

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RONALD WELTS,

Claimant,

v.

EAGLE INSULATION, INC.,

Employer,

and

LIBERTY NORTHWEST
INSURANCE CORPORATION,

Surety,
Defendants.

IC 2007-013334

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

Filed May 7, 2013

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue. He conducted a hearing in Coeur d'Alene on August 8, 2012. Claimant was represented by Starr Kelso. Defendants Employer and Surety were represented by Kent Day. The parties presented oral and documentary evidence and later submitted briefs. The case came under advisement on December 27, 2012. This matter is now ready for decision.

ISSUES

The issues to be decided according to the Notice of Hearing and as agreed to by the parties at hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;
2. Whether apportionment of permanent disability for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether the condition is due in whole or in part to a subsequent intervening cause; and

4. Whether and to what extent Claimant is entitled to benefits for:
 - (a) Temporary disability (TTD/TPD),
 - (b) Permanent partial impairment (PPI),
 - (c) Permanent partial disability in excess of impairment,
 - (d) Medical care, and
 - (e) Attorney fees.

CONTENTIONS OF THE PARTIES

Claimant contends that as a result of an April 16, 2007 compensable industrial accident, he requires additional medical treatment which Surety abruptly and arbitrarily cut off. Alternatively, if the treatment recommended by Claimant's treating physician is deemed unreasonable, Claimant is entitled to PPI and permanent disability. Dan Brownell's disability evaluation is unrebutted, showing disability of 35%, inclusive of PPI. Defendants have acted unreasonably in discontinuing recommended medical treatment and attorney fees should be awarded.

Defendants contend that Claimant received reasonable medical care. He improved and recovered fully around December 2007. He returned for additional medical care at the end of February 2008 and reported his pain had returned. After additional treatment was provided, Claimant's condition did not appear to improve and he reported it worsened. Two treating physicians, Jeffrey McDonald, M.D., and James Vancho, D.C., made different treatment recommendations, repeat injections versus a Medrol dose pack, respectively. Surety reasonably elected to follow Dr. Vancho's recommendations. After an IME reported Claimant at MMI, and both Drs. McDonald and Vancho concurred, Surety reasonably denied additional medical care. Claimant sought care outside the chain of referral thereafter. Claimant's PPI, if any, is no more than 5% and Dan Brownell's disability evaluation is inconsistent with medical evidence. Defendants acted reasonably in handling Claimant's claim.

FINDINGS, CONCLUSIONS, AND ORDER - 2

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant, his companion Santina Smith, his mother Karen Welts, and his father Richard Welts;
2. Claimant's exhibits 1-15 admitted at hearing; and
3. Defendants' exhibits A-Q, admitted at hearing (a surveillance video on two disks, exhibit Q, was physically provided later without objection.)

The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The Accident

1. On April 16, 2007, Claimant was working for Employer primarily installing insulation in crawl spaces under new residential construction. He injured his back when, sliding backward to install insulation in a shallow crawl space, his back struck a concrete pillar.
2. He finished the day and reported the accident. The following day he was unable to return to work and sought medical care.

Post-Accident Medical Care: 2007

3. On April 17 Claimant sought medical treatment at North Idaho Immediate Care Center. Claimant reported that his pain began when he "twisted" while crawling and when he was in a "lying/sitting position." Although the history does not mention that Claimant said his back struck a concrete pillar, it consistently locates the onset of pain beginning while in a crawl space while working. Blair Lindblad, M.D., a colleague of Kirk Hjeltness, M.D., examined Claimant and diagnosed lumbar back strain with muscle spasm. Dr. Lindblad imposed temporary work restrictions in the light-duty range.

4. At a recheck examination one week later, Dr. Lindblad noted Claimant reported and showed improvement but retained some paraspinal muscle tenderness to the left of center at Claimant's "iliac spine." Dr. Lindblad extended Claimant's light-duty work restrictions.

5. At a May 2 visit Claimant had worsened. He now also described back pain in his left lower T-spine levels which he attributed to physical therapy.

6. On May 9 Claimant reported improvement at previous levels but with new trapezius pain arising out of physical therapy. After ten visits Claimant showed improvement in the paraspinal muscles of his T-spine but his low back pain largely remained.

