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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN OLIVEROS,)	
)	DOCKET NO. 45782-2018
Claimant/Appellant,)	
vs.)	I.C. No. 2008-024772
)	
RULE STEEL TANKS, INC., Employer,)	
and ADVANTAGE WORKERS)	
COMPENSATION INSURANCE CO.,)	
Surety,)	
)	
Defendants/Respondents.)	
_____)	

RESPONDENTS' BRIEF

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal by Claimant Bryan Oliveros from two decisions of the Idaho Industrial Commission in a worker's compensation claim against his employer Rule Steel Tanks, Inc. ("Employer") and its surety Advantage Workers Compensation Insurance Company ("Surety") for injuries suffered on July 30, 2008. Claimant first appeals the Commission's Findings of Fact, Conclusions of Law, and Order, filed November 2, 2012, regarding the Commission's determination that Claimant/Appellant (hereinafter "Claimant") was not entitled to prostheses under Idaho Code §72-432. Claimant second appeals the Commission's Findings of Fact, Conclusions of Law, and Order, filed August 25, 2017, regarding the Commission's determination regarding Claimant's permanent disability in excess of or in addition to permanent partial impairment, as well as Claimant's entitlement to retraining benefits.

Pursuant to the argument set forth below, Respondents Employer and Surety assert the Claimant's appeal of the Industrial Commission's 2012 Decision is not timely and should not be disturbed on appeal, and the Industrial Commission's 2017 Decision was supported by substantial and competent evidence and should not be disturbed on appeal.

B. FACTUAL AND PROCEDURAL HISTORY

Claimant was age 18 and working the summer of 2008 between his junior and senior years of high school in full-time temporary employment for Rule Steel Tanks,

where his father was also employed. *2017 Tr.* 31, ll. 10-15, 51, ll. 3-22. In addition to attending high school at Nampa High School, Claimant was also employed part-time at Dairy Queen. *2017 Tr.* p. 31, ll. 11-20. His work history included part-time work in 2006 in landscaping and fast food service at Burger King in 2006-2007. *2017 Tr.* p. 35, ll. 1-10, p. 51, ll. 8-16. His wages on a pre-injury basis ranged from \$7.00 – 7.50 per hour. *2017 Tr.* p. 31, ll. 12-15; p. 51, ll. 8-13.

On July 30, 2008, his second day at work at Rule Steel Tanks, Claimant Oliveros was operating a metal press when four fingers on his dominant right hand became caught in the metal press, resulting in traumatic amputation of portions of four fingers. *2017 Hrg. Def. Ex. 1.* He was transported by paramedics to Saint Alphonsus Regional Medical Center, where Dr. Dominic Gross, MD, hand surgeon, was on call. *2017 Hrg. Def. Ex. 2; 2017 Hrg. Def. Ex. 3,* pp. 6-13. Dr. Gross considered two treatment options, the first involving total amputation of the remainder of the four amputated digits, the index, long, ring, and small fingers of the right hand, and the second using skin grafts to rebuild and preserve the damaged digits with the goal of leaving Claimant with some residual function in the right hand. *2017 Hrg. Def. Ex. 4,* pp. 25-26. Dr. Gross opted for the second option, performing a total of five surgeries, July 30, 2008 (*2017 Hrg. Def. Ex. 4,* pp. 27-28), July 31, 2008 (*2017 Hrg. Def. Ex. 4,* pp. 29-30), August 21, 2008 (*2017 Hrg. Def. Ex. 4,* pp. 38-40), September 9, 2008 (*2017 Hrg. Def. Ex. 4,* pp. 50-51), and February 24, 2009 (*2017 Hrg. Def. Ex. 4,* pp. 66-67). The surgeries included debridement of the open fractures, fusion of the PIP joint on the long finger, repair of the proximal phalanx fracture on the index and ring fingers, and revision of the amputation of the small finger. Dr. Gross

initially used a skin flap from the Claimant's forearm, and then a right groin flap to cover the injured digits. *2017 Hrg. Def. Ex. 4*, p. 41. Ultimately, Claimant was left with an uninjured thumb and functional portions of each of the remaining four digits, described by the Commission as follows:

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.

R. Vol. 1, p. 132, fn. 1.

On April 6, 2009, Dr. Gross found Claimant was medically stable, and had suffered a 54% upper extremity, or 32% whole man permanent partial impairment as a result of his industrial injuries. *2017 Hrg. Def. Ex. 4*, p. 71. Based upon a Functional Capacity Evaluation conducted on or about March 30, 2009, Dr. Gross released Claimant to his pre-injury occupation with restrictions as follows:

He may work an 8-10 hour shift, with usual and customary breaks, at a medium duty position. The following restrictions are for his Right Upper Extremity Only:

5 pound grip/carry

75 pound push

50 pound pull

20 pound 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.

2017 Hrg. Def. Ex. 4, pp. 75-77; *2017 Hrg. Def. Ex. 5*, pp. 87-94.

On June 25, 2009, Claimant was evaluated by Dr. Beth S. Rogers of the Spine Institute of Idaho for a permanent partial impairment rating. *2017 Hrg. Def. Ex. 6*. Dr. Rogers agreed with the results of the FCE, and she also arrived at a 32% whole man PPI rating. *2017 Hrg. Def. Ex. 6*, p. 107.

Claimant returned to high school in 2009, during which time he also returned to work for Dairy Queen. *2017 Tr.* p. 31, l. 21 – p. 32, l. 4, p. 55, l. 8 – p. 56, l. 10. He obtained his GED through Boise State University in the summer of 2010. *2017 Tr.* p. 25, ll. 25-15. Claimant enrolled in college courses at Lewis and Clark State in Lewiston, Idaho for two semesters, the fall of 2010 and the spring of 2011. *2017 Tr.* p. 25, l. 16- p. 26, l. 2, p. 57, l. 11-15, p. 60, ll. 9-11. He returned to the Nampa/Boise area in the early summer of 2011 and obtained employment at WDS Global. *2017 Tr.* p.37, ll. 23-25. Also in the summer of 2011 he took one general studies summer online class through the College of Western Idaho. *2017 Tr.* p. 26, ll. 2-14, p. 38, ll. 4-9. He did not continue the programs at Lewis-Clark State or CWI. *2017 Tr.* p. 26, ll. 10-12.

