

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID SHAFFMASTER,

Claimant,

v.

LINCARE, INC.,

Employer,

and

LIBERTY INSURANCE CORPORATION,

Surety,

Defendants.

**IC 2011-016784
2011-006476**

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

Filed January 8, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Idaho Falls on March 28, 2013. Claimant was present and represented by Dennis R. Petersen of Idaho Falls. E. Scott Harmon represented Employer/Surety.¹ Oral and documentary evidence was presented. The record remained open for the taking of four post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on October 23, 2013.

ISSUES

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

1. Whether and to what extent Claimant is entitled to permanent partial impairment (PPI) benefits;

¹ Upon Mr. Harmon's retirement, Joseph M. Wager prepared and filed Defendants' post hearing brief.

2. Whether and to what extent Claimant is entitled to permanent partial disability (PPD) benefits;
3. Whether and to what extent apportionment pursuant to Idaho Code § 72-406 is appropriate; and
4. Whether the Industrial Commission should retain jurisdiction beyond the statute of limitations.²

CONTENTIONS OF THE PARTIES

Claimant contends that he is entitled to disability above his impairment resulting from a back injury and surgery. At the time of the hearing, Claimant was working part-time as a substitute school bus driver in Salmon as well as a summer job of ferrying river rafters to and from Salmon for Caldwell Transportation. Claimant is presently able to do most of the activities he engaged in before his surgery, except tire work. Claimant's treating physician rated Claimant at 5% whole person PPI, and as was generally his practice with two-level discectomies, released him to return to work without restrictions. An independent examining physician rated Claimant at 15% PPI and placed restrictions on his return to work. When using that physician's PPI and restrictions, Claimant has suffered PPD above PPI of at least 41.75%

Defendants concede that Claimant suffered two accidents causing back injuries while employed by Employer. They have paid for Claimant's treatment as well as the 5% PPI assigned by Claimant's treating physician. However, based on Claimant's treating physician's non-restricted work release, Claimant is entitled to no additional PPI or PPD. If the Commission adopts Claimant's IME physician's restrictions, then, according to Defendants' vocational expert, Claimant has incurred PPD of 18% inclusive of his 5% PPI.

² Issues numbered 3 and 4 were not argued in briefing and are deemed waived.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant presented at the hearing.
2. Joint Exhibits (JE) A-P admitted at the hearing.
3. The post-hearing deposition of James H. Bates, M.D., taken by Claimant on April 23, 2013.
4. The post-hearing deposition of Lynn J. Stromberg taken by Defendants on May 14, 2013.
5. The post-hearing deposition of Delyn Porter, M.A., CRC., CIWCS., taken by Claimant on June 28, 2013.
6. The post-hearing deposition of Mary Barros-Bailey, Ph.D., CRC, taken by Defendants on June 28, 2013.

FINDINGS OF FACT

1. Claimant was 42 years of age and resided in Salmon at the time of the hearing. He is employed by the Salmon School District as a substitute school bus driver during the school year and as a bus driver for Caldwell Transportation transporting river rafters during the summers.
2. Claimant graduated from high school in 1990. His first job post-high school was as a customer service representative in an airline's frequent flyer program in South Dakota. He ended up a corporate manager; this employment lasted about five years. He used a computer at this job and he describes his computer skills as "fairly good." Hearing Transcript, p. 11.

3. Claimant then moved to Elko, Nevada and worked at a Walmart tire and lube shop for two years. He then worked for another tire shop in Elko for about two years changing semi truck tires. Claimant then drove a bus transporting low income individuals for about another two years. He obtained a CDL to perform this job and his CDL remains current. Claimant then went to work for Office Max as a software manager. He was promoted to furniture manager and eventually to overnight stocking supervisor where he supervised three people. Claimant then became employed by the Elko school district as a substitute bus driver for two years.

4. Claimant suffered a non-surgical industrial back injury in 2003 while still living in Nevada. He attended about 6 months of physical therapy and recovered fully.³

5. Claimant moved to Salmon to be near his wife's parents in 2004. His first job in Salmon was with the Salmon School District as a school bus driver. He was paid \$9.00 an hour for a 15-hour week. Claimant was also available for field trips, sports trips, and special needs trips. These trips generally averaged 30 to 40 hours a month in addition to his regular 60 hours a month route driving. He also earned \$9.00 an hour for these outside trips.

