an Open Labor Market Within a Reasonable Geographic Area Considering All the Personal and Economic Circumstances of the Employee: At the time of injury, Mr. Oliveros was earning \$7.00 per hour in a summer job while on summer vacation from high school. As a result of the industrial injury, Mr. Oliveros is unable to perform his time of injury job, and most other jobs that he could reasonably perform before the injury. In my opinion, Mr. Oliveros has sustained a 80% loss of labor market access.

Occupation of the Employee at Time of Injury or Manifestation of An Occupational Disease: Mr. Oliveros's work history, education and experienced have resulted in a modest set of residual transferable vocational skills to lighter employment. Mr. Oliveros has a narrow range of employment experience. He has yet to graduate from high school. Mr. Oliveros' injury occurred before he had a chance to begin a career.

Age at Time of Injury: At the time of injury, Mr. Oliveros was 18 years of age. I believe that the fact that this injury occurred before Mr. Oliveros had a chance to begin a career, and that it will be a considerable vocational burden *with or without training* for the rest of his life, is an extremely important factor in determining an appropriate level of disability.

In my opinion, the above retraining program should be considered Mr. Oliveros' best means of mitigating the dramatic loss of function of all four fingers on his dominant right hand. Without retraining, it is my opinion that Mr. Oliveros will have a very difficult time finding and maintaining any sort of good-paying job in his labor market.

Without retraining, it is my opinion that Mr. Oliveros' would reasonably experience permanent partial disability, inclusive of impairment, of approximately 75%.

Mr. Marsh
Re: Bryan Oliveros
Page 8

Please feel free to contact me if you have any questions about the above information.

Yours Truly,

A handwritten signature in black ink that reads "Douglas N. Crum". The signature is written in a cursive, slightly slanted style.

Douglas N. Crum CDMS
Vocational Rehabilitation Consultant

Milan Institute - Nampa

Oliveros, Bryan



1021 W. Hemingway
Nampa, ID 83651

(208) 461-0616
www.milaninstitute.edu

349 Coppertree Dr.
Nampa, ID 83651
USA - United States

ID: 201200257
Phone: (208) 949-5480

Program: PT - Pharmacy Technician

Status: Grad Grad Date: 05/21/2013
First Term: 09/04/2012 LDA: 05/21/2013

FT/PT: Full Time
Session: D

Student Transcript

<u>Term</u>	<u>Course</u>	<u>Grade</u>	<u>Hours</u>	<u>Units Attempted</u>	<u>Units Completed</u>	<u>GPA</u>
09/04/2012	SFS001 (D-1) Strategies for Success	A	40.00	4	4	
09/18/2012	PSE202 (D-1) Pharmacy Skills/Law & Ethics	C	80.00	5.95	5.95	
10/16/2012	PHA203 (D-1) Pharmacology	B	80.00	5.95	5.95	
11/13/2012	COM204 (D-1) Compounding	C	80.00	5.95	5.95	
12/12/2012	UDS205 (D-1) Unit Dose System	C	80.00	5.95	5.95	
01/01/2013	PTE202 (D-1) Externship - PT	Pass	160.00	5.33	5.33	
01/22/2013	MMS206 (D-1) Medication Measurements	C	80.00	5.95	5.95	
02/20/2013	IAD207 (D-1) Intravenous Admixtures	C	80.00	5.95	5.95	
03/20/2013	PHH201 (D-1) Pharmacy/History	B	80.00	6.1	6.1	
<i>Student Transcript Total</i>			760	51.13	51.13	2.60

Transcript Key

A: Excellent B: Good C: Satisfactory D: Below
F: Fail INC: Not Completed

Wednesday, May 29, 2013

Official Signature: Joseph Robles

Page 1

Certificate of Completion

This Certifies That
Bryan Oliveros

Has Successfully Completed the Prescribed 760 Hours of Instruction in

PHARMACY TECHNICIAN

*As Developed and Taught by This School and Thus Having Shown Proficiency
Is Awarded This Certificate by*

