

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOEL BACKES,

Claimant,

v.

DEPENDABLE FABRICATION, INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2007-016312

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

Filed February 5, 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 Coeur d'Alene on December 20, 2010. On August 11, 2011, the Commission issued its order concluding that while Claimant may have low back, neck and left shoulder problems for which he requires further medical treatment, he failed to demonstrate that the need for such care is referable to the subject accident.

On October 29, 2013, the Referee conducted another hearing in Coeur d'Alene. Claimant, Joel Backes, was present in person and represented by Starr Kelso, of Coeur d'Alene. Defendant Employer, Dependable Fabrication, Inc., and Defendant Surety, Idaho State Insurance

Fund, were represented by Paul Augustine, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken.

Following hearing the parties engaged in negotiations and in February 2014 agreed to settle the case for a lump sum. Defendants prepared and forwarded to Claimant's Counsel settlement documents. Claimant's Counsel reviewed and executed the settlement documents; however, he urged Claimant to take the document home and think about the settlement before signing. Thereafter, Claimant's Counsel did not hear back from Claimant concerning the settlement.

On March 9, 2015, Defendants filed a motion to enforce acceptance of the settlement agreement reached by the parties. By affidavit, Claimant's Counsel averred that although Claimant initially acceded to the settlement proposal, diligent efforts to obtain his signature on the settlement documents were unsuccessful. As set forth in the affidavit, Counsel had reason to believe that his letters and messages were received by Claimant, but for reasons unexplained, Claimant declined to re-engage with his Counsel to enable finalization of the settlement.

On June 18, 2015, the Commission issued its Order Denying Defendants' Motion to Enforce Settlement. Claimant and Defendants then submitted briefs and the matter came under advisement on October 5, 2015. The Referee authored proposed findings of fact and conclusions of law for consideration by the Commission. The Commission has reviewed the Referee's recommendation, and while the Commission agrees with the ultimate outcome proposed by the Referee, the Commission disagrees with the Referee's treatment and analysis of the 2012 FCE performed by Zachary Norling, DPT. For these reasons, the Commission declines to adopt certain portions of the Referee's analysis, and substitutes these modified Findings of Fact and Conclusions of Law in lieu thereof.

ISSUES

As set forth in the March 27, 2013 notice of hearing, the following matters were scheduled for hearing at the request of the parties:

1. Whether, and to what extent, Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary Partial and/or Temporary Total Disability benefits (TPD/TTD);
 - c. Permanent Partial Impairment (PPI); and
 - d. Disability in excess of impairment.

2. Whether Claimant's condition is due in whole or in part to a subsequent injury/condition.

3. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise.

At hearing, these issues were revised following discussion with the parties as follows:

Referee Taylor: So the issues, then, that remain for consideration today would be permanent partial impairment, permanent partial disability, and claimant has expressly indicated that he makes no assertion of total permanent disability. And then the question of causation apparently remains still at issue. Is that correct, Counsel?

Mr. Augustine: Correct.

Transcript, 7/23-8/5.

Therefore, the extent and degree of Claimant's impairment/disability as well as the cause of Claimant's impairment/disability remained at issue for purposes of hearing. Addressing the 2012 FCE, Defendants have argued that the FCE failed to delineate between restrictions referable to Claimant's left wrist injury versus non-work related conditions relating to his left hip, left shoulder, neck and low back. Therefore, we perceive that the noticed issue of causation has not been abandoned by the parties, but must be considered by the Commission in this matter.

CONTENTIONS OF THE PARTIES

Claimant asserts he is entitled to permanent impairment of 1% of the whole person and

permanent partial disability of 30% in addition to his impairment. He relies upon the opinion of vocational expert Dan Brownell. Defendants acknowledge that Claimant suffers permanent impairment of 1% of the whole person due to his industrial accident, but assert he has not proven entitlement to any permanent disability. They rely upon the opinion of vocational expert William Jordan.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. All evidence admitted in connection with the December 20, 2010 hearing and the Commission's August 11, 2011 Order adopting the Referee's Findings of Fact, Conclusions of Law, and Recommendation;
2. The Industrial Commission legal file;
3. The testimony of Claimant taken at the October 29, 2013 hearing;
4. Claimant's Exhibits a through i and Defendants' Exhibits I and J, admitted at the October 29, 2013 hearing; and
5. Defendants' Exhibit K, agreed to by the parties during the October 29, 2013 hearing and hereby admitted.