6. The following summer Claimant began ferrying river rafters for Caldwell Transportation. He worked about 60 hours a week. He was paid a flat-rate per job from \$65.00 to \$120.00. Claimant estimates that he earned between \$3,000 and \$4,000 a month for July and another \$3,000 for August. Claimant held these two jobs for about four or five years until he tired of driving and went to work for Lincare, Inc., Employer herein, in August 2010.

7. Lincare, Inc. is in the business of setting up durable medical equipment such as oxygen tanks and concentrators in patient's homes. Claimant started at \$11.50 an hour and

³ Under cross-examination at hearing, Claimant admitted (but had forgotten) that he sought treatment on April 3, 2007 for leg and back pain.

worked a forty-hour week. His delivery area included Salmon, Challis, Mackay, Stanley, Leadore, and Gibbonsville.

8. Claimant suffered his first industrial accident with Employer on December 31, 2010. Claimant was on his way to a “house call” carrying a 55-plus pound concentrator when he slipped on some ice. He grabbed the open door to his van to keep from falling and felt immediate “pressure” in his low back. Claimant reported his accident to his supervisor but declined to see a physician,⁴ as he had had similar back pain before and thought he would be all right in a day or two.

9. Claimant suffered his second industrial accident with Employer on March 5, 2011 when his right leg gave out when he was at home leaving for a set-up in Mackay; he fell to the ground. Claimant described his back condition between his two accidents this way:

I had pain radiation from my spine outwards towards my hips on both sides. I had a constant pain in the middle of my right buttock that went from my right buttock, down my right leg, on the outside of my right leg, down into the outside of my right foot to where I couldn't feel the last two toes, my pinkie toe and the next toe over.

Hearing Transcript, p. 27.

10. Claimant presented to a local emergency room on March 6, 2011. He eventually came under the care of Lynn Stromberg, M.D., an orthopedic surgeon in Idaho Falls, who he first saw on March 24th. On April 11, 2011, Dr. Stromberg performed an L4-5 and L5-S1 laminotomy and discectomy on the right. Dr. Stromberg released Claimant to gradual work effective June 1, 2011, with no lifting over 10 pounds the first week, 15 pounds the second week, and no restrictions thereafter.

11. Claimant returned to work with Employer and was able to do his regular job but needed help with the heavier tanks. Employer provided such help for a time shortly after

⁴ Claimant did self-refer to a physical therapist on January 11 and February 24, 2011.

Claimant returned to work; however, the person helping Claimant with the tanks eventually stopped doing so.

12. Employer terminated Claimant on October 24, 2011 for reasons unrelated to this action.

13. In November 2011, Claimant returned to work for the Salmon School District as a substitute bus driver,⁵ a position he still held at the time of the hearing. His hours vary dependent on need. He is paid \$9.50 an hour for his regular route and \$13.50 an hour for special trips. Claimant has not looked for full-time work because it makes more sense economically to stay at home with his three children than it does to pay for daycare.

14. Claimant has no intention of leaving Salmon or his employment with Salmon School District or Caldwell Transportation. Neither of his bus driving jobs requires any lifting; just driving.

15. Claimant testified that he still has radiating pain from his right buttock down to his right foot. When asked to describe how that pain affects his activities of daily living, he testified:

I can still pretty much do what I did before. I just have time limitations. I know what - - about how long I can walk, how long I can sit, how long I can stand.

When I, when I do everything else - - I mean I can still carry my daughter. If it's in short times, I can carry her. I don't have any problems, you know, getting down on the floor; but if I've been driving all day, like when I get home at night and I have to change her, I can get down on the floor with no problem. But then I have to support - - use something to support myself to get up with her.

Hearing Transcript, p. 66.

⁵ Prior to going to work for Employer, Claimant drove school bus full-time. However, when he went back to work for the school district, no full-time positions were available. Claimant testified that he would like to drive full-time if a position becomes available. His pay would then go from \$9.50 an hour to \$13.50 an hour.

DISCUSSION AND FURTHER FINDINGS

PPI

“Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment when medical evidence is conflicting. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Lynn J. Stromberg, M.D.