Two years after his release by Dr. Gross, in the spring of 2011, Claimant received an unsolicited call from MacJulian Lang, the Clinical Director for Advanced Arm Dynamimcs in Portland, Oregon. *2017 Hrg. Def. Ex. 10*, Clmt. Dep. p. 23, ll. 10-25, p. 24, ll. 1-6; Deposition of MacJulian Lang (“Lang Dep.”), p. 5, ll. 5-14. Claimant received literature about the company and then traveled to Portland, where he was evaluated for prosthetic devices by Advanced Arm Dynamics. *2017 Hrg. Def. Ex. 10*, Clmt. Dep. p. 24, ll. 9-13. Advanced Arm Dynamics generated a report, dated April 1, 2011, detailing the evaluation and the available prosthetic options. *2017 Hrg. Def. Ex. 8*.

On April 1, 2011, Defendants received the report and a request to solicit a prescription from Claimant's treating physician, Dr. Gross, for four silicone partial finger prostheses, two heavy duty finger protectors, and two suction sockets at a cost of \$17,814.15. *2017 Hrg. Def. Ex. 8*, p. 117. Claimant did not return to Dr. Gross to discuss or seek examination in connection with prosthetics. *2011 Tr.* p. 54, ll. 7-10. The Advanced Arm Dynamics report and request were forwarded to Dr. Gross, and by letter dated June 17, 2010, Dr. Gross indicated he knew of no prostheses that would improve Claimant's function, and he did not routinely recommend them to patients with functional use of the hand. *2017 Hrg. Def. Ex. 4*, p. 78. Claimant's attorney contacted Dr. Gross in writing on August 30, 2011, and again on December 10, 2011 in order to persuade Dr. Gross to prescribe the prosthetics. *2017 Hrg. Def. Ex. 4*, pp. 79-80. In response, Dr. Gross set forth his opinions regarding the proposed prosthetics, stating Claimant's hand function would not improve and would be for cosmetic purposes only. He further noted that in his professional experience, finger prosthetics are "cumbersome, awkward, and time-consuming to use." *2017 Hrg. Def. Ex. 4*, p. 79. While willing to prescribe the prostheses for Claimant for cosmetic purposes, Dr. Gross reemphasized the prosthetic devices were not medically necessary as "prosthetic devices are not required for Claimant to improve his function use of the hand." *2017 Hrg. Def. Ex. 4*, p. 80. Dr. Gross concluded his testimony characterizing the utilization of the prosthetics solely for cosmetic purposes at the expense of function ridiculous and absurd. *2017 Hrg. Def. Ex. 4*, p. 82, l. 23.

A hearing was conducted before the Idaho Industrial Commission on December 11, 2011. (*2011 Tr.*) At that time, Claimant was age 21 and residing with his parents and sister

in Nampa. *2017 Tr.* p. 22, ll. 9-15. Having completed his GED and some college courses, Claimant was gainfully employed full-time as a call center customer service agent for WDS Global since August of 2011 at a wage of approximately \$9.50 per hour plus benefits. *2017 Tr.* p. 36, ll. 1-18; *2011 Tr.* p. 43, ll. 19-25; *2011 Hrg. Clmt. Ex. 2*, p. 12. By stipulation of the parties, and pursuant to the Commission's Order, the issues at the 2011 hearing were Claimant's entitlement to prosthetic benefits and attorney fees thereon. *R. Vol. 1*, p. 6.

Subsequent to the hearing and pursuant to the Rules of Practice and Procedure before the Idaho Industrial Commission, post-hearing depositions were taken by the parties. Claimant's counsel took the deposition of MacJulian Lang on December 15, 2011 ("Lang Dep."), and Defendants took the deposition of Dr. Gross on February 22, 2012 ("Gross Dep."). Thereafter, Claimant's counsel sought to take a rebuttal deposition of Mr. Lang (*R. Vol. 1*, pp. 18-33), and when denied by the Commission (*R. Vol. 1*, pp. 40-43), Counsel then sought to dismiss the Complaint and withdraw the issue before the Commission without prejudice (*R. Vol. 1*, pp. 44-81, pp. 90-124). The Commission issued its Order Denying Motion to Dismiss and Motion for Reconsideration on July 11, 2012. *R. Vol. 1*, pp. 125-128.

The Commission issued its Findings of Fact, Conclusions of Law, and Order on November 2, 2012, finding Claimant was not entitled to prostheses under Idaho Code §72-432. *R. Vol. 1*, pp. 129-142. Claimant filed a Motion for Reconsideration and Motion for Commission to Rehear Case Or In The Alternative To Consider Motion to Reconsider En Banc on November 20, 2012 (*R. Vol. 1*, pp. 143-155), and the Industrial Commission

issued its Order on Alternative Motions to Reconsider Or To Rehear Case En Banc on December 14, 2012, denying Claimant's motions. *R. Vol. 1*, pp. 166-168.

Following the first hearing, Claimant enrolled in a pharmacy technician certification program at Carrington College in early 2012. *2017 Tr.* p. 15, ll. 15-17, p. 16, ll. 3-14. He attended classes at Carrington for a month to a month-and-a-half, and then switched to a program at Milan Institute from September 2012 through May 2013. *2017 Tr.* p. 27, ll. 10-16, p. 29, ll. 5-8. Claimant successfully completed the pharmacy technician program in May of 2013. *2017 Hrg. Clmt. Ex. 8*; *2017 Tr.* p. 29, ll. 19-22. He completed an internship at Walgreens in June of 2013, and then he received a provisional license as a Pharmacy Technician. *2017 Tr.* p. 69, ll. 12-16.

In July of 2013, Claimant began work as a Pharmacy Technician for Terry Reilly at a wage of \$13.00 per hour, which then increased in time to \$13.80 per hour plus benefits. *2017 Tr.* p. 40, ll. 11-25. Claimant was able to work on a probationary basis, but he was terminated in July or August of 2015 because he did not successfully pass two (2) separate attempts at the national test that leads to certification for a permanent license. *2017 Tr.* p. 41, ll. 10-13, p. 69, ll. 1-7, p. 70, ll. 17-25, p. 71, ll. 1-17. Claimant worked briefly as a Pharmacy Technician at Medicap in August and September of 2015 at a wage of \$14.00 per hour. *2017 Tr.* p. 41, ll. 24-25, p. 42, ll. 1-14.

