BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK M. OLSEN, Claimant, v. IDAHO DEPARTMENT OF HEALTH & WELFARE, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2011-005369** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed February 18, 2016

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Douglas A. Donohue who conducted a hearing in Boise on August 17, 2015. Clinton Miner represented Claimant at hearing; Bryan Storer represented Claimant during briefing. Neil McFeeley represented Defendants. The parties presented evidence and submitted briefs. The case came under advisement on November 23, 2015 and is now ready for decision.

ISSUES

According to the Notice of Hearing, the issues are as follows:

1. Whether Claimant is medically stable, and, if so, on what date;

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

3. Whether and to what extent Claimant is entitled to benefits for:

    a) Temporary disability,
    b) Permanent partial impairment,
    c) Disability in excess of PPI, and
    d) Medical care; and

4. Whether apportionment of permanent disability for preexisting conditions is appropriate under Idaho Code § 72-406.

CONTENTIONS OF THE PARTIES

Claimant contends that on February 21, 2011 he was injured in a "brutal assault." While working at the Idaho State School and Hospital, also referred to as the Southwest Idaho Treatment Center, he was thrown against a dumpster by a resident of the facility. He injured his neck and right shoulder. He aggravated, exacerbated, and/or accelerated a pre-existing physical condition. He suffered posttraumatic stress disorder (PTSD) as a result of the assault. He needs more medical care and is not yet medically stable. If deemed stable, he has suffered impairment and permanent disability as a result of the assault.

Defendants contend Claimant's claim should be dismissed for failure to prove allegations of his Complaint. Regardless, they have paid all benefits due him for this accident. Claimant has returned to baseline without additional PPI and is medically stable. No further medical care is reasonable. His current condition relates to his pre-existing condition and not to the industrial accident. PTSD was newly alleged at hearing. Without such a claim in the Complaint, without prior allegations of PTSD raised during discovery, and without inclusion of an Idaho Code § 72-451 issue in the Notice of Hearing, no psychological issue can be considered for compensability. Regardless, Claimant failed to prove eligibility for benefits for PTSD. The only medical opinion about PPI attributes an 8% PPI wholly to Claimant's pre-existing condition, none to the industrial accident. Claimant is not a credible witness. He has exaggerated his permanent disability in order to receive benefits including Social Security and PERSI as well as those alleged here.

EVIDENCE CONSIDERED

The record in the instant case included the following:

1. Oral testimony at hearing of Claimant;
2. Claimant's exhibits 1 through 16 admitted at hearing (Claimant's

proposed exhibit 17 was not admitted); and

3. Defendants' exhibits A through M admitted at hearing (Defendants' proposed exhibit N was withdrawn).

The record includes a February 10, 2010 note by Sam Jorgenson, M.D., for a Mark McDonough. (Cl. Ex. 6, Bates p. 000422.) Also, medical records from January 2004-Bates pp. 000500 through 000514—pertain to a Mark D. Olsen, older and at a different address, who worked as an insurance adjuster. These documents do not appear to be related to Claimant.

The Referee submits the following findings of fact and conclusions of law for the approval of the Commission and recommends it approve and adopt the same.

FINDINGS OF FACT

1. Claimant worked for Employer on February 21, 2011. He worked with residents of the Idaho State School and Hospital in Nampa, some with a diagnosis of autism, some with other diagnoses indicative of developmental disability. Medical records show Claimant generally describes these residents as "autistic." Attempting to restrain a 17-year-old resident, Claimant was shoved or thrown against a dumpster. He struck the back of his head and other parts of his body on the dumpster.

Medical Care: Beginning February 21, 2011

2. Claimant visited Primary Health that day. He reported the assault. He described neck pain radiating into both shoulders but not into his arms or hands. X-rays were reported as showing "moderate to severe degenerative changes without acute findings." Daryn Barnes, physician assistant to Stephen Martinez, M.D., diagnosed a neck sprain. He issued a return to work order with temporary restrictions prohibiting lifting, pushing or pulling over 20 pounds, together with some motion restrictions. Claimant visited for

follow-up on February 24.

3. On March 2 Claimant showed cold symptoms and was diagnosed with bronchitis. He made no complaints to indicate ongoing neck injury or related symptoms. On March 3 Claimant telephoned to request a Norco refill. Claimant was given the Norco on March 4 for a diagnosis of "neck pain."

4. On March 10 Claimant visited Primary Health and reported he was ready to return to full work. Upon examination Dr. Martinez released Claimant to full work. Claimant refused Dr. Martinez's offer of physical therapy. Dr. Martinez noted Claimant was under treatment for chronic pain by Dr. Marsh. Dr. Martinez issued a return to work order which specified no restrictions and which advised home treatment including ice and exercise.

5. On March 13 Claimant telephoned to request a Norco refill. Dr. Martinez approved this request. On March 15 Claimant telephoned to request massage therapy. Shortly afterward Claimant began physical therapy which continued until about April 18. On March 20 Claimant telephoned to request a Norco refill. Dr Martinez approved this request.