16. Dr. Stromberg is the board certified spine surgeon who performed Claimant’s L4-5 and L5-S1 laminotomy/discectomy. He was deposed by Defendants on May 14, 2013. On October 6, 2011, Dr. Stromberg rated Claimant for PPI purposes utilizing the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition, specifically Table 17-4 at pages 570 and 571. Dr. Stromberg opined that Claimant’s PPI was 5% of the whole person. He explained his reasoning:

It was a motion segment lesion which includes intervertebral disc herniation.

Class I, which has a default of 7.

And then adjustments were applied. Functional history, 1. Exam, zero. Clinical studies, zero. Net adjustment minus 2; yielding 5 percent.

Dr. Stromberg Deposition, p. 9.

17. On cross-examination, Dr. Stromberg explained what he meant by the above:

Q. (By Mr. Petersen): Okay. You circled a 7 here.

A. That's the default that you start with.

Q. And where did you get the minus 2 from?

A. There's a formula applying physical exam clinical studies and functional history.

And if there are outstanding events or notes that you apply, then you subtract whatever number you get from those from the class number, which is 1.

Add them all up and subtract that from a 7.

And I think my formula is in the notes.

Q. It says: Adjustments are rated functional history, 1. What does that mean?

A. It means that under the scale of functional history, he gives a history of some impairment that I gave him an accommodation for on that item.

Q. Are you talking about the back injury back in 2002, 2004?

A. No, the current one.

Q. Functional history meaning at the time you saw him here on 10/6/11 when you did the impairment rating?

A. Right.

Q. So he was having some issues?

A. Yeah.

Q. Okay. And then the physical exam, it says zero. What does that tell us?

A. That tells us I didn't find any objective losses that I would rate.

Q. And then the clinical studies, zero with a net adjustment of - -

Well, clinical studies, zero. What did you mean by that?

A. CT myelogram doesn't show us that he had any ongoing, like, recurrent herniations or instability or anything else that added in.

Q. So the 2 zeros, does that make a minus 2?

A. Yeah.

Dr. Stromberg Deposition, pp. 18-20.

James H. Bates, M.D.

18. Claimant retained Dr. Bates, a board certified physiatrist, to provide a PPI rating and to assign physical restrictions. Claimant deposed Dr. Bates on April 23, 2013. Dr. Bates

saw Clamant one time only on July 19, 2012. He took Claimant's history, reviewed medical records provided by Claimant's counsel, examined Claimant, and prepared an original and supplemental report. At the time of his examination by Dr. Bates, Claimant was complaining of pain in his right gluteal region, numbness and intermittent pain in his right leg.

19. Dr Bates did not believe that Claimant was at MMI when he examined him:

He continued to be symptomatic with symptoms, and he only had six physical therapy visits after surgery. I felt that there was room for further improvement or the need to have - - to try further treatment or try to help him further to recover.

Dr. Bates Deposition, p. 10.

20. In spite of his doubts regarding Claimant's medical stability, nonetheless

Dr. Bates assigned a PPI rating:

I gave an explanation of - - I believe I gave an explanation of where his impairment would lie. Kind of tentatively, this would be the impairment, but would recommend treatment before the impairment rating.

Q. (By Mr. Petersen): Okay. And what was the impairment, Doctor?

A. 15 percent whole person impairment.

Q. And that's based on the AMA Guides for the Evaluation of Permanent Impairment, Sixth Edition?

A. Yes.

Id., pp. 10-11.

21. In his July 19, 2012 report, Dr. Bates explained in more detail his PPI analysis:

As a preliminary look at impairment, Mr. Shaffmaster has a class 3 impairment of the lumbar spine and in accordance to table 17-4, of the AMA Guides for the Evaluation of Permanent Impairment, Sixth Edition, and impairment for intervertebral disk herniations at multiple levels, with or without surgery and with or without documented radiculopathy at a single clinical level, the impairment would range from 15% to 23%, 19% being the default. The physical examination and the clinical studies are grade modifiers of 2. The current functional history is a grade modifier of 3 and regardless of whether there is improvement of the functional history, the imaging studies and physical exam will reduce the impairment rating to a 15% whole person impairment. But, due to the diagnosis, the impairment rating cannot drop below a 15%

whole person impairment for a multilevel disk herniation, the conditions as noted above.

JE L, pp. 7-8.