Claimant worked as an account manager selling business supplies, office furniture, and electronics for TigerDirect from September 28, 2015 to November 15, 2015. *2017 Tr.* p. 15, ll. 15-25, p. 43, ll. 1-22. He then worked as a "floater" teller for KeyBank at a wage

of \$11.75 per hour plus benefits, but he was terminated after 7 or 8 months due to a business-related mistake. *2017 Tr.* p. 45, ll. 2-13, p. 46, ll. 8-9.

On December 5, 2016, Claimant was hired by Albertson's Corporate Office as a third-party coordinator at a wage of \$15.87 per hour plus benefits. *2017 Tr.* p. 47, ll. 14-25, p. 48, ll. 1-16. His job duties involved assisting pharmacy technicians in working with third-party billing to get claims paid. *2017 Tr.* p. 73, ll. 17-25. Claimant was still employed for Albertson's at the time of the hearing in 2017.

A second hearing was conducted on February 22, 2017 on the issues of Claimant's entitlement to retraining reimbursement benefits, temporary disability benefits while in the period of retraining, permanent disability, and attorney fees. (*2017 Tr.*). The issue of retraining benefits was related only to Claimant's request for reimbursement of the Milan Institute program. *2017 Tr.* p. 30, ll. 15-19. The Commission issued its Findings of Fact, Conclusions of Law, and Order on August 25, 2017, finding Claimant failed to prove he is entitled to retraining or corresponding temporary total disability benefits under Idaho Code §72-450, failed to prove he is entitled to additional permanent disability benefits in excess of his 32% permanent impairment benefits previously paid, and failed to prove he is entitled to an award of attorney fees under Idaho Code §72-804. *R. Vol. 2*, pp. 195-217. Claimant filed a Motion for Reconsideration on September 13, 2017 (*R. Vol. 2*, pp. 218-221), and the Industrial Commission issued its Order on Claimant's Motion for Reconsideration on January 5, 2018, denying Claimant's Motion. *R. Vol. 2*, pp. 222-230.

II.

ISSUES PRESENTED ON APPEAL

The issues presented on appeal by Claimant/Appellant Bryan Oliveros include the following:

1. Whether the Commission erred as a matter of law in its interpretation of Idaho Code and precedent concerning Permanent Partial Impairment pursuant to Idaho Code §§72-422 and 424 and Permanent Disability benefits pursuant to Idaho Code §§72-423 and 425.
2. Whether the Commission erred as a matter of law in concluding that Claimant was not entitled to retraining benefits pursuant to Idaho Code §72-450.
3. Whether the Commission erred as a matter of law in concluding Claimant failed to prove he was entitled to Permanent Disability benefits in excess of the 32% whole person Permanent Partial Impairment benefits previously paid.
4. Whether the Claimant has timely appealed the Commission's 2012 Order denying additional medical benefits for prostheses pursuant to Idaho Code §72-432.
5. Whether the Commission erred as a matter of law in concluding Claimant failed to prove he was entitled to prostheses pursuant to Idaho Code §72-432.
6. Whether Claimant is entitled to attorney fees on appeal pursuant to I.A.R. 41.

Respondents also raise the additional issue of entitlement to attorney fees against Claimant/Appellant pursuant to Idaho Code §§12-121, I.R.C.P. 54(d) and 54(e), I.A.R. 41, and all other applicable Idaho state law.

III.

THE STANDARD OF REVIEW

The standard of review in an appeal from the Idaho Industrial Commission is governed by statute. This Court can only overturn an Industrial Commission decision under the following circumstances: (1) The Commission's findings of fact are not based on any substantial competent evidence; (2) The Commission acted without jurisdiction or in excess of its powers; (3) The findings of fact, order or award were procured by fraud; or (4) The findings of fact do not as a matter of law support the order or award. **Idaho Code §72-732.**

In reviewing an appeal from the Industrial Commission, the Court exercises free review over questions of law, but reviews questions of fact only to determine whether findings of the Commission are supported by substantial and competent evidence in the record. **Idaho Code §72-732; *Eacret v. Clearwater Forest Indus.***, 136 Idaho 733, 735, 40 P.3d 91, 93 (2002); ***Lethrud v. State***, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). The interpretation of a statute is a question of law over which this Court extends free review. ***Carrier v. Lake Pend Oreille School Dist. #84***, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006). Whether a claimant has an impairment and the degree of disability resulting from an industrial injury are questions of fact. ***Funes v. Aardema Dairy***, 150 Idaho 7, 10, 244 P.3d 151, 154 (2010). Evidence is "substantial and competent" if a reasonable mind might accept such evidence as adequate and sufficient to support a conclusion. ***Reiher v. American Fine Foods***, 126 Idaho 58, 60, 878 P.2d 757, 759 (1994). The Court will not disturb the Commission's findings on the weight and credibility of the evidence unless the

conclusions are clearly erroneous. *Shubert v. Macy's W., Inc.*, 158 Idaho 92, 98, 343 P.3d 1099, 1105 (2015). The Court will not re-weigh evidence or consider whether it would have reached a different conclusion from the evidence presented. *Funes*, 150 Idaho at 10.

IV.

ARGUMENT

The essence of Claimant's appeal of the Industrial Commission's 2017 Decision is that he disagrees with the Commission's determination that the claimed industrial accident resulted in a 25% permanent partial disability and that this disability is not a separate benefit payable in addition to Claimant's permanent partial impairment. Claimant further disagrees with the Commission's refusal to reimburse Claimant for training he obtained outside of the workers' compensation system. It is well established that the Commission is free to accept or reject expert opinions, and it did just that in this case. The Commission weighed the expert opinions as well as the medical evidence and arrived at its own factual determination as to the percentage of Claimant's disability. Pursuant to the statute and precedent, the Commission found the disability in this case did not exceed the permanent impairment. As the Commission's disability determination was supported by substantial and competent evidence, its decision should not be disturbed on appeal. Furthermore, the Commission properly found Claimant's that post-secondary education did not qualify as "retraining" within the meaning of the statute and that Claimant had not proven he was entitled to retraining. As such, the Commission's decision denying Claimant retraining benefits was supported by substantial and competent evidence, and the decision should not be disturbed on appeal.

