BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ENRIQUE LOPEZ, Claimant, v. VANBEEK HERD PARTNERSHIP, Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2011-020952** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 14, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant, Enrique Lopez, was represented by Justin Aylsworth, of Boise. Defendant Employer, Vanbeek Herd Partnership (Vanbeek), and Defendant Surety, State Insurance Fund, were represented by Neil McFeeley, of Boise. In lieu of a hearing, the parties agreed to submit the matter on stipulated exhibits. On October 21, 2015, Claimant filed his proposed list of medical providers, exhibits, and issues. On October 27, 2015, Defendants filed their Notice of Joinder in Claimant's proposed list of exhibits and requested issues. The parties then submitted post-hearing briefs. The matter came under advisement on December 23, 2015, and is now ready for decision.

ISSUES

The stipulated issues to be addressed are:[1]

1. The proper methodology for calculating Claimant's hearing loss impairment; and

[1] Although not a stipulated issue, the issue of causation of Claimant's permanent hearing impairment is addressed hereafter.

2. The proper impairment rating.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant sustained an industrial accident while working for Vanbeek on August 26, 2011. Defendants accepted the claim and provided medical treatment. Defendants have paid Claimant permanent partial impairment benefits of 8% of the whole person for his hearing loss from his industrial accident. Claimant now requests additional permanent partial impairment benefits for his hearing loss. Defendants deny further impairment benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Exhibits A through I (Bates Nos. 1-43), as stipulated by the parties.

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

1. Claimant was born July 13, 1979. On August 26, 2011, he was employed by Vanbeek as a dairy worker.

2. On August 26, 2011, Claimant's coworkers found him unconscious in a pen on Vanbeek's premises. Claimant regained consciousness while being transported to St. Benedicts Family Medical Center in Jerome for treatment. Claimant recalled a bull coming at him, but could not remember being hit or knocked down. He reported head, low back, and left knee pain, and buzzing in his right ear. After evaluation, he was found to have multiple contusions and abrasions, left knee meniscal tear, low back contusion, closed head injury, mild left ear hearing

loss, and profound right ear hearing loss. Defendants accepted the claim and provided medical treatment for Claimant's injuries.

3. Joseph Seitz, AuD., tested and treated Claimant for his hearing loss. On February 13, 2012, Dr. Seitz wrote that Claimant suffered mild high frequency hearing loss in his left ear and profound hearing loss in his right ear. On March 30, 2012, Dr. Seitz rated Claimant's hearing loss at "18% of total hearing impairment." Exhibit E, p. 30. Dr. Seitz recommended a behind the right ear hearing aid which Defendants authorized; however, it resulted in no right ear hearing improvement.

4. On May 4, 2012, Tyler McKee, M.D., performed arthroscopic left knee medial meniscectomy. On November 8, 2012, Dr. McKee rated Claimant's left knee impairment due to his industrial injury at 2% of the left lower extremity.

5. On June 10, 2013, Christine Pickup, AuD., reported that testing revealed Claimant had no speech audiometry responses in his right ear—confirming that he had no usable right ear hearing—and mild high-frequency hearing loss in his left ear. Dr. Pickup recommended a bilateral contralateral microphone positioned behind Claimant's right ear with wireless relaying of sound to a hearing aid positioned behind Claimant's left ear, known as a BICROS system. Dr. Pickup opined that Claimant suffered a 100% hearing impairment for monaural hearing loss (right) pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides).

6. On November 17, 2013, Delray Maughan, M.D., reviewed Claimant's records and concurred in the BICROS system recommended by Dr. Pickup. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, together constituting a 22.9% binaural impairment which Dr. Maughan rated at

8% whole person permanent partial impairment. Dr. Maughan noted Claimant sustained his right ear total hearing loss secondary to his closed head injury on August 26, 2011.

7. Defendants provided Claimant a BICROS system that significantly improved his hearing. No physician has restricted Claimant's work activities due to his hearing loss.

8. Defendants have paid Claimant 8% whole person permanent partial impairment for his bilateral hearing loss.

DISCUSSION AND FURTHER FINDINGS

9. 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). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

10. **Causation and impairment.** A claimant must provide medical testimony that supports his 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), and "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).