22. Dr. Stromberg commented on Dr. Bates' PPI rating:⁶

I have reviewed the report of Dr. James H. Bates, MD, of July 19, 2012. It appears that the patient was taken completely at face value and the examination was done without any distractive or Waddell's components. With my review and examination of the patient today, I sustain my previous rating of 10/6/11. My rating of that time will stand.

JE H, p. 14.

23. In his deposition, Dr. Stromberg further discussed his disagreement with Dr.

Bates:

I did not agree with his application of the guides nor his exam method.

Q. (By Mr. Harmon): And within your examination of Mr. Shaffmaster, were you able to utilize any testing or observational methods to test the validity of Mr. Shaffmaster's presentation or representation of symptoms?

A. Yes.

Q. And what are those measures, please.

A. You use distractive measures and nonanatomic indicators.

Q. Did you find any reference in Dr. Bates' evaluation that he had used similar validity testing?

A. No.

Q. As we sit here today, do you continue to stand by your 5 percent whole person rating previously stated for Mr. Shaffmaster?

A. Yes.

Dr. Stromberg Deposition, p. 10.

24. Both Dr. Stromberg and Dr. Bates utilized the same table of the *AMA Guides* (table 17-4) to arrive at their respective PPI ratings and both are qualified to assess PPI. Dr. Stromberg issued his rating on October 6, 2011 and Dr. Bates on July 19, 2012, some nine

⁶ Although listed as a medical record/opinion reviewed in preparation of his report, Dr. Bates never commented on Dr. Stromberg's 5% PPI rating or his lack of assigning any permanent physical restrictions.

months later. This lapse of time could explain the difference between Dr. Stromberg's failure to detect any verifiable radiculopathy upon his exam and Dr. Bates' findings. Dr. Bates did not utilize Waddell's testing to determine the validity of his clinical findings. Because the Referee is unable to determine which physician is "right" or "wrong" and because both have plausible explanations for their respective ratings, it is reasonable to average the two ratings. Therefore, the Referee finds that Claimant is entitled to whole person PPI benefits of 10%.

PPD

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

25. Claimant retained **Delyn Porter**, MA, CRC, CIWCS, to assist with vocational issues. Mr. Porter is a private rehabilitation counselor residing in Blackfoot. He has been in private practice for two-and-a-half years. Before that he was employed by the Industrial Commission Rehabilitation Division, and before that with Idaho Division of Vocational Rehabilitation.

26. Mr. Porter conducted a telephone interview of Claimant, reviewed medical records provided by Claimant’s counsel, considered Claimant’s subjective assessment of his functional capacities in performing various physical activities, reviewed a Functional Capacities Evaluation (FCE) as well as Dr. Bates’ physical restrictions, and obtained Claimant’s education and work history. Mr. Porter considered Claimant’s labor market to be within a 50-mile radius of Salmon.

27. At his deposition, Mr. Porter explained how he arrived at a 16% loss of earning capacity number:

Basically, the first thing I did was went through and identified jobs within the - - I’ll give you the exact name here so I don’t butcher it - - Idaho Occupational Employment and Wage Release Report and used those SOC codes to indentify what the median wage was for each of these occupations. The occupations that I listed there are occupations that, in my mind, are still considered options for Mr. Shaffmaster as far as employment. I then average that out to come up with an average median wage of \$9.38 per hour, but when you look at his current employment as a school bus driver, he was actually making \$9.50 an hour.

Q. Okay.

A. And so because his actual earnings were higher than the median wage average, I used his actual earnings in that wage loss.

Q. Okay. So you took the \$9.50, divided it by the \$11.30⁷ and came up with that 16 percent?

A. Yes.

Mr. Porter Deposition, pp. 19-20.

28. Mr. Porter initially used physical restrictions identified in an FCE accomplished December 12 and 13, 2011. He later amended his report to include permanent physical restrictions supplied by Dr. Bates. Mr. Porter opined that Claimant suffered a 75 % loss of his pre-injury labor market. He then averaged those numbers (16% and 75%) to come up with a 45.5% permanent partial disability rating inclusive of Dr. Bates' 15% PPI.

29. Subsequent to Mr. Porter's initial report, Dr. Bates assigned certain physical restrictions causing Mr. Porter to amend his report:

Basically, the functional capacity evaluation had Mr. Shaffmaster being able to lift a total of 40 pounds. If you look at Dr. Bates' restrictions, he indicates he can lift a total of 45 pounds. And so that difference in that total lifting is the significant difference between the FCE and Dr. Bates.