Claimant's Reply Brief contains three motions to strike. Motion to Strike No. 1 requests that Defendants' briefing regarding Idaho Code § 72-223 be stricken. Inasmuch as Idaho Code § 72-713 requires "at least ten (10) days' written notice of the time and place of hearing and of the issues to be heard," and the applicability of Idaho Code § 72-223 was not requested as an issue by either party prior to hearing or listed as an issue in the Commission's notice of hearing, the Commission is precluded from presently considering this issue. Claimant's Motion to Strike No. 1 is granted.

Claimant's Motion to Strike No. 2 requests that the portion of Defendants' briefing supported only by citation to an internet website be stricken. Inasmuch as the supporting internet website was not identified as an exhibit for hearing, not admitted as an exhibit, no request was made that the Commission take notice thereof, and no witness testified as to its contents or reliability, Claimant's motion is well taken. Claimant's Motion to Strike No. 2 is granted.

Claimant's Motion to Strike No. 3 requests that the "Financial Status/Obligations" and the "Post Injury Sources of Income" sections of Defendants' Exhibit K, containing the report of vocational expert William Jordan, be stricken as not relevant to a determination of Claimant's permanent disability. Although these areas may be only minimally relevant, Claimant's financial status and post-injury sources of income may have bearing on his capacity to pursue self-employment and thus may have some relevance to his permanent disability. Claimant's Motion to Strike No. 3 is therefore denied.

After considering the above evidence and the arguments of the parties, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born in 1952 and is right-handed. He was 61 years old and lived in the Coeur d'Alene area at the time of the industrial accident herein and at the time of the 2013 hearing.

2. Claimant completed his junior year in high school but did not graduate. He received his GED in 1971 and joined the United States Army where he served as a wheeled vehicle mechanic in Vietnam. He was honorably discharged in 1977. During his service Claimant was regularly assigned to clean gore from vehicles. On one occasion he assisted in recovering a helicopter shot down in which all aboard were killed, including his roommate.

Claimant's medical records document he was assigned to "picking up the pieces of the wreckage, including body parts. This detail lasted 1.5 hours, and the entire time they were very concerned about an enemy attack. In addition, just gathering up body parts was very disturbing. . . . Overall level of traumatic exposure is judged to be hig[h], based on frequency and severity of incident exposure." Defendants' Exhibit I, 57. Claimant has suffered waxing and waning post-traumatic stress disorder (PTSD) since that time. He has treated at the VA Medical Center from time to time for PTSD resulting from his military service and for other health issues.

3. After Claimant's honorable discharge, he worked for approximately nine years on the dry chain and the planer at Potlatch. In 1990, he completed a 14-month certificate course in diesel mechanics at North Idaho College. From approximately 1990 until 2005, Claimant worked for Atlas Pellets as a bagger, loader operator, and eventually as the head mill operator. In January 2006, Claimant began working full-time for Dependable Fabrication as a laborer earning \$9.50 per hour. He unloaded and cut steel for the welders and fabricators.

4. On April 20, 2007, Claimant was working for Dependable Fabrication installing a sign for Silverstone Construction. He climbed approximately seven or eight feet up on a three-legged ladder provided by Silverstone. One ladder leg broke, and Claimant fell onto the concrete sidewalk on his left side. He sustained abrasions on his head, left hip, left hand, and left shoulder. Wrist x-rays revealed a left distal radius fracture and Claimant was referred to orthopedic surgeon Roger Dunteman, M.D.

5. On April 26, 2007, Dr. Dunteman performed open reduction and internal fixation of Claimant's left wrist fracture. Dr. Dunteman examined Claimant on May 30, 2007, noted that his left wrist continued to heal, and recommended physical therapy. Claimant attended physical

therapy from approximately June 11 through August 8, 2007. However, his attendance was sporadic and he missed a number of scheduled physical therapy sessions.

6. On September 5, 2007, Claimant presented to Dr. Dunteman, reporting slight grip weakness and some persisting left wrist discomfort. X-rays showed his left wrist fracture was healed. Dr. Dunteman recommended that Claimant be seen for a functional capacity evaluation or an independent medical evaluation.