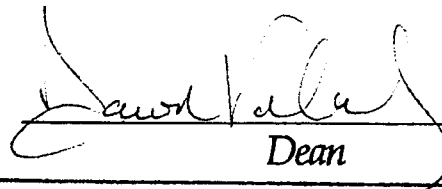
Milan Institute

1021 W. Hemingway • Nampa, ID 83651

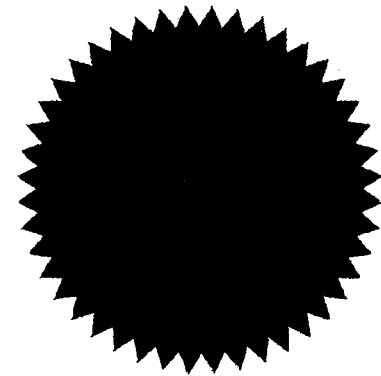
This 21st day of May 2013



Director



Dean





Milan Institute - Nampa

1021 W. Hemingway
 Nampa, ID 83651-
 (208) 461-0616
 www.milaninstitute.edu

AR Student Ledger

Oliveros, Bryan		
Program: PT - Pharmacy Technician		
ID: 201200257 ██████████	Status: Grad First Term: 09/04/2012 Grad Date: 05/21/2013	349 Coppertree Dr. Nampa, ID 83651 USA - United States
Phone: (208) 949-5480		

<u>Trans Date</u>	<u>Ledger Code</u>	<u>Description</u>	<u>Receipt/Check #</u>	<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
8/13/2012	CASHRE	Payment	Rcpt# 10224Chk# 0	\$0.00	\$100.00	(\$100.00)
9/4/2012	TUITION	PP1 Tuition AY: 1 AP: 1		\$5,704.25	\$0.00	\$5,604.25
9/4/2012	SALESTAX	SALES TAX AY: 1 AP: 1		\$39.24	\$0.00	\$5,643.49
9/4/2012	SUPPLIES	SUPPLIES AY: 1 AP: 1		\$180.44	\$0.00	\$5,823.93
9/4/2012	SALESTAX	SALES TAX AY: 1 AP: 1		\$10.83	\$0.00	\$5,834.76
9/4/2012	REGFEE	Registration Fee AY: 1 AP: 1		\$100.00	\$0.00	\$5,934.76
9/4/2012	LABFEE	LAB FEE AY: 1 AP: 1		\$69.00	\$0.00	\$6,003.76
9/4/2012	BOOKS	BOOKS AY: 1 AP: 1		\$654.03	\$0.00	\$6,657.79
9/5/2012	CASH	Payment	Rcpt# 10469Chk# 0	\$0.00	\$132.36	\$6,525.43
9/5/2012	CASH	Payment	Rcpt# 10468Chk# 0	\$0.00	\$7.64	\$6,517.79
9/5/2012	AUTOPAY	Payment	Rcpt# 10472Chk# 0	\$0.00	\$132.36	\$6,385.43
10/10/2012	AUTOPAY	Payment	Rcpt# 10734Chk# 0	\$0.00	\$132.36	\$6,253.07
11/10/2012	AUTOPAY	Payment	Rcpt# 11124Chk# 111012	\$0.00	\$132.36	\$6,120.71
12/1/2012	BOOKS	09/04/12 contract adj.	Rcpt# 0Chk# 0	\$12.91	\$0.00	\$6,133.62
12/1/2012	SUPPLIES	09/04/12 contract adj.	Rcpt# 0Chk# 0	\$0.28	\$0.00	\$6,133.90
12/1/2012	SALESTAX	09/04/12 contract adj.	Rcpt# 0Chk# 0	\$0.79	\$0.00	\$6,134.69
12/17/2012	CASHSOLD	Payment		\$0.00	\$4,227.75	\$1,906.94
1/10/2013	DSTAF13	Payment		\$0.00	\$1,733.00	\$173.94
1/10/2013	DSTFU13	Payment		\$0.00	\$990.00	(\$816.06)
1/10/2013	PELL13	Payment		\$0.00	\$1,450.00	(\$2,266.06)
1/22/2013	TUITION	Tuition PP2 AY: 1 AP: 2		\$6,338.06	\$0.00	\$4,072.00
2/7/2013	DSTAF13	Payment		\$0.00	\$1,733.00	\$2,339.00
2/7/2013	DSTFU13	Payment		\$0.00	\$990.00	\$1,349.00
2/7/2013	PELL13	Payment		\$0.00	\$1,450.00	(\$101.00)
2/20/2013	R-UNIVERSAL	Payment	Rcpt# 11563Chk# 0	\$0.00	(\$101.00)	\$0.00
				\$13,109.83	\$13,109.83	\$0.00

Amarillo College of Hairdressing, Inc.

