

2. Whether and to what extent Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, including whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine.

Defendants represented in their post-hearing brief that the issue of PPI benefits was resolved by the parties post-hearing and that Defendants have initiated benefits based on a 19% PPI rating. Claimant does not assert an alternate PPI rating. This decision will incorporate the agreement of the parties into its conclusions of law without additional findings of fact or discussion on the issue of PPI.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant sustained a head injury and right knee injury while working for Employer on December 10, 2001.¹ Claimant asserts that cognitive deficits associated with his traumatic brain injury render him unemployable and that he is totally disabled by virtue of both the 100% method and pursuant to the odd-lot doctrine. Claimant relies on the medical records as well as the vocational opinion of Nancy Collins, Ph.D.

Defendants maintain that Claimant failed to meet his burden of proof to establish that he is totally and permanently disabled. Medical records recite unsubstantiated subjective complaints. The deterioration of Claimant's condition is due, at least in part, to his lack of effort and poor motivation. Claimant's condition is self-perpetuated because of Claimant's failure to

¹ Some of the evidence reflects that Claimant's right knee was injured as the result of a separate subsequent injury sustained while working for Employer. The two injuries have been handled as a single claim without objection from either party. The agreed upon 19% PPI rating includes impairment for both Claimant's head and right knee. Claimant asserts that his right knee was injured in the initial injury and that the subsequent re-injury is causally related to the initial claim. Causation of Claimant's right knee condition is not in dispute and will be attributed to the initial industrial injury of December 10, 2001.

effectively utilize prescription medication or seek psychiatric care. The opinions of Dr. Collins are speculative.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Joint Exhibits 1 through 12;
2. Testimony of Claimant and his wife, Luz Beltran Huamanlazo, taken at hearing (with the benefit of a Spanish/English interpreter); and
3. The Industrial Commission's Legal File.

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

Background

1. Claimant was born in Peru on June 9, 1960 and was 48 years old at the time of hearing. Claimant moved to the United States in late 2000 or early 2001 with an agricultural work visa allowing him to work for Employer in Dayton, Idaho. Claimant completed high school in Peru and attended trade school to become an electrician/lineman. He worked as an electrician for Electro Peru for 15 years but lost his job when the Peruvian government privatized the industry. Claimant inherited a small plot of land in Peru which he farmed concurrently with and subsequent to his government employment. His farm produced small crops such as oranges, but did not generate enough income to support his family.

2. Claimant's work for Employer included maintenance and management of farm equipment, operation of farm equipment and vehicles, electrical work, cow milking and welding.

RECOMMENDATION - 3

Claimant's primary job was driving a tractor to clear lots. Claimant began working for Employer in early 2001 and was regarded by Bryce Checketts, owner of Employer, as a good worker. Claimant was provided housing on Employer's premises.

Injury, Treatment and Post-Injury Return to Work

3. On December 10, 2001, Claimant was demonstrating the use of a front-end loader to a co-worker when the bucket on the loader moved suddenly and struck Claimant in the head. Claimant immediately lost consciousness. He was transported to Franklin County Medical Center and transferred to LDS Hospital in Salt Lake City. Claimant's head MRI revealed a depressed skull fracture with easily visible bone fragments and a brain contusion. Claimant underwent emergency surgery that included craniotomy, laceration repair, evacuation of contusion/clot in his brain, and fracture repair with placement of mini-plates and bone screws.

4. Claimant received post-operative care and initial occupational therapy at LDS Hospital. He was transferred to the brain injury program at Idaho Elks Rehabilitation Hospital in Boise (Elks) on January 17, 2002 and received in-patient services until March 1, 2002. Nancy E. Greenwald, M.D., followed Claimant's care at Elks.

5. Upon discharge from Elks in March 2002, Claimant attempted to return to work for Employer in a modified duty capacity and Employer made efforts to accommodate Claimant's restrictions. In spite of mutual effort, Claimant's return to work was not successful. Claimant rolled a truck he was driving for Employer but did not sustain injuries as a result of that incident. Employer attributed the single vehicle accident to Claimant's inattentiveness, but Claimant maintains that he failed to apply the brakes in a timely manner because of concentration and perception deficits associated with his head injury.

