

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT EVANS,

Claimant,

v.

TWIN FALLS TAXI TRANSPORTATION,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,
Defendants.

IC 2013-000808

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

Filed May 4, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on June 23, 2015. Claimant, Robert Evans, was present in person and represented by Daniel J. Luker, of Boise. Defendant Employer, Twin Falls Taxi Transportation (Twin Falls Taxi), and Defendant Surety, Idaho State Insurance Fund, were represented by Alan K. Hull and Matthew O. Pappas, of Boise. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on January 20, 2016.

ISSUES

The issues to be decided were narrowed by the parties' post-hearing briefing and are:¹

¹ Additional issues noticed for hearing but not addressed in briefing include (1) Claimant's entitlement to additional medical care, and (2) apportionment pursuant to Idaho Code § 72-406. These issues are considered waived. Furthermore, Claimant's briefing requests the Commission retain jurisdiction to consider his entitlement to future medical treatment and to surgery-related impairment and temporary and permanent disability benefits in the event he decides to undergo lumbar surgery as recommended by Dr. Manning. Jurisdiction of medical benefits need not be retained as medical benefits pursuant to Idaho Code § 72-432 are not subject to a five-year statute of limitations. However, Idaho Code § 72-713 requires the Commission "give at least ten (10) days' written notice of the ... issues" to be addressed at hearing. Claimant did not request and the Commission did not provide notice that retention of jurisdiction of temporary disability, impairment, or permanent disability would be addressed at the hearing. The Commission therefore declines to address the issue of retention of jurisdiction of these benefits herein.

1. The extent of Claimant's permanent partial impairment caused by the industrial accident; and
2. The extent of Claimant's permanent disability caused by the industrial accident, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on January 7, 2013, when the bus he was driving for Twin Falls Taxi was rear-ended by another vehicle. He asserts permanent impairment ranging from 10 to 13% and permanent disability ranging from 61% to total permanent disability. Defendants assert that Claimant is not credible, overstates his limitations, and is entitled to no more than 3% permanent impairment and no permanent disability beyond impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant;
3. The testimony of Claimant, Jason Kindelberger, and Anthony Reyna taken at hearing;
4. Joint Exhibits 1-49, admitted at the hearing;
5. The post-hearing deposition testimony of Leah Speich, taken by Defendants on September 3, 2015;
6. The post-hearing deposition testimony of Bret Adams, MPT, taken by Claimant on September 10, 2015;

7. The post-hearing deposition testimony of James Bates, M.D., taken by Claimant on September 10, 2015;
8. The post-hearing deposition testimony of Rodde Cox, M.D., taken by Defendants on September 30, 2015;
9. The post-hearing deposition testimony of Nancy Collins, Ph.D., taken by Claimant on October 5, 2015; and
10. The post-hearing deposition testimony of Douglas Crum, CDMS, taken by Defendants on October 5, 2015.

All pending objections are overruled. After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born in Wallace, Idaho in 1957. He was 55 years old and resided in the Boise area at the time of accident. He was 57 years old and continued to reside in the Boise area at the time of the hearing.

2. Twin Falls Taxi was a service providing transportation for mentally and/or physically disabled adults, including transportation to medical and similar appointments.

3. **Work and health history.** At an early age Claimant moved to and was largely raised in Denair, California where he graduated from high school in approximately 1972. He has obtained no further formal education. He worked on a cattle ranch and a large poultry farm as a teenager. He learned to operate tractors and front end loaders. Claimant left home when he was approximately 15 and worked at a gas station. After graduating from high school in Denair, he

performed a large number of jobs. His work history also suggests extended periods of unemployment.²

4. Shortly after high school, Claimant began working at a sporting goods store in Turlock, California, where he initially stocked merchandise and progressed to store security, detecting and apprehending shoplifters. From 1974 until 1976, Claimant worked part-time in maintenance at a nursing home in Turlock. From approximately 1976 until 1978, Claimant worked as an undercover confidential informant in various drug-related cases in Turlock and Modesto, California. At approximately this time, Claimant also worked as a farm laborer. In 1978 Claimant also worked in Modesto as an auto detailer.

5. Claimant then moved to San Francisco where he engaged in body building and martial arts and was employed as an exotic dancer and a limousine driver from approximately 1978 until at least 1979 and perhaps through 1985. From approximately 1978 until 1979 Claimant also worked installing siding. He installed residential and commercial siding thereafter from time to time over many years.

6. In 1980 Claimant worked as a custodian cleaning banks in Sherlock, California. From 1981 through 1982, he worked as doorman/bouncer.

7. In approximately 1982, Claimant had a motorcycle accident and sustained a serious right shoulder injury requiring surgery. He testified he suffered an adverse reaction to anesthesia during surgery and “almost didn’t make it off the table.” Transcript, p. 29, l. 10. No medical records of this shoulder injury or surgery were presented by the parties. Claimant fully

² Claimant’s work experience is so varied, many periods of employment so brief, his recall so incomplete, and precise information of the dates and sequence of his employments so lacking, that a reasonably comprehensive chronological work history is very difficult to ascertain from the record. The work history set forth herein is an approximated summary.

recovered from his shoulder injury and returned to body building and full-time employment without limitation.

8. In 1984, Claimant moved to Modesto and provided security for concerts. Claimant worked in Stockton as a subcontractor installing siding on homes. He was highly proficient in using skill saws, chop saws, nail guns, and various other power tools.

9. In 1987, Claimant worked as a fitness trainer at a fitness center in Modesto. He also continued to work installing siding.

10. In 1988, Claimant worked for North Cal Distributing for two months. In 1988 Claimant also worked in construction in Modesto. He became proficient at walk-through inspections and completing final inspection checklists. Claimant also worked laying carpet for several months.

11. In approximately 1990, Claimant worked as a security officer at the Hilton Hotel in Reno, Nevada where he transported money from tables to secure locations.