02/05/12

Milan Institute - Nampa, ID

1021 W. Hemingway
Nampa, ID 83651
(208) 461-0616

ENROLLMENT AGREEMENT

Student Name: Bryan Oliveros
Address: 349 Coppertree Dr. City: Nampa State: Id
Zip: 83651 Phone Number: 208 949 5400
Program Name: PT Hours/Credits: 760/51 Start Date: 9/4/12 Projected End Date: 5/7/13
Sex: Male Female U S Citizen: Yes No Admissions Representative: Cheryl Beate

Our goal is to provide quality education and training to motivated individuals whose career goals are best served by relevant, quality, short term training programs. We want you to succeed, and will assist you in the steps to achieving your goals.

- 1. This agreement and its listed attachments are the only agreement between the School and the Student. No other promises made by the School or any of its representatives or agents should be relied upon by the Student. Student Initials: B.O.
- 2. The Student agrees to comply with all the School rules and regulations, including, but not limited to; attendance, grades, conduct, honesty and financial commitment. If you fail to follow the School rules and regulations you could be dismissed from the School. If you are dismissed, you may be entitled to a refund as described in the Refund Section on the back of this agreement. Student Initials: B.O.
- 3. Upon your successful completion of the program and payment in full of all tuition and fees, you will receive a Certificate of Completion for the program and the School will then attempt to assist you in your job search. The School nor any of its representatives or agents can guarantee or promise you employment, or a salary amount once you have completed your program. Student Initials: B.O.
- 4. Your signature on this Agreement acknowledges you have been given reasonable time to read and understand all of the information presented to you. Your signature also indicates you have received and read all of the following:
 - a) A current catalog with inserts and addendum's (if applicable)
 - b) Graduation and Placement Information for your program of choice
 - c) A copy of the Enrollment Agreement
 - d) A tour of the campusStudent Initials: B.O.
- 5. I hereby acknowledge by my initials and signature that this Enrollment Agreement becomes a legally binding document after I sign it and is accepted by the school. I understand the amount for the Pharmacy Technician program is \$ 13,109.83 (as presented in the Course Cost Addendum B).

YOU ARE RESPONSIBLE FOR THIS AMOUNT. IF YOU GET A STUDENT LOAN, YOU ARE RESPONSIBLE FOR REPAYING THE LOAN AMOUNT AND ANY INTEREST THAT IS INCURRED.

CRIME AWARENESS AND CAMPUS SECURITY

The Campus Security Policy and crime statistics are available and can be requested through the office of the School Director.

ETHNIC INFORMATION

Each institution approved to operate by the Department of Education is required to report the following information for students in each course of instruction. This information is for statistical purposes only.

Number: 1

For non-Hispanics only:

- 1. Nonresident Alien
- 2. Race & Ethnicity unknown
- 3. Hispanics of any race
- 4. American Indian or Alaska National
- 5. Asian
- 6. Black or African American
- 7. Native Hawaiian or other Pacific Islander
- 8. White

DOUGLAS N. CRUM C.D.M.S.

Vocational Rehabilitation Consultant
Crum Vocational Services, Inc.
894 E. Boise Avenue
Boise, ID 83706

April 7, 2016

Mr. Breck Seiniger
Attorney at Law
Seiniger Law Office
942 West Myrtle
Boise, ID 83702

Claimant: Bryan Oliveros, Nampa, Idaho
[REDACTED] Los Angeles, California
Date of injury: July 30, 2008
Employer: Rule Steel, Meridian, Idaho
Occupation: Metal brake operator, seasonal
Date of hire: July 28, 2008

Dear Mr. Seiniger:

Per your request, I have conducted additional work on this case in order to produce an updated report regarding permanent partial disability.

As you will recall, on November 16, 2009, I produced a permanent partial disability report for your office.

I have reviewed to reports by Dr. Dominic Gross, dated June 17, 2010 and December 19, 2011.

I have reviewed the transcript of the September 1, 2011 deposition of Bryan Oliveros.

