

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANA A. GRAVES,)
)
 Claimant,)
)
 v.)
)
 EVERGREEN LOGGING, INC.,)
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 Employer,)
)
 and)
)
 INSURANCE COMPANY OF THE WEST,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2000-000583

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

Filed August 13, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d’Alene on August 16, 2007. Michael J. Walker of Spokane represented Claimant. Paul S. Penland of Boise represented Employer/Surety. Oral and documentary evidence was presented. The record remained open for the taking of three post-hearing depositions. The parties submitted post-hearing briefs. This matter came under advisement on March 20, 2008, and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:¹

1. Whether Claimant’s alleged occipital neuralgia and/or cervical dystonia (ON/CD)² is causally related to his December 8, 1999, industrial accident;

¹ Defendants’ objection to the inclusion of total temporary disability benefits as an issue is granted as that issue was not identified in the Notice of Hearing. Therefore, the issue of the date of medical stability is moot.

² During the course of these proceedings, the terms occipital neuralgia and cervical dystonia have sometimes been used interchangeably. While the terms technically describe slightly distinct medical diagnoses, the Referee will use their abbreviations, ON/CD, to describe Claimant’s symptomatology regarding his neck, surrounding nerves, and musculature unless otherwise specified.

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2. Whether and to what extent Claimant is entitled to the following benefits:
 - (a) Permanent partial impairment (PPI); and
 - (b) Permanent partial disability (PPD).

CONTENTIONS OF THE PARTIES

Claimant contends that as a result of an industrial accident on December 8, 1999, wherein a snag fell from behind and crushed his left forearm while he was performing his duties as a sawyer, he developed ON/CD that has resulted in permanent restrictions. He seeks reimbursement for the diagnosis and treatment of that condition. Claimant also seeks whole person PPI in excess of what has been paid. He also seeks PPD benefits, as he is no longer able to work in the woods and has taken a lower paying job as the result of his industrial injuries.

Defendants contend that Claimant's ON/CD, if he in fact suffers from that (those) condition(s), is not causally related to his accident. His treating physician who so opines, has not been privy to all Claimant's medical records and those records do not support that physician's diagnosis of ON/CD. Further, Claimant's treating physician was unaware of a "pillow incident" almost four years post-accident, wherein Claimant started to first complain of cervical symptoms after having slept on a new pillow. Regarding PPI, Defendants argue that there should be none awarded for ON/CD and in the event such is found compensable, Claimant's treating physician's rating should be discounted because he did not properly utilize the AMA Guides. Finally, if Claimant has incurred PPD in excess of PPI, it is minimal when taking the restrictions stemming from the ON/CD out of the picture.

Claimant counters by asserting that Defendants' expert, upon whom they rely in denying the ON/CD claim, also failed to relate Claimant's shoulder condition, for which they eventually accepted and authorized surgery, to his industrial accident. Therefore, his opinion regarding causation should carry little weight. Further, Claimant's shoulder condition was not diagnosed (and accepted) until five years after his accident so the argument that it was not until four years

after his accident that the ON/CD was diagnosed is without merit. Finally, the pillow incident is a red herring in that there is no medical evidence that sleeping on a new pillow resulted in ON/CD.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Elaine, taken at the hearing.
2. Claimant's Exhibits A-R with the exception of page 4 of Exhibit F which was withdrawn.
3. Defendants' Exhibits A-DD with the addition of page 9-A to Exhibit K.
4. The post-hearing depositions of: H. Graeme French, M.D., taken by Claimant on August 29, 2007; William Bozarth, M.D., taken by Defendants beginning on September 18, 2007 and continuing on November 14, 2007; and ICRD consultant Lynette Schlader taken by Defendants on November 14, 2007.

All objections made during the course of the taking of the above-referenced depositions are overruled.

Claimant moved to strike any and all testimony proffered by Dr. Bozarth regarding ON/CD that relied to any extent on certain literature research he conducted. The ground for Claimant's motion is that none of the materials utilized by Dr. Bozarth were ever disclosed to Claimant in discovery despite specific requests for that information. Thus, Claimant was denied the opportunity for meaningful cross-examination of Dr. Bozarth's causation opinions.