A. The Industrial Commission’s determination of Claimant’s permanent disability pursuant to Idaho Code §72-435 is supported by substantial and competent evidence.

1. Applicable Law.

The medical appraisal of “permanent impairment” is defined by statute as the “anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation.” I.C. §72-422. The rating of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects claimants’ functional abilities. I.C. §72-424. The impairment rating is one component and not the exclusive factor to be considered by the Commission in determining a Claimant’s permanent partial disability. *Baldner v. Bennett’s Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

Permanent disability results when an injured worker’s ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be expected. I.C. §72-423. The evaluation of “permanent disability” under Idaho worker’s compensation law is the “appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors as provided in Section 72-430, Idaho Code.” I.C. §72-425 [Emphasis added]. A permanent disability rating takes into consideration medical and non-medical factors to include the nature of the physical disablement, disfigurement, the cumulative effect of multiple

injuries, the occupation of the employee, the age at the time of accident, the diminished ability of the injured employee to compete in an open labor market within a reasonable geographical area, and other factors the commission deems relevant. **I.C. §72-430(1)**.

Simply put, disability results when a physical impairment and other factors impact the ability of a worker to return to or find new employment. Disability takes into account the injured worker's prior wages and access to the labor market as compared to his post-injury income and ability to return to his employment or compete for jobs in the labor market. A rating is then calculated as a percentage of loss calculated based on a combination of medical and nonmedical factors. Impairment is the foundational factor that is included in a disability determination, and there is no basis in the statute to suggest that impairment and disability are separately payable. Under Idaho Code §72-425, the question then is whether factors justify an award of disability over and above (but inclusive of) impairment.

2. Permanent Impairment (PPI) is an essential component of Permanent Disability (PPD).

The Act does not support a separate award of permanent impairment and permanent disability in a case such as this involving disability less-than-total. Per the Act, and in practice, benefits paid under "permanent impairment" are permanent "disability" benefits and not payable as a separate benefit. There is no statute which creates a separate permanent impairment benefit. Absent permanent impairment, there can be no permanent disability. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 753, 769 P.2d 1122, 1125 (1989). Permanent impairment is the medical portion of the calculation of

disability considered in conjunction with the non-medical factors portion of the calculation to arrive at the computation of “permanent disability.” Thus, absent the permanent physical injury that qualifies for an impairment rating, there can be no calculation of disability. Impairment is disability, as opposed to a “benefit payable” under the Act. It is, if you will, a baseline analyses which can be added to by other factors if appropriate.

Claimant correctly points out that the Act and case law distinguishes between permanent impairment and permanent disability. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995); *Corgatelli v. Steel West Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014). Claimant asserts that per the decisions in *Corgatelli* and *Davis*, impairment and disability are separate classes of benefits, or separate awards, and thus separately payable. *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014); *Davis v. Hammack Management, Inc.*, 161 Idaho 791, 391 P.3d 1261 (2017). However, in this case (as in other cases), the Commission distinguished the *Corgatelli* and *Davis* decisions, finding impairment is a necessary medical component of disability but subsumed within disability and not a separately payable benefit as supported by this Court’s decision in *Mayer v. TPC Holdings, Inc.* and multiple Commission decisions, including *Dickinson v. Adams County. Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016); *Dickinson v. Adams County*, 2017 IIC 0007 (2017). How, then, is it possible to reconcile the *Corgatelli/Davis* decisions and the *Mayer/Dickinson* cases?

The *Corgatelli* decision boils down to the Court’s finding “there is no statutory basis [in Idaho Code §72-408] for the Commission to award [the employer] a credit for permanent physical impairment benefits previously paid [to the injured worker].”

Corgatelli, 157 Idaho at 292, 335 P.3d at 1155. The Court reasoned that nothing in Idaho Code §72-408 in calculating benefits for total and permanent disability recognizes a deduction or credit. The same rule was applied in the total and permanent disability case of *Davis v. Hammack, Inc.*, 161 Idaho 791, 391 P.3d 1261 (2017). The Court acknowledged that *Corgatelli* invalidated credits to employers in the context of total and permanent disability benefits, and thus the Court voided an Order by the Commission dismissing a claim pursuant to a settlement stipulation to resolve a claim for total and permanent disability benefits because it did not provide for a separate award of impairment above the total and permanent disability benefits. *Id.*

Subsequent to the *Corgatelli* decision, the Court and Industrial Commission have had multiple opportunities to analyze the impact of the decision and the interplay between impairment and disability. The statute distinguishes between disability that is total and less than total and permanent. As opposed to **Idaho Code §72-408** (Income benefits for total and permanent disability), **Idaho Code §§ 72-422** (Permanent impairment), **72-423** (Permanent disability), **72-425** (Permanent disability evaluation), and **72-427** (Permanent impairment evaluation not exclusive) specifically address the role of impairment in calculating disability, and thus the plain language of the statute and the clear legislative intent appears to clearly intend for impairment to be a component of disability.

Claimant's reliance upon *Corgatelli* and *Davis* in this case is misplaced as the decisions have been scrutinized and limited to the facts of the respective cases, and in particular, limited to cases involving total and permanent disability pursuant to Idaho Code §72-408. *See, Lableu v. Challenger Companies*, IC 2013-013166 (November 23, 2016);

Mayer v. TPC Holdings, Inc., 160 Idaho 223, 370 P.3d 738 (2016); *Dickinson v. Adams County*, 2017 IIC 0007 (2017). Upon close examination, the Court in *Davis* cited to *Corgatelli* only for the proposition that the Act does not provide a “credit” for impairment previously paid, but it did not revisit the actual holding in *Corgatelli* or the issues raised in this case. But what is clear in the cases interpreting and analyzing *Corgatelli*, impairment is only payable as a component of disability less-than-total under I.C. §72-438, and not at all in the case of total and permanent disability under I.C. §72-408. *Dickinson* at p. 8. To summarize, the Court in *Mayer* found an “impairment award” characterized as such, is not payable as a separate benefit under the Act. *Mayer*, 160 Idaho at 227, 370 P.3d at 742. An injured worker must suffer impairment, *i.e.*, a permanent anatomic injury, in order to implicate entitlement to disability, and in a less-than-total case, Claimant’s impairment may represent his entire disability or only a part of his disability. Regardless, for purposes of calculating benefits payable to Claimant, impairment is only relevant because it is disability. *Id.*; *See also, Dickinson* at p. 10.