I conducted a follow-up interview with Mr. Oliveros on September 24, 2015, and talked to him by telephone on April 7, 2016.

CASE SUMMARY:

On July 30, 2008, just after his 18th birthday, Mr. Oliveros sustained the traumatic amputation of all the fingers of his *dominant right-hand* at or about the MIP joint (excluding the thumb). Subsequently, he underwent surgeries performed by Dr. Gross.

On March 30, 2009, Leah Padaca, ATC-L, performed a functional capacity evaluation. The evaluator characterized this as a valid representation of Mr. Oliveros' present physical capabilities. She indicated that Mr. Oliveros demonstrated full effort. "Based on the Dictionary Of Occupational Titles and the Department of Labor, Mr. Oliveros is demonstrating the current Capacity to work an eight hour workday, medium duty with occasional right-hand fine grasp. During the grip dynamometer, Mr. Oliveros supported the dynamometer on his leg when he did the first grip with the right hand, the rest he was able to hold the dynamometer without needing support. When doing standing tasks, Mr. Oliveros had a difficult time grabbing washers with his right hand."

Specific recommendations:

Occasional ability:

Lifting above shoulder, bilateral	25.8 #
Lifting above shoulder, right	10.0 #
Lifting desk to chair, bilateral	50.6 #
Lifting desk to chair, right	10.0 #

Phone 208.426.0858

Fax 208.426.8292

Email: crumvoc@mac.com

EXHIBIT 6

OLIVEROS

190

Lifting desk to chair, left	37.2 #
Lifting chair to floor, bilateral	34.6 #
Lifting chair to floor, right	10.0 #
Push	96.6 #
Pull	66.3 #
Carry, right	22.0 #
Carry, left	37.0 #
Occasional:	Fine grasp, right
Frequent:	Bend/stoop, crouch, simple grasp right
Continuous:	Squat, crawl, climb stairs, kneel, balance, (use) right or left foot, simple grasp left, firm grasp right, firm grasp left, fine grasp left.

On May 6, 2009, Dr. Gross indicated that he had reviewed a March 30, 2009 functional capacity evaluation. Dr. Gross recommended restrictions limited to the right upper extremity:

- May work 8 to 10 hour shift with usual breaks.
- 5 pound grip/carry
- 75 pound push
- 50 pound pull
- 20 # lifting
- No fine manipulation
- "Mr. Oliveros should be able to comply with these restrictions for the full shift, without special breaks or rest periods, based on the findings of the FCA."

On June 25, 2009, Beth Rogers, MD, indicated that Mr. Oliveros was medically stable with a 53% permanent partial impairment rating of the right upper extremity / 32% permanent partial impairment rating of the whole person.

As was noted in my original report, Mr. Oliveros had no history of pre-existing permanent physical restrictions that limited his activities.

EDUCATION HISTORY:

Subsequent to his July 30, 2008 industrial injury, Mr. Oliveros returned to high school for a while in early 2009 for 2 or 3 months. He was told that because of his deficits in credits, he would not be able to graduate with his class, and so he decided to complete a GED.

Mr. Oliveros completed a GED in late 2010 through Boise State University. He indicated to me at the time of my follow-up interview that he had no difficulties completing the studies and testing required for the GED.

Beginning in the fall of 2010, Mr. Oliveros attended Lewis Clark State College, Lewiston Idaho, for two semesters and one summer session, on a full-time basis, taking some general business classes.

In the summer/fall of 2011, Mr. Oliveros started, but soon withdrew from classes at the College of Western Idaho because he did not like their online method of instruction.

In the spring of 2012, Mr. Oliveros attended Carrington College, Boise, ID, for about two months, commuting from his home in Nampa in the pharmacy technology program. He did not finish these studies because he was unable to afford the daily commute. The cost of this program was \$3000 for the one semester program.

Beginning September 4, 2012, running through May 21, 2013, Mr. Oliveros attended classes at the Milan Institute in Nampa, ID, earning a Certificate of Completion in Pharmacy Technology. His overall GPA was 2.60. In this program, he attended classes four days a week, six hours a day. The program required a lot of data entry and practice entering prescriptions and patient information into database application software.