12. In approximately 1991, Claimant moved to Montana and worked in Missoula at Ready Mix Concrete as a supervisor for nearly one year. He may also have lived and worked in Idaho briefly.

13. Claimant returned to California and became certified as a forklift operator in Stockton. In approximately 1992, he received training in hydraulics; however, Claimant did not like the field and never used the training.

14. In approximately 1993, Claimant moved to Idaho and began working at the Good Samaritan in Boise as a maintenance technician. His duties included plumbing repairs, painting, and changing electrical switches. Claimant suffered a work accident at Good Samaritan when he struck his head on a hand truck, resulting in a concussion. He was treated at a hospital for his

head injury and for a time could not recall who he was or where he was. However, a brain CT scan was normal and Claimant ultimately recovered without residual complaints.

15. In 1994, Claimant lived in Boise and worked for Retaining Walls Northwest. On January 8, 1994, he sustained a work injury when he grabbed someone to prevent them from falling through a floor of a building that was being demolished. Claimant was diagnosed with a hip strain, received conservative medical treatment, and recovered. By 1996 Claimant worked making cabinets.

16. In approximately 1996, Claimant began working for Franklin Building Supply in Boise. His duties included operating forklifts and unloading freight. On September 26, 1996, he sustained a work accident when a metal band struck his right eye causing a corneal abrasion. He was off work for approximately one week and received conservative treatment by an ophthalmologist. Claimant fully recovered and returned to his usual work. In June 1997, he sustained another work accident when he was bitten by a spider at work and developed immediate arm numbness. He was treated at the emergency room and returned to work within a day or so. In November 1997, Claimant sustained another work accident when a sheet of plywood fell on his foot, badly bruising his right big toe. He recovered and continued working. Thereafter Claimant lived and worked at Home Town RV Park, where his duties included tree trimming, lawn work, and snow removal.

17. In approximately 1999, Claimant returned to California and worked briefly in a lumber yard. He then moved to Missoula to join his father and learn truck driving.

18. In approximately 2001, Claimant moved back to Boise and worked driving a 26-foot box truck making local deliveries. In 2002, Claimant worked as a driver delivering cargo from Boise to McCall and Riggins.

19. In 2003, Claimant began working for Just Roses in Boise as a delivery driver. On July 17, 2003 Claimant sustained a work injury when his vehicle was rear-ended while he was stopped. He was off work briefly. Claimant settled his worker's compensation claim for this accident. In January 2004, Claimant slipped on the ice while making a delivery and landed on his right shoulder. He sustained a partial right supraspinatus rotator cuff tear. Surgical repair was recommended; however, he declined surgery and chose physical therapy. His shoulder steadily improved over approximately one year with conservative treatment. He was eventually released without permanent restrictions.

20. In 2004, Claimant worked for Flowerama in Boise. He was subsequently laid off. In 2005, Claimant worked for a courier service in Boise delivering blueprints and other items to Tamarack and McCall. While driving on November 26, 2005, Claimant's vehicle rear-ended the vehicle of another driver who stopped suddenly in front of him. Following the accident Claimant's employment was terminated. Thereafter Claimant worked for an interstate moving company as a loader and driver. Claimant obtained a CDL and drove from Boise to California, Montana, and Nevada.

21. In approximately 2006, Claimant worked for Great Basin delivering sodas and other products to bars and grocery stores from Mountain Home and McCall to Vale, Oregon.

22. In approximately 2007 Claimant went to Lincoln City, Oregon and worked at a motel as a doorman or bell hop. His duties also included valet parking.

23. In approximately 2007 or 2008, Claimant returned to Boise and worked maintaining an RV park. Claimant next worked for Fleet Street transporting large cargo and mail to and from Boise, Pocatello, Mountain Home, Burley, Gooding, and occasionally Salt Lake

City. Thereafter Claimant worked in Boise for Okanogan Valley Transport driving a bus transporting the disabled.

24. In 2012, Claimant began working for Twin Falls Taxi driving a bus transporting disabled clients to medical appointments. His duties included assisting passengers, stooping, bending, and picking up wheelchairs. Some of his wheelchair passengers weighed 400 pounds or more. The bus accommodated up to 12 clients and four wheelchairs. Claimant was required to wheel wheelchairs up ramps, position each wheelchair, and kneel and secure it in the bus. Claimant also had to regularly lift frail non-wheelchair clients from their seats and assist them in boarding and exiting the bus. Claimant drove a regular daily route in the Boise area. He was also dispatched by calls to his personal cell phone to pick up new clients and take them to medical appointments.

25. By January 2013, Claimant had recovered from his prior industrial and non-industrial injuries. He had no significant physical limitations and no work restrictions.

26. **Industrial accident and medical treatment.** On January 7, 2013, while driving a bus for Twin Falls Taxi, Claimant was waiting at a stop-light in Boise on a road where the posted speed limit was 35 miles per hour. The roads were snow-covered and slick. The bus Claimant was driving was rear-ended by a 1989 suburban. The driver of the suburban braked but was unable to stop on the snow-covered roadway. The driver estimated her speed at approximately 10-15 miles per hour when her vehicle slid into Claimant's bus. The force of the collision broke out the rear window of the bus and propelled broken glass forward, striking Claimant in the back of the head. The collision also split one corner of the housing of the bus's rear air conditioner, split the exterior rear fiberglass panel of the bus across its entire length, bent the bus's rear bumper, and jammed the handicap lift rendering it inoperable. The impact jolted

Claimant. He was wearing a seat belt and noted immediate neck pain. The collision bent the front license plate but produced no other visible damage to the suburban. Both vehicles were still drivable after the collision. Jason Kindelberger, the police officer responding to the scene of the accident later testified that the height of the suburban's front bumper and the rear frame of the bus were closely matched, thus it was difficult to estimate the suburban's speed on impact and the force of the impact. Officer Kindelberger accepted the suburban driver's estimate of 10-15 miles per hour as the speed on impact. Claimant reported neck pain but declined paramedic treatment at the scene of the accident. At the time of the accident Claimant was earning a flat rate of \$90.00 per day and working five days per week. He may have on occasion worked as much as 12 or more hours per day.