11. In the present case, Defendants assert Claimant has not proven that his mild left ear hearing loss is related to his industrial accident. Claimant responds that the issue of causation was not noticed for decision, was not agreed to by the parties, and was not included in Claimant's Proposed List of Medical Providers, Exhibits, Issue(s) to be Determined, to which

Defendants assented in their Notice of Joinder, and thus is not before the Commission.[2] In his recommendation, Referee Taylor did not resolve whether Claimant was unfairly surprised with the issue of causation, instead finding that the record established causation. Although as developed *infra*, the Commission agrees that Claimant has proven causation, the Commission finds it appropriate to address Claimant's arguments on surprise and unfairness. Idaho Supreme Court precedent instructs that causation is at issue any time benefits are sought, because without the demonstration of a causal relationship, there is simply no entitlement to benefits. Gomez v. Dura Mark, Inc., 152 Idaho 597, 272 P.3d 569 (2012). Therefore, the issue of causation does not need to be expressly delineated in the notice of hearing where workers' compensation benefits are sought. Id. Here, Claimant argues that at a pre-hearing telephone conference, the parties stipulated that causation was not contested. The Referee's pre-hearing telephone conference was

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[2] Claimant criticizes Defendants for raising the issue of causation as not mentioned in the parties' stipulated list of issues. Claimant cites to Gomez v. Dura Mark, Inc., 152 Idaho 597, 272 P.3d 569 (2012), and argues "that to avoid due process complications, parties to work comp proceedings can stipulate to the 'prerequisites and elements of recovery,' which is exactly what transpired in this case." Claimant's Reply Brief, p. 3. In Gomez, the Idaho Supreme Court affirmed a Commission decision denying additional medical benefits because Gomez had not proven the need for such medical treatment was caused by the industrial accident—even though the issue of causation was not set forth in the notice of hearing. The Court declared:

> [W]e hold that I.C. § 72–713 does not require specific notice of causation. Causation is put on issue by virtue of any claim regarding the reasonableness of medical benefits arising from an industrial accident or disease; even if reasonableness is found—without causation, there is no entitlement to benefits.

Gomez, 152 Idaho at 601-02, 272 P.3d at 573-74. Significant to the instant case, the Court expressly observed "causation is an issue whenever entitlement to benefits is at question." Gomez, 152 Idaho at 601, 272 P.3d at 573. Additionally, the Court expressly advised:

> [T]his Court wishes to provide a clear message that without a specific stipulation that causation will be a contested issue at the hearing pursuant to I.C. § 72–713, and especially if there is a difference of opinion as to causation by opposing parties and their experts, claimant's attorneys should no longer be lulled by anything other than a stipulation to all legal prerequisites and elements for recovery and be prepared to present evidence of a causal connection between the industrial injury or sickness and the required treatment.

Gomez, 152 Idaho at 599, 272 P.3d at 571 (emphasis provided). In the present case, a "stipulation to all legal prerequisites and elements for recovery," was arguably lacking and Claimant was wisely prepared to present evidence of a causal connection between his industrial accident and his hearing impairment.

informal and no transcript or recording exists. Moreover, Referee Taylor reports that he cannot recall whether Defendants conceded causation during the telephone conference. Possibly a legitimate misunderstanding exists as to what remained at issue for hearing. We cannot tell. The parties are cautioned that it is best to reduce all important understandings to writing. At any rate, we will not assume that the issue of causation has been waived by Defendants. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear. Dr. Maughan stated that Claimant:

> sustained a unilateral total hearing loss (right) secondary to the closed head injury sustained 8/26/2011. This is well documented in the medical records. The left ear high frequency neurosensory hearing loss might or might not be related to the head injury. Without a pre injury audiogram I cannot exclude the head injury as the cause of the left ear loss, even though the pattern is consistent with a pre-existing noise induced high frequency hearing loss.

Exhibit H, p. 38. After noting he could not exclude the industrial accident as the cause of the left ear hearing loss, Dr. Maughan concluded that Claimant suffered 22.9% binaural impairment, which he rated as 8% permanent partial impairment of the whole person. The Commission disagrees with the Referee's conclusion that the above quoted appraisal is sufficient to prove that Claimant's left ear condition is causally related to the accident. However, the Commission finds that Dr. Seitz has provided the necessary opinion establishing a link between the accident and the left ear condition.