The Milan Institute program also included a one month internship at a Walgreens store in Nampa. Mr. Oliveros indicated at the time of my second interview with him that the internship at Walgreens went very well. He

Mr. Seiniger
Re: Bryan Oliveros
Page 3 of 5

indicated that at first, his hand injury made it difficult for him to count out pills at a production rate, but by the end, his production was acceptable.

In order to become a certified Pharmacy Technician, he needed to pass the pharmacy technology certification Board test. He took, and failed, that test twice after graduating from the program at Milan Institute. In my telephone conference with Mr. Oliveros earlier today, he indicated that he plans to take the Pharmacy Technology test again this summer and believes that he can pass it because he has much better study materials than he did before the first two attempts. However, he also indicated that he does not plan on leaving his current employment with KeyBank due to the potential for advancement.

Mr. Oliveros indicated to me that he believes that the training that he received through the Milan Institute and the Walgreens internship was extremely beneficial in terms of him being able to obtain and perform the types of work he has done since he left that program. In particular, he states that the customer service training and the computer skills training that he received have been particularly marketable for him.

At the time of his September 1, 2011 deposition, Mr. Oliveros stated that he was "very familiar" with Microsoft Office applications software such as Microsoft Word, Excel, PowerPoint. At that time, he was working at WDS Global, and was using Excel spreadsheets in that job.

In my telephone conference with Mr. Oliveros earlier today, he indicated that he is able to type perhaps 45 words per minute, primarily using his left hand. He uses the right hand to a lesser extent when keyboarding due to lack of reach of the fingers. He does not have pain in the fingers of the hand. Mr. Oliveros also indicated that he is able to count money okay in his current job, mostly performing that task left-handed.

EMPLOYMENT HISTORY:

February 29, 2016 to present

Employer: KeyBank, Boise, ID

Occupation: Teller floater

Duties: General paying and receiving. Works as a floater between multiple branches. Performs data entry, customer service, etc. Regularly uses computers.

Wage: \$11.75 per hour, full-time. Also has employer supported health and dental insurance benefits for which he pays \$42 per month.

Note: Mr. Oliveros indicated to me that he believes this job is going well. He plans to stay with the employer on a long-term basis. He believes the company offers the potential for a good deal of advancement over time. He indicated that prior to being hired by KeyBank, he applied for a number of other tellering positions, but was primarily seeking full-time work, not part-time.

September 28, 2015 to November 15, 2015

Employer: Tiger Direct, Boise, ID

Occupation: Account Manager

Duties: call businesses to sell office supplies, furniture and electronics.

Wage: \$14.42 per hour for six months plus a 3% to 6% commission. After six months, \$7.74 per hour plus a 13% to 16% commission. Benefits available after 60 days.

Reason for leaving: business closed shop and everyone was laid off.

August 9, 2015 through September 9, 2015

Employer: Medicap Pharmacy, Nampa, ID

Occupation: Pharmacy Technician.

Reason for leaving: Laid off, company had too many Pharmacy Technicians.

Wage: \$14.00 per hour

Mr. Seiniger
Re: Bryan Oliveros
Page 4 of 5

June 2013 through August 7, 2015

Employer: Terry Riley Clinic, Nampa, ID

Occupation: Pharmacy Technician in a retail pharmacy environment..

Wage: \$13.00 per hour, plus 100% employer paid health, dental and vision insurance benefits. Full-time.

August 2011 through December 2011,

Employer: WDS Global, Boise Idaho

Duties: Worked in a call center, performing customer service communications for Verizon customers. He received some on-the-job training. He reports that the job required a lot of data entry. He reported that he was quite slow with his data entry at first but got better over time. Mr. Oliveros told me that early on, WDS seemed to think that his abilities for data entry/keyboarding would be an issue, but later he proved that it wasn't.

Wage: \$9.50 per hour, full-time, with 100% employer supported health, dental and vision insurance benefits.

Reason for leaving: He was assigned to a night shift, working 12 hour days, four days a week. He reports that this work schedule wore him down and he eventually resigned.

See previous report regarding claimant's work history prior to the above. In general, he was a teenager, employed at fast food restaurants and performing some landscape laboring work. At the time of the July 28, 2008 injury, he had been employed for two days by Rule Steel, as a metal brake operator, working seasonally during the summer between his junior and senior year. When he went to work at Rule Steel, he was still employed as a fast food worker at a Dairy Queen store.