Mr. Porter Deposition, p. 25.

30. The added lifting weight assigned by Dr. Bates did not change Mr. Porter's loss of earning capacity figure, but did reduce the loss of labor market access number from 75 percent to 67.5 percent. When considering Dr. Bates' restrictions, Mr. Porter concluded that Claimant's PPD is 41.75 percent inclusive of Dr. Bates' 15 percent PPI.

31. Mr. Porter was aware from reviewing Dr. Stromberg's records that he (Dr. Stromberg) did not assign any permanent physical restrictions. When asked what Claimant's

⁷ Mr. Porter considered \$11.30 an hour to be Claimant's time-of-injury wage.

PPD rating would be if the Commission adopted Dr. Stromberg's lack of restrictions, he answered, "zero."

32. Defendants retained **Mary Barros-Bailey**, Ph.D., CRC, to assist with vocational issues. The Commission is familiar with Dr. Barros-Bailey's credentials and qualifications and they need not be repeated here. Dr. Barros-Bailey personally met with Claimant in Salmon, reviewed medical records, obtained his social, education, and work/salary histories, discussed his computer proficiency, and prepared a report which was subsequently supplemented.

33. Claimant informed Dr. Barros-Bailey that his current employment as a substitute school bus driver and, in the summers, driving for Caldwell Transportation was suitable for his family situation; he is the primary caretaker of his children as his wife's job is very demanding.

34. In her initial report, Dr. Barros-Bailey based her opinions on there being no physical restrictions:

There were no restrictions. In terms of permanent restrictions, when I'm doing a disability evaluation, I'm looking at permanent function into the future. It was very specific in the FCE by the physical therapist and by Dr. Bates that these were temporary; they were not permanent restrictions. So there were no set of restrictions upon which I could opine as to permanent disability.

* * *

Well, when I did my January 18, 2013, report, in terms of restrictions in the file, Dr. Stromberg indicated none. And then there was the functional capacity evaluation, but the functional capacity evaluation and Dr. Bates' review of it indicated that these were not permanent. And so just because they exist, if they're not permanent, I can't provide an opinion as to somebody's permanent disability if I have no permanent restrictions available.

Dr. Barros-Bailey Deposition, pp. 2021.

35. Subsequent to Dr. Barros-Bailey's original report, Dr. Bates provided some permanent restrictions that caused her to supplement her report:

So I'll just read from my report of March 11, 2013. It says that he was appropriate for full-time employment. General exertion level is light to moderate level with limited bending, twisting, stooping, squatting, with maximum lifting

floor to waist of 25 pounds and otherwise 45 pounds, occasional lifting up to 25 pounds, with frequent changes in position from sit-stand/stand-walk combination generally one, one and a half hours at a time.

Dr. Barros-Bailey Deposition, pp. 21-22.

36. Dr. Barros-Bailey concluded that Claimant has a loss of wage earning capacity of about 25%. She noted that Claimant was making \$11.50 an hour with Employer and \$9.50 to \$13.50 an hour depending on the type of route he was driving.

37. Dr. Barros-Bailey concluded that Claimant has lost access to 23.5% of his pre-injury employment opportunities when applying Dr. Bates' restrictions which she interprets as allowing for medium work.

38. Dr. Barros-Bailey assessed an overall PPD of 18% inclusive of PPI.

39. To determine an appropriate PPD rating, it is necessary to examine the restrictions assigned to Claimant by Dr. Bates and the FCE and determine whether the same were temporary or permanent and whether they trump Dr. Stromberg's lack of restrictions. The FCE was performed by therapist Tracy Ervin on December 13 and 14, 2011 (about six months after Dr. Stromberg's work release with temporary restrictions) at Claimant's counsel's request. Ms. Ervin noted that she was not provided job descriptions for either the Lincare job or the bus driving jobs and was therefore unable to comment further regarding whether those positions would constitute a "match." Dr. Bates reviewed the FCE and commented in his July 19, 2012 IME that:

In terms of restrictions, the restrictions and recommendations provided in the functional capacities evaluation of 12/13/2011, through 12/14/2011, are appropriate for temporary restrictions. However, Mr. Shaffmaster is not at maximum medical improvement. He can still benefit from rehabilitation⁸ and after he has finished the course of rehabilitation, he should be evaluated for appropriate permanent restrictions.