7. On October 10, 2007, J. Craig Stevens, M.D., examined Claimant at Defendants' request. He tested Claimant's grip strength and sensation and recorded his complaints of left wrist pain. Dr. Stevens found resolved cervical strain, resolved lumbar strain, and resolved left shoulder strain. He rated Claimant's left wrist impairment at 1% of the whole person and recommended a left wrist cortisone injection for mild de Quervain's syndrome. Dr. Stevens released Claimant to return to full-duty work without restrictions.

8. On October 26, 2007, Dr. Dunteman discussed Dr. Stevens' evaluation and findings with Claimant and administered the recommended cortisone injection. On November 1, 2007, Dr. Dunteman agreed with Dr. Stevens' findings, but wanted to allow time to assess the benefit of the cortisone injection before determining Claimant's lifting restrictions. On November 16, 2007, Dr. Dunteman examined Claimant, noted improvement after the cortisone injection, but continued Claimant's restrictions against heavy lifting with his left arm due to his prior left wrist fracture. Dr. Dunteman anticipated that by February 16, 2008, Claimant would be able to return to full-duty work.

9. On April 21, 2008, Dr. Dunteman examined Claimant, recorded his continuing left wrist complaints, and recommended removal of his left wrist hardware. Defendants approved the hardware removal. On August 18, 2008, Lloyd Witham, M.D., examined Claimant at the VA Medical Center and also recommended left wrist hardware removal. On

January 21, 2009, a VA Medical Center psychiatrist diagnosed Claimant with moderate recurrent major depression. On February 2, 2009, Claimant presented to the VA Medical Center with left wrist complaints. He was advised that one screw was backing out of the plate in his left wrist, causing hardware bursitis.

10. On July 23, 2009, Claimant's left wrist hardware was removed by Jeffrey Bert, M.D., in Coos Bay, Oregon. On September 21, 2009, Claimant presented to Dr. Bert in follow-up to his left wrist hardware removal. Dr. Bert noted that Claimant had "very weak grip; however, he has calluses on his hand and I am not sure I am getting a full effort here." Claimant's Exhibit G, 138. Dr. Bert had previously prescribed physical therapy. Claimant had not yet attended therapy and Dr. Bert strongly encouraged Claimant to participate in therapy to regain full left hand function. However, on or about November 2, 2009 Dr. Bert released Claimant to return to regular work without restrictions.

11. On October 17, 2009, consulting VA psychologist John Gardin, Ph.D., noted Claimant's military medical records listed his low back pain problems. Dr. Gardin conducted a mental status examination of Claimant and reported:

the veteran's PTSD is caused by or a result of traumatic events ... which occurred during his military service. [T]he fact that he is not currently working is, as mentioned above, most likely a function of his lethargy and fatigue secondary to his PTSD than to any other factor. In summary, it is this examiner's opinion that this veteran is experiencing total occupational and social impairment due to PTSD signs and symptoms.

Defendants' Exhibit I, 62-63. Commencing in December 2009, Claimant began receiving 100% service-related disability benefits for PTSD.

12. In 2012, Claimant reported to VA health providers that he had chronic low back pain requiring daily narcotics. In January 2013, Claimant reported degenerative lumbar disk disease, bilateral hip osteoarthritis, low back pain, and shoulder pain.

13. At the time of the 2013 hearing, Claimant was unemployed and lived in Coeur d'Alene in a fifth wheel trailer that he purchased with his service-connected disability benefits. He has worked for only approximately three months since his 2007 industrial accident. He testified that his left wrist becomes painful when it becomes fatigued after working and his grip then decreases. Claimant testified that his industrial accident increased his anxiety and depression by precluding him from heavy work to which he was accustomed. He explained the therapeutic effect of heavy work:

It was a method for me to cope with everything. Any anger issues I might have or anxieties or anything like that. As long as I kept myself busy, I really didn't think about it.

Most of my jobs were pretty physical. Physical labor. Some very labor intensive. It just gave me something to focus my energies on. And I actually enjoyed doing some of it, you know. But yeah, it kept me pretty in line. I would have some days when I'd have flare-ups with my anger and stuff, but nothing serious.

Transcript, 53/5-8, 16-22. He observed that "since I haven't been working, I've noticed that I don't sleep well at night. It's worse now than it ever was. So that [working] would be a way of me basically wearing myself down so I could just climb into bed and go right off to sleep."

Transcript, 54/3-7.

