



2. Whether and to what extent Claimant is entitled to the following benefits:
  - (a) medical;
  - (b) total or partial temporary disability (TTD/TPD);
  - (c) permanent partial impairment (PPI); and
  - (c) permanent partial disability (PPD).

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he injured his neck in a November 30, 1998, industrial accident that resulted in a cervical fusion on March 16, 2004, and he is entitled to medical and associated benefits.

Defendants deny that Claimant's cervical fusion was related to his 1998 accident and he is owed no benefits relating thereto.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing;
2. Claimant's Exhibits 1-22 admitted at the hearing;
3. Defendants' Exhibits A-R admitted at the hearing; and,
4. The post-hearing depositions of: James H. Bates, M.D., taken by Claimant on December 14, 2005; Douglas N. Crum, CDMS, with one exhibit taken by Claimant on December 16, 2005; and William C. Jordan, MA, CRC, CDMS, taken by Defendants on January 4, 2006.

Claimant's objection at page 7 of Mr. Jordan's deposition is overruled.

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

## **FINDINGS OF FACT**

1. Claimant was 46 years of age at the time of the hearing and resided in Albuquerque, New Mexico.

2. On November 30, 1998, while in the course of his employment as a long haul truck driver, Claimant was involved in an accident resulting in an injury that he described as follows at hearing:

Q. (By Mr. Monroe): Tell us how the accident happened.

A. I took a load of palletized stuff to a waste center down in – by Seattle and they didn't have a dock or anything to unload it, so what transpired was the forklift driver, the warehouse worker at that particular place, would hook a chain to the pallets and drag them forward from my trailer and, then, I was twisting the pallets around so he could get underneath them at the end of the trailer to pick them up and take them off the trailer. And at one time or another, I twisted a pallet and just heard a crack or pop in my neck. It was earlier the next morning I get severe pain and couldn't move and I called the company and they sent me down to a self help in Federal Way, Washington, to get looked at.

Hearing Transcript, pp. 28-29.

3. Claimant presented to HealthSouth in Federal Way on December 3, 1998. The handwritten notes from that visit indicate that Claimant was complaining of neck and low back pain. He gave a history of moving pallets and experiencing low back pain running up into his neck. He was diagnosed with lumbar and cervical strains, prescribed physical therapy, and given light duty work restrictions.

4. Claimant presented to Pomeroy Medical Clinic, a treatment facility in his place of residence, on December 7, 1998. There, Jay D. Schmauch, D.O., took a history of moving pallets and twisting and having instant pain in Claimant's right low back area that was non-radiating. Nothing was mentioned regarding cervical pain and it was noted that Claimant's cervical range of motion was complete and without "significant limitations." Claimant's Exhibit 10, p. 6. Dr. Schmauch prescribed physical therapy and medication. On December 28, 1998,

Doug West, PA-C, of Dr. Schaech's office, released Claimant to return to work without restrictions based on the resolution of his lumbar strain. Claimant sought no further medical treatment until August 16, 2000. However, Claimant credibly testified that about three to four months after his accident, he began experiencing pain and numbness radiating down both his arms into his fingertips.

5. In about October of 1999, Claimant could no longer continue driving long haul due to hand cramping, neck pain, and his inability to sit for long periods of time. Employer accommodated Claimant by allowing him to move to a dock job where he primarily moved trailers to and from the loading dock before and after loading. However, that job made his symptoms worse as he was constantly moving, twisting, and turning. Claimant's neck pain got to the point to where he returned to Pomeroy Clinic on August 16, 2000, and saw Suzanne Grove, ARNP. NP Grove diagnosed bilateral wrist and shoulder pain and made an appointment for Claimant to see Terry Dietrich, M.D., an orthopedic surgeon in Walla Walla, Washington, who had previously treated Claimant for unrelated problems.

6. Claimant saw Dr. Dietrich on August 24, 2000, complaining of bilateral wrist and shoulder pain that was getting worse when doing his dock work activities. Dr. Dietrich diagnosed bicipital tendinitis and impingement of the left shoulder and bilateral De Quervain's tendinitis. He ordered blood tests and injected Claimant with corticosteroid shots in the affected areas.

7. Dr. Dietrich continued to treat Claimant conservatively for his bilateral wrist pain. On December 7, 2000, Dr. Dietrich suspected bilateral carpal tunnel syndrome and ordered EMG studies that were performed by Kenneth Isaacs, M.D., on January 31, 2001. The studies revealed mild, primarily sensory, left median neuropathy at the wrist and very mild, primarily sensory,

right median neuropathy at the wrist. Claimant's Exhibit 9, p. 5. Dr. Dietrich discussed Claimant's options, including surgery, but informed Claimant that he might not obtain much relief from surgery if the carpal tunnel symptoms are mild. Claimant opted for a carpal tunnel release on the left that was accomplished on April 10, 2001; however, Claimant's symptoms were not resolved by the surgery.

8. In November 2001, Claimant's employment was terminated due to medical-related absences. He remained unemployed until 2004.