Defendants respond that there was only about one week between when Dr. Bozarth received Claimant's treating physician's deposition transcript and his (Dr. Bozarth's) deposition so he had no time to supplement his discovery responses to disclose the articles, treatises, etc. However, it appears that Defendants did not disclose research material utilized in reaching opinions expressed in Dr. Bozarth's first deposition, either. While perhaps "hypertechnical" as

Defendants argue, nonetheless, the Referee agrees with Claimant's position. Without disclosing, at the bare minimum, the titles and authors of the studies relied upon by Dr. Bozarth, Claimant could not verify that the information contained therein was as represented by Dr. Bozarth or locate other articles, treatises, etc. that might reveal contrary opinions.

Claimant's motion to strike any testimony of Dr. Bozarth that relies on any "research" he conducted is granted and the Referee will not consider that testimony in this decision.

FINDINGS OF FACT

1. Claimant was 43 years of age and resided in Clarkston, Washington, at the time of the hearing. He has been married for 21 years and is a third-generation logger. He grew up in the woods of western Oregon and has been logging for 20-25 years. He has had other occupations along the way, but has primarily been involved in logging in one capacity or another. Claimant graduated from Crow High School near Eugene where he was a good athlete and still holds the school record for the quarter mile. He attended a junior college right out of high school for about a year and a half in automotive repair.

2. On December 8, 1999, Claimant was squaring a butt on a tree he had just downed when a snag about 40-45 feet tall and seven inches around (not the one he had just cut) fell from somewhere behind and struck Claimant on his left forearm shattering his radius. He does not know from where the snag³ came and testified that had he seen it before it fell, he would have taken it down. Claimant described at hearing the force of the impact:

Well, the saw - - the tank and the pistol grip are hooked to your saw. It was ripped off of the - - off of the power head where the motor, the actual cylinder and the pistons, are at. It was ripped off. After it went through my arm - - I had the saw in this position. (Demonstrating). And after it went through my arm, it threw the saw to the ground. Well, actually the saw went up in the air and did a big flip, come around, and the bar hit me in the belly. So after the impact the saw flipped in the air. And then, when I looked down, I could see that it was - - the pistol grip and the tank were ripped from the power head.

³ Claimant described a snag as a dead, standing tree with no root system.

* * *

I knew my hard hat did come off my head. I - - the impact took my hard hat off my head. And I think I did end up on my knees or something right after the saw hit me.

Hearing Transcript, pp. 42-43.

3. Claimant was initially transported by ambulance to Syringa General Hospital in Grangeville and from there to Tri-State Memorial Hospital in Clarkston, where he came under the care of orthopedic surgeon Timothy K. Flock, M.D. On December 8, Dr. Flock performed an ORIF procedure on Claimant's left radial shaft fracture.

4. Post-surgery, Claimant developed left biceps atrophy and weakness. He further developed a significant musculocutaneous nerve (MCN) lesion in his left arm. EMG studies performed in June and July 2000 revealed some reinnervation of Claimant's left bicep, but another in December noted little change from the prior EMGs. Claimant underwent a course of conservative treatment for his MCN injury and left biceps weakness and, at his request, was released to return to his time-of-injury job in June 2000. However, Claimant modified his duties in that he was no longer working on steep terrain and shifted the bulk of his left arm activity to his right.

5. In a November 16, 2000, office note, his treating physician, neurosurgeon Donald S. Soloniuk, M.D., indicated that he doubted surgery would be of any benefit and recommended another EMG as well as an IME. Another office note dated February 12, 2001, indicated that Claimant was having some difficulty working overhead with his chain saw, but was otherwise able to tolerate his work. Dr. Soloniuk deemed Claimant to be at MMI and would continue to see him on an as needed basis. He reiterated that opinion in a March 19, 2001, "To whom it may concern" letter and again recommended an IME and a functional capacities evaluation to address disability issues.

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6. At Surety's request, Claimant saw Al H. Kuykendall, M.D., a retired neurosurgeon, on May 19, 2001. Claimant reported that his work as a tree faller was "proceeding without difficulty." However, he also reported that he has some left upper extremity weakness if he used his chain saw above his head. Dr. Kuykendall assigned a 3% whole person PPI rating for the motor deficit relating to the injury to the MCN. No rating was given for the healed fracture of the left radial bone. Dr. Kuykendall saw no signs of ON/CD. Based on Dr. Kuykendall's evaluation, Surety terminated medical benefits and paid the 3% PPI rating.