The Commission’s decision that Claimant is not entitled to a separate disability payment from the permanent impairment rating previously paid is entirely consistent with the statutory scheme and cases involving disability less-than-total, such as *Mayer*. The question in this case, then, is whether Claimant has suffered a permanent disability greater than permanent impairment.

3. The Commission’s determination that Claimant suffered permanent partial disability (PPD) of 25% is supported by substantial and competent evidence.

If the Industrial Commission’s findings are supported by substantial and competent evidence, it does not matter that the Court would have reached a different conclusion in its own evaluation of the evidence – the Court must affirm the decision. *Brooks v. Standard Fire Insurance Co.*, 117 Idaho 1066, 1070, 793 P.2d 1239, 1242 (1990). The Industrial Commission is the fact-finder, and as such it is up to the Commission to evaluate the evidence and issue its findings based on that evidence, and said findings should not be disturbed on appeal unless clearly erroneous. *Id.* [additional citations omitted]; *See also, Funes*, 150 Idaho at 10.

Under the statute, a permanent partial disability rating is a measure of the injured worker’s “present and probable future ability to engage in gainful activity.” **Idaho Code §72-425**. The test for determining “disability” is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). The opinion of an expert is not binding on the trial court, and, as long as it does not act arbitrarily, the trial court may reject expert testimony even when it is uncontradicted. *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). Expert opinions are advisory only. *Clark v. Truss*, 142 Idaho 404, 408, 128 P.3d 941, 945 (2006). The Commission considers all relevant medical and nonmedical factors and evaluates the purely advisory opinions of vocational experts. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

The crux of Claimant's challenge of the disability assessment is his perception that Defendants have unfairly declined to pay for post-secondary education and then enjoyed a reduced disability (PPD) rating as a result of that education. To overcome this perceived inequity, Claimant asserts disability should be determined at the time of Claimant's medical stability (MMI). At the time of MMI, Claimant was still in high school. The Commission reasoned that "[t]o judge [Claimant's] ability to obtain and hold employment at a point in time when he was not seeking to enter the workforce on a career basis, makes no legal sense." *R. Vol. 2*, p. 16, ¶ 46. Thus, the Commission found the proper time to assess Claimant's disability was at the time of hearing per *Brown v. The Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

Turning to the vocational expert assessment, the mistaken assertion raised repeatedly by Claimant before the Commission and now on appeal is that his un rebutted vocational expert opinion should somehow be the final word on disability, and the Commission's failure to accept his expert's disability assessment is arbitrary and clearly erroneous. On the contrary, the Commission analyzed the expert's assessments in great detail in the decision, and ultimately found that such did not provide an accurate measure of the injured worker's "present and probable future ability to engage in gainful activity." The Commission found the expert's opinions conclusory and of little benefit in evaluating Claimant's "present and probable future ability to engage in gainful activity." The first assessment in 2009 was based upon a prospective labor market because Claimant was too young and inexperienced to have much of a pre-injury labor market, and because he could have (theoretically) decided at some point in the future to pursue skilled occupations. The

Commission noted Mr. Crum did not provide any evidence regarding job categories which Claimant was precluded from as a result of his industrial injuries. *R. Vol. 1*, p. 210-211, ¶ 47. Furthermore, the assessment was flawed in having included heavy manual labor and other occupations that Claimant clearly had no intention on a pre-injury basis of pursuing. The Commission also pointed out that the expert's first assessment in 2009 had turned out to be incorrect, when Claimant had demonstrated he had consistently been able to find employment above minimum wage even before additional education, and that Claimant's injuries did not severely impact his employment options as originally forecast. *R. Vol. 1*, p. 211, ¶ 48. The Commission also suggested Mr. Crum's analysis significantly undervalued Claimant's transferable skills, such fluency in Spanish, math skills, and experience with computer programs.

The Commission then provided a detailed examination of the totality of the evidence, including Claimant's pre- and post-employment history, his pre- and post-injury labor market, and his medical and non-medical factors which led to its own determination that at the time of the hearing, Claimant had not demonstrated a loss of more than 30% of his applicable labor market, and no loss of earning capacity. The Commission reasoned that in reality, Claimant, despite his physical loss, demonstrated the ability to return to the labor market and obtain and maintain employment. He completed high school and obtained employment that significantly exceeded his time-of-injury wage despite his lack of training and skills. Furthermore, Claimant and his own expert admitted that the post-secondary education did very little to reduce Claimant's loss of labor market access or his ultimate disability. As such, the Commission found Claimant suffered a 25% non-medical

permanent disability as a result of his claimed injuries. Claimant did not demonstrate that he suffered a disability in excess of his impairment.

B. The Commission’s decision denying retraining benefits pursuant to Idaho Code §72-450 is supported by substantial and competent evidence.

In addition to disability benefits, Claimant seeks reimbursement for post-secondary education to obtain his Pharmacy Technician certification through the Milan Institute in 2012. Claimant asserts his post-injury education is “retraining,” and as such he is entitled to reimbursement for the program and time loss benefits. Although Claimant expressed interest in “retraining” in 2009 before he was out of high school, Claimant neither pursued retraining nor identified a retraining program, but rather, he obtained employment and pursued a series of post-secondary education programs over the next three years. Claimant’s educational pursuits do not constitute “retraining” under the statute, and were not necessary to restore his earning capacity.

Idaho Code §72-450 provides for retraining:

Following a hearing upon a motion of the employer, the employee, or the commission, if the commission deems a permanently disabled employee, after the period of recovery, is receptive to and **in need of retraining in another field, skill or vocation in order to restore his earning capacity**, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case may be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty (52) weeks. An employer and employee may mutually agree to a retraining program without the necessity of a hearing before the commission. [Emphasis added].

There is no statutory obligation to pay retraining, and by the plain language of the Statute, the Act provides for retraining up to 52 weeks only after application and hearing, and extension of up to an additional 52 weeks following application and hearing. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990). There is no provision in the Act for retroactive reimbursement for retraining.