7. On May 10 Employer telephoned Dr. Lindblad for clarification of work restrictions. Dr. Lindblad's response apparently was recorded on the back of exhibit 1, p. 15, which was not copied into evidence.

8. Claimant's symptoms waxed and waned. On some May follow-up visits Claimant was examined by another colleague of Dr. Hjeltness, M. James Johnson, M.D. A May 17 X-ray showed mild spondylosis at multiple lower lumbar levels without evidence of other acute findings.

9. A May 24 recheck provided the first note of symptoms radiating into the left buttock. Dr. Hjeltness recommended a trial of full duty three days per week with alternating light-duty days. Through May and June Dr. Hjeltness continued to diagnose a resolving lumbar strain.

10. On June 23 John Casper, M.D., another of Dr. Hjeltness' colleagues at the clinic, diagnosed a lumbar disc herniation. Pain diagrams on various visits inconsistently mark either the right or left sacroiliac (SI) region as the locus of pain. Claimant has consistently reported

that the problem is on the left.

11. On July 5 the physical therapist discharged Claimant from his care for failure to attend therapy and to maintain communication. Later Claimant explained that the TENS unit which had been prescribed was helping more than physical therapy. At that point Dr. Hjeltness deemed continued physical therapy was unnecessary.

12. On July 10 Dr. Hjeltness noted substantial improvement, but found that left SI pain could be generated with certain hip motion. One week later Dr. Hjeltness recorded almost total recovery after an examination which noted full forward flexion and no objective symptoms. Nevertheless, medication and work restrictions were maintained.

13. On July 31 Claimant reported to Dr. Hjeltness that he still had mild left SI joint pain after a day of overuse. Left straight-leg-raising tests which in May were equivocally positive had returned to normal in June but on this visit the test was again positive. Throughout these May through July visits Dr. Hjeltness consistently diagnosed an acute myofascial lumbar strain with involvement in the iliopsoas and SI joint.

14. An MRI on August 2 showed left-sided disc bulges at L3-4 and L4-5 with annular tears and a more rightward bulge and tear at L5-S1. These showed a probable basis for clinical symptoms. Dr. Casper's diagnosis of disc herniations was confirmed.

15. On August 27 at Dr. Hjeltness' request, neurologist Jeffrey McDonald, M.D., examined Claimant. He noted a negative left straight-leg-raising test. He evaluated the MRI. Some subjective indications on examination led Dr. McDonald to diagnose left sacroiliitis. He recommended conservative care with steroid injections, more physical therapy, and full-time, light-duty work. The first injection was performed on September 6; the second, October 4.

16. About October Claimant resumed physical therapy.

FINDINGS, CONCLUSIONS, AND ORDER - 5

17. On November 5 Dr. McDonald reported that the first injection had helped more than the second, that physical therapy had not produced much result, and that Claimant requested modification of restrictions to allow him to work more. Dr. McDonald modified restrictions to allow full work with no lifting over 50 pounds. He recommended a third injection which was performed November 15.

18. On December 21 Dr. McDonald reported that Claimant considered himself to be “at least 90% improved”. Dr. McDonald recommended continued conservative care and released Claimant to full work without restrictions. He approved follow-up visits on an as-needed basis. He noted Claimant preferred not to carry more than 75-pound loads.

Additional Medical Care: 2008

19. On February 29 Claimant returned to Dr. McDonald. Claimant reported recurrent pain primarily associated with work activity. Dr. McDonald recommended repeat injections, renewed physical therapy, and light-duty work restrictions.

20. On March 6 Claimant inquired about chiropractic care in lieu of SI joint injections. Dr. McDonald agreed to this and referred Claimant to James Vancho, D.C. (See Transcript, p. 37; Claimant’s Exhibit 2, p. 94). After several visits Dr. Vancho suggested that a Medrol dose pack might help, although Dr. Vancho was unqualified to prescribe it himself. On April 17 Dr. Vancho released Claimant from chiropractic treatment “due to lack of clinical response.” He signed two return-to-work orders; the first released Claimant to work with “no restrictions”; the second deferred restrictions by stating, “His current treating physician needs to address work release/restrictions.”