27. Claimant drove himself home. He swept the snow from the steps and deck adjoining his fifth wheel trailer. Claimant's neck pain worsened and he developed a bad headache. He notified his supervisor and presented to Primary Health where he received medication, a cervical collar, and was referred to an occupational medicine clinic. The day following the accident, Claimant awoke with neck and back pain of moderate severity.

28. On January 14, 2013, Claimant presented to Stephen Martinez, M.D., who recorded Claimant's report of neck, back, and left hip pain, including "shooting pains to the left leg, buttock, and left hip." Exhibit 27, p. 283. Dr. Martinez assessed work related neck, back, and hip sprain and prescribed medication. He ordered cervical and lumbar MRIs.

29. On February 1, 2013, Claimant underwent a cervical MRI which documented: "cervical spondylosis, most noticeable at the C5-6 and C6-7 levels. At the C6-7 level there is severe left neural foraminal stenosis." Exhibit 27, p. 300. On February 9, 2013, he underwent a lumbar MRI which documented: "L2-L3: There is ... a mild circumferential disk bulge with a

more prominent component in the left lateral to extreme left lateral aspect where disc material abuts the exiting left L2 nerve root.” Exhibit 27, p. 306. Claimant’s neck pain resolved over time; however, his back pain worsened. Dr. Martinez referred Claimant to orthopedic surgeon Thomas Manning, M.D.

30. On February 20, 2013, Dr. Manning examined Claimant and recorded: “Clinically, Robert Evans has an L2 radiculopathy. The L2-L3 disc protrusion is not extraordinarily large, but I believe that is what he is symptomatic from and it pretty clearly is contacting that left L2 exiting nerve root in a slightly extraforaminal position.” Exhibit 28, p. 331. Epidural steroid injection was recommended but apparently declined as Claimant is strongly needle-adverse. Claimant diligently pursued physical therapy which produced only slight improvement and his back symptoms persisted. Dr. Manning recommended L2-3 microdiscectomy. However, Claimant cited his adverse reaction to anesthesia during his shoulder surgery years earlier and declined lumbar surgery. Several months of chiropractic treatment produced no significant lasting improvement.

31. On October 2, 2013, Dr. Manning found Claimant had reached maximum medical improvement and rated his permanent impairment at 13% of the whole person, all attributable to his industrial accident.

32. **Post-accident work search.** After the accident Twin Falls Taxi provided Claimant no further work assignments and he began searching for other employment. He visited the Department of Employment, searched for jobs on-line, and submitted applications—all without success. Claimant then applied for and began receiving Social Security Disability benefits.

33. **Sub rosa video surveillance.** On December 17, 18, and 23, 2014, private investigator Anthony Reyna performed sub rosa surveillance of Claimant's residence and activities at Defendants' request. Mr. Reyna observed no activity on December 17 or 23, 2014. On December 18, 2014, Mr. Reyna observed Claimant's activities outside of his residence and videotaped Claimant arriving and departing his attorney's office, visiting Dick's Stereo, changing a tail light on his pickup, dining at Del Taco, and refueling his pickup at a Jackson's gas station. Exhibit 40 is a copy of the sub rosa surveillance video taken by Mr. Reyna.

34. The December 18, 2014 surveillance video footage from approximately 1:11 to 1:14 p.m. shows Claimant walking with a noticeable limp favoring his left leg, but without a cane, to his mid-size pickup and climbing in without apparent difficulty. The footage at approximately 1:46 p.m. shows Claimant exiting his pickup without apparent difficulty, walking with a noticeable limp and using a cane with his left hand into his attorney's office building. The footage at approximately 2:10 p.m. shows Claimant exiting his attorney's office building, walking with a noticeable limp and with a cane to his pickup, and climbing in without apparent difficulty.

35. The surveillance video footage from approximately 2:28 to 2:51 p.m. shows Claimant walking with a noticeable limp but without a cane into Dick's Stereo, returning to his pickup, and proceeding to change a bulb in the left tail light panel. The footage shows Claimant primarily standing for approximately 23 minutes. During this time Claimant lowers the tailgate of his pickup, fully bends at the waist to retrieve a small red funnel that falls from his pickup bed onto the ground, bends slightly at the waist more than 10 times while he removes the tail light panel, extracts and replaces a bulb, replaces and secures the tail light panel, and raises and lowers the tailgate several times while apparently seeking a screw or other small object. In walking

around the rear of the pickup, Claimant limps slightly. The footage from approximately 2:35 to 2:43 p.m. shows Claimant using one arm to prop himself up against the tailgate at least nine times. The footage from approximately 2:43 through 2:51 p.m. shows Claimant using both arms to prop himself up against the tailgate at least seven times while conversing with another man.

36. The surveillance video footage at approximately 4:04 p.m. shows Claimant walking into Del Taco without a cane and with very little limp. The footage at approximately 4:37 p.m. shows him walking out of Del Taco with no limp discernible to the Referee, and climbing into his pickup with no apparent difficulty.

37. The surveillance video footage from approximately 4:48 to 5:06 p.m. shows Claimant walking with no limp discernible to the Referee while fueling and washing the windows of his pickup at a Jackson's gas station. The footage shows Claimant primarily standing and walking for approximately 18 minutes. During this time Claimant fully bends at the waist at least four times to obtain paper towels and a squeegee and thoroughly cleans all of his pickup's windows. On one occasion he uses his left arm to momentarily prop himself up against the paper towel dispenser while bending down to remoisten the squeegee.

38. **Condition at the time of hearing.** At the time of hearing, Claimant had daily low back pain and left leg pain and aching. He used medications, mostly ibuprofen and Aleve, to manage the pain. He also took prescription pain medication when he had to go shopping or be out of his trailer. On occasion he continued to use a cane to steady himself; however, he did not use a cane at all times and used no cane while attending the hearing.