14. At the time of the 2013 hearing, Claimant continued to experience recurring nightmares, anxiety attacks, and deep depression and regularly treated with psychologists and psychiatrists. Claimant testified that he has no patience with people, could not tolerate a job interacting with the public, and avoids crowds. He continued receiving 100% service-related disability benefits for PTSD in the amount of approximately \$3,000 per month. In addition, he also received approximately \$1,400 per month for Social Security Disability for his PTSD, left shoulder and hip pain.

15. Claimant acknowledged at hearing that he received approximately \$2,900 from the settlement of his personal injury case arising from his industrial accident.

16. **Credibility.** Claimant testified in his deposition that he had not worked since his industrial accident. However, at the 2011 hearing he acknowledged that since his accident he had worked for two different employers for at least one month each. At the 2011 hearing, Claimant admitted that he did not disclose involvement in any other litigation, when he was actually pursuing a third-party suit arising from his industrial accident. The day before the 2013 hearing, Claimant disclosed for the first time to his counsel that he had settled his third-party case. Drs. Stevens and Bert noted Claimant's inconsistent physical therapy attendance and his inconsistent performance during their evaluations, leading them to question whether he was giving full effort. Claimant refused to sign a release to allow Defendants to access his VA medical records which documented his repeated complaints of low back and hip pain prior to his industrial accident. At hearing, Claimant denied chronic low back pain prior to his industrial accident; however, his VA medical records contain multiple reports of prior back pain.

17. Some of the inaccuracies in Claimant's testimony may arise from his PTSD. Dr. Gardin, when assessing Claimant's mental status in October 2009, noted that Claimant was:

Cooperative during the interview, however many of his answers conflicted with later responses. For instance, when asked if he has participated in counseling since discharge from the military, he reported that he attended classes in Idaho. He only later reported ongoing therapy in North Bend. His omission[s] were not perceived as malingering or confabulation, but as lack of attention.

Defendants' Exhibit I, 61. Dr. Gardin further described Claimant as "very distractible Memory: poor for recent, remote and immediate Very poor concentration and attention." *Id.*

18. Having reviewed the evidence, observed Claimant at both hearings, and considered his testimony, the Referee found that Claimant is not an entirely reliable witness. We do not disturb this finding.

DISCUSSION AND FURTHER FINDINGS

19. 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).

20. **Permanent partial impairment.** The first issue is the extent of Claimant's permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

21. In the present case, Dr. Stevens rated Claimant's left wrist permanent impairment at 2% of the upper extremity which equates to 1% of the whole person. Defendants do not dispute that Claimant sustained permanent impairment of 1% of the whole person due to his industrial accident. Claimant has not proven any other permanent impairment from his industrial

accident. Claimant has proven he suffers permanent impairment of 1% of the whole person due to his left wrist fracture from his industrial accident.

22. **Permanent disability.** The remaining issue is the extent of Claimant's permanent disability. "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. 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). The proper date for disability analysis is the date of the hearing, not the date that maximum medical improvement has been reached. *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012). Where, as here, it is alleged that Claimant's disability is not causally related to the work accident, a two-step approach is envisioned. First, the Claimant's disability

from all causes combined must be determined. Second, a determination must be made of the extent, if any, to which the injured worker's permanent disability is attributable to the industrial accident. *See Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

23. **Work restrictions.** Work restrictions assessed by medical experts are critical to the evaluation of a claimant's ability to engage in gainful activity and thus his permanent disability. In the present case, Defendants maintain Claimant has no work restrictions due to his industrial accident. They correctly note that Dr. Stevens imposed no work restrictions and released Claimant to full-duty work in October 2007. Similarly, Dr. Bert imposed no work restrictions on Claimant due to his industrial injury. Claimant asserts neither physician fully evaluated Claimant's functional capacity before rendering their opinion and that his ability to engage in gainful activity was most reliably established by a functional capacity assessment.

24. Claimant's claim for disability rests, in large part, on his assertion that the May 1, 2012 functional capacity evaluation performed by Zachary Norling, DPT, establishes that as a result of the subject accident, he is now unable to perform anything more onerous than medium duty work, as described by the Dictionary of Occupational Titles. It is argued that these restrictions, considered in the light of other medical and nonmedical factors, equate to disability in the range of 30% of the whole person. Because there is no other medical evidence establishing permanent limitations/restrictions for Claimant's left wrist injury as of the date of hearing, it is important to carefully consider the results of the FCE in evaluating Claimant's disability claim.