21. On March 21 Surety refused to authorize the additional injections without first

trying a Medrol dose pack. Dr. McDonald recommended additional SI joint injections, but acceded to Surety's request to first try Dr. Vancho's recommendation. Although the Medrol dose pack was never demonstrated to have positively affected Claimant's recovery, Claimant never received the additional injections.

22. On May 8 Judith Heusner, M.D., in Spokane, Washington, examined Claimant and evaluated his condition at Defendants' request. She reviewed medical records and surveillance video. She opined that Claimant's asserted disability was greater than that which he exhibited in the examination and on the video. She opined Claimant to be at MMI and that he should be rated at zero PPI. Although Surety expressly asked her to use the *Guides*, 5th edition, in providing a rating, Dr. Heusner did not reference any source when she provided her conclusory opinion about PPI. She opined that additional treatment was not indicated by objective findings. She diagnosed a left sacroiliac strain. She opined that Claimant could return to work without restrictions. Her report suggests that she was not familiar with the requirements of Claimant's job. Nevertheless, she opined he could do it.

23. On May 31 Dr. Vancho responded to correspondence from Surety. He checked a box indicating he agreed with Dr. Heusner's IME report.

24. On June 2 Dr. McDonald responded to correspondence from Surety. He checked a box indicating he agreed with Dr. Heusner's IME report. In an examination of Claimant on that same date Dr. McDonald told Claimant, "I can identify no objective reason why Mr. Welts cannot pursue gainful employment without restriction at this time." He refused to sign a form recommending work restrictions which Claimant presented to him. Claimant responded angrily. Dr. McDonald refused to treat Claimant further.

25. On July 23 Claimant visited the ER at Kootenai Medical Center ("KMC")

following an exacerbation of lumbar sacroiliac pain and new left radiculopathy symptoms. Claimant associated the increased pain with having mowed his lawn.

26. On September 4 physiatrist Royce VanGerpen, M.D., performed a consultation examination. He found reduced range of motion. He suggested additional diagnostic tests including an MRI. He opined Claimant should not return to his previous job, but he also said:

We reviewed the possibility of no correctable disorder being present and the recommendation to move forward with return to work at whatever work activities he can do and ignoring the pain as being ultimately correct.

27. On November 9 Dr. McDonald responded to correspondence from Claimant's attorney. Dr. McDonald declined to see Claimant again. He opined Claimant's MRI findings were degenerative in nature and "not pertinent to his pain complaints".

Additional Medical Care: 2009 to Hearing

28. On May 15, 2009, a lumbar MRI showed some degenerative changes including broad-based disc bulges at L3-4-5-S1.

29. About July 14, 2011, John McNulty, M.D., examined Claimant for a PPI evaluation. Findings on exam were as follows:

Mr. Welts is pleasant and cooperative during the course of the evaluation. He has a slight antalgic gait, favoring his left lower extremity. He is able to forward flex with his knees extended and reach within 20 cm of the floor. Lumbar extension is approximately 30 degrees. He has tenderness over the SI joint without paraspinal muscle spasm. He does not have any pain complaints with axial compression of his spine or thoracic rotation. Both seated and standing straight leg raising test is negative. Left hip flexion is approximately 80 degrees versus 100 degrees on the right. Fabere's test is positive on the left and negative on the right. Ankle and knee jerk reflexes are 2+ and symmetrical bilaterally. He is able to stand on his heels and toes without difficulty. Sensation to light touch is intact in both lower extremities. Knee flexion and extension strength against resistance is 5/5. EHL strength is 5/5 bilaterally.

Upon examination, Dr. McNulty diagnosed chronic left sacroiliac strain and low back pain. He found Claimant to be at MMI and that further treatment was not indicated. He rated Claimant at

5% PPI for asymmetrical loss of range of motion and nonverifiable radicular complaints, under the *Guides*, 5th edition, DRE lumbar category 2. Dr. McNulty's records show a follow-up visit and a telephone contact with Claimant, both in December 2011.

Other History and Prior Medical Care

30. Claimant reported that he had suffered a back strain while in the Navy about 1980. After about one month of recovery he had no further low back symptoms or problems until this industrial accident.