39. At the time of hearing Claimant was not working and had not worked since his industrial accident. He continued to receive Social Security Disability benefits. He completed applications at the unemployment office and applied for driving jobs, all without success.

Claimant testified he could no longer perform his prior job at Twin Falls Taxi because he could not pick up people or wheelchairs, or get down on the floor to secure wheelchairs in place on the bus. He no longer hikes, backpacks, fishes, or camps.

40. **Credibility.** Having observed Officer Kindelberger and Mr. Reyna at hearing, and compared their testimony to the other evidence of record, the Referee finds that both are credible witnesses.

41. As to Claimant's credibility, Defendants have vigorously argued that he is not credible. They correctly note that Claimant has overstated the speed of the vehicle that rear-ended the bus he was driving at the time of the accident. Claimant told Dr. Manning he was rear-ended by a car going 30-40 miles per hour. Claimant told Dr. Cox he was rear-ended by a car going 40 miles per hour. The most credible estimate of the vehicle's speed is that recorded by Officer Kindelberger of no more than approximately 15 miles per hour. Defendants also correctly note that Claimant has misrepresented his need for and use of a cane. The December 18, 2014 surveillance video documents Claimant using a cane when entering and exiting his attorney's office, but not at any other time that day. The video twice documents him standing for well over 15 minutes. Nevertheless, the surveillance video also documents Claimant limping, bending stiffly, and repeatedly supporting his weight by using one or both of his arms to prop himself up.

42. At hearing, Defendants' counsel asked Claimant about his use of a cane on December 18, 2014:

Q. Why is it the only place you used your cane was at Mr. Luker's office?

A. Because before I came there that day I had taken a pain pill—a full pain pill about 45 minutes before I even—before I went there and, the, after I left there that pain pill really took effecting [sic] me to where I didn't—didn't want to use the— the cane no [sic] more.

Transcript, p. 121 ll. 9-16. Claimant explained that he has slipped a few times while using the cane. As detailed above, the surveillance video shows Claimant not using a cane earlier that same day, using a cane at his attorney's office, and then not using a cane the rest of the surveillance period. Claimant's motive for using the cane when visiting his attorney's office is therefore highly suspect. Nevertheless, Claimant's progressive ease of ambulation and bending documented across four hours of surveillance on December 18, 2014, is consistent with his explanation and indicates that his symptoms are manageable with appropriate medication.

43. Having observed Claimant at hearing, and compared his testimony with all other evidence of record including the surveillance video, the Referee finds that Claimant has a poor memory, overstates some circumstances surrounding his accident, and has misrepresented some of his resulting physical limitations. Claimant is not a reliable witness. However, the Referee finds that the weight of the evidence establishes that Claimant does suffer significant chronic back pain and some left leg pain, resulting in physical limitations as set forth hereafter.

DISCUSSION AND FURTHER FINDINGS

44. 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).

45. **Permanent partial impairment.** The first issue is the extent of Claimant's permanent impairment caused by the industrial accident. "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. A determination of physical impairment is a question of fact for the Commission. The Commission is the ultimate evaluator of impairment and “in conducting a permanent impairment evaluation, is not limited to record or opinion evidence of a physician requested to give a permanent impairment rating.” Soto v. J.R. Simplot, 126 Idaho 536, 539-540, 887 P.2d 1043, 1046-1047 (1994).

46. In the instant case, Drs. Manning, Bates, and Cox have rated Claimant’s lumbar spine impairment due to his industrial accident. Their opinions merit discussion.

47. Dr. Manning. Dr. Manning was Claimant’s treating physician. Claimant told Dr. Manning his bus “was rear-ended by a car going approximately 30 to 40 miles an hour.” Exhibit 28, p. 330. After Claimant declined L2-3 microdiskectomy, on October 3, 2013, Dr. Manning rated Claimant’s lumbar impairment due to the L2-3 disc herniation and L2 radiculopathy from his industrial accident at 13% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, (Guides) Sixth Edition. Exhibit 28, p. 357. Dr. Manning rendered his impairment opinion without the benefit of reviewing the December 2014 surveillance video of Claimant.

48. Dr. Bates. On May 4, 2015, James Bates, M.D., examined Claimant at Claimant’s counsel’s request. Dr. Bates assessed L2 radiculopathy and L2-3 disc herniation caused by the industrial accident. He did not record, and Claimant apparently did not inform Dr.

Bates of, the speed of the vehicle that rear-ended his bus. Dr. Bates concurred in Dr. Manning's selection of a class II impairment due to an intravertebral disc herniation at a single level with medically documented findings and radiculopathy present at the appropriate level during examination pursuant to the AMA Guides. However, in light of Claimant's ability as demonstrated in the surveillance video, Dr. Bates concluded that grade modifiers under the Guides support a 10% permanent impairment rating due to the industrial accident. Exhibit 48, p. 1060.

49. Dr. Cox. Rodde Cox, M.D., examined Claimant on March 13, 2015, at Defendants' request. Claimant reported to Dr. Cox that "he was at a light and was hit from behind, he states by a vehicle traveling 40 miles per hour." Exhibit 33, p. 443. Claimant also reported that "he uses a cane whenever he is walking, basically at all times when outside." Exhibit 33, p. 449. Dr. Cox diagnosed chronic low back strain, chronic pain syndrome, and possible depression. He noted symptom magnification behavior. Dr. Cox reviewed the surveillance video of Claimant taken in December 2014. He then addressed Claimant's L2-3 disc herniation:

It is certainly possible that the L2-3 disc predated the 1/7/13 industrial injury, as disc bulges are fairly common and even in asymptomatic individuals. I question the significance of the L2-3 herniated disc as I do not see any evidence of obvious radiculopathy at this time and there are marked inconsistencies between the video and his exam today.