Claimant's claim for retraining benefits fails based on the plain language of the statute. While the Commission pointed out that Claimant clearly and undeniably was permanently disabled, Claimant did not otherwise meet all of the statutory criteria for an award of retraining benefits. *R. Vol. 2*, p. 202, ¶ 19. The Commission first pointed out that Claimant was not precluded from returning to his date-of-injury "field, skill, or vocation," which at the time was fast food and landscaping. *R. Vol. 2*, p.202, ¶ 20. Both before and after the accident Claimant was capable of returning to these vocations, and indeed did return to fast food work which was within his physical restrictions. The Commission then noted that before the accident Claimant had aspirations to attend college after high school, and his attempts at various post-secondary programs "hardly fits the common definition of 'retraining into a different field, skill, or vocation' per the statute." *Id.* Finally, the Commission addressed the clear stated purpose of retraining, which is not to increase wage earning capacity, but, rather, "to restore his earning capacity." *R. Vol. 2*, p. 202-203, ¶ 21.

At the time of the injury, Claimant was earning minimum wage. Although his limited work history itself does not mean he had no loss of access to the labor market due to his injuries, by the same token it does not mean that he had unlimited availability of the

labor market absent his injuries. The proffered vocational expert analysis regarding retraining programs in 2009 was speculative.

The pharmacy tech program did not significantly or even modestly increase the job markets available to him. The combination of his multiple post-secondary educational programs arguably provided him with experience in clerical customer-service-type work, but so did his continued work in customer service jobs such as the bank teller position.

As for the timing of his retraining, Claimant's one-time request for retraining in 2009, before he was out of high school and before he was medically stable, did not entitle him to seek retraining (or in his case "training") outside of the workers' compensation system simply because he did not get a response from the Surety. In fact, the Industrial Commission Rehabilitation Division was forced to close his file in October of 2009, because rehabilitation was not an option while Claimant was still in high school. The issue was premature. However, at the Surety's request, the case was held open for the school year. *2011 Hrg. Def. Ex. 9*, pp. 118-124.

Claimant did not seek application and hearing on the issue of retraining in 2009, or even in 2011 at the first hearing of this matter. Thereafter, Claimant did not request assistance from the ICRD or contact the Surety to discuss retraining options. He actually completed his GED at Boise State and attended Lewis and Clark and CWI before the 2011 hearing, but he did not seek reimbursement for these programs. He likewise did not seek reimbursement for the Carrington program. In reality, he demonstrated from 2009 through 2011 that retraining was not necessary to replace his pre-injury earnings or even his access to the labor market.

Now, eight years after the first vocational assessment and the speculative assessment that Claimant could benefit from some type of retraining, and five years after he actually completed the Pharmacy Tech program at Milan Institute, Claimant seeks reimbursement for the one program he completed. But even with his post-secondary training, he is not working as a pharmacy technician or in a pharmacy utilizing the training he obtained in the Milan Institute training program. And even with the training, his own expert found it minimally reduced his disability.

Notwithstanding Claimant's failure to satisfy the statutory requirements of Idaho Code §72-450, the Commission examined several arguments in favor of allowing reimbursement for Claimant's post-secondary education. *R. Vol. 2*, p. 203-204, ¶¶ 23-26. The Commission and Defendants credited Claimant for his achievements after the accident, the Commission weighed the respective arguments of the parties and found Claimant failed to prove he was entitled to retraining benefits for his post-secondary education. The role of worker's compensation is to take the worker as we find them before the accident – medically and vocationally – and return them as close to that position as possible following an industrial accident. As we cannot speculate as to whether Claimant would have a reduced likelihood of injury or a reduced impairment but for some preexisting physical issue, by the same token we cannot speculate that someone in a temporary job situation or with no job skills or training is entitled to an inflated presumption as to what his "baseline" labor market "would be" or "should be" if he graduated, or got training, or completed an internship... without the industrial injury. We can only assess where he was at the time of his injury, and where he ends up at the time of

MMI and/or hearing. In this case, Claimant did not have an established “field, skill, or occupation.” He had aspirations beyond high school, but the fact remains that he did not require retraining out of his “field, skill, or vocation,” into a different “field, skill or vocation,” and he did not require retraining to restore his earning capacity. He was released to perform his time-of-injury job as well as his fast food work. The Commission properly found there simply was no plausible proof that Claimant would have pursued any specific field, skill, or occupation once he graduated from high school, that his return to employment was not significantly impacted by his industrial injuries; and, his multiple attempts and ultimate success in one post-secondary program was not directed by his injuries and was not pursued as an alternative to what he would have done but for his injuries. Accordingly, the Commission’s decision that Claimant failed to prove he was entitled to retraining benefits was supported by substantial and competent evidence and should not be disturbed on appeal.

C. The Commission’s decision that Claimant is not entitled to prosthetics under Idaho Code §72-432 is supported by substantial and competent evidence, and the appeal of this issue is not timely.

Even if the issue of Claimant’s entitlement to additional medical benefits is timely, which Respondents dispute, Claimant essentially offers no substantial legal argument to support the appeal relating to Claimant’s request for prosthetics, asking this Court to second-guess the weight and credibility the Commission gave to the respective experts in 2011 and 2012. Defendants/Respondents presented the expert medical opinion of Claimant’s treating orthopedic hand surgeon, Dr. Dominic Gross. Claimant presented the

testimony of Clinic Director of Advanced Arm Dynamics, MacJulian Lang, CPO. In its detailed Findings of Facts, the Commission outlined the factual and legal basis for its decision. The weight and credibility of the proffered witnesses and the testimony of Claimant was considered by the Commission. As such, the Commission's decision is supported by substantial and competent evidence that (1) Claimant provided insufficient evidence to prove finger prostheses was reasonable, and (2) that Defendants were not obligated to provide the medical care recommended by a non-medical expert witness.

1. The Commission's November 2, 2012 Decision on this Issue was final and conclusive pursuant to Idaho Code §72-718.

Claimant now seeks an appeal of all issues relevant to his entitlement to worker's compensation benefits, including all matters adjudicated in 2012 and 2017. The plain language of **Idaho Code §72-718** provides:

A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decision may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

Therefore, a decision of the Commission is final upon denial of a motion for rehearing or reconsideration, and such may be appealed to the Idaho Supreme Court.