6. Claimant's right knee gave out at work and he pursued right knee treatment in mid to late 2002. In September 2002, Claimant was diagnosed with a lateral meniscus tear and anterior cruciate ligament (ACL) tear. Philip R. McCowin, M.D., performed arthroscopic surgery on September 12, 2002.

7. Claimant's wife was still living in Peru at the time of Claimant's industrial injury. She experienced difficulty obtaining a visa and it took approximately one year before she was able to join Claimant in Idaho. She arrived in late 2002.

8. Claimant was re-admitted to Elks on April 27, 2003 with complaints of continued vertigo and headaches. He was unable to complete a full shift at work. Employer could only continue to accommodate Claimant's restrictions if he was able to work a full eight-hour shift. Claimant received inpatient evaluation and treatment until he was discharged from Elks on May 7, 2003.

9. Craig Beaver, Ph.D., performed a neuropsychological evaluation of Claimant during the 2003 hospitalization. He determined that Claimant functioned in the average to low average range of intellectual skills and abilities; demonstrated difficulties on formal neuropsychological testing; performed poorly on tests related to effort and motivation; demonstrated poor motor speed and dexterity; performed tasks involving simple attention in the low average range; demonstrated low average skills of expressive fluency and verbal reasoning; had visual spatial skills within normal limits; and demonstrated memory deficits. Some of Claimant's contradictory test results reflected that Claimant was likely over-stating his difficulties and there was a significant motivational component to Claimant's poor performance. Tests were either provided in Spanish or given with translation. Claimant demonstrated severe depression.

10. Dr. Beaver concluded that Claimant had mild neurocognitive deficits as a result of his 2001 industrial injury, but that Claimant's poor motivation and emotional distress exacerbated his symptom presentation. At the time of the 2003 evaluation, Dr. Beaver was hopeful that Claimant could return to employment. He felt that Claimant required a structured work environment with repetitive tasks.

11. Claimant had a repeat brain MRI on May 2, 2003 because of complaints of daily headaches. The MRI demonstrated post-traumatic changes within the right superior temporal gyrus/angular gyrus region with mild encephalomalacic change and exvacuo dilation of the right atrium and temporal horn of the left ventricle. No acute abnormalities were identified. These findings were interpreted by Dr. Greenwald to demonstrate scarring in the right temporal area with some loss of brain parenchyma in the temporal region.

12. Upon Claimant's release from Elks in 2003, he was restricted to four hours of work per day with a recommended gradual increase in shift length to eight hours over a period of two months. He was restricted from operating machinery or working at unprotected heights. He was permitted to drive only with accompaniment of a responsible adult. Claimant was instructed to limit work on uneven surfaces, squatting and kneeling. Claimant was prescribed medications (Topamax, Lexapro, and Maxol) for headaches. Claimant's diagnoses included sensorineural hearing loss on the left, history of vertigo and chronic headaches.

13. Employer was not able to accommodate Claimant's restrictions following the 2003 hospitalization and Claimant has not been able to maintain employment since April 2003. He worked at a farm in Tarreton, Idaho for approximately one month but was let go because he could not understand instructions given to him and was experiencing difficulty operating machinery.

14. Dr. Greenwald recommended in May 2003 that Claimant continue his medications for six months, but that Claimant should assume responsibility for the medications as of October 2003. Dr. Greenwald did not apportion any of Claimant's head injury impairment to a prior injury or pre-existing cause. She did not elaborate as to why Claimant's medications would be related to the industrial injury for an additional period of six months, but not thereafter.

15. This case was referred to the Industrial Commission Rehabilitation Division (ICRD) in May 2004. During Claimant's initial interview, he complained of headaches and expressed frustration over his condition. Claimant was not a good historian and the ICRD consultant relied on medical records to supplement information provided by Claimant. The ICRD consultant conferred with Employer and confirmed that continuing modified-duty employment was not available. However, Employer reported that Claimant had been a good worker and that they would attempt to find him some form of employment if he was physically able to work.