25. Claimant attended the FCE on May 1, 2012 at the request of his attorney. The exam was performed by Mr. Norling, whose report is found at Claimant's Exhibit D. That report is eight pages long and purports to memorialize the results of a one-day FCE consisting of "three

hours of subjective evaluation, physical clinical exam, and functional capacity testing.” Pages four through seven of the report contain the results of the physical exam performed by Mr. Norling. Page eight of the report, the “Workwell FCE History”, consists of historical information provided by Claimant relating to the occurrence of the subject accident, his past medical treatment and his current subjective complaints. Pages two through three of the report relate to the “Workwell Functional Capacity Evaluation”, and it is in this part of Mr. Norling’s report that we find information most relevant to his establishment of limitations/restrictions for Claimant. However, it is difficult to ascertain exactly what type of testing Mr. Norling performed in order to assess Claimant’s functional capacity. At page two of the report we find that Mr. Norling administered to Claimant something called an “EPIC Hand Function Sort” and an “EPIC Spinal Function Sort”. What these tests measure, what their protocols might be, and how they are validated and scored, is left unexplained in Mr. Norling’s report or anywhere else in the record. However, from the EPIC tests, Mr. Norling concluded that Claimant is in the “medium work category” for both his hand function and spinal function. He felt confident that the EPIC tests reliably measured Claimant’s hand and spinal function because the EPIC test results were “consistent with client’s physical performance demonstrated during functional capacity testing”. Therefore, Claimant underwent “functional capacity testing”, in addition to the EPIC Hand Function Sort and the EPIC Spinal Function Sort, and Claimant’s performance on said functional capacity testing was consistent with his performance on the EPIC tests. However, Mr. Norling’s report contains no information whatsoever, such as worksheets, scoring, measurements or protocols relating to this functional capacity testing. Moreover, what little the report does reveal about functional capacity testing does not appear to support Mr. Norling’s

conclusion that functional capacity testing results are consistent with the EPIC conclusion that Claimant is limited to performing nothing more onerous than medium duty work:

With the EPIC Hand Function Sort he scored 222 and with the EPIC Spinal Function Sort client scored a 178 placing him in the Medium work category for both. Each of these tests were scored with high reliability and Medium work scores are consistent with client's physical performance demonstrated during functional capacity testing.

Despite impairments with left shoulder and wrist ROM and strength, client was able to complete material handling subtests without limitations.

Pain Report

Client reported a gradual increase in left shoulder and low back pain with lifting activities that increased to as high as a 8/10. However, the pain did not reach the intensity of 9/10 as reported by the client during subjective evaluation.

Safety

Overall client demonstrated safe performance requiring minimal or no cuing for body mechanics with all physical activities and subtests.

Quality of Movement

Client demonstrated appropriate changes in body mechanics, including use of accessory muscles, momentum, and counterbalancing as the intensity of the activities increased. Client demonstrated consistent work pace along with smooth and coordinated movement patterns throughout FCE testing.

Abilities/Strengths

High abilities were noted in the following functional areas; sitting, walking, hand function, stationary work, stationary elevated work, stairs, ladder climbing, and material handling.

Limitations

There were no significant functional limitations observed during functional capacity exam.

However, impairment noted during physical exam included:

- 1) Decreased left forearm and wrist ROM compared to the right.
- 2) Slight decrease in ROM of left shoulder forward flexion, and abduction compared to the right.
- 3) Slight decrease in strength of left shoulder forward flexion, external rotation, and abduction compared to the right.
- 4) Limited strength of bilateral hip external rotation and abduction.

Summary/Recommendations

These projections are for 8 hours a day 5 days a week at the levels indicated on the FCE grid.

Client's physical performance and scores on the EPIC Hand Functional Sort and EPIC Spinal Functional Sort are consistent with Medium Work. He demonstrated high abilities in the following functional areas: sitting, walking, hand function, stationary work, stationary elevated work, stairs, ladder climbing, and material handling.

Despite impaired left forearm and wrist ROM and strength, client demonstrated left grip strength above the mean for his age group and also demonstrated average or above average hand coordination skills for both dominant and non dominant hands.

Impairments with left shoulder AROM and strength were noted during physical exam, but did not limit client's performance during functional testing.

Maximal effort was demonstrated on 22/22 (100%) of FCE subtests with functional date reflecting client's physical abilities. This information could be used for job matching and future occupational planning if needed.

Claimant's Exhibit D (emphasis supplied).