31. Medical records provided do not show a relevant symptomatic condition existed before this industrial accident.

Vocational Factors

32. Born May 11, 1962, Claimant was 50 years old on the date of hearing. He is a high school graduate with one year of technical training.

33. In addition to the Navy, Claimant has worked as a satellite dish installer, in construction, and as a forklift driver.

34. Beginning in April 2008 Claimant received services from ICRD. The case notes reflect substantial effort by consultant Carol Jenks to assist Claimant in a work search. Claimant's perception of his abilities differed greatly from those physicians who released him to work without restrictions. At the end of January 2009 ICRD closed the file because Claimant did "not feel that he can seek employment at this time." Claimant requested further assistance from ICRD in May 2009. ICRD again attempted to place him without success. At the end of July 2009 ICRD again closed the file, this time because of lack of cooperation by Claimant. In mid-September 2009 Claimant again requested further assistance. This time Claimant obtained a

job earning \$10.25 per hour on a full-time basis.

35. In December 2008 Claimant was evaluated for services from IDVR. A pending recommendation for medical care rendered him ineligible for services.

36. On July 29, 2011, rehabilitation consultant Dan Brownell evaluated Claimant's disability. In conducting his evaluation, one of Mr. Brownell's foundational assumptions was that as a result of his injuries, "the Claimant's physical capabilities are limited to light-duty work activities with continued need for job accomodation and pain medications". See Claimant's Exhibit 9 at 160. The evaluation process employed by Mr. Brownell, and his ultimate opinion, are described at page 5 of his report:

I have acquired the most recent Labor Market information and statistics from the DOL Labor Analyst. This information was analyzed and compared to the claimant's current case profile, and current physical capabilities, to determine employability and loss of access to the Competitive Labor Market Area. Included in this analysis, is all of the documented Standard Occupational Job Classifications with Hourly Wage Earnings and number of people employed in each occupation. After detailed analysis, I have determined and opined that the claimant has a 35% PPD inclusive of impairment.

Claimant's Exhibit 9.

DISCUSSION AND FURTHER FINDINGS OF FACT

37. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

38. Claimant's demeanor provided no basis for questioning his credibility.

39. Surveillance video taken April 12, 26 and 27, 2008, shows Claimant occasionally bending forward at the waist and crouching. The motions exceed Claimant's assertions of his range of motion, but not impressively so. While Claimant does not appear to hesitate before

bending, the initial sequence on April 12 shows him putting a hand to back muscles on the left and stretching as if to relieve some soreness. The video does not materially affect a credibility or disability analysis.

40. The content of Claimant's testimony at hearing showed a mild exaggeration of his symptoms and his diminished function compared to medical and other evidence of record. Overall, Claimant is a credible witness.

Causation

41. A claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Further, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *Paulson v. Idaho Forest Industries, Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Roberts v. Kit Manufacturing Company, Inc.*, 124 Idaho 946, 866 P.2d 969 (1993). A claimant is required to establish a probable, not merely a possible, connection between cause and effect to support his or her contention. *Dean v. Dravo Corporation*, 95 Idaho 558, 560-61, 511 P.2d 1334, 1336-37 (1973).

Temporary Disability

42. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code §72-408, *et. seq.* Upon medical stability, eligibility for temporary disability benefits does not continue. *Jarvis v. Rexburg Nursing*, 136 Idaho 579, 38 P.3d 617 (2001).

43. Surety paid TTD benefits through May 7, 2008. MMI was declared to have been

reached on May 8, 2008.

PPI, Permanent Disability, and Apportionment

44. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 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*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

45. Dr. Heusner opined Claimant's condition rated no PPI, but did not state whether that opinion was based on reference to the *Guides*. On or about May 31, 2008, Dr. Vancho signified his agreement with all aspects of Dr. Heusner's report by responding to a fill-in-the-blank letter provided to him by surety. (See Defendants' Exhibit K at 165). For his part, Dr. McDonald, too, was forwarded a copy of Dr. Heusner's report and asked whether he agreed or disagreed with Dr. Heusner's findings. On June 2, 2008, Claimant was seen by Dr. McDonald for a final visit. In his note of the date, Dr. McDonald provided an update on Claimant's status, and addressed the issue of his agreement or disagreement with Dr. Heusner's findings:

