



working for Employer. He sustained a serious facial injury resulting in a 95% loss of vision in his right eye and depth perception problems that limit his future ability in seeking other employment. He still has pain and wants to ensure his ability to receive future medical treatment and corresponding benefits including temporary disability, impairment, and permanent disability.

Defendants assert that permanent disability is the sole issue to be determined and that Claimant is not entitled to disability in excess of impairment. He has returned to his time-of-injury job earning more money per hour than he did pre-injury. Employer has no concerns or reservations about Claimant's continued employment because he is an excellent employee who can do everything now that he did before the accident. Defendants paid a 42% whole person PPI already; and, Dr. Barbuto, who assigned the PPI rating, stated Claimant's actual permanent disability is much less than his impairment. Defendants have paid all temporary disability and medical care due Claimant.

### **EVIDENCE CONSIDERED**

The record in the instant case consists of the following:

1. The hearing testimony of Claimant and Gary Peterson;
2. Claimant's Exhibits A through G; and
3. Defendants' Exhibits A through H.

After considering the record and arguments of the parties, the Referee submits the following Findings of Fact, Conclusions of Law, and Recommendation for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant began working for Employer in November 1995 as a laborer. Employer is a construction company that builds thin-shelled monolithic domes throughout the world.

2. Claimant sustained significant facial injuries working for Employer in Mexico on August 29, 1998. While being lifted in a basket by a crane, Claimant was suddenly thrown down into the basket striking his face. He incurred multiple fractures to the right face and orbit. He also suffered nerve damage and became almost totally blind in his right eye. He received initial medical care, including three surgeries, in Mexico before he returned to the United States.

3. On December 2, 1998, eye surgeon Branson Call, M.D., examined Claimant's right eye and described mechanical lagophthalmos, significant corneal exposure, and markedly decreased vision. He recommended and performed surgery to protect the cornea, a levator recession with placement of a gold weight, later that month. He recommended Claimant not return to work until his vision improved, which could take a couple months or longer.

4. On December 10, 1998, Claimant saw W. Bradford Rockwell, M.D., a plastic and reconstructive surgeon at the University of Utah Hospital. Nerve conduction studies done that day showed the main branches of the facial nerves to be intact. Dr. Rockwell felt Claimant's best option would be to wait and see if some of the problems resolved on their own. He noted the possibility of future surgery and requested a follow-up in six months.

5. On March 24, 1999, a panel consisting of neurologist Gerald Mores, M.D., and orthopedist Richard Knoebel, M.D., examined Claimant at Defendants' request. The panel found Claimant medically stable and provided a PPI rating, not including a visual loss impairment that an ophthalmologist would need to provide, of 22% of the whole person. Regarding return to work, the panel physicians stated Claimant could return to modified work for Employer and the only problem they would have would be Claimant returning to his former work, which they felt would require good binocular vision, especially at heights. They concluded Claimant needed no further medical treatment, except as recommended by Dr. Call.

6. On April 9, 1999, Dr. Call described continuing problems with corneal exposure and pain exacerbated by dust in Claimant's workplace. At Dr. Call's recommendation, Claimant underwent further eyelid and orbital surgery on April 26, 1999. Dr. Call released him to work on May 10, 1999, for four hours per day, increasing each week to full-time work within four weeks.

7. Claimant returned to Dr. Rockwell on June 17 and September 23, 1999. He still had decreased right facial nerve function that had not improved. Dr. Rockwell opined the motion of Claimant's right cheek could not be improved, but he recommended excision of a right cheek scar that had adhered to the underlying, non-functioning muscles. This procedure was accomplished on October 1, 1999, and Claimant was released to work one week later.

8. On December 9, 1999, Claimant underwent an open tarsorrhaphy performed by Dr. Call. On January 13, 2000, Dr. Call wrote in his chart notes that he recommended no further eye or orbital surgery and Claimant could return to all jobs that do not require depth perception. On February 28, 2000, Dr. Call provided an impairment rating of 24% of the visual system, which translated into a 23% whole person impairment. He based the impairment on a 95% impairment of the right eye, and a 0% impairment of the left eye.