16. ICRD closed its file in November 2004. Claimant lost his work permit and ICRD was no longer able to assist Claimant in his return-to-work efforts. At the time of file closure, Russ Griffith from Idaho Division of Vocational Rehabilitation (IDVR) did not feel that Claimant was able to look for work due to continuing medical problems. Claimant testified at hearing that he believed he could renew his work permit if he was physically able to work.

17. Claimant was referred to the Clinical Services Program of the Center for Persons with Disabilities (CPD) by his attorney. Claimant was evaluated by CPD in mid-2005. The evaluation consisted of review of past medical and neuropsychological test records, an interview with Claimant and his wife and a battery of tests to measure Claimant's current intellectual and neuropsychological functioning. Claimant demonstrated extreme depression as a psychological

reaction to his injuries. The depression exacerbated his cognitive deficits and contributed to Claimant's decline in function since 2003. It was recommended that Claimant consult a psychiatrist regarding medication to alleviate his depression and noted that it was extremely important that Claimant take his medication as prescribed.

18. Claimant's right knee symptoms persisted and he underwent a second surgery on April 21, 2005 by Richard A. St. Onge, M.D., in the form of an arthroscopic revision of Claimant's right knee ACL reconstruction with removal of hardware and bone graft. Dr. St. Onge restricted Claimant from repetitive twisting, bending, stooping, jumping, kneeling, ladders, stairs and squatting. He detected post-traumatic arthritis which he predicted would advance with time. Dr. St. Onge recommended a home exercise program with use of a stationary bicycle.

19. Dr. Beaver re-evaluated Claimant in March 2006 at which time Claimant was functioning at a much lower level than in 2003. Claimant was more passive than in 2003 and his affect was obviously depressed. He moved slowly and required frequent prompting and encouragement to complete most tasks presented.

20. Dr. Beaver attributed Claimant's decreased performance to significantly increased depression, poor compliance with his medications, possible cultural issues and increased life stressors. Claimant's wife explained that they did not have insurance and could not get refills of the medications prescribed by Dr. Greenwald. Claimant had some unused pills of Maxol that he was taking once or twice per week. Dr. Beaver noted that neither Claimant nor his wife seemed to understand that Maxol, Lexapro and Topamax were not effective when taken on an as-needed basis.

21. Dr. Beaver concluded that Claimant remained poorly motivated to return to any type of employment. He felt that Claimant should not drive, work at unprotected heights or

operate fast-moving machinery. He deferred to the treating orthopedist to address additional physical restrictions. Dr. Beaver felt that Claimant could return to structured repetitive type employment if his depression and pain were better controlled.

Testimony at Hearing

22. Claimant was soft-spoken and testified with dull affect. He demonstrated an inability to comprehend some questions, in spite of translation from English to Spanish for questions posed and from Spanish to English for answers given. He was a sincere witness and did not appear to exaggerate his cognitive deficits.

23. Claimant explained that it is difficult for him to concentrate or follow directions. He was not able to continue modified-duty work for Employer because of his inability to follow directions which resulted in conflicts with his boss. He lost his job with Employer because he rolled the truck and generally was not able to perform well.

24. Claimant understands some English and is able to engage in work-related small talk but is not fluent in English. He attempted to find work at other farms in the Preston/Dayton area after his injury but was unable to do so. He tried to get a job at the dairy where his wife works but was unsuccessful.

25. Claimant's wife, Luz Beltran Huamanlazo, was a spirited and forthright witness. She explained that Claimant's testimony was not accurate with regard to various details and that Claimant's perceptions have been altered because of his head injury. Claimant has a bad temper and can be violent which is different from how he was before the industrial injury. Claimant was previously a mild-mannered person who was a hard worker and the sole financial provider for their family which includes six children. Claimant's headaches, lack of focus and mood changes

are currently his worst problems. However, he also has difficulty walking because of his right knee condition and experiences difficulty with vision and hearing.