⁸ Dr. Stromberg testified that physical therapy so long after a surgery would not be beneficial.

JE L, p. 8.

40. There is no evidence that Claimant ever finished the above-referenced “course of rehabilitation.” Therefore, on February 11, 2013, Dr. Bates wrote a letter to Claimant’s counsel dated February 11, 2013, wherein he stated, *inter alia*:

Without further treatment, his temporary restrictions are appropriate then for permanent restrictions. A two-day functional capacity evaluation was performed in December 2011. It was noted as valid with the examinee providing maximal effort. Mr. Shaffmaster is appropriate for full time employment. General exertion level at light to moderate level, with limited bending, twisting, stooping, squatting, with max lifting of waist to floor of 25 pounds and otherwise 45 pounds. Occasional lifting up to 35 pounds. With frequent changes of position from sit, stand, stand/walking combination generally one and a half to two hour at a time.

JE L, p. 9.

41. The Referee finds Dr. Stromberg’s opinion regarding restrictions, or lack thereof, more credible than the opinion expressed by Dr. Bates. Dr. Stromberg is a board certified spine surgeon who performed Claimant’s back surgery and followed up with him post-surgery. He was most familiar with Claimant’s physical condition at a time closer to his injury and surgery than Dr. Bates, who is not a surgeon. Dr. Stromberg found no instability in Claimant’s back post-surgery that would require any permanent physical restrictions. Dr. Bates did not examine Claimant until about 27 months post-surgery. Dr. Bates never expressed his opinion as to whether the restrictions he recommended were as a result of Claimant’s accident. Ms. Ervin commented that Claimant’s deconditioning may have affected his performance over two days with the floor to waist lift. Claimant informed Dr. Bates that the reason he was no longer employed by Lincare was because he could no longer physically tolerate the activities of full, regular work.⁹ Claimant testified that July of 2012 was a big month financially for him driving river rafters, yet he reported many subjective complaints (except regarding lifting) to Dr. Bates

⁹ Claimant testified at length at hearing regarding why he was terminated by Lincare; it had nothing to do with his physical inability to do his job.

that same month. Further, Dr. Bates did not re-examine Claimant between his IME of July 2012 and his February 2013 letter wherein he assigned permanent restrictions apparently because Claimant did not undergo any further rehabilitative treatment. Finally, unlike Dr. Stromberg, Dr. Bates did not utilize any distraction techniques in his examination of Claimant such as Waddell's testing to determine the validity of Claimant's subjective complaints.

42. Claimant's own testimony and statements to others indicates that he is satisfied driving a school bus part time¹⁰ and for Caldwell Transportation in the summers. Because such an arrangement fits well with his family situation, he has not looked for other employment. He has no physical problems bus driving.

43. The Referee finds that based on Dr. Stromberg's reasonable refusal to assign permanent physical restrictions, and the opinions of Mr. Porter and Dr. Barros-Bailey, the Referee is unable to find Claimant has suffered any PPD above his 10% PPI.

CONCLUSIONS OF LAW

1. Claimant is entitled to whole person PPI equaling 10%.
2. Claimant is not entitled to PPD in excess of his PPI.

RECOMMENDATION

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

DATED this 31st day of December, 2013.

INDUSTRIAL COMMISSION

/s/
Michael E. Powers, Referee

¹⁰ Claimant is confident that his current part-time position will soon become full-time and he would gladly accept such a position.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January, 2014, 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:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

JOSEPH M WAGER
PO BOX 6358
BOISE ID 83707-6358

ge

Gina Espinosa

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID SHAFFMASTER,

Claimant,

v.

LINCARE, INC.,

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2011-006476**

ORDER

Filed January 8, 2014

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with 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 is entitled to whole person PPI equaling 10%.
2. Claimant is not entitled to PPD in excess of his PPI.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 8th day of January, 2014.

INDUSTRIAL COMMISSION

/s/

Thomas P. Baskin, Chairman

_____/s/_____
R. D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

DENNIS R PETERSEN
PO BOX 1645
IDAHO FALLS ID 83403-1645

JOSEPH M WAGER
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BOISE ID 83707-6358

ge

_____/s/_____