Exhibit 33, p. 456. Dr. Cox disagreed with Dr. Manning's recommendation for L2-3 microdiscectomy. Dr. Cox rated Claimant's permanent impairment at 3% of the whole person pursuant to the AMA Guides due to his chronic back strain.

50. Weighing the impairment ratings. Dr. Manning found L2 radiculopathy in October 2013 and Dr. Bates confirmed L2 radiculopathy in May 2015. However, Dr. Cox

discerned no L2 radiculopathy in March 2015. Claimant's L2 radiculopathy is corroborated by the February 9 and July 22, 2013 lumbar MRIs showing L2-3 significant left-sided foraminal narrowing and disc material abutting the exiting L2 nerve root with mass effect on the exiting left L2 nerve root. The weight of the medical evidence indicates it is more probable than not that Claimant suffers ongoing L2 radiculopathy. Dr. Cox's rating largely dismisses objective imaging because of his perception of the surveillance video. Certainly the video documents greater functioning than Claimant acknowledged; however, it also documents abnormal movement patterns and does not disprove the L2-3 disc herniation confirmed by two MRIs.

51. Claimant urges averaging the impairment ratings assessed by Dr. Manning and Dr. Bates, as contemplated by IDAPA 17.02.04.281.02. However, Dr. Manning's opinion was rendered without reviewing the surveillance video in which Claimant demonstrated abilities beyond those he reported to Dr. Manning and beyond those determined by his functional capacity evaluations. Dr. Bates' opinion is the most persuasive as it is supported by the objective medical imaging, the surveillance video, and the medical evidence as a whole.

52. Claimant has proven he suffers permanent impairment of 10% of the whole person due to his industrial accident.

53. **Permanent disability.** The next issue is the extent of Claimant's permanent disability due to his industrial accident, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "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. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant.

54. The focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The extent and causes of permanent disability "are factual questions committed to the particular expertise of the Commission." Thom v. Callahan, 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). A disability evaluation generally requires "the Commission evaluate [claimant's] disability according to the factors in I.C. § 72-430(1), and make findings as to her permanent disability in light of all of her physical impairments, including pre-existing conditions, and that it then apportion the amount of the permanent disability attributable to [claimant's] accident." Page v. McCain Foods, Inc., 145 Idaho 302, 309, 179 P.3d 265, 272 (2008). The proper date for disability analysis is the date of the hearing, not the date the injured worker reaches maximum medical improvement. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012). Work restrictions assigned by medical experts and suitable employment opportunities identified by vocational experts may be particularly relevant in determining permanent disability.

55. Work restrictions. In the present case, Claimant had no permanent work restrictions prior to his January 7, 2013 industrial accident. After his accident, Bret Adams, Dr. Manning, Dr. Bates, and Dr. Cox have opined regarding his permanent work restrictions.

56. *Bret Adams, MPT.* On April 30, 2014, physical therapist Brent Adams performed a functional capacity evaluation of Claimant's physical abilities. That same day, Claimant responded to a Modified Oswestry Low Back Pain Disability Questionnaire by checking the boxes corresponding to: "I can only walk with crutches or a cane. Pain prevents me from sitting more than 10 minutes. ... Pain prevents me from standing for more than 10 minutes." Exhibit 31, p. 414. After testing, Mr. Adams concluded Claimant had the following restrictions: lifting 10 pounds occasionally, carrying not at all, walking limited to 15 minutes at a time and "All walking should be performed with a cane." Exhibit 31, p. 408. Additionally, Mr. Adams concluded Claimant should perform no balancing, stooping, twisting, or stair-climbing and only occasional squatting, kneeling, crawling, or reaching above or below shoulder height. Sitting was limited to 15 minutes at a time which could be exceeded on occasion. Mr. Adams concluded that Claimant could grasp, and perform fine manipulation and fingering frequently.

57. On April 27, 2015, Mr. Adams again performed a functional capacity evaluation and concluded Claimant had the following restrictions: lifting 15 pounds to shoulder height occasionally, carrying and lifting 10 pounds above shoulder height occasionally, walking limited to 15 minutes at a time (without reference to use of a cane), no stooping or twisting, stair climbing rarely, and only occasional squatting, kneeling, crawling, or reaching above or below shoulder height. Sitting was limited to 15 minutes at a time which could be exceeded on occasion, and standing was limited to 30 minutes at a time which could be exceeded on occasion.

Mr. Adams concluded that Claimant could grasp, and perform fine manipulation and fingering frequently.

58. During his post-hearing deposition Mr. Adams acknowledged that his FCE protocol is derived in part from a standardized model and in part from his own experience. To measure validity he relies upon repeatability of testing rather than on indicators such as pulse rate, oximetry level, and blood pressure. Mr. Adams acknowledged that his findings are only advisory to physicians. Defendants emphasize that Mr. Adams' FCE testing is not entirely standardized and thus his conclusions are difficult to meaningfully compare with other data. Mr. Adams noted that Claimant did not use a cane when he presented for the 2015 FCE although he did use a cane, and was determined to need a cane, in his 2014 FCE. Mr. Adams acknowledged that he reviewed but did not recall many details of the December 2014 surveillance video.

59. *Dr. Manning.* On October 2, 2013, Dr. Manning noted that Claimant had declined L2-3 microdiskectomy and restricted Claimant to lifting 50 pounds occasionally and 40 pounds frequently. However, by letter dated July 1, 2014, Dr. Manning wrote:

I reviewed the functional capacity evaluation which appears to be valid and the restrictions as spelled out by Bret Adams all seem reasonable and in accordance with Robert's performance during that evaluation, which was done this spring. I would not make any changes or alterations to the FCE findings and I would state that the FCE findings from the April 30, 2014, functional capacity evaluation should serve as an indicator of Robert's current abilities and limitations, superseding any recommendations and limitations I placed back in October of 2013.

Exhibit 28, p. 359.