7. On April 4, 2003, Claimant presented to Brian A. Howlett, D.C., complaining of a headache in the occipital region, numbness in his lips, and some nausea. Dr. Howlett noted that the onset of symptoms was two weeks earlier after Claimant "slept on a new pillow."

8. On April 5, 2003, Claimant saw Don Greggain, M.D., his family physician, and his physician's assistant, Tuck Ainge, complaining of pain in his neck and the back of his head, nausea, and a numb upper right lip after using a new pillow two weeks prior. Physical exam showed normal cranial nerves II-XII and full range of motion of the cervical spine. Claimant was referred back to Dr. Soloniuk.

9. On April 18, 2003, Claimant saw Dr. Soloniuk who noted that he had not seen Claimant since February of 2001. Claimant indicated that the strength in his left arm had improved; it was not 100% but he was able to do his work without difficulty. Dr. Soloniuk noted that Claimant's posterior neck pain began around February 26, 2003, but at present, his symptoms had returned to normal. Claimant exhibited full cervical range of motion. Dr. Soloniuk assessed degenerative cervical disk disease, resolved. He did, however, recommend a neck stretching exercise program.

10. On April 28, 2003, Claimant presented to Eastgate Chiropractic in Lewiston complaining of neck pain, headaches, and nausea for the past two months. Claimant indicated

his symptoms started on February 26, 2003. He denied having similar symptoms before that date and denied that his symptoms were work related.

11. On May 1, 2003, Claimant returned to Dr. Greggain with essentially no symptoms. He was complaining of new onset of travel sickness, occasional blurring vision, and nausea and remaining neck and shoulder pain. A cervical and head MRI was ordered and a pain clinic and orthopedic referral were considered.

12. On May 14, 2003, Claimant saw orthopedic surgeon Gregory D. Dietrich, M.D., and his physician's assistant, Jeremy B. Ostermiller, in consultation for Dr. Greggain. Claimant thought his neck pain and the pain at the base of his skull was caused by sleeping on a new pillow; he has since gone back to his old pillow. He noted normal neck range of motion but that pain was reproduced with extension. Dr. Dietrich assessed cervicalgia, multiple level degenerative disk disease, and peri-oral numbness. He recommended continuing Claimant's nonsteroidal anti-inflammatories and perhaps a referral to a pain clinic for facet block and potentially epidural steroid injections. He also recommended a referral to a neurologist for his peri-oral numbness.

13. On August 27, 2003, Claimant presented to N. Kirke White, M.D., a pain specialist, on a referral from Dr. Greggain. Claimant was complaining of posterior neck pain with some radiation to the front of the neck as well as some face numbness. Dr. White noted that Claimant's symptoms started when he awoke one morning. By history, Claimant had neck spasms. On exam, Claimant's cervical range of motion was, "quite normal." Dr. White diagnosed neck pain secondary to C5-6 disk spur complex producing moderate cervical stenosis. He administered a cervical epidural steroid injection. Claimant received four more epidural steroid injections through November 2003 with no significant improvement of his symptoms.

14. On Dr. Greggain's referral, Claimant saw Janet E. Ploss, M.D., at his own expense, at the University of Washington Pain Center on February 2, 2004, complaining of a

“sloshing” of fluid within the occipital area. A brain MRI revealed no findings to explain Claimant’s clinical history. Both Claimant and his wife denied any knowledge regarding the cause of Claimant’s neck pain. A Pain Clinic Psychological Evaluation was prepared by Mark Jensen, Ph.D. Dr. Jensen termed Claimant’s presentation as somewhat “unusual” in that he could find very few psychological factors that were contributing to his pain problems and he was continuing to work in a very physically demanding job. Dr. Jensen concluded, “Given the lack of evidence for psychological factors contributing to his pain problem, it is unlikely that he would benefit significantly from our pain management program.” Defendants’ Exhibit Q., p. 5.

15. Dr. Ploss also evaluated Claimant on February 2. She noted, “The patient reports that on February 27, 2003, he felt an electric pain running up his neck and terminating at the top of his head. This pain lasted for three days, and during that time he was unable to move his head. After the three-day period, he went into another phase of the pain problem which has persisted until today.” *Id.*, p. 6. Dr. Ploss was unable to determine the cause of Claimant’s pain, but thought it was most likely musculoskeletal. Dr. Ploss concluded that Claimant was not a candidate for their multidisciplinary rehabilitation program. She recommended a home exercise program for strengthening and stretching but did not believe he had a disk problem.