9. On March 28, 2002, Claimant underwent an independent medical evaluation performed by R.C. Colburn, M.D., an orthopedic surgeon practicing in Lewiston. Dr. Colburn noted that Claimant "... was not a very good historian and it was a little difficult to get a clear picture from him as to the sequence of events." Claimant's Exhibit 14, p. 1. In any event, Claimant's chief complaint at that time was bilateral wrist pain, the onset of which was "confusing" to Dr. Colburn.<sup>1</sup> Dr. Colburn diagnosed, among other things, left and right carpal tunnel syndrome and opined that surgical intervention on the right would be reasonable given Claimant's increasing symptoms. Dr. Colburn would not release Claimant back to driving pending the results of a right carpal tunnel release.

10. On July 9, 2002, Claimant underwent a right carpal tunnel release at the hands of Dr. Dietrich. As with the left, Claimant obtained no relief from the procedure.

11. Claimant moved to Albuquerque a few months after his right carpal tunnel release. Once there, Claimant presented to Robert W. Benson, M.D., on December 20, 2002, to

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<sup>1</sup> Dr. Colburn noted, "The listed injury date is 8/17/00. The injury report in the records indicates a date of injury of 8/01/00 and the accident is described as, "while working felt pain in wrists and shoulders plus as days went by the pain got worse." Claimant's Exhibit 14, p. 3. The record reflects that Claimant filed a Complaint for his carpal tunnel problems and lists 8/17/00 as the date of the onset of his CTS symptoms. That Complaint was consolidated with the Complaint regarding his cervical problems. The Referee is unable to determine from where Dr. Colburn arrived at the 8/01/00 date of injury.

establish ongoing care. Claimant was still complaining of bilateral wrist pain, right worse than left. EMG studies were normal. Dr. Benson prescribed occupational therapy.

12. On September 19, 2003, Claimant presented to Joseph Kobliska, PA, at the New Mexico Veteran's Administration Health Care System. PA Kobliska ordered a cervical MRI and EMG/NCV studies. The cervical MRI was accomplished on October 21, 2003, and revealed: "1. Focal large left paracentral C6-7 disc extrusion with severe canal compromise and evidence of abnormal spinal cord signal at the C6 and C7 levels. There is also evidence of severe bilateral neural foraminal narrowing, left greater than right. 2. Diffuse disk bulge at the C5-C6 level with moderate to severe narrowing of the neural foramina bilaterally, but no evidence of spinal canal narrowing." Claimant's Exhibit 2, p. 65.

13. On March 16, 2004, Claimant underwent an anterior decompression and C6 corpectomy and a C5-7 fusion with cage, plate, screws, and local autograft bone. Claimant testified that the surgery completely resolved his neck pain, and the pain and numbness in his wrists that he had experienced since his 1998 accident and injury.

14. Claimant did not suffer any further injuries to his neck, arms, or wrists between his November 30, 1998 accident and his March 16, 2004, cervical fusion.

## **DISCUSSION AND FURTHER FINDINGS**

### **Causation:**

The initial question to be answered in this case is whether or not Claimant's need for his cervical surgery was the result of his accident and injury of November 30, 1998. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against."

*Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-413, 18 P.3d 211, 217 -218 (2001).

15. The only physician to express a causation opinion is James H. Bates, M.D., who is board certified in physical medicine and rehabilitation and practices in Boise. In the field of rehabilitation, the majority of the patients he sees are for musculoskeletal problems involving the neck and back. Dr. Bates saw Claimant on April 13, 2005, at his attorney's request with a chief complaint of, "Nothing new. Occasional hand cramping." Claimant's Exhibit 17, p. 1. Unlike Dr. Colburn, Dr. Bates found Claimant to be a "good historian." *Id.*, p. 2. Claimant informed Dr. Bates that he was moving pallets when he felt a pop in his neck area. Dr. Bates examined Claimant and reviewed his medical records. Based on Claimant's history, his examination, and medical records review, Dr. Bates opined as follows regarding causation:

Q. (By Ms. Kaufmann): Just so I'm clear, could you tell me, upon what did you base your opinion that Mr. Nodine's cervical surgery was related to the accident of November 30, 1998?

A. The main factor was following the accident around '98, Mr. Nodine had complaints of tingling in his hands. He was diagnosed as having carpal tunnel syndrome, but the nerve conduction studies showed really very mild symptoms. There is confusion, or there's – At times through the medical records there were not clear dates to follow throughout there.

But frequently throughout there the patient reported that his hands went – were numb since picking up the pallets, or since '99, or when he presented to the Veteran's Hospital in New Mexico. He reported that he had been having those symptoms for five years. The symptoms in the hands did not improve after surgery. And then - -I'm sorry; did not improve after the carpal tunnel surgeries. And it seems to be a – The hand numbness and complaints seem to be constant throughout the medical records, and then the resolution of the symptoms with the cervical surgery.

Dr. Bates' Deposition, p. 13.