PROGRESS NOTE: Mr. Welts returns to the clinic today for further neurosurgical followup and review of his independent medical examination. He states that he continues to have tingling over the left sacroiliac region. He has been unable to return to work and his insurance benefits have therefore been discontinued. He has not been taking Celebrex due to the lack of insurance coverage/workers compensation benefits. He has had physical therapy and chiropractic care, neither of which provided any relief. His sacroiliac injection helped temporarily last fall. He has not been able to pursue further injections due to insurance reasons. He is currently in the process of applying for unemployment because of this.

DISPOSITION: I have informed Mr. Welts that I am in agreement with the findings and conclusions of the independent medical examination. I can identify no objective reason why Mr. Welts cannot pursue gainful employment without restriction at this time. I have refused to complete a form that he presented

indicating work restrictions. He then “stormed out of the clinic slamming the door.” No further followup will be scheduled in this office.

Claimant’s Exhibit 2.

Therefore, Dr. McDonald noted that Claimant continued to complain of tingling over the left sacroiliac region. He noted that Claimant had not been taking Celebrex due to the lack of insurance coverage. He also noted that Claimant had not been able to pursue further injections “due to insurance reasons”. The puzzling thing is that notwithstanding his observations that Claimant had not received all of the medical treatment Dr. McDonald evidently thought was indicated, Dr. McDonald nevertheless stated his agreement with the findings and conclusions of Dr. Heusner, and further stated that Claimant could pursue gainful employment without restriction. In fact, he refused to complete a form proffered by Claimant which identified certain work restrictions.

46. Dr. McNulty provided a thorough evaluation and examination. Claimant still had symptoms and impaired function on that late date. Dr. McNulty expressly referenced how he arrived at his PPI rating of 5% by examination and by use of the *Guides*, 5th edition. Dr. McNulty’s opinion carries greater weight.

47. Claimant showed it likely he suffered permanent impairment as a result of this industrial accident rated at 5% of the whole person.

48. “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 permanent impairment and by pertinent nonmedical factors

provided in Idaho Code § 72-430.

49. 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 nonmedical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (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, 896 P.2d 329 (1995).

50. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425, *et. seq.* Permanent disability is a question of fact in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See, Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997). A claimant bears the burden of establishing permanent disability. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). In assessing whether or not Claimant has suffered disability in excess of physical impairment, it is important to understand whether Claimant’s permanent impairment has caused a loss of functional capacity which impacts his ability to engage in physical activity. (See *Poljarevic v. Independent Food Corporation*, 2010 IIC 0001 (2010)).

51. Although we have found that on the issue of Claimant’s permanent physical impairment the opinion of Dr. McNulty is more persuasive than those of other providers, it is more difficult to accept Mr. Brownell’s opinion on the extent and degree of Claimant’s disability in excess of impairment, even though Mr. Brownell’s opinion is altogether unchallenged by other opinions of record. Of course, Defendants are not required to prove the negative in

defending the case. Accordingly, we must determine whether Mr. Brownell's report is sufficient to allow Claimant to meet his burden of proving that he has suffered disability in excess of impairment.

52. Mr. Brownell's opinion is premised on a foundational assumption he made concerning Claimant's permanent limitations/restrictions. Mr. Brownell assumed that Claimant's injury restricted him to "light duty" work. (See Claimant's Exhibit 9, p. 160). Based on the labor market, Claimant's relevant non-medical factors and what Mr. Brownell assumed to be Claimant's physical capabilities, Mr. Brownell ultimately concluded that Claimant has suffered disability of 35%, inclusive of Dr. McNulty's 5% PPI rating. The problem with this conclusion is that nowhere in the record can we find any evidence that a treating or evaluating physician has given Claimant any permanent limitations/restrictions as a consequence of the subject accident. Dr. McNulty, who evaluated Claimant at Claimant's instance, failed to speak to the issue of whether or not Claimant's 5% PPI rating coincided with any limitations/restrictions on Claimant's ability to engage in physical activities. Other of Claimant's treating/evaluating physicians have specifically addressed the issue of limitations/restrictions, and have proposed that Claimant has not suffered any permanent limitations/restrictions as a consequence of the subject accident.