9. On November 28, 2000, neurologist John Barbuto, M.D., examined Claimant at Defendants' request. Dr. Barbuto described Claimant's right face as sunken and flattened with an ongoing twitch of the right upper lip. He recorded complaints including headaches that increased with fatigue, sensitivity in the right cheek, speech problems, difficulty closing the right side of the mouth, drooling from the right side of the mouth, and a right eye that was essentially blind. Dr. Barbuto concluded some additional treatment might help the facial pain and further work on the infraorbital nerve might also be indicated, "although ultimately the best

treatment for pain in a situation like this might be to resolve the impairment issues and let [Claimant] move on with his life. Since he is back to work, and has been working consistently since July of 1999, I do think it is appropriate to consider him at MMI and to draw this case to a close.” Dr. Barbuto provided a 42% whole person PPI rating (24% for loss of right eye vision; 7.5% for facial disfigurement; 14% for cranial nerve V function; and, 4% for unilateral facial weakness – combined using the AMA Guides’ Combined Values Chart). Defendants have paid this impairment. Claimant does not dispute the rating.

10. In his report of December 11, 2000, Dr. Barbuto discussed the relationship between permanent impairment and disability in a general sense, and specifically as he saw their application to Claimant’s situation:

Using the guides in a technically correct fashion, this would be an impairment rating, as I see it, from the defects he is experiencing. . . . [A] 42% whole person impairment may seem excessive for his actual level of function. It is notable that he is back to work and his ability to work did not seem to reflect a 42% impairment. However, in rendering impairment ratings, we are not asked to make the transition between technical impairment ratings and actual function {disability}. Clearly, his disability is much less than his impairment. Yet, we are expected to render impairments based on structural damage, even if this is not something which would directly effect [*sic*] the patient’s ability to work. In some situations, impairments underestimate the degree of disability. {For example, a concert pianist who loses [*sic*] one finger}. In this particular case, the impairment overstates the degree of disability.

11. In late 2001, Claimant began seeing physiatrist Nancy Greenwald, M.D., for periorbital pain and TMJ issues. Dr. Greenwald prescribed physical therapy and medications and referred Claimant to Russell Griffiths, M.D., a plastic and reconstructive surgeon.

12. Dr. Griffiths examined Claimant and felt additional surgery was warranted. He recommended: 1) Right orbital exploration with removal of silicone sheathing from the orbital floor; 2) Costal cartilage graft, right orbit, for enophthalmos correction; 3) Removal of hardware, right face and malar eminence; 4) Facial composite flap, right face, to correct facial assymetry;

and, 5) Septal rhinoplasty. He performed the procedures on July 30, 2002. Prior to surgery, Dr. Griffiths explained to Claimant that the surgery would not be able to return him to a normal state and he will always have some deformity.

13. At hearing, the Referee observed Claimant's continued facial deformity. He has mild disfigurement including a prominent scar on his right cheek and an asymmetry of his eyes. In addition, Claimant testified he has ongoing pain over his right eye and essentially cannot see out of his right eye. According to Claimant, this affects his ability to work because "many times I hit myself. I crash with things that I can't see in this eye; and I have to be very careful because I have to watch it from my other eye, too." He also described an inability to chew on the right side and difficulty breathing through his nose.

14. Employer's executive vice president/human resources director testified at hearing and described in detail the work Claimant does for Employer. He described Claimant as an excellent worker who is certified and trained to do everything related to the construction of a dome: "He has the ability to start at the bottom ... and do everything in or on the dome." Employer has no reservations about Claimant's continued employment, which is going into its 11<sup>th</sup> year. Claimant currently earns \$14.00 per hour working for Employer, and earned \$11.00 per hour on the date of the accident.

#### **DISCUSSION AND FURTHER FINDINGS**

15. **TPD/TTD Benefits; PPI Benefits; and Medical Care.** Claimant has presented no evidence of temporary disability, permanent partial impairment, or medical benefits that are currently in dispute or that Defendants failed to pay. At hearing, Claimant explained his concerns in this regard as relating more to *future* benefits that might arise from additional medical procedures. He asserted there is a "strong possibility" these issues will come up because

of the extent of his injuries. Claimant's comments resemble a request for retention of jurisdiction beyond the statute of limitations. However, the parties did not identify that issue as one to be addressed at hearing and, even if they had, the record fails to show a basis for retention of jurisdiction. Claimant last received medical treatment in 2002, and there are no apparent recommendations for future treatment. Medical benefits themselves would not be precluded by any statute of limitations. Claimant is not presently entitled to additional TPD/TTD, PPI, or medical benefits.