6. On April 7 Claimant visited Dr. Marsh's PA. She noted Claimant was last seen at that office on February 14, 2011 and had ongoing prescriptions of Soma, Aleve, and morphine, taken alternately depending upon pain level. Upon examination, the PA noted slightly decreased range of neck flexion and tenderness and spasm of cervical paraspinous, levator, scalene, and rhomboid muscles. The PA noted Claimant's prior drug history, counted his pills, and did not note any overuse problem.

7. On April 22 an MRI showed multilevel degenerative spondylosis from C3 through C7. Claimant gave a history of a neck sprain "re-injured 2 months ago." Compared

to a June 5, 2010 MRI, the recent MRI showed progression of degenerative changes at C3-4, C4-5 and C6-7. The radiologist recommended "correlation for right C7 radiculopathy." At the time of the 2010 MRI Claimant had reported worsening chronic neck pain and headaches with pain and tingling in both arms. Upon receipt and review of the MRI Dr. Martinez diagnosed a neck sprain superimposed on a preexisting degenerative disc disease.

8. On April 24 PA Barnes noted the prior history. Upon examination he found no muscle tenderness despite limited range of motion in Claimant's neck, and all other tests indicated no abnormality.

9. Throughout March, April, and May, Claimant continued follow-up with telephone calls and occasional office visits. The limited neck motion remained. Claimant continued to report an absence of symptoms in his arms or elsewhere.

10. On May 24 Claimant visited Richard Manos, M.D. Claimant reported he had been working full duty since the February 10 [sic], 2011 assault but "is beginning to get numbness in his hands." Upon examination Dr. Manos found moderate tenderness over the paraspinal muscles, reduced range of neck motion, slight motor weakness of his wrist extensors, a positive Tinel's and Phalen's, and diminished reflexes in the C6 distribution. All else was normal. He observed the MRI and noted the presence of spondylosis. Dr. Manos opined that, despite the degenerative changes, the tingling in his hands was likely related to the assault. He recommended continued chiropractic care and wrist splints. He imposed no temporary restrictions and allowed full-duty work. He found Claimant was not a surgical candidate.

11. Claimant resumed physical therapy about June 15 and continued through the end of 2011. At hearing Claimant pointed to his right trapezius, deltoid, and latissimus dorsi to indicate three of his problem areas. The physical therapists focused more upon the underlying

and nearby scalene, levator, infraspinatus, and surrounding muscles in treatment. Claimant's indication at hearing is consistent with the physical therapists' focus of treatment.

12. Claimant reported flare-ups of neck pain on July 26 and September 1.

13. On July 26 after evaluation by Dr. Manos, Claimant was allowed to continue full-duty work; continued physical therapy was recommended.

14. On July 29 Claimant "talked about wanting to go on Disability" with psychiatrist Mark Kimsey, M.D.

15. On August 22 a C7-T1 epidural steroid injection was administered by physiatrist Beth Rogers, M.D. Claimant was cleared to return to full duty effective August 25. Claimant was essentially pain free—could work and fly fish—for about one week afterward. However the pain returned, and he returned to Dr. Manos' office.

16. On September 2 a physicians' assistant to both Dr. Manos and Dr. Rogers took Claimant off work from September 1 "until 1 week after injection (to be scheduled)." On September 14 Dr. Rogers performed a second injection. On September 28 Dr. Manos opined that he expected Claimant would be "permanent and stationary" in four weeks.

17. On October 20 Claimant told Dr. Kimsey that he thought he had PTSD and linked it to unremembered events which occurred before age 15. Without noting the presence or absence of criteria for diagnostic evaluation of PTSD, Dr. Kimsey included it among his list of mental health "impressions."

18. On October 26 Claimant visited Dr. Manos and reported "'everything imaginable happening to me.'" Claimant described a dramatic increase in symptoms, as well as having been punched in the face at work two days earlier. Upon examination, Dr. Manos expressed concern about Claimant's mental status and that job stress "may be beginning to push him

over the edge." He released Claimant from work for two weeks. Dr. Manos noted, "I could certainly feel that this is work-related and stems from his work injuries. He has difficulties dealing with his chronic pain."

19. A physical therapist's record dated October 27 notes that Claimant asserted he suffered from PTSD.

20. On November 8 another Primary Health physician's assistant imposed restrictions including certain motions and allowing no repetitive overhead lifting in excess of 10 pounds, no lifting whatsoever over 20 pounds.

21. Also on November 8 Dr. Manos' physician's assistant took him off work entirely, anticipated through December 6. Claimant did report initial satisfaction with "Dr. Callahan" [Calhoun] providing psychiatric treatment.

22. On November 3 Robert Calhoun, Ph.D., evaluated Claimant. He reviewed records and administered psychological tests. To Dr. Calhoun Claimant stated he believed his neck and head pain was caused by "