53. Mr. Brownell's report reflects that he did review the Claimant's treatment records that describe Claimant's subjective complaints and difficulties. As well, Mr. Brownell took his own history from Claimant concerning the extent to which the subject accident had impacted Claimant's ability to engage in various physical activities. (See Claimant's exhibit 9 at 159). In the absence of physician imposed limitations/restrictions, we are left to assume that Mr. Brownell's assumption concerning Claimant's physical capabilities is ultimately informed only

by what he could glean from the medical records, and the history he took from Claimant concerning Claimant's subjective sense of what he could and could not do.

54. As Defendants have noted, this case bears some similarities to the recent Industrial Commission case of *Lenz v. Bertram Construction, Inc.*, 2011 IIC 0075 (2011). In that case, Lenz asserted that he had suffered a work-related low back injury. The parties disputed this, but the Commission was ultimately persuaded by the opinion of Dr. McNulty, who opined that Lenz suffered a work-related low back injury that entitled him to a 5% PPI rating. As in this case, Dr. McNulty did not address whether Mr. Lenz had suffered any limitations/restrictions as a consequence of his PPI rating. Claimant retained the services of Mr. Brownell to evaluate the extent and degree of the claimant's disability in excess of physical impairment. Mr. Brownell met with Lenz, reviewed his medical records, and prepared a report based on his knowledge of the relevant labor market. Mr. Brownell testified that he relied primarily on the report of Dr. McNulty to define Claimant's medical restrictions. In *Lenz, supra*, Mr. Brownell ultimately concluded that Claimant had suffered disability of 25%, inclusive of the 5% PPI rating. The Commission noted a number of problems with Claimant's claim for an award of disability in excess of physical impairment. However, relevant to the instant matter are the Commission's observations concerning the assumptions made by Mr. Brownell about Lenz's limitations/restrictions:

24. Fourth, contrary to Mr. Brownell's testimony, there are no medical restrictions to be found in Dr. McNulty's report (or anywhere else in evidence). The only evidence of any "restrictions" is Claimant's overly broad statements to Mr. Brownell that have nothing to do with lifting, bending, etc. Mr. Brownell noted in his report that Claimant had not had the opportunity to have a Functional Capacities Evaluation (FCE) performed. The unknown here is what restrictions a physician with knowledge in such matters would impose, or what an FCE would reveal, and how such restrictions would affect Claimant's employability.

25. Fifth, Mr. Brownell's conclusory opinions regarding the degree of Claimant's PPD are troublesome. As mentioned above, Mr. Brownell reported and testified that he utilized the medical restrictions imposed by Dr. McNulty, yet neither he, nor any other physicians, ever imposed any restrictions. Mr. Brownell made no attempt to correlate whatever Claimant may have told him about his subjective restrictions with medical records or opinions. Further, Mr. Brownell arrives at a 25% PPD figure with little explanation. There was no loss of labor market access or loss of earning capacity analysis. The unknowns here are the specific information upon which Mr. Brownell relied in arriving at his opinions and the basis for the analyses of vocational factors he undertook.

Lenz, 2011 IIC 0075 at 10.

55. In *Lenz, supra*, we found that based on "the paucity of convincing vocational evidence", *Lenz* had failed to prove his entitlement to PPD over and above PPI.

56. In the instant matter, Mr. Brownell acknowledges the importance of identifying Claimant's functional limitations, noting that such limitations are defined by medical and subjective information. Mr. Brownell's report identifies a number of Claimant's self-reported complaints and limitations. Against this background, the only medical evidence of record clearly conveys the opinion that Claimant has no limitations/restrictions as a consequence of the subject accident. Dr. McNulty, to whom one might reasonably look to controvert the opinions of Drs. Heusner, and McDonald is altogether silent on the question of Claimant's limitations/restrictions.

57. In a nutshell, we are asked to award 35% disability based on Claimant's subjective sense of what he can and cannot do in the face of affirmative medical opinions that Claimant has no limitations/restrictions whatsoever as a consequence of the subject accident.