16. On March 12, 2004, Claimant presented to Andrew A. Friedman, M.D., at the Virginia Mason Medical Center in Seattle, apparently on referral from Dr. Greggain. Claimant’s chief complaint was right suboccipital pain since February 26, 2003. Upon review of various diagnostic studies and a physical examination, Dr. Friedman concluded that Claimant has a C2-C3 facet dysfunction that he attributed to a blow Claimant suffered to his head subsequent to his December 1999 accident. He also diagnosed, *inter alia*, a history of greater occipital neuralgia. He recommended a bone scan to either rule in or rule out the above diagnosis. After obtaining the results of the bone scan, which was essentially normal, Claimant underwent a right C2-C3

facet injection. Claimant treated, at his own expense, at Virginia Mason for pain management through September 2004.

17. At his wife's suggestion, Claimant began treating with H. Graeme French, M.D., an orthopedic surgeon practicing in Colfax, Washington, on February 2, 2005. He presented with chief complaints of aching paraesthesias down the left musculocutaneous nerve distribution, aching at the root of the neck, an occipital neuralgia type pain, and a sloshing around in the back of his head. During his exam, Dr. French discovered an anterior inferior instability in Claimant's left shoulder. He recommended taping and bracing along with physical therapy for left shoulder stabilization. Dr. French noted, "I think this injury was caused by the tree hitting his left forearm and pulling his left arm out at the same time he broke his left radius." Defendants' Exhibit E., p. 1.

18. In a March 16, 2005, follow-up, Dr. French recommended an arthroscopy and repair of Claimant's left shoulder based on an MRI that showed a small rotator cuff tear. He sought authority for that procedure from Surety.

19. Surety wanted a second opinion regarding surgery and its relation to Claimant's 1999 industrial accident and commissioned Michael Weiss, M.D., a physiatrist, Paul Collins, M.D., an orthopedic surgeon, and Al Kuykendall, M.D., a neurosurgeon (the panel), to conduct an IME in that regard. Claimant informed the panel of the February 2003 pillow incident. The panel concluded that, "It is likely that he had a left rotator cuff or labral injury at the same time injuring the musculocutaneous nerve." Defendants' Exhibit G., p. 8. The panel concurred with Dr. French's suggestion for an MR arthrogram for further evaluation of their diagnosis. The panel did not believe Claimant's neck problems were related to his 1999 accident. The panel also warned that arthroscopic surgery could temporarily exacerbate Claimant's musculocutaneous nerve injury.

20. On October 13, 2005, Dr. French performed a left shoulder arthroscopy. Claimant's left shoulder improved post-surgery, but his neck pain and other symptoms associated with ON/CD did not.

21. Dr. French released Claimant to light-to-moderate work on or about August 2, 2006.

22. On October 20, 2006, Claimant participated in the third Surety-arranged IME with William R. Bozarth, M.D., a neurologist, and Steven R. Sears,⁴ an orthopedic surgeon (the panel). The panel produced a report consisting of 147 pages. Claimant presented with complaints of right and left skull base pain, neck pain, and left forearm pain. Claimant informed the panel that he had no neck pain before 2003. He had no left shoulder problems at the time of the evaluation.

23. After examining Claimant and reviewing voluminous medical records, the panel concluded:

- Claimant was not entitled to TTD benefits following his shoulder surgery because he was off work following an ankle injury and "other multiple pain complaints"; not his shoulder surgery.
- Claimant reached maximum medical improvement from his left shoulder surgery by June 9, 2006.
- Claimant's left shoulder injury/surgery is not related to his 1999 accident. However, if "administratively" found to be related, his permanent restrictions related to that condition would be only light work above shoulder height, "perhaps 10 pounds."
- Based solely on today's exam, Claimant has no PPI relative to his left shoulder as Claimant has "excellent" range of motion. The panel agrees with Dr. Kuykendall's 3% whole person rating for the injury to his musculocutaneous nerve.
- No additional medical care, including physical therapy, is necessary for either his left shoulder or his left forearm and musculocutaneous nerve injury.