Interpretation of the statute begins with the plain language of the statute:

Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. Only

where the language is ambiguous will this Court look to results of construction for guidance and consider the reasonableness of proposed interpretations. The objective of statutory interpretations is to derive the intent of the legislative body that adopted the act.

Melton v. Alt, 163 Idaho 158, 16-163, 408 P.3d 913, 917-918 (2018)(citing *State v. Dunlap*, 155 Idaho 345, 361, 313 P.3d 1, 17-18 (2013)). The language of the statute is ambiguous only where reasonable minds might differ or be uncertain as to the meaning of the statute. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 582, 416 P.3d 951, 954 (2018). Statutory language is not ambiguous “merely because the parties present differing interpretations to the court.” *Stonebrook Const., LLC v. Chase Home Fin.*, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012) (citation omitted)(quoting *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty*, 132 Idaho 551, 557, 976 P.2d 477, 483).

There is nothing ambiguous in the plain language of I.C. §72-718 or in the statute as a whole to suggest a Commission “decision” is something more than “a judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.” Black’s Law Dictionary 436 (8th Ed. 2004). There is also no support in statute of practice for a conclusion that a Commission decision is not final until all issues are resolved between the parties. To the contrary, a decision as to “matters adjudicated” is appealable to the Idaho Supreme Court within the time constraints dictated per I.C. § 72-718.

In this case, the parties presented oral and documentary evidence at hearing on December 7, 2011 on the limited issue of whether Claimant was entitled to a prosthetic appliance and related medical benefits for his right hand finger amputations. *R. Vol. 1*, p. 6.

The parties took post-hearing depositions and submitted a flurry of post-hearing motions and the parties' respective briefs. *R. Vol. 1*, pp. 29-124. The Commissioners issued their Findings of Fact, Conclusions of Law, and Order on November 2, 2012, rendering its final decision that Claimant's suitability for prostheses was not reasonable and Defendants were not responsible to provide benefits for the prosthetic device. *R. Vol. 1*, p. 129. Claimant thereafter filed motions for reconsideration and rehearing. *R. Vol. 1*, pp. 143-168. Once the Commission denied the motions on December 14, 2012 (*R. Vol. 1*, p. 160.), the decision and the orders became final as to those matters adjudicated.

No appeal was filed in 2012 following the November, 2, 2012 Decision and December 14, 2012 order. Rather, more than four years later, a second hearing was conducted on February 22, 2017 on separate issues, including Claimant's entitlement to retraining reimbursement benefits, temporary disability benefits while in the period of retraining, permanent disability, and attorney fees. Defendants do not dispute that Claimant timely appealed the 2017 Decision. However, Defendants respectfully submit the 2012 Decision was final and conclusive as to the prosthetics issue, and therefore, Claimant's appeal is not timely.

It is hard to argue that the November 2, 2012 order and December 14, 2014 order does not represent a "decision" of the Commission on the issues noticed for hearing, using the plain, usual, and ordinary meaning of the term "decision." Claimant has not argued that the Commission's 2012 Decision was not final and conclusive, because there were additional unresolved issues relevant to his entitlement to worker's compensation benefits. Claimant did not raise the issue of Claimant's entitlement to prosthetics or even additional

medical treatment or benefits at the 2017 hearing or in the post-hearing briefing. However, in order for this Court to consider the prosthetics issue, the Commission's Decision in 2012 and the Order denying Claimant's motions for reconsideration and rehearing must be treated as "interlocutory" orders, subject to review and revision by the Commission at any time. Such a view is not found or supported in statute.

As the November 2, 2012 order and December 14, 2014 order are "decisions" of the Commission, the question then is whether said decisions are "final." By operation of the plain language of the statute, the 2012 Decision of the Commission was final upon the filing of the decision in the offices of the Commission and the denial of Claimant's motion for rehearing and reconsideration. I.C. §72-718. To define "decision" to mean an order of the Commission which resolves not less than all the issues in a case could be construed in a way that would make it possible to ignore the finality provisions of the statute in perpetuity, as an injured worker is entitled to future medical benefits as long as said treatment is related to his industrial injuries. **I.C. §72-432(1).**

In this case there is no change in Claimant's medical condition, and no evidence submitted beyond 2012 in support of Claimant's renewed request for the hand prosthesis. There were no unresolved issues relating to Claimant's entitlement to prosthetic fingers that were addressed in the 2017 hearing. The issue of Claimant's entitlement to additional medical benefits pursuant to Idaho Code §72-432 was not raised at hearing in 2017, the post-hearing briefing, or in the Commission's 2017 Decision and Order. The clear and unambiguous language in Idaho Code §72-718 instructs us to conclude that the Commission's 2012 Decision was final and conclusive to the issue of Claimant's

entitlement to prosthetics under Idaho Code §72-432. Accordingly, the Commission's 2012 Decision should not be disturbed on appeal.

2. Medical testimony supports the Commission's Determination that prostheses were/are not medically reasonable or necessary.

The Act provides for medical treatment and benefits pursuant as follows:

(1) The employer shall provide for an injured employee such **reasonable** medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, **as may be 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 the accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

I.C. §72-432(1) and (2)[emphasis added].

By the plain language of the statute, Idaho Code §72-432 requires (1) reasonable medical care as reasonably required by a "physician," or (2) "reasonable care" "needed" immediately after the injury and a reasonable time thereafter. The term "physician" is defined by Idaho Code §72-102(25):

"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 statute of this state and as authorized by their licenses. (Emphasis added).

The Court has held on numerous occasions that a claimant must support his worker's compensation claim with medical testimony that has a reasonable degree of medical probability. *Hope v. Industrial Special Indemnity Fund*, 157 Idaho 567, 572, 338 P.3d 546, 551 (2014); *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980).

In this case, Claimant supports his claim for a medical prosthetic solely on the "expert" recommendation of the prosthetic company C.P.O., Mr. Lang. Although Claimant lauds the qualifications of Mr. Lang, he is not a licensed prosthetist or orthotist, and there is no statutory provision that authorizes him to prescribe treatment within the meaning of Idaho Code §72-102(25). Lang Dep. pp. 5-7.