26. Therefore, Claimant was able to "complete material handling subtests without limitations" and "high abilities were noted in the following functional areas: sitting, walking, hand function, stationary elevated work, stairs, ladder climbing and material handling. . . . [N]o significant functional limitations [were] observed during functional capacity exam." Despite the finding that the EPIC testing revealed limitations consistent with medium work, Claimant demonstrated "high abilities in hand function and material handling." Claimant demonstrated left grip strength above the mean for his age group and also demonstrated average or above average hand coordination skills for both dominant and non-dominant hands. Although he had some impairment of left shoulder range of motion this did not limit his performance during functional testing. Therefore, Mr. Norling's report provides a few tantalizing snippets about Claimant's performance on the other functional testing performed. However, the information

that is provided about this other testing leaves the Commission unable to understand how those test results are consistent with, and provide additional validation to, the EPIC testing which demonstrates only medium duty capabilities. Mr. Norling was not called to testify to explain his methodology and findings. We decline to speculate about the EPIC Hand Function Sort, the additional functional capacity testing that was performed and how it is that Mr. Norling came to the conclusion that the additional functional capacity testing tended to validate the results of the EPIC Hand Function Sort. Accordingly, we find it difficult to give much weight to this testing, notwithstanding that it is the most recent attempt to measure Claimant's functional capabilities. We find the opinions of Dr. Stevens and Dr. Bert to be a more persuasive indicator of Claimant's functional ability.

27. It is to be noted, however, that Dr. Dunteman, too, has been invited by Claimant's counsel to provide a current assessment of Claimant's limitations/restrictions. Claimant was last seen by Dr. Dunteman in the spring of 2008, at which time Dr. Dunteman recommended Claimant for left wrist hardware removal. However, Claimant did not keep his June 4, 2008 pre-op appointment and Claimant's surgery was cancelled. Claimant was lost to follow up by Dr. Dunteman and Dr. Dunteman did not weigh in on this case again until he responded to counsel's October 21, 2013 invitation to review and comment on the 2012 functional capacity evaluation. Dr. Dunteman was invited to review and signify his agreement with the following "reply" contained in counsel's letter:

I agree to a reasonable degree of medical probability (51% or more of the evidence supports my opinion) that the findings set forth in the March 1, 2012 Pinnacle Physical Therapy and Sports Medicine functional capacity evaluation are appropriate for Mr. Backes.

Dr. Dunteman signified his agreement with this statement by signing his name in the space provided. The Commission assigns little weight to this document. It is but a variation of the

“check the box” type of opinion letters frequently generated by attorneys and provided to treating/evaluating physicians in an effort to relieve them of some of the burden of dealing with workers’ compensation patients in the litigation environment. However, such letters are mostly unhelpful in illuminating the true opinion of a treating/evaluating physician. It is unclear what part of Mr. Norling’s findings Dr. Dunteman does agree with. Does he know what EPIC Hand Function Sort testing is? Does his signature signify his agreement with the results of that testing, and if so, how did he reconcile those results with the results of the other functional testing referenced in Mr. Norling’s report? Dr. Dunteman’s signed “reply” leaves us with very little information about what Dr. Dunteman actually thinks about the functional capacities evaluation performed by Mr. Norling. We also assign less weight to the signed reply due to the fact that Dr. Dunteman has not seen Claimant since April of 2008. In the interim Claimant’s hardware was removed by Dr. Bert, and Dr. Bert pronounced Claimant stable, ratable and without restrictions.

28. In summary, we disagree with the Referee that the FCE administered by Mr. Norling and accepted by Dr. Dunteman provides the most objective and reliable assessment of Claimant’s functionality. Important and apparently contradictory statements were not explained in a way that would allow us to conclude that the FCE credibly establishes that Claimant has medium duty limitations/restrictions as a consequence of his left wrist injury.

29. **Vocational Experts.** Two vocational experts have addressed Claimant’s permanent disability. Both experts have made different assumptions concerning the extent and degree of Claimant’s accident-produced limitations/restrictions.