12. Dr. Seitz examined Claimant and on March 30, 2012, rated his hearing impairment at "18% of total hearing impairment," Exhibit E, p. 30, based upon "a profound hearing loss on the right and a mild high-frequency loss on the left." Exhibit E, p. 32. Dr. Seitz observed that Claimant suffered hearing loss as a result of head trauma in August 2011. Significantly, Dr. Seitz specifically indicated that none of the impairment rating he assigned was due to a pre-existing condition.

13. Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). The essence of Dr. Seitz's ratings is that Claimant's left ear hearing loss is related to his industrial accident.

14. Claimant has proven that both his right and left ear hearing impairments are related to his industrial accident. [3]

15. **Calculation methodology and extent of permanent partial impairment.** The next issues are the proper methodology for calculating Claimant's permanent impairment and the extent thereof.

16. "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 non-progressive at the time of 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 employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized 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. Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014), Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

[3] In response to Defendant's causation challenge herein, Claimant raises the issue of attorney fees pursuant to Idaho Code § 72-804—an issue not mentioned in the parties' stipulation of issues. Attorney fees was not an issue noticed in any fashion, is not "an issue whenever entitlement to benefits is at question," and is not properly before the Commission at this time.

17. In the present case, several physicians have rated Claimant's permanent impairment due to his industrial accident. Dr. Seitz rated Claimant's hearing impairment at 18% of total hearing impairment. Dr. Pickup opined that Claimant suffered a 100% hearing impairment for monaural hearing loss on the right pursuant to the Guides. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, together constituting a 22.9% binaural impairment pursuant to the Guides which Dr. Maughan rated at 8% whole person permanent partial impairment.

18. Defendants assert that 8% impairment is appropriate per the Guides and is reasonable because so long as Claimant uses a BICROS system—which Defendants have provided—he has no work restrictions and no functional loss. Claimant persuasively notes that such correction by artificial means does not eliminate permanent impairment. In Burke v. EG & G/Morrison-Knudsen Const. Co., 126 Idaho 413, 885 P.2d 372 (1994), the Court stated:

> In Kelley [v. Prouty, 54 Idaho 225, 30 P.2d 769 (1934)], the Court said in determining the specific indemnity for loss of vision provided for in I.C. § 43-1113, which is now I.C. § 72-428, corrective glasses and "other artificial means" should not be considered. Id. at 245-46, 30 P.2d at 777. This direction was given to make sure that vision as corrected would not determine the degree of a claimant's loss of vision for purposes of specific indemnity.

Burke, 126 Idaho at 415-16, 885 P.2d at 374-75.

19. Claimant observes that when impairment ratings from the Guides or another source conflict with statutory scheduled impairment benefits, the statutory schedule is controlling. See Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 903, 591 P.2d 143, 150 (1979); Paul v. DeMarco Wood Products, 1990 IIC 0230, 0230.3 (1990). Claimant asserts that Idaho Code §§ 72-428 and 429, and prior case law mandate a comparative assessment or fixed mathematical calculation of his partial binaural hearing loss of either 18.8 or 20.1% permanent partial impairment as set forth more fully hereafter.

20. Idaho Code § 72-428. Claimant first asserts that the proper methodology for determining his permanent impairment is dictated by Idaho Code § 72-428 which provides in part:

> **§ 72-428. Scheduled income benefits for loss or losses of use of bodily members**
>
> An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five percent (55%) of the average weekly state wage stated against the following scheduled permanent impairments respectively:
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> (1) Amputations of Upper Extremities — Weeks
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> Forequarter amputation — 350
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> ….
>
> (3) Loss of Vision and Hearing
>
> Total loss of vision of one eye — 150
> Loss of one eye by enucleation — 175
> Total loss of binaural hearing — 175
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> (4) Total loss of use. Income benefits payable for permanent disability attributable to permanent total loss of use of [or] comparable total loss of use of a member shall not be less than as for the loss of the member.
>
> (5) Partial loss or partial loss of use. Income benefits payable for permanent partial disability attributable to permanent partial loss or loss of use, of a member shall be not less than for a period as the permanent impairment attributable to the partial loss or loss of use of the member bears to total loss of the member.