⁴ At the time of the IME, Dr. Sears' license to practice medicine was significantly limited by the Washington State Medical Quality Assurance Commission regarding his addiction to Ultram and the manner in which he obtained the same. See, Claimant's Exhibit D. Claimant asserts that his credibility has been compromised and asks the Commission to take such into consideration when weighing his opinions. This Referee sees no reason to discount Dr. Sears' opinions based on this factor alone, but will place whatever weight to his opinions as is warranted by the substance of those opinions and how his opinions compare with the record as a whole.

- Other than by history, the panel does not believe that Claimant's neck pain was caused by his 1999 industrial accident. The cause of his neck pain "is not clear."
- There is no objective reason to assign permanent restrictions regarding his neck complaints.
- No medical care is necessary for the treatment of Claimant's neck.
- No PPI is assigned for Claimant's neck complaints as there is a lack of objective findings on examination.
- The panel cannot identify complaints or findings that would support a diagnosis of occipital neuralgia. Claimant's symptoms are vague and variable and not consistent with an occipital neuralgia.
- No permanent restrictions or further medical treatment is needed for Claimant's alleged occipital neuralgia.

22. Based on the above IME, Surety terminated all benefits.

23. On January 13, 2007, Dr. French authored a letter to Claimant's attorney wherein he expressed his disagreement with the above IME. He agrees that Claimant is at MMI regarding his left shoulder, but disagrees with the 3% PPI rating for the musculocutaneous nerve injury. Because Claimant also required a biceps tenodesis, his PPI should be 10% of the left upper extremity. Dr. French also disagrees with Dr. Sears' opinion regarding Claimant's left brachial plexus injury and bilateral occipital neuralgia because Dr. Sears ignored many of the abnormal findings he (Dr. Sears) reported that support a diagnosis of occipital neuralgia and a moderate cervical dystonia. Dr. Sears dismisses the diagnosis of occipital neuralgia because there was no history of direct trauma to his head at the time of his accident. However, "Mr. Graves was wearing a hard hat at the time of his injury and the suspension mechanism for the hard hat, essentially rests on the occipital nerves. The injury was caused by a forty-foot long snag (i.e: a small tree) falling on him, resulting in a severe fracture of his left forearm, as well as his left shoulder subluxation event. I find it highly likely that, at least, a branch impacted his helmet." Defendants' Exhibit E. Dr. French opined that the weakness in Claimant's left arm warrants a PPI rating of "at least 20%." He also assigns a 20% rating for Claimant's ON/CD if

uncorrected. He recommended Botox injections or, if they proved ineffectual, a surgical neuroplasty.

24. On July 8, 2007, Dr. Bozarth authored a letter to Defendants' attorney wherein he re-reviewed medical records and was asked to assume a "worst case scenario" and assign PPI ratings to conditions that otherwise might not be compensable (ON/CD). Dr. Bozarth describes in detail his utilization of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA *Guides*) in arriving at the following PPI ratings:

- Ups the previous 3% whole person rating for Claimant's musculocutaneous nerve injury to 4% due to a motor deficit in addition to the previously found sensory deficit.
- 1% whole person for range of motion limitation for the left shoulder.
- Maximum 12% whole person for reduction in left hand grip or pinch strength.
- 16% of the whole person when all upper extremity impairments are combined and converted.
- 15% whole person if the occipital neuralgia is accepted.
- When combining 16% for the upper extremity impairments with the 15% for the occipital neuralgia, Claimant has incurred a 25% whole person impairment.

FURTHER DISCUSSION

Causation: ON/CD

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).

Dr. French:

25. Dr. French is a board certified orthopedic surgeon with an active orthopedic practice⁵ in Colfax, Washington. He testified in this matter by way of deposition. Dr. French began treating Claimant in February of 2005 for his ON/CD and left shoulder injury. In his deposition, Dr. French was asked to describe ON/CD:

Occipital neuralgia, the greater occipital nerve is the small nerve that supplies sensation to the back of the scalp, basically from the back of the ear across the top and back of the head. It comes off - - it's the dorsal ramus at C1, and wraps around the levator scapularis and then supplies the back of the head. It can get trapped at the side of the neck and in the back of the scalp. It typically causes burning headache pain.

The - - it can get trapped by muscle spasm so that dystonias are one of the causes for irritating the greater occipital nerve, because it runs kind of through the occipitalis muscle as it comes up into the back of the scalp. If that muscle's in spasm and there's a little bit of scar where the nerve penetrates, that can irritate the nerve.