26. Ms. Huamanlazo found work at a dairy and she initially brought Claimant to work with her as a volunteer. Eventually, Ms. Huamanlazo's employer prohibited Claimant from continuing to assist her at work because the employer was concerned about repercussions from Claimant's mistakes and inappropriate behavior. While attempting to assist Ms. Huamanlazo with her work duties, Claimant failed to properly clean a corral; erroneously placed medicine in a water tank; and had violent outbursts towards the cows and Ms. Huamanlazo when he became frustrated.

27. Since his brief employment in Tarreton, Claimant has applied for work at seven ranches, including the dairy where Ms. Huamanlazo works, but has not been offered a job. Ms. Huamanlazo believes that Claimant is at a disadvantage to obtain work because his injury is common knowledge in the local community.

28. Ms. Huamanlazo has attempted to get Claimant's prescription medication refilled but has been told that workers' compensation will no longer pay for the medication. They do not have alternate insurance or other means to obtain the medication.

Expert Vocational Evidence

29. Nancy J. Collins, Ph.D. is a vocational rehabilitation expert who was hired by Claimant to provide a vocational assessment. Dr. Collins reviewed medical and vocational records as part of her case evaluation. She classified Claimant's previous work as a lineman as semi-skilled and his work in agriculture as ranging from unskilled to low-level semi-skilled. Claimant currently has limitations for skill acquisition.

30. Claimant performed medium to heavy work in the past. He does not currently have specific lifting restrictions, but has cognitive deficits that limit all strength categories. He is restricted from driving and operating fast-moving machinery. He has physical restrictions regarding his right knee to limit kneeling, crouching or climbing.

31. Based on Claimant's past work experience as a tractor operator, electrical lineman and farmer, Dr. Collins identified 77 job titles in the national labor market for which Claimant was qualified to perform prior to his industrial injury. Based on Claimant's post-injury restrictions and limitations, he no longer qualifies for any of the 77 job titles.

32. Dr. Collins concluded that Claimant has experienced a 100% loss of access to the labor market as the result of his industrial injury. There is not a single job in the Directory of Occupational Titles to which Claimant has access. Dr. Collins does not believe that Claimant is employable in any job, in any labor market.

DISCUSSION AND FURTHER FINDINGS

33. A claimant may establish that he or she is totally and permanently disabled by using either of the two methodologies available to establish total permanent disability:

First, a claimant may prove a total and permanent disability if his or her medical impairment together with the nonmedical factors total 100%. If the Commission finds that a claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical factors, there is no need for the Commission to continue. The total and permanent disability has been established at that stage. *See Hegel v. Kuhlman Bros., Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989) (Bakes, J., specially concurring) ("Once 100% disability is found by the Commission on the merits of a claimant's case, claimant has proved his entitlement to 100% disability benefits, and there is no need to employ the burden-shifting odd lot doctrine").

Boley v. State, Indus. Special Indem. Fund, 130 Idaho, at 281, 939 P.2d at 857 (emphasis added).

When a claimant cannot make the showing required for 100% disability, then a second methodology is available:

The odd-lot category is for those workers who are so injured that they can perform no services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Jarvis v. Rexburg Nursing Center, 136 Idaho 579, 584 38 P.3d 617, 622 (2001), citing *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). The worker need not be physically unable to perform any work:

They are simply not regularly employable in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.

Id., 136 Idaho at 584, 38 P.3d at 622.

34. Defendants did not present vocational evidence to contradict the opinions of Dr. Collins and did not offer evidence of an alternate PPD rating, less than total. Rather, Defendants assert that Claimant did not meet his burden of proof to establish total permanent disability because many of his complaints were subjective and because he engaged in self-limiting behaviors such as failing to properly take his medication and failing to seek psychiatric help for depression. Defendants identified potential job titles in their post-hearing brief for which “Claimant’s physical condition lends itself.” (Defendants’ Brief, p. 13). However, the record is void of any evidence that establishes Claimant’s ability to perform any specific type of job. Claimant’s testimony that he would be capable of any type of work if he recuperates from his head injury does not establish that he is able to work or that he is regularly employable. Similarly, Dr. Beaver’s hope that Claimant will be able to return to work in a structured, repetitive type job falls short of establishing that Claimant is able to return to work.