58. In evaluating this matter, we are guided by the principle that Claimant bears the burden of proving, by a preponderance of the evidence, all facts essential to his recovery. *See, Tipton v. Jansson*, 91 Idaho 904, 435 P.2d 244 (1967); *Wilson v. Carl Gilb, Inc.*, 94 Idaho 106, 482 P.2d 81 (1971); *Ellis v. Dravo Corporation*, 97 Idaho 109, 540 P.2d 294 (1975); *Ball v. Daw Forest Products Company*, 136 Idaho 155, 30 P.3d 933 (2001). The basic question in this case is

whether Mr. Brownell's report is sufficient to meet Claimant's burden of proving that he has suffered disability over and above impairment. As noted above, although the medical records, and Claimant's own testimony, support the proposition that Claimant continues to have subjective complaints of pain/discomfort, and though he has also testified that these complaints limit his functional capacity, there is a dearth of expert opinions affirmatively establishing that Claimant has any permanent limitations/restrictions. However, we are also mindful that the Referee who heard this case, and who had the unique opportunity to observe Claimant at hearing, found that Claimant was, overall, a credible witness.

59. Although the medical record does not affirmatively establish the existence of any physician imposed permanent limitations/restrictions, a close review of the record nevertheless lends some support to the proposition that Claimant does, indeed, suffer reduced functional capacity as a consequence of the accident.

60. First, as noted above, there is the puzzling internal contradiction in Dr. McDonald's June 2, 2008 note. On the one hand, Dr. McDonald acknowledged Claimant's ongoing complaints and referenced the fact that due to Surety's handling of the case Claimant had not received two medications that had been prescribed for further treatment. On the other hand, Dr. McDonald nevertheless chose to agree to Dr. Heusner's findings, and specifically declined to entertain Claimant's request for the imposition of work restrictions. This internal contradiction is difficult to reconcile, but is perhaps explained by the fact that Claimant's relationship with Dr. McDonald had deteriorated by the time of the June 2, 2008 meeting, also as referenced in the June 2nd note.

61. Next, it is clear from the records that Claimant's complaints persisted following his last visit with Dr. McDonald. Claimant was seen by Dr. VanGerpen on September 4, 2008.

After examining Claimant, Dr. VanGerpen stated that Claimant was unable to return to his time of injury job, but was encouraged to continue to explore opportunities for “light work” at whatever level he could perform. (See Claimant’s Exhibit 6, pg. 147). Finally, although it is true that Dr. McNulty did not author any specific permanent limitations/restrictions at the time he examined Claimant in July of 2011, there is no evidence that he was specifically asked to address any issue other than the extent and degree of Claimant’s permanent physical impairment. However, from what Dr. McNulty did say, it is clear that as of July 2011, the subject accident continued to limit Claimant’s functional abilities. Dr. McNulty made note of Claimant’s subjective complaints, and also noted that Claimant walked with a slight antalgic gait, favoring his left lower extremity. Claimant was unable to forward flex with his knees extended and reach within 20 centimeters of the floor. On exam, Claimant had tenderness over the SI joint. Left hip flexion was limited as compared to the right and Fabere’s test was positive on the left and negative on the right. The 5% PPI rating eventually awarded by Dr. McNulty was based on Claimant’s demonstrated asymmetrical loss of range of motion and nonverifiable radicular complaints. Claimant’s Exhibit 7.

62. Mr. Brownell reviewed these and other records, and we assume they were considered by him in coming to his conclusion that Claimant was limited to performing light duty work. Mr. Brownell also relied on Claimant’s recitation of his subjective complaints in performing the vocational evaluation, which might be problematic had Claimant’s testimony concerning the nature and extent of his complaints been found not credible. However, as noted, Referee Donohue found Claimant to be generally credible at hearing.

63. Although one could certainly wish for a more detailed explanation of how Mr. Brownell arrived at his conclusion that Claimant is limited to light duty work, we cannot say that

the record does not contain enough medical information to allow Mr. Brownell to make this foundational assumption. It is also worth noting that Mr. Brownell's vocational opinion was not challenged, either by cross-examination or the retention of a defense expert. In all, we cannot say that Mr. Brownell's opinion, unchallenged as it is, is insufficient to meet Claimant's burden of proving that he has suffered disability in excess of impairment.