Idaho Code § 72-428.[4]

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[4] At least as early as Thom v. Callahan, 97 Idaho 151, 154, 540 P.2d 1330, 1333 (1975), the Idaho Supreme Court noted that "The Workmen's Compensation Law contemplates evaluation of permanent impairment in terms of the 'whole man,' and in terms of impairment of body extremities as provided by the schedule of income benefits found in I.C. § 72-428." Most recently in the case of Mayer v. TPC Holdings, Inc., 2015 IIC 0031, 2015 WL 4994298 (Idaho Ind. Com. 2015), the Industrial Commission examined Idaho Code § 72-428, and reaffirmed:

> [T]he specific indemnities identified for partial and total loss of body parts represent benefits for what can only be characterized as "permanent impairments". In short, what is clearly anticipated by Idaho Code § 72-428 is that if an injured worker is less than totally and permanently disabled, he is entitled to receive the payment of permanent impairment for total or partial loss of the body parts referenced in the statute. It is unclear why the statute specifies income benefits paid pursuant

21. Thus Idaho Code § 72-428(3) specifies 175 weeks for total loss of binaural hearing which equates to 35% permanent partial impairment (175 weeks ÷ 500 weeks = 35%). Notably, the Guides, of which the Commission takes notice, also rate total loss of binaural hearing at 35% permanent impairment. Guides, p. 254.

22. Claimant argues that the Commission is required to apply a "fixed mathematical calculation per the 'total loss' scheduled mandates of I.C. § 72-428," Claimant's Opening Brief, p. 11, which Claimants designates, and is referred to hereafter, as a comparative assessment of partial loss impairments. Claimant asserts that since he sustained 100% right ear hearing loss, Idaho Code § 72-428(5) mandates a comparative assessment of partial loss impairments by which he is entitled to receive 50% of 175 weeks (which is one-half of the scheduled impairment for total loss of binaural hearing). Relying upon this same subsection, he claims an additional amount for his 7.5% left ear hearing loss in the amount of 50% of 7.5%, or 3.75% of 175 weeks. In total he claims 53.75% of 175 weeks, which equates to 18.8% permanent partial impairment. Alternatively, Claimant requests 50% of 175 weeks for right ear hearing loss plus 7.5% of 175 weeks for left ear hearing loss, thus totaling 57.5% of 175 weeks which equates to 20.1% permanent partial impairment.

23. Defendants point to the scheduled benefits for loss of vision of one eye in Idaho Code § 72-428(3) and assert that the statutory scheme shows that the legislature was well aware of how to specify scheduled benefits for loss of use of only one eye and could have done the same for loss of hearing in one ear, but did not. They allege that the impairment from the

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to the statute are for "permanent disability" when the payments are intended for what can only be described as "permanent impairment".

complete loss of hearing in one ear is not equivalent to half of the impairment warranted by total loss of hearing in both ears.[5]

24. Clearly, total loss of hearing in one ear is not a scheduled impairment listed in Idaho Code § 72-428. Significantly, Idaho Code § 72-430 conclusively provides that partial loss of binaural hearing is not a scheduled impairment. It states in pertinent part:

> Preparation of schedules—Availability for inspection—Prima facie evidence. The commission may prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries less than total, including, but not limited to, a schedule for partial loss of binaural hearing and for loss of teeth, and methods for determination thereof. ….

Idaho Code § 72-430(2) (emphasis supplied).[6] Inasmuch as partial loss of binaural hearing is not a scheduled impairment, Idaho Code § 72-428(5) does not control the instant case and Claimant's arguments founded thereon are unpersuasive.

25. Idaho Code § 72-429. Claimant also argues that Idaho Code § 72-429 supports his request. It provides:

> In all other cases of permanent disabilities less than total not included in the foregoing schedule the amount of income benefits shall be not less than the evaluation in relation to the percentages of loss of the members, or of loss of the whole man, stated against the scheduled permanent impairments, as the disabilities bear to those produced by the permanent impairments named in the schedule. Weekly income benefits paid pursuant to this section shall likewise be paid at fifty-five percent (55%) of the average weekly state wage for the year of the injury as provided in section 72-428, Idaho Code.