60. As noted previously, Bret Adams reevaluated Claimant's functional capacity on April 27, 2015, and identified some differences as compared to the 2014 FCE. It is not clear whether Dr. Manning reviewed and approved Mr. Adams' 2015 FCE restrictions. Moreover, it

does not appear that Dr. Manning reviewed the surveillance video of Claimant taken in December 2014.

61. *Dr. Bates.* Dr. Bates examined Claimant on May 4, 2015, at Claimant's counsel's request. Dr. Bates found Claimant's L2-3 disc herniation was caused by his industrial accident and diagnosed L2 radiculopathy. He expressly agreed with Dr. Manning's diagnosis, observing that Dr. Manning's concise records and clinical findings correlated with imaging studies and that chiropractic treatment and physical therapy records were also consistent with this diagnosis. Dr. Bates recorded Claimant's report that he could stand for 25-30 minutes and walk and stand for 30-45 minutes at a time. Dr. Bates reviewed the December 2014 surveillance video and described Claimant's actions as recorded in the video and Dr. Bates' perceptions:

1:11 PM Mr. Evans was observed walking with a limp. Also, walking for a short time supporting himself against his truck bed. He had minimal difficulty, raising his left leg to get into his truck. 1:46 PM He was seen using a cane to enter and exit the building. No prominent difficulty lifting his left leg into the truck. 2:28 PM He was seen walking around his truck, changing a tail light, talking with another individual. Frequently during this time, he was supporting his weight using his arms and propping himself up against the tailgate and walking with a limp. 4:04 PM He was seen in a restaurant or diner. The majority of this clip, the view of Mr. Evans was blocked. 4:04 [sic] PM He was seen for a fairly extensive time putting gas in his truck and washing the windows of his truck with very minimal asymmetry of gait. Also forward bending at the waist.

....

[A]vailable information from the video does demonstrated [sic] that Mr. Evans does have a capability for activity beyond that which is listed in the FCE. However he does not demonstrate full and normal movement patterns. I believe that the findings of the video surveillance would have bearing or relevance in establishing a permanent partial impairment rating and also bearing in establishing restrictions for Mr. Evans. However it does not establish or change the diagnosis.

Exhibit 48, pp. 1059-1060. Dr. Bates opined that Claimant is restricted to "maximum lifting of 50 pounds. And frequent changes of position, sitting and standing, for a maximum of 1 hour at a time." Exhibit 48, p. 1071.

62. *Dr. Cox.* Dr. Cox examined Claimant on March 13, 2015, at Defendants' request. He reviewed Claimant's medical records and the December 2014 surveillance video. Dr. Cox diagnosed cervical and lumbar strain. He disagreed with Dr. Manning's recommendation for L2-3 microdiscectomy and did not attribute Claimant's L2-3 disc herniation to the industrial accident, rating Claimant's permanent impairment at 3% of the whole person due to chronic back strain. Based upon his review of the surveillance video, Dr. Cox opined that Claimant was capable of returning to his full work duties.

63. *Weighing the restrictions.* The findings of the 2014 FCE are not persuasive. Although the 2014 FCE limited Claimant to walking 15 minutes always with a cane—the surveillance video documented that Claimant is well able to walk without a cane. He did not use a cane at the 2015 FCE or at the hearing. Furthermore, the 2014 FCE limits Claimant to sitting for 15 minutes; however, Claimant sat for about 30 minutes consecutively during his interview with Dr. Cox. Although the 2014 FCE concluded that Claimant should not perform any stair climbing at all, at the time of hearing Claimant lived in a fifth wheel trailer which he apparently accessed using several stairs. The surveillance video documents that Claimant's true functional ability exceeds that determined by either of the functional capacity evaluations performed by Bret Adams.³ Dr. Manning's adoption of the FCE restrictions is not persuasive.

64. As previously noted Dr. Cox's impairment opinion dismisses the objective MRI evidence of Claimant's L2-3 disc herniation abutting and with mass effect on the L2 nerve root, and is unique in discerning no indication of L2 radiculopathy. Furthermore, Dr. Cox's report of his review of the December 2014 surveillance video entirely fails to acknowledge that the video reveals Claimant does not demonstrate full and normal movement patterns. Specifically, the

³ The demonstrably inaccurate results of the 2014 FCE call into question reliance upon repeatability as the sole or at

video documents that while Claimant changed his pickup's tail light he: "Frequently during this time, he was supporting his weight using his arms and propping himself up against the tailgate and walking with a limp" as Dr. Bates described in his report. Exhibit 48, p. 1060. In fact, during the 23 minutes of footage of changing his pickup's tail light, Claimant partially supports his weight by using one or both of his arms to prop himself up against the tailgate at least 16 times. See Exhibit 40.

65. Dr. Bates' description of Claimant's activities shown in the surveillance video is consistent with the Referee's own observations of the video. Dr. Bates' opinion that the surveillance video demonstrates that Claimant is capable of activity beyond that listed in the 2015 FCE, but does not demonstrate full and normal movement patterns is well supported by the record and highly persuasive.

66. Dr. Bates' restrictions are the most persuasive as they are corroborated by and consistent with the evidence as a whole, including but not limited to medical imaging, Claimant's significant but somewhat limited actual ability as demonstrated by the surveillance video, and multiple physical examinations spanning years. The Referee concludes that Claimant is restricted to lifting a maximum of 50 pounds and requires frequent changes of position, sitting and standing, for a maximum of one hour at a time.

67. Opportunities for gainful activity. Claimant has not worked since his industrial accident. Two vocational experts have rendered opinions as to Claimant's employability.

68. *Douglas Crum.* Douglas Crum, CDMS, a vocational expert retained by Defendants, interviewed Claimant on April 22, 2015, and prepared a report evaluating his

least primary criteria for evaluating testing validity.

disability. Mr. Crum testified that assuming Dr. Cox's conclusion that Claimant had no work restrictions; he would suffer no permanent disability.