16. Defendants argue that Dr. Bates' opinion is flawed to the extent that he relied upon Claimant's history of experiencing a "pop" in his neck at the time of his accident in that Claimant informed no other physician of a "pop." Whether he did or not is not particularly relevant because the medical records of Claimant's first visit to a physician post-accident – December 3, 1998 – refer to a cervical strain regardless of how described. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). The Referee finds Dr. Bates' IME report and deposition testimony straightforward, logical and persuasive. The Referee finds that his November 30, 1998, industrial accident and injury necessitated Claimant's cervical surgery.

**Medical:**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

17. Having found Claimant's cervical surgery compensable, it follows that Defendants are liable for all medical costs and expenses associated therewith and the Referee so finds.

### **TTDs:**

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

18. Claimant was hospitalized for three days for his cervical surgery. Defendants are liable for TTD benefits for those three days.

### **PPI:**

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

19. Dr. Bates is the only physician to assign an impairment rating for Claimant's cervical condition. He concluded:

In accordance with the American Medical Association's Guide for the Permanent and Partial Impairment [*sic*], Fifth Edition, the DRE category of rating is the preferred system of rating. Cervical fusion is considered an alteration of motion segment integrity and, as specifically noted, that an individual may have loss of motion of a motion segment due to a developmental fusion, successful or unsuccessful attempt at surgical arthrodesis, and with that definition of a DRE cervical category 3, an impairment rating of 25% to 28% impairment of the whole person is appropriate. Therefore, given the patient's loss of a motion segment, decreased range of motion without presence of radiculopathy, I feel that a 25% whole personal [*sic*] impairment is appropriate for involvement of the neck.

Claimant's Exhibit 17, p. 7.

20. The Referee agrees with Dr. Bates' analysis and finds that Claimant has incurred PPI of 25% of the whole person.

**PPD:**

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

employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

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

21. Claimant left public education in the ninth grade; he then obtained his GED while serving in the Army in 1984. In the Army (1980-1987), Claimant was a mechanic and became a sergeant in the motor pool where he supervised others in the repair and maintenance of light vehicles. He left the Army due to a knee problem. He worked as a farm laborer then attended Walla Walla Community College from 1989-1991 when he received an AA degree in Criminal Justice. He never pursued employment in that field. He has also worked as a cannery laborer and as an assembler of food processing equipment. He has also worked as a restorer of automobiles. At the time of his injury, Claimant had been employed as a long haul truck driver for four or five years. Claimant is currently employed as a lead security officer in Albuquerque earning \$10.50 an hour. He likes his current job and has no plans to leave it.

22. Two vocational experts were retained in this matter; Douglas Crum CDMS, by Claimant and William Jordan, MA, CRC, CDMS, by Defendants. Both Mr. Crum and Mr.

Jordan interviewed Claimant and reviewed his medical records, and his education, work, and salary histories. Both considered Dr. Bates' assigned permanent restrictions of :

“No forceful or repetitive gripping, fine motor movements on a continual basis. Lifting and carrying, light to moderate level. Limited pulling, reaching and overhead activity. With the pulling and reaching, to 25 to 30 pounds. Minimal overhead lifting and working. Frequent changes of position from a sit [*sic*] to a standing position. Avoidance of vibration such as in commercial driving.”

Dr. Bates' Deposition, pp. 8-9.

23. Based on the foregoing, Mr. Crum opined that Claimant has lost 40-55% of his pre-injury wage earning capacity and has incurred PPD inclusive of impairment of 50% of the whole person. Mr. Jordan opines that if the Commission finds Claimant's cervical condition to be related to his industrial accident that Claimant has incurred PPD inclusive of impairment of 45-50% of the whole person. The Referee finds that Claimant has incurred PPD inclusive of impairment of 50% of the whole person.

### **CONCLUSIONS OF LAW**

1. Claimant's cervical injury and subsequent cervical fusion are causally related to his November 30, 1998 industrial accident.
2. Defendants are liable for all costs and expenses arising from his cervical fusion.
3. Defendants are liable for three days of TTD benefits.
4. Defendants are liable for PPI benefits of 25% of the whole person.
5. Defendants are liable for PPD benefits of 50% of the whole person inclusive of his 25% whole person PPI.

**RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this \_\_15<sup>th</sup>\_\_ day of \_\_May\_\_, 2006.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_23<sup>rd</sup>\_\_ day of \_\_May\_\_, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DARIN G MONROE  
PO BOX 50313  
BOISE ID 83705

ANGELA SCHAER KAUFMANN  
PO BOX 829  
BOISE ID 83701-0829

\_\_\_\_\_/s/\_\_\_\_\_

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4. Defendants are liable for permanent partial impairment benefits of 25% of the whole person.

5. Defendants are liable for permanent partial disability benefits of 50% of the whole person inclusive of his 25% whole person permanent partial impairment.

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

DATED this \_\_23<sup>rd</sup>\_\_ day of \_\_May\_\_\_\_, 2006.

INDUSTRIAL COMMISSION

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

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

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

ATTEST:

\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_23<sup>rd</sup>\_\_ day of \_\_May\_\_\_\_, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

DARIN G MONROE  
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