Idaho Code § 72-429 (emphasis supplied). Claimant asserts that the above emphasized statutory language mandates the comparative assessment of partial loss impairments according to his

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[5] Other provisions of the Worker's Compensation Act recognize a substantial difference between partial and total loss of a sensory function. Idaho Code § 72-428(3) lists total loss of vision of one eye as a scheduled impairment warranting 150 weeks of benefits, equating to 30% permanent partial impairment. However, loss of vision in both eyes is presumptively deemed 100% total and permanent disability per Idaho Code § 72-407(1).

[6] The Commission has adopted no present schedule for determination of percentages of unscheduled permanent impairment for partial loss of binaural hearing.

mathematical calculations previously set forth, and requires acceptance of his claim for 18.8% or 20.1% permanent impairment.

26. Certainly, as a catch-all provision for disability less than total, Idaho Code § 72-429 applies to the instant case. However, while applying to all non-scheduled impairment cases where disability is less than total, upon a close reading, in contrast to Idaho Code § 72-428(5), Section 72-429 does not address loss of use, or partial loss of use but only "loss of the members." Partial loss of binaural hearing is a partial loss of use.

27. Most significantly, the fact that the legislature via Idaho Code § 72-430(2) expressly authorized the Commission to "prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries … for partial loss of binaural hearing" soundly refutes Claimant's contention that the legislature intended Sections 72-428 and/or 429 to require that the Commission apply a "fixed mathematical calculation per the 'total loss' scheduled mandates of I.C. § 72-428." Claimant's Opening Brief, p. 11. Idaho Code § 72-429 does not mandate the comparative assessment of partial loss impairments that Claimant urges for his partial loss of binaural hearing.

28. Case law. Claimant also argues that past Supreme Court and Commission decisions require a comparative assessment of partial loss impairments according to the mathematical calculations he advocates. He cites Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989), Colson v. Guinn, 1984 IIC 0487 (1984), Carman v. Twin City Foods, 1985 IIC 0228 (1985), Johnson v. Industrial Special Indemnity Fund, 2000 IIC 0040, 2000 WL 38726 (Idaho Ind. Com. 2000), and Wisner v. Shilo Automatic Sprinkler, 1987 IIC 1051 (1987) to support his analysis.

29. Claimant maintains that the following pronouncement in Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 756, 769 P.2d 1122, 1128 (1989), supports his impairment evaluation methodology:

> As guidance on remand, we note that the impairment attributable to an injured and replaced hip is not among the "scheduled permanent impairments" enumerated in I.C. § 72–428. Rather, it is an unscheduled impairment, to be determined by analogy to the statutory schedule. This analogizing process is sufficiently flexible to recognize that a painful hip may produce greater functional loss than would an asymptomatic hip.

While the Court directed that unscheduled impairments be determined by analogy to the statutory schedule of Idaho Code § 72-428, it did not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

30. In Colson v. Guinn, 1984 IIC 0487.3 (1984), a doctor rated Colson's hand impairment at 5% as compared to the loss of the hand; the Commission concluded: "Pursuant to Idaho Code § 72-428, the loss of a hand entitles a claimant to benefits for 270 weeks so, under Section 72-429 the claimant in this case is entitled to receive permanent partial disability benefits for 5% of 270, or 13.5, weeks." Colson illustrates quantifying permanent impairment based upon a medical appraisal of the percentage of loss of a scheduled impairment. Colson does not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

31. In Carman v. Twin City Foods, 1985 IIC 0228 (1985), Carman sustained a knee injury. In commenting generally on Idaho Code § 72-428, the Commission declared:

> It provides that when a permanent disability involves the partial loss of use of a member set out in schedules found in 72-428, the period of time for which benefits as calculated under 72-428 shall be allowed shall bear the same proportion to the period of time allowed for total loss of use or loss of that

> member as the partial loss of use bears to the total loss of use or loss of that member.