Dystonias are groups - - are abnormal patterns of muscle firings. They're actually kind of - - I think many of them begin as reflex muscle spasm due typically to an injury. So a common group of muscles involved in dystonias are the occipitalis, the levator and the scalenes. Those actually are initiated by nerve injury in the upper extremity.

Dr. French Deposition, pp. 14-15.

26. Asked why he disagreed with the Bozarth/Sears panel, Dr. French responded:

Because, one, they're - - he has a sensory loss and [*sic* - in] the distribution of the greater occipital nerve. He has irritability and point tenderness in the distribution of the greater occipital nerve. Local anesthetic injections obliterate the pain in the occipital nerve distribution, which is pretty much the definition of occipital neuralgia. So he has it.

And the cervical dystonia, his physical findings are consistent with the current diagnosis of cervical dystonia. He has restrictions in motion. He has palpable tenderness in the muscles that are involved in cervical dystonia.

⁵ Dr. French testified that 99% of his practice is dedicated to treating patients.

He - - those muscles, again, respond to anesthetic injection and Botox, with decreases in tone, which pretty much makes it a cervical dystonia. And he has mechanisms of injury and injuries that are associated with the development of cervical dystonias. And so, I mean he has it.

Dr. French Deposition, pp. 16-17.

27. Even though often referred to as separate conditions, Dr. French testified that occipital neuralgia and cervical dystonia are used interchangeably.

28. Dr. French testified that it makes no difference whether or not Claimant was struck directly on his head in the accident because ON/CD can be caused by shoulder subluxation and dislocation.

29. Dr. French acknowledged on cross-examination that he was unaware of Claimant's medical treatment from the date of his 1999 accident to his initial treatment of him in February 2005 except for what he learned from Claimant and Drs. Kuykendall, Bozarth, and Sears.

30. Dr. French was not concerned that Claimant's ON/CD symptomatology did not arise until after the pillow incident, of which Dr. French was unaware. He testified that ON/CD is an evolving process. While the occipital neuralgia's etiology may have been compromised by the pillow incident, the cervical dystonia was already present due to Claimant's musculocutaneous nerve injury. Dr. French testified as follows regarding whether or not the pillow incident made it less probable that the industrial accident was the cause of Claimant's ON/CD:

Not - - no, because the shoulder instability by itself is enough to trigger the dystonia, and it requires that the shoulder be unstable, not just loose. The torn labrum by itself is enough to create the dystonia at two years. It could create the dystonia at five to ten years even with complete recovery.

* * *

Probably it could, yes. Probably it could. I mean, the things that cause the dystonia are shoulder joint injuries, nerve injuries, spinal injuries, spinal surgery.

Those are the things that cause them. Those are what cause traumatic dystonias.
And - -

Dr. French Deposition, pp. 90-91.

Dr. Bozarth:

31. Dr. Bozarth is a board “eligible” neurologist. He has practiced neurology for 35 years and is currently practicing in Lewiston after having practiced in Spokane. He sees patients three-and-one-half days a week and performs EMG and nerve conduction studies one-and-one-half days a week. He devotes one-and-one half days a month to performing IMEs. Dr. Bozarth spent considerable time in this matter reviewing medical records, diagnostic studies, deposition transcripts, and the hearing transcript.⁶

32. Dr. Bozarth, along with Dr. Sears, conducted an IME of Claimant on October 20, 2006. Dr. Bozarth was deposed; Dr. Sears was not. Dr. Bozarth was also asked to conduct further record reviews and provide PPI ratings after the October 20 IME. Of note, the panel opined that Claimant’s left shoulder condition was not related to his industrial injury even though Surety accepted that claim and authorized surgery after an IME panel concurred with Dr. French that it was related. *See*, Finding of Fact number 17 above.

33. Regarding ON/CD, Drs. Sears and Bozarth do not believe Claimant suffers from those conditions, therefore, they cannot be related to his industrial accident. Dr. Bozarth reached his conclusions by doing medical research to which Claimant’s counsel has properly objected. Because Dr. Bozarth admitted he was not an expert on cervical dystonia and was “becoming one” on occipital neuralgia, the bulk of his testimony was gleaned from his research and is given little weight.