69. Mr. Crum opined that utilizing Dr. Manning's restrictions from October 2, 2013, which restricted Claimant to lifting 50 pounds occasionally and 40 pounds frequently, he would sustain a loss of labor market access of approximately 23%. Mr. Crum noted that at the time of the accident Claimant was earning a flat rate of \$90.00 per day and working five days per week, thus earning approximately \$11.25 per hour. Mr. Crum believed that Claimant would be competitive for the following jobs in the Boise area with average hourly wages as indicated: sales/delivery driver (\$13.13), cabinet maker (\$13.93), and security guard (\$12.89). Mr. Crum concluded that under Dr. Manning's 2013 restrictions, Claimant would have "a permanent partial disability inclusive of impairment of about 15 percent." Crum Deposition, p. 34, ll. 8-9.

70. Mr. Crum readily acknowledged that his report and conclusions did not provide any analysis of the effect of sitting or standing limitations on Claimant's employability. Crum Deposition, p. 35. Mr. Crum's report also acknowledged that Claimant "may sustain age-based discrimination/hiring difficulties." Exhibit 46, p. 1030. Mr. Crum did not have Dr. Bates' restrictions when he prepared his report. However, Mr. Crum opined that, assuming Dr. Bates' restrictions, Claimant could return to his time of injury job.⁴ Mr. Crum was not asked and did not provide any other opinion regarding Claimant's permanent disability given Dr. Bates' restrictions.

71. *Nancy Collins*. Nancy Collins, Ph.D., a vocational expert retained by Claimant, interviewed Claimant and authored a report dated September 11, 2014. Applying the 2014 FCE results as adopted by Dr. Manning, Dr. Collins found that Claimant was not employable.

⁴ At the time of the hearing, Twin Falls Taxi was no longer doing business in the Boise area.

72. On May 20, 2015, Dr. Collins issued another vocational report after having received additional information including the surveillance video taken of Claimant in December 2014, Dr. Cox's March 2015 report, Douglas Crum's April 23, 2015 report, and Dr. Bates' May 4, 2015 report. Dr. Collins continued to opine that assuming the 2014 or 2015 FCE restrictions, Claimant is totally disabled. She affirmed that accepting Dr. Cox's conclusion that Claimant has no work restrictions; he would have no permanent disability.

73. Dr. Collins opined that given Dr. Bates' restrictions, Claimant was limited to medium level work with the opportunity to change positions every hour. Dr. Collins testified that although she typically does both a computer-based analysis and a local labor market analysis: "I didn't do a computer-based analysis in this case because I can't adjust for the restrictions that I feel are the most limiting for him, which is the sit-stand-walk option. You can't do that using those programs, you kind of have to rely on your experience, basically." Collins Deposition, p. 13, ll. 10-15. Dr. Collins testified that Claimant's highest pre-injury earning capacity was \$17.41 per hour as a heavy truck driver and his average pre-injury earning capacity was approximately \$14.50 per hour. She concluded that he could no longer perform heavy truck driving or long haul truck driving due to his one hour positional change and 50 pound lifting restrictions. Dr. Collins opined that given Dr. Bates' restrictions, Claimant could perform the following jobs with average hourly wages as indicated: security guard (\$11.68), school bus driver (\$11.40), transit bus driver (\$13.58), and light delivery driver (\$11.28). She opined Claimant's average post-injury earning capacity is approximately \$12.00 per hour.

74. Assuming the restrictions imposed by Dr. Bates, Dr. Collins opined that Claimant sustained a loss of labor market access of 83% and a loss of earning capacity of 17%, producing an estimated permanent disability of 50% ($[83\% + 17\%] \div 2$). However, because Claimant's

loss of labor market access was significant—83%—and at age 57 he is an older worker, Dr Collins determined this factor should be given additional weight. She concluded that Claimant suffered permanent disability of 61%, inclusive of his permanent impairment.

75. *Weighing the vocational opinions.* Mr. Crum offered no opinion of Claimant's disability assuming Dr. Bates' restrictions. Dr. Collins is the only vocational expert to render an opinion of Claimant's permanent disability based upon Dr. Bates' weight and positional work restrictions, which are the most credible and persuasive restrictions in the record.

76. Dr. Collins testified of several nonmedical factors significant in her analysis, including:

[W]hen I met with him, he was walking with a cane, he had a significant limp, and he looked uncomfortable if he was sitting or standing very long. So if you were to go in to an employer and you either limped or had a cane, you know, those could be a concerning factor for the employer; they don't help.

Collins' Deposition, p. 23, ll. 7-12. As previously noted, the surveillance video, the 2015 FCE, and Claimant's attendance at hearing without a cane clearly establish that he need not use a cane. Claimant's testimony that he took prescription medication on December 18, 2014, and his noticeably improved gait over the hours of the surveillance video, support the conclusion that with appropriate medication Claimant can likely manage his limping and decrease his sitting and standing discomfort.

77. Dr. Collins opined that Claimant's average pre-injury earning capacity was \$14.50 and his average post-accident earning capacity is approximately \$12.00 per hour. Mr. Crum accurately noted that at the time of Claimant's accident he was earning \$11.25 per hour. Thus every category of job identified by Dr. Collins as suitable for Claimant given his prior work experience and Dr. Bates' restrictions pays more than Claimant's time of injury wage. Claimant's work history generally shows a pattern lacking employment longevity with many

jobs of relatively brief duration and multiple periods of apparent unemployment. A conclusion that Claimant's estimated average post-accident earning capacity constitutes a 17% loss of wage earning capacity is not persuasive.