35. It is undisputed that Claimant sustained a serious head injury for which he underwent immediate brain surgery and an extensive rehabilitation program. Following the industrial injury, Claimant demonstrated deficits in multiple areas as demonstrated by

neuropsychological testing. Claimant's test results reflected low motivation and a deterioration of his condition from 2003 through 2006 that was linked to an increase in depression and other emotional factors.

36. Claimant's precise pre-injury cognitive functioning is unknown. However, the unrefuted evidence from Claimant's wife is that Claimant's mood and cognitive abilities were significantly altered by his head injury. Comments recorded from Employer regarding Claimant's pre-injury performance corroborate the testimony of Claimant's wife. It is undisputed that Claimant was able to maintain a job in Peru as an electrician for approximately 15 years. Claimant demonstrated the motivation and know-how to obtain a legal work permit and immigrate to the United States for employment prior to his injury.

37. Following his injury, Claimant unsuccessfully attempted to return to modified-duty work for Employer. He was able to find an alternate farming job but was unable to remain employed for longer than a month because of his inability to follow directions and operate machinery. He attempted to find work with his wife's employer and was rejected from working in even a volunteer capacity.

38. During his testimony, Claimant did not exaggerate his limitations. To the contrary, Claimant seemed oblivious to them. Claimant acknowledged problems with his head in the form of headaches and an inability to concentrate. He did not dwell on his right knee symptoms and indicated that he did not know what depression was. To the extent that Claimant's testimony and self-perception differed from the medical records and observations of his wife, Claimant's testimony was disregarded in favor of the other evidence.

39. The evidence fails to establish that Claimant's identified lack of motivation during neuropsychological testing was volitional or anything other than sequelae from his

industrial head injury. Similarly, Claimant's depression is a component of his head injury that exacerbates his cognitive shortcomings.

40. Defendants' assertion that Claimant's "disdain for prescription medication" is to blame for his failure to comply with his medication regimen is rejected. All of the medical service providers who evaluated Claimant after mid-2003 indicate that Claimant's cognitive deterioration was likely related, at least to some extent, to his failure to consistently take medications as prescribed. The records reflect that Claimant and his wife required education as to which medications needed to be consistently taken as opposed to utilized on an as-needed basis. Once this education was provided, Claimant was unable to obtain his prescription medication on a regular basis because Surety declined to pay for it and Claimant had no alternate means to obtain the medication. The testimony of Claimant's wife regarding her inability to obtain medication for Claimant is unrefuted and consistent with her frustration about Surety's refusal to pay for medication as documented in the medical records.

41. The opinions of Dr. Collins are unrefuted and are supported by the other evidence. Accordingly, Claimant has established that he is 100% disabled by virtue of total loss of access to the labor market.

42. Defendants assert that "though harsh in tone, the old axiom that 'it's all in your head,' is unfortunately, largely true in this matter." (Defendants' Brief, p.16). Ironically, Defendants maintain that this summation supports their contention that Claimant has failed to meet his burden of proof. In light of the fact that Claimant sustained a skull fracture and traumatic brain injury, the Referee agrees that the axiom is in fact legally true but yields the opposite result in this case. Claimant has met his burden to establish that he is totally and permanently disabled.

CONCLUSIONS OF LAW

1. Claimant is entitled to a 19% permanent partial impairment rating attributable to his industrial injury of December 1, 2001.

2. Claimant is totally and permanently disabled.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this __23__ day of _February__ 2009.

INDUSTRIAL COMMISSION

_____/s/_____
Susan Veltman, Referee

/s/ Thomas E. Limbaugh, Commissioner

/s/ James F. Kile, Commissioner

ATTEST:

/s/ Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __26__ day of __February__, 2009, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

JEFFERY K WARD
149 N PLACER AVE
IDAHO FALLS ID 83402

GLENNA M CHRISTENSEN
P O BOX 829
BOISE ID 83701-0829

jkc

/s/