⁶ At the time of his September 18, 2007, deposition, Dr. Bozarth had spent 21 hours in records review, 2 ½ hours with Claimant, and talked with Defendants’ counsel for 6 ½ hours the evening before his deposition and had billed \$26,000.00 at \$400.00 an hour for his services. At the time of his continued deposition on November 17, 2007, he had spent an additional 6-8 hours in preparation and research. He testified that Surety was having “. . . difficulty with my fees.” He had yet to be paid anything but testified that would not affect the quality of his testimony.

Dr. Kuykendall:

34. Dr. Kuykendall saw Claimant twice in IMEs, once by himself (*See*, Finding of Fact number 6), and once as a member of a panel (*See*, Finding of Fact number 17). Dr. Kuykendall was deposed. He testified that Claimant showed no signs of ON/CD when he examined him. Dr. Kuykendall believes ON/CD is “overused” and, because Claimant does not suffer from those conditions, they cannot be related to his industrial accident.

35. The Referee gleans from the medical evidence of record that ON/CD is not particularly well understood. In fact, the only article admitted into evidence (*See*, Defendants’ Exhibit X) concerns occipital neuralgia, or headache syndrome, and indicated that trauma to the occipital nerves is a cause as is whiplash and hyperextension. It also indicated that a diagnosis of ON can be “challenging.”

36. During Dr. Bozarth’s deposition, Defendants’ counsel led Dr. Bozarth through several mind-numbing hours⁷ of medical minutia that only a professor of anatomy could follow and understand. However, when the dust settles, the Referee is more persuaded by the causation opinions expressed by Dr. French over those expressed by Drs. Kuykendall, Sears, and Bozarth. Of course, Defendants criticize Dr. French for not having read all the medical records. However, he reviewed all the IME reports that contained summaries of Claimant’s medical treatment. Further, he was not getting paid \$400.00 an hour to review medical records and express expert opinions based thereon. Dr. French’s role was to treat, not teach. Moreover, it was Dr. French that discovered Claimant’s shoulder problem even after Claimant began to experience symptoms associated with ON/CD. Surety and their experts trusted Dr. French’s opinions regarding the shoulder, why not the ON/CD? The pillow incident is a red herring. None of the Defendants’ experts opined that the pillow incident “caused” Claimant’s ON/CD because none of them

⁷ Dr. Bozarth’s deposition had to be continued to allow Claimant’s counsel to complete his cross-examination.

believed he had that condition. The fact that Dr. French did not know of the incident is irrelevant because he expressed an unequivocal opinion regarding causation. Further, Claimant in his September 14, 2005, deposition testified that he just woke up with the pain, was sorry the pillow incident ever got mentioned, and doubted “it had anything to do with it.” Moreover, Dr. French’s causation opinion makes common sense. Something knocked Claimant’s hard hat off when he was hit by the snag and something destroyed his chain saw and fractured his forearm. As Dr. French observed, the support for Claimant’s hard hat sits right over the occipital nerves and likely caused them damage. Dr. French may have misstated certain anatomical or neurological details during his deposition that got the attention of Defendants’ experts but he was not afforded the pre-deposition preparation time as was, for example, Dr. Bozarth. He spent five minutes with Claimant’s counsel and waited 40 minutes for Defense counsel to arrive. On top of that, his staff failed to copy notes from the first year of his treatment of Claimant. Lastly, he was deposed from 6:05 p.m. until 9:10 p.m. Still, overall, his testimony regarding causation was strong and credible. Because ON/CD is a challenge to diagnose, it follows that there is room for reasonable differences of medical opinions surrounding the etiology of those conditions.

37. The Referee finds that Claimant suffers from ON/CD as a direct result of his industrial accident of December 8, 1999, and Defendants are responsible for all expenses associated with the care and treatment Claimant has received for those conditions. However, Defendants will be given the opportunity to challenge Dr. French’s referral to Dr. Aaron Fuller should that referral still be in effect.

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).

38. While Dr. Bozarth's causation opinions did not carry the day, his "worst case scenario" PPI analysis, as expressed in his July 8, 2007, letter to Defense counsel found within Defendants' Exhibit CC at pp. 163-166, and in his deposition at pp. 108-118, and pp. 21-25 of his continued deposition, is well-reasoned and will be adopted by the Referee as follows:

- 4% whole person for the MCN injury.
- 1% whole person for range of motion limitation of the left shoulder.
- The Referee agrees with Dr. Bozarth regarding loss of grip or pinch strength and will not award a PPI rating therefore.
- 15% whole person for occipital neuralgia.