DISABILITY ASSESSMENT:

November 16, 2009 report:

At the time of my November 16, 2009 report, I concluded that as a result of the July 28, 2008 industrial injury, Mr. Oliveros had sustained an 80% reduction in labor market access and no reduction in wage earning capacity, based on his time of injury wage of \$7.00 per hour. In my November 16, 2009 report, I recommended that Mr. Oliveros mitigate the effects of the industrial injury through continued education. In fact, Mr. Oliveros has done just that. It appears that the Milan Institute program cost \$13,109.83.

In my opinion, without completing the retraining that he obtained using his own funding, more probably than not, Mr. Oliveros would have been relegated to entry-level occupations. In my first report, I estimated that he would be able to find a job at about the federal minimum wage of \$7.25 per hour.

In my opinion, without the retraining that he has obtained on his own, Mr. Oliveros would have sustained the vocational loss as described in my first report at which time I recommended permanent partial disability, inclusive of impairment, about 75%. I believe that this proposed level of permanent partial disability inclusive of impairment still applies, assuming no retraining.

Current disability status:

In my opinion, because Mr. Oliveros has obtained further education and training as a Pharmacy Technician, this has significantly reduced his overall labor market access loss. The number of Pharmacy Technicians in the Boise area labor market is relatively small. According to the Idaho Department of Labor publication Idaho Occupational Employment And Wage Survey 2015 there are approximately 607 Pharmacy Technicians in the labor market. Compared to the general run of occupations that Mr. Oliveros could have performed on a preinjury basis (7.3% or approximately 20,367 jobs), even adding all of the Pharmacy Technician jobs back into his labor market, Mr. Oliveros would still sustain a 77% reduction in labor market access.

Also, through further education/training and employment experience, Mr. Oliveros has gained new computer and customer service skills since the industrial injury. He has used those skills successfully in employment. By including jobs that would require those skills, considering all of Mr. Oliveros' other medical and nonmedical factors, as well as the nature and composition of his labor market, I estimate his labor market access loss, at this time, to be approximately 55%.

Mr. Seiniger
Re: Bryan Oliveros
Page 5 of 5

Through retraining, Mr. Oliveros has been able to significantly improve his post injury wage earning capacity. In the Boise area labor market, the average wage for Pharmacy Technicians is \$15.57 per hour. The entry wage is \$12.54 per hour. He is currently earning \$11.75 per hour, with employer supported benefits. He anticipates that within a few months, he may earn as much as \$14.00 per hour.

Cost of retraining:

Based on the dates that Mr. Oliveros participated in college-level training, excluding his brief time with the College of Western Idaho, it appears that Mr. Oliveros attended college-level school for approximately 72 weeks since high school / GED completion.

- Direct cost: \$13,109 (Milan Institute)
- Time loss/retraining benefits: \$414.06 per week, assuming 67% of the average state wage, for a 2008 injury.
- Total duration of all retraining: 72 weeks.
- Total "time loss" value of retraining \$29,812.
- *Total of time loss and direct costs associated with retraining: \$42,921*

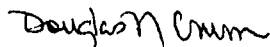
Of course, the issue of who benefits from his retraining (and who should pay for it) is a matter for discussion. Certainly, Mr. Oliveros benefited from it in terms of significantly reduced labor market access loss as well as significant new marketable skills. The retraining also significantly reduced his level of permanent partial disability.

Assuming Mr. Oliveros' current level of education and skills (post-retraining), assuming a 55% loss of labor market access and a 0% loss of wage earning capacity, it would be appropriate to propose permanent partial disability inclusive of impairment of approximately 45% (assigned PPI rating is 32% whole person).

The above level of disability would compensate (to a very minor degree) Mr. Oliveros for the loss of all the digits of his dominant hand, exclusive of the thumb, and most especially the vocational difficulties this will cause him for the rest of his life. Mr. Oliveros is currently 25 years of age. Assuming a retirement date of 2057 (if he retires at age 67), Mr. Oliveros still has approximately 40 years of work life ahead of him.

Please feel free to contact me if you have any questions about this report.

Yours Truly,



Douglas N. Crum CDMS
Vocational Rehabilitation Consultant