30. Dan Brownell considered only the limitations/restrictions identified in the 2012 FCE. He did not offer an alternative opinion based on the limitations/restrictions proposed by Dr. Stevens and Dr. Bert. In fact, he stated, without explanation, that Claimant’s functional work

ability is “most accurately as set forth in the functional capacity evaluation performed by Pinnacle Physical Therapy and Sports Medicine”. (Claimant’s Exhibit I). He dismissed Dr. Steven’s opinion on Claimant’s limitations/restrictions as being entirely subjective, but praised Mr. Norling’s evaluation as one in which Claimant’s limitations/restrictions were objectively documented. We fail to appreciate how the limitations imposed by Dr. Stevens and those imposed by Mr. Norling can be distinguished in this fashion on the basis of the medical records before the Commission. With his assumption concerning Claimant’s limitations/restrictions in place, Mr. Brownell conducted an analysis which led him to conclude that Claimant has suffered disability in the range of 30% of the whole person as a consequence of the accident. We decline to adopt Mr. Brownell’s opinion in this regard simply because, as explained above, we cannot accept the limitations identified by Mr. Norling as credible.

31. William Jordan evaluated Claimant at the instance of Defendants. A review of Mr. Jordan’s report reveals that he, too, struggled to make sense of the 2012 FCE:

Approximately two years after being medically released by Dr. Bert, Claimant was eventually advised by his Attorney to undergo a Functional Capacity Evaluation. While the FCE of 05/10/12 reflects Claimant’s performance at a medium exertional level, the FCE also reflects that ‘...despite impaired left forearm and wrist range of motion and strength, client demonstrated left grip strength above the mean for age group and also demonstrated average or above average hand coordination skills for both dominant/non-dominant hands. Impairments with left shoulder active range of motion and strength were noted during physical exam, but did not limit client performance during testing. Approximately 1 ½ years later (10/12/13), Dr. Dunteman was then asked by Claimant’s Attorney if he agreed with the FCE findings, to which he positively responded. In analyzing this data, it is noteworthy that if the Claimant demonstrated a high ability for hand function and grip strength above the mean age group as well as average or above average hand coordination for both the dominant and non-dominant hands there is no restriction or limitation concerning his left/injured wrist. It would appear the most significant finding of the FCE is that of a medium exertional level capacity: if Claimant demonstrated full function of his left wrist in the FCE testing, the lifting capacity of medium duty would be attributable to other physical dysfunction.

Defendants' Exhibit K.

32. Correctly or incorrectly, Mr. Jordan concluded that the medium duty restrictions referenced in the FCE must relate to restrictions stemming from other of Claimant's physical maladies. Mr. Jordan was unable to reconcile the results of the EPIC Hand Function Sort with the other upper extremity functional capacity testing evidently performed by Mr. Norling. In his interpretation of the FCE, Mr. Jordan concluded that Claimant has no limitations/restrictions for his left wrist injury. As developed above, we cannot go that far, and only conclude that the FCE fails to satisfy us that Claimant does have medium duty restrictions stemming from his left wrist injury. At any rate, because we find that the limitations/restrictions authored by Dr. Stevens and Dr. Bert are the most persuasive, we come to the same spot as Mr. Jordan; absent evidence of permanent limitations/restrictions referable to the subject accident we conclude that Claimant has suffered no disability in excess of the 1% PPI rating discussed above.

33. In evaluating disability, our preferred approach is to first evaluate an injured worker's disability from all causes and then ascertain what portion of that disability is referable to a work accident. *Page v. McCain Foods, Inc., supra*. Here, if Claimant does have medium duty restrictions stemming from conditions unrelated to the subject accident it seems likely that Claimant may well have some disability from all causes in excess of his 1% PPI rating. Mr. Jordan did not quantify that disability, concluding only that because (in his opinion) Claimant has no limitations/restrictions referable to the subject accident, he does not have a disability referable to the subject accident. Although Mr. Jordan did not follow the methodology outlined in *Page, supra*, we do not believe that this warrants rejection of his opinion under the facts of this case. Regardless of what Claimant's disability might be from all causes combined (assuming that he really does have medium duty restrictions), none of that disability is referable

to the subject accident because Claimant has failed to demonstrate, to our satisfaction, that he has limitations/restrictions referable to the subject left wrist injury.

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven he suffers permanent impairment of 1% of the whole person due to his left wrist fracture from his industrial accident.

2. Claimant has not proven that he suffers permanent disability due to his industrial accident, in addition to his permanent impairment of 1% of the whole person.

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

DATED this 5th day of February, 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 5th day of February, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

STARR KELSO
PO BOX 1312
COEUR D'ALENE ID 83816-1312

PAUL J AUGUSTINE
PO BOX 1521
BOISE ID 83701-1521

ka

_____/s/_____