Utilizing the combined values table of the AMA *Guides*, Claimant's total whole person PPI equals 18%.

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).

39. Claimant had worked in virtually all aspects of logging prior to his injury. No one seriously disputes that he cannot return to that profession. Claimant worked with ICRD consultant Lynette Schlader of the Lewiston field office regarding return to work issues. Defense counsel supplied her with various medical records and the deposition transcript of Dr. Kuykendall as well as the hearing transcript. Ms. Schlader testified by way of deposition that she felt somewhat “pressured” in that she usually does not have that much contact with defense counsel. She testified that Claimant “. . . was one of the most motivated clients I have ever worked with. He worked very hard in getting a new job.” Schlader Deposition, p. 23.

39. Claimant was earning approximately \$2800.00 a month at the time of his injury. After the subject accident, Claimant injured his ankle in another industrial accident with Employer. He has not returned to work in the woods due to his restrictions and his concerns about safety issues. At the time of the hearing, and presumably presently, Claimant was, and is, employed by the State of Idaho Department of Transportation as a Traffic Technician Apprentice. He sits in the back of a sign truck and paints the white and yellow lines. In the winter, he thought he would probably drive a snow plow.⁸ It bothers him somewhat in staring out a window at one place for lengthy periods of time, but he endures it because, “. . . it’s a good job.” He was earning \$10.41 an hour at the time of the hearing, but expected a raise once he completed his 6-month probationary period. He has full State benefits including medical, dental, vacation, paid holiday leave, and retirement. The only benefit he had with Employer was medical and he had to pay for a portion of that himself.

40. Defendants acknowledge that the symptoms associated with Claimant’s ON/CD have limited his wage earning capacity and limited his access to significant aspects of his labor market. *See*, Defendants’ Post-Hearing Brief, p. 27. However, as previously discussed, they fervently argue that the ON/CD is not related to his accident. The Referee finds that Claimant is entitled to disability above his impairment. Claimant was 43 years of age at the time of the hearing. Ms. Schlader did not believe his age was a particularly limiting factor in his obtaining employment and testified there were really no “negatives”, other than his restrictions, to his employability. It cannot be ignored that Claimant, much to his credit, is now employed, although at a lesser wage than he was earning in the woods, but with better benefits. When considering the statutory factors found in Idaho Code § 72-430, the Referee finds that Claimant has incurred PPD of 35% of the whole person inclusive of his 18% whole person PPI.

⁸ Claimant, on his own, obtained his CDL which may have been a significant factor in his securing the job with the IDOT.

CONCLUSIONS OF LAW

1. Claimant's occipital neuralgia/cervical dystonia is causally related to his December 8, 1999, industrial accident and Defendants are responsible therefore.

2. If necessary, Defendants will be allowed to challenge Dr. French's referral to Dr. Fuller.

3. Claimant has incurred whole person PPI of 18%.

4. Claimant has incurred whole person PPD of 35% inclusive of his PPI.

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 __8th__ day of August, 2008.

INDUSTRIAL COMMISSION

/s/_____
Michael E. Powers, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DANA A. GRAVES,)
)
 Claimant,)
)
 v.)
)
 EVERGREEN LOGGING, INC.,)
)
 Employer,)
)
 and)
)
 INSURANCE COMPANY OF THE WEST,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2000-000583

ORDER

Filed August 13, 2008

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

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

1. Claimant's occipital neuralgia/cervical dystonia is causally related to his December 8, 1999, industrial accident and Defendants are responsible therefore.
2. If necessary, Defendants will be allowed to challenge Dr. French's referral to Dr. Fuller.
3. Claimant has incurred whole person PPI of 18%.

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4. Claimant has incurred whole person PPD of 35% inclusive of his PPI.

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

DATED this _13th_ day of ___August_____, 2008.

INDUSTRIAL COMMISSION

/s/
James F. Kile, Chairman

/s/
R.D. Maynard, Commissioner

Thomas E. Limbaugh, Commissioner

ATTEST:

/s/
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _13th_ day of ___August_____, 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

MICHAEL J WALKER
601 W MAIN ST STE 1212
SPOKANE WA 99201-0684

PAUL S PENLAND
PO BOX 8266
BOISE ID 83707-8266

ge/cjh
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/s/