As Mr. Lang is not a "physician", the inquiry turns to whether the prosthetic devices recommended by Mr. Lang are "reasonable care" "needed" in connection with Claimant's industrial injury. As convinced as Counsel and Claimant are that the suggested prosthetics were/are appropriate for Claimant's condition, the fact remains that Claimant did not present any medical testimony that demonstrated with a reasonable degree of medical probability that the prosthetic fingers were/are medically reasonable and necessary.

In short, the only credible medical evidence on the ultimate question of reasonable and necessary medical treatment is that of Dr. Gross. However, the Commission weighed Claimant's cosmetic concerns, as well as the evidence presented by Claimant's prosthetics expert.

3. As the tryer of fact, the Commission considered the weight and credibility of the evidence presented and supported is decision denying prostheses with substantial and competent evidence.

The weight and credibility of witnesses is a factual determination, and in its role as fact-finder the Commission weighed the evidence presented by the parties in its consideration of the medical and cosmetic purposes the prosthetic fingers would serve. It then provided a thorough analysis of the substantial and competent evidence in support of its decision:

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 for this reason alone, they might be suitable for an individual to whom appearance is important.

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 Respondent, 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 [sic] 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. (Emphasis added).

R. Vol. 1, pp. 139-140, ¶¶ 23-24.

Claimant's treating orthopedic hand surgeon, Dr. Gross, responded to repeated inquiries by Claimant's attorney and testified as to the basis for his opinions, and he unequivocally opined Claimant's multiple amputations made him a poor candidate for the prostheses. *2017 Hrg. Def. Ex. 4*, pp. 79-80. The Commission also pointed out Dr. Gross testified that he understood and would support Claimant's desire to try the prosthetic fingers, but medically the prosthetics were not medically necessary and were purely cosmetic. Furthermore, he testified the prosthetics in question would not improve and might actually impede Claimant's residual hand function. *R. Vol. 1*, pp. 139-140, ¶ 23. The Commission found the medical opinions of Dr. Gross more persuasive, and the medical factors more important than the nonmedical factors considered.

The question under Idaho law is whether the medical device is medically and reasonably necessary. In this case, Claimant did not provide medical testimony to support a claim that the proposed prostheses are medically and reasonably necessary. The Commission weighed all of the evidence presented, and in the end it found the testimony of Claimant's treating physician, a respected orthopedic hand surgeon, to be more

persuasive. The Commission looked at (1) the residual function of Claimant's hand and the remaining digits; (2) the potential improvement of function of the hand and digits with the proposed prostheses; (3) Dr. Gross' prior experience with patients with multiple finger amputations; (4) Mr. Lang's certification by the American Board for Certification in Prosthetics and Orthotics, and his experience in evaluating individuals for prostheses; (5) the cosmetic purpose of restoring the hand to a more natural appearance and Claimant's desire for the same; and (6) the potential psychological impact on Claimant and his ability to return to gainful employment. Weighing all of these considerations and the evidence as a whole, the Commission concluded the medical factors to be more important than whatever cosmetic advantage the prostheses may offer, and thus the recommended prostheses were not reasonable. Accordingly, the Commission's decision was supported by substantial and competent evidence and should not be disturbed on appeal.

V.

ATTORNEY FEES ON APPEAL

Respondents request attorney fees and costs associated with this appeal pursuant to Idaho Code §§12-121, I.R.C.P. 54(d) and 54(e), I.A.R. 41, and all other applicable Idaho state law.

As argued in this Brief, the Claimant is simply asking this court to rehash factual determinations made by the Idaho Industrial Commission in both 2012 and 2017. The issues raised by Claimant are not unique, or of a first impression for decision by this Court. Claimant's proffered complaints against the factual determinations and the procedural actions of the Industrial Commission are without merit. Specifically, Claimant's

complaints about the Industrial Commission's assignment of disability less than total and permanent merely reiterates the same facts and arguments considered and weighed by the Industrial Commission. Moreover, the question of the degree of disability is a question of fact, not a question of law that is permissibly reviewable on appeal. Pursuant to the provisions of I.A.R. 41(a), the Respondents in this matter make application for an award of attorney fees.

VI.

CONCLUSION

Claimant suffered a traumatic, devastating injury in the course and scope of his employment, and as such he received sure and certain relief through the worker's compensation system in the form of medical benefits, time loss, and permanent impairment. Once he was medically stable, he completed his GED and he returned to gainful employment at a wage that significantly exceeded his date-of-injury wage. He, like most other young men his age, eventually desired a more challenging and rewarding career, and a year after he was medically stable he sought education to make that possible. He made multiple attempts at college and ultimately succeeded in completing a pharmacy technician program at Milan Institute in 2012.

Although a hearing was conducted in 2011, Claimant did not seek retraining benefits at that time. Pursuant to a stipulation by the parties, the issues before the Commission in 2011 were limited to Claimant's entitlement to prostheses. Although Claimant did timely request reconsideration and rehearing, he did not appeal the Commission's 2012 Decision.

The retraining issue did not come before the Commission until 2017 when Claimant sought retroactive reimbursement for the Milan program as “retraining benefits.” In addition, he asked the Commission to pay disability benefits exclusive of and in addition to permanent impairment.

As argued herein and supported by the evidence as a whole in this matter, the 2012 Decision of the Idaho Industrial Commission was final and conclusive as to the issues adjudicated, and thus Claimant’s appeal is not timely and the decision should not be disturbed on appeal. Further, Defendants assert the Industrial Commission’s 2012 Decision that Claimant was not entitled to prosthetics Under Idaho Code §72-432 was/is supported by substantial and competent evidence and should not be disturbed on appeal. Finally, the Industrial Commission’s 2017 Decision regarding Claimant’s impairment, disability, and retraining benefits was supported by substantial and competent evidence and should not be disturbed on appeal.

RESPECTFULLY SUBMITTED this 16th day of August, 2018.

BOWEN & BAILEY, LLP



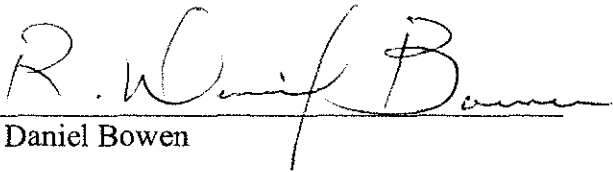
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of August, 2018, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

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