16. **Disability in excess of impairment.** The burden of proof is on Claimant to prove the existence of any disability in excess of impairment. Seese v. Ideal of Idaho, Inc., 110 Idaho 32, 714 P.2d 1 (1986). The test for such determination is not whether Claimant is able to work at some employment, but whether the physical impairment, taken in conjunction with non-medical factors, has reduced Claimant's capacity for gainful activity.

17. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no functional or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the Claimant'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 non-medical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disability, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation

of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographic area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

18. The test for determining whether a claimant has suffered a permanent disability greater than impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful activity.” Bennett v. Clark Hereford Ranch, 106 Idaho 438, 440-441, 680 P.2d 539, 541-542 (1984). In sum, the focus of a determination of permanent disability is on a claimant’s ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

19. Claimant was 41 years old at the time of hearing. He will likely remain in the labor force for at least 20 more years and may need to compete openly for work. In the ten years prior to working for Employer, Claimant earned \$4.25 - \$6.00 per hour as a farm worker. He completed the 11<sup>th</sup> grade in Mexico and speaks primarily Spanish. Per his records, Dr. Call released Claimant to return to all jobs that *do not require depth perception*. Dr. Moress, in his job site evaluation, indicated it was unlikely Claimant would be physically capable of returning to the job duties of general construction worker (his pre-injury job) due to vision loss. Drs. Moress and Knoebel expressed concern with Claimant returning to his pre-injury job because of visual difficulties, especially when working at heights.

20. Claimant understandably worries about the future. However, Employer’s testimony that Claimant’s employment is permanent and expected to continue indefinitely is credible. Even if Claimant could no longer work in dome-building, Employer has other work including traditional house construction, a business that constructs steel buildings, and work

at “the yard.”

21. Although Claimant has returned to his pre-injury job, it has not been without difficulty or incident. He described hitting himself with, or crashing into, things he cannot see. Dr. Greenwald in November 2001 described “a new incision or laceration on his forehead from a spray nozzle hitting him in the forehead” which required sutures. Dr. Barbuto’s notes indicated Claimant is cautious and worried at work for fear of losing his other eye. He has headaches around his right eye and in the orbit and “[m]ost of the time he can continue to work because he has to keep going but he will rest when he can.” Nonetheless, he still works at heights while spraying foam. Co-workers assist him in gauging how thick the foam is that he is spraying. Claimant’s testimony indicates he still operates heavy construction equipment including a backhoe and skyhook.

22. Claimant failed to establish that he sustained disability in excess of his 42% whole person impairment. He has worked continuously for Employer going on eleven years, eight of which were after the industrial accident. It is not disputed that he performs most, if not all, the job duties he did prior to the accident, works significant overtime, and earns more now than he did at the time of the accident. Although he receives some minimal help at work (e.g., sometimes his co-workers help him measure the thickness of foam he has sprayed), it is clear Employer is not simply keeping him employed out of sympathy. Claimant has valuable skills in dome-building and construction generally. Employer is pleased with his work and has no concerns about continued employment. Claimant is pleased with his job and has no intentions of working elsewhere.

23. Claimant has received an appropriate PPI rating which Defendants have paid. Claimant failed to show he sustained permanent disability in excess of that rating.

**CONCLUSIONS OF LAW**

- 1. Claimant is not presently entitled to additional TPD/TTD, PPI, or medical benefits.
- 2. Claimant is not entitled to disability in excess of impairment.

**RECOMMENDATION**

The Referee recommends the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 8<sup>TH</sup> day of March, 2006.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Douglas A. Donohue, Referee

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>TH</sup> day of MARCH , 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Raymundo G. Peña  
P.O. Box 676  
Rupert, ID 83350

Glenna M. Christensen  
P.O. Box 829  
Boise, ID 83701

db

/S/ \_\_\_\_\_



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

DATED this 15<sup>TH</sup> day of MARCH, 2006.

INDUSTRIAL COMMISSION

/S/ \_\_\_\_\_  
Thomas E. Limbaugh, Chairman

/S/ \_\_\_\_\_  
James F. Kile, Commissioner

Dissent without comment

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

ATTEST:

/S/ \_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on 15<sup>TH</sup> day of MARCH, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Raymundo G. Peña  
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