Carman v. Twin City Foods, 1985 IIC 0228 at 11. Carman does not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

32. In Johnson v. Industrial Special Indemnity Fund, 2000 IIC 0040, 2000 WL 38726, at 3 (Idaho Ind. Com. 2000), the Commission addressed the permanent impairment resulting from Johnson's partial binaural hearing loss stating:

> Claimant has a severe hearing loss on the right and a profound loss on the left. The parties do not disagree that this is an 81% hearing loss equivalent to a 28% whole person impairment rating based upon the AMA Guidelines. Claimant can only hear in a very small range and it would sound like noise to him if amplified. Therefore, hearing aids would be of no use for verbal communication, but they could help to monitor his environment and assist in lip reading. This rating is consistent with Idaho Code § 72-428(3) that gives a 35% whole person impairment rating for total loss of binaural hearing. The Referee found, and the Commission concurs, that Claimant suffers an impairment of 28% due to his pre-existing hearing loss.

Thus the Commission received a medical appraisal of an 81% overall hearing loss based upon the then current AMA Guides and multiplied the 81% overall hearing loss by 35% impairment, based upon the statutory schedule for total binaural hearing loss, to obtain 28% permanent impairment (81% x 35% = 28%).

33. In Wisner v. Shilo Automatic Sprinkler, 1987 IIC 1051 (1987), the Commission evaluated a lesser partial binaural hearing loss and declared:

> [C]laimant does suffer a permanent physical impairment for hearing loss which was occasioned by the noise he experienced at work during 1983. The Referee finds that claimant has a 20 percent loss of hearing as determined by Dr. Smedley. Since total loss of hearing would entitle claimant to 175 weeks of compensation under Section 72-428, Idaho Code, 20 percent loss of hearing would entitle claimant to 35 weeks of compensation, which is equivalent to an impairment of 7 percent of the whole man.

Thus the Commission again received a medical appraisal of a 20% overall hearing loss and multiplied the overall hearing loss by 35% impairment rating, based upon the statutory schedule for total binaural hearing loss, to obtain 7% permanent impairment (20% x 35% = 7%).

34. While Claimant cites Johnson and Wisner in support of his demand for comparative assessment of partial hearing loss impairment, neither case utilized or supports the methodology Claimant urges herein. Rather, in both cases the Commission followed the guidance of Urry in analogizing the unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code § 72-428(3); specifically, by relying upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code § 72-428(3) for total binaural hearing loss). This is the proper method for calculating Claimant's partial binaural hearing loss impairment.

35. Following the precedent of Johnson and Wisner, and based upon Dr. Maughan's credible evaluation, Claimant's impairment for his partial binaural hearing loss is properly calculated as follows: 22.9% overall binaural hearing loss sustained x 175 weeks = 40.075 weeks; 40.075 weeks ÷ 500 weeks = 8% permanent impairment of the whole person.[7]

36. The Commission finds that Claimant suffers permanent impairment of 8% of the whole person attributable to his partial binaural hearing loss due to his industrial accident.

37. Claimant has not proven he is entitled to additional permanent impairment benefits due to his partial binaural hearing loss from his industrial accident.

[7] As set forth previously, Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, constituting a 22.9% binaural impairment which Dr. Maughan rated at 8% whole person impairment. Not surprisingly, Dr. Seitz's rating is reasonably similar. Dr. Seitz rated Claimant's hearing impairment at 18% of total hearing impairment which would equate to 6.3% permanent impairment of the whole person (18% x 175 weeks = 31.5 weeks; 31.5 ÷ 500 weeks = 6.3% impairment).

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven both his left and right hearing impairments are related to his industrial accident.

2. The proper method for calculating Claimant's partial binaural hearing loss impairment is by analogizing his unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code § 72-428(3); specifically, by relying upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code § 72-428(3) for total binaural hearing loss).

3. Claimant suffers permanent impairment of 8% of the whole person attributable to his partial binaural hearing loss from his industrial accident. Defendants have paid 8% permanent impairment benefits for Claimant's hearing loss. Claimant has not proven he is entitled to any additional permanent impairment benefits due to his partial binaural hearing loss from his industrial accident.

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

DATED this 14th day of April, 2016.

INDUSTRIAL COMMISSION

__/s/_____
R.D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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