64. Based on the foregoing, the Commission concludes that Claimant has met his burden of proving that he has suffered disability of 35%, inclusive of his 5% PPI rating.

Medical Care and Attorney Fees

65. An employer is required to provide reasonable medical care for a reasonable time as recommended by an injured worker's treating physician. Idaho Code § 72-432(1).

66. Attorney fees are not granted to a claimant as a matter of right under the Idaho workers' compensation law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides in relevant part:

Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety . . . without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

67. Dr. Vancho, a chiropractor, suggested to Dr. McDonald, a neurosurgeon, that a Medrol dose pack might be worth a try. Dr. McDonald disagreed and recommended a second set of injections.

68. However, it is worth noting that Claimant did not experience anything but brief improvement following the first set of injections performed by Dr. McDonald, or at his instance. Dr. Vancho, a chiropractor, who is nevertheless a “physician” under Idaho Code § 72-102(25), thought it worthwhile to propose a Medrol dose pack (an orally administered steroid) to see if it would be of assistance in mediating Claimant’s subjective complaints. Defendants authorized this treatment in lieu of the second set of injections proposed by Dr. McDonald, and the record reflects that Dr. McDonald agreed to this. Claimant argues that surety’s actions in this regard constitute impermissible meddling in Claimant’s treatment. Claimant argues that Dr. McDonald required that Claimant undergo a second set of sacroiliac joint injections, and that Defendants were obligated to provide this care under Idaho Code § 72-432. However, the evidence makes it abundantly clear that Dr. Vancho was of a different view concerning Claimant’s prospective care. He felt that Claimant would benefit from an oral steroidal medication. It is intimated that because Dr. McDonald is a neurosurgeon, his opinion ought to trump that of Dr. Vancho. We are unwilling to accept this argument under the peculiar facts of this case. Both Dr. Vancho and Dr. McDonald are “physicians” for purposes of Idaho Code § 72-102. Ultimately, since Claimant was eventually found to be medically stable, the question of Claimant’s entitlement to the Medrol dose pack versus the second set of sacroiliac injections is of import only in connection with the claim for attorney’s fees.

69. We do not believe that Surety’s decision to endorse the treatment recommendation proposed by Dr. Vancho instead of the recommendation made by Dr. McDonald is sufficient to justify an award of attorney’s fees against Defendants under Idaho Code § 72-804.

70. Pursuant to Idaho Code § 72-432(1) an employer is obligated to provide such

reasonable care as may be required by the employees physician following an accident. Here, it is undeniable that Dr. Vancho qualifies as Claimant's "physician" within the meaning of the statute. Though he was initially treated by Dr. McDonald, Claimant requested a trial of chiropractic care, to which Dr. McDonald agreed. Dr. Vancho treated Claimant for a period of time, and ultimately made the recommendation for the administration of a Medrol dose pack, a medication that he was not legally able to prescribe. He requested that Dr. McDonald prescribe the medication. Dr. McDonald did not agree with this course of treatment, but Surety authorized it just the same, possibly aware that the first course of injections administered by Dr. McDonald offered Claimant only temporary relief. We cannot say that Surety's decision to follow one of two conflicting recommendations, both made by "physicians", is sufficient to justify an award of attorney's fees under Idaho Code § 72-804.

CONCLUSIONS AND ORDER

1. Claimant suffered a compensable injury caused by this industrial accident;
2. Claimant failed to show that there remains any unpaid temporary disability benefits;
3. Claimant is entitled to PPI rated at 5% of the whole person;
4. Claimant is entitled to permanent disability of 35%, inclusive of impairment;
5. Claimant is not entitled to an award of attorney fees under Idaho Code § 72-804.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 7th day of May, 2013.

INDUSTRIAL COMMISSION

/s/ _____
Thomas P. Baskin, Chairman

/s/ _____
R.D. Maynard, Commissioner

PARTICIPATED, BUT DID NOT SIGN

Thomas E. Limbaugh, Commissioner

ATTEST:

/s/ _____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May , 2013, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816

KENT W DAY
PO BOX 6358
BOISE ID 83707-6358

/s/ _____