78. Dr. Collins increased her original disability rating of 50% to 61% in recognition of Claimant's substantial loss of labor market access, which she determined was 83%. The Commission has noted that when calculating permanent disability, simply averaging the expected loss of labor market and loss of earnings may not accurately quantify disability, particularly where loss of labor market access is substantial and high unemployment rates ensure significant competition for suitable jobs:

Rating an injured worker's permanent disability by averaging her estimated loss of labor market access and expected wage loss ... can provide a useful point of reference. However, the averaging method itself is not without conceptual and actual limitations. As the loss of labor market access becomes substantial, and the expected wage loss negligible, the results of the averaging method become less reliable in predicting actual disability. For illustration, as judged by the averaging method, a hypothetical minimum wage earner injured sufficiently to lose access to 99% of the labor market may theoretically suffer no expected wage loss if she can still perform any minimum wage job. Calculation of such a worker's disability according to the averaging method would produce a permanent disability rating of only 49.5% $([99\% + 0\%] \div 2)$ even though her actual probability of obtaining employment in the remaining 1% of an intensely competitive labor market may be as remote as winning the lottery. The averaging method fails to fully account for the reality that the two factors are not fully independent.

As the residual labor market becomes increasingly small, the disability rating obtained by the averaging method becomes increasingly skewed, especially in labor markets with high unemployment rates where competition for the remaining portion of suitable jobs will be fierce.

Deon v. H&J, Inc., 2013 IIC 0034.14, 2013 WL 3133646, at 11-12 (Idaho Ind. Com. May 3, 2013) (emphasis supplied), order on reconsideration 2013 IIC 0071, 2013 WL 6699885 (Idaho Ind. Com. Nov. 4, 2013), reversed on other grounds and remanded "with instructions to reinstate

the Findings of Fact, Conclusions of Law and Order dated May 3, 2013,” Deon v. H & J, Inc., 157 Idaho 665, 672, 339 P.3d 550, 557 (2014).

79. In Deon, the injured worker had lost access to approximately 90% of her labor market and post-injury could only perform unskilled sedentary work. Expert testimony established there were more than 6,500 unemployed job-seekers in her north Idaho labor market and a significant employer in her area had just laid off 200 additional workers. Deon’s time of injury employer had several hundred workers—including unskilled sedentary workers—but had no work available within her restrictions. Under these circumstances, the Commission found the averaging method did not accurately quantify Deon’s permanent disability.

80. In the present case, Dr. Collins estimated Claimant’s loss of labor market access was 83%. However, Claimant may still perform medium, light, and sedentary work allowing hourly change of positions. Claimant’s labor market is extensive—the greater Boise area—and Dr. Collins’ testimony indicated that the unemployment rate in Claimant’s labor market was favorable:

Q. What’s the unemployment rate here in Ada County now?

A. It’s three-point-something.

Q. So we’re basically fully employed?

A. Basically.

Q. So there are jobs out there that if he goes out and tries hard enough he can get; isn’t that true?

A. There are, using Bates’ restrictions, yes.

Collins Deposition, p. 40, ll. 16-23. Given these circumstances, Dr. Collins’ conclusion that Claimant’s estimated permanent disability should be increased 11% beyond her original

calculations due to intense competition for a very limited number of suitable positions is not persuasive.

81. Based upon Claimant's permanent impairment of 10% of the whole person, permanent physical restrictions as determined by Dr. Bates of lifting no more than 50 pounds and sit, stand, and walk positional changes every hour, transferable skills, and considering all of Claimant's medical and non-medical factors including his limited formal education, computer illiteracy, and his age of 55 at the time of the industrial accident and 57 at the time of the hearing, Claimant's ability to compete in the open labor market and engage in regular gainful activity after his industrial accident has been greatly reduced. The Referee concludes that Claimant has proven permanent disability of 40%, inclusive of his 10% whole person permanent impairment due to his industrial accident.

82. Total permanent disability. Claimant has also alleged he is totally and permanently disabled. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are 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." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant

may satisfy his burden of proof and establish a prima facie case of total permanent disability under the odd-lot doctrine in any one of three ways:

1. By showing that he has attempted other types of employment without success;
2. By showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

83. In the instant case, Claimant has presented no evidence of any failed attempts at other types of employment. He has presented evidence of a limited unsuccessful work search; however, Dr. Collins has persuasively testified that Claimant is able to work as a security guard, school or transit bus driver, or local delivery driver. Claimant has not established a prima facie case that he is an odd-lot worker under the Lethrud test. Claimant has not proven he is totally and permanently disabled.

CONCLUSIONS OF LAW

1. Claimant has proven permanent impairment of 10% of the whole person due to his industrial accident. Pursuant to Idaho Code § 72-316, Defendants are entitled to credit for 13% permanent impairment which Defendants have previously paid to Claimant.

2. Claimant has proven permanent disability of 40%, inclusive of his 10% whole person permanent impairment due to his industrial accident. Claimant has not proven he is totally and permanently disabled.

RECOMMENDATION

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

DATED this 25th day of April, 2016.

INDUSTRIAL COMMISSION

_____/s/_____
Alan Reed Taylor, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

DANIEL J LUKER
2537 W STATE STREET SUITE 130
BOISE ID 83702

MATTHEW O PAPPAS
PO BOX 7426
BOISE ID 83707-7426

_____/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT EVANS,

Claimant,

v.

TWIN FALLS TAXI TRANSPORTATION,

Employer,

and

STATE INSURANCE FUND,

Surety,
Defendants.

IC 2013-000808

ORDER

Filed May 4, 2016

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

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

1. Claimant has proven permanent impairment of 10% of the whole person due to his industrial accident. Pursuant to Idaho Code § 72-316, Defendants are entitled to credit for 13% permanent impairment which Defendants have previously paid to Claimant.
2. Claimant has proven permanent disability of 40%, inclusive of his 10% whole person permanent impairment due to his industrial accident. Claimant has not proven he is totally and permanently disabled.

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

DATED this 4th day of May, 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 4th day of May, 2016, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

DANIEL J LUKER
2537 W STATE STREET SUITE 130
BOISE ID 83702

MATTHEW O PAPPAS
PO BOX 7426
BOISE ID 83707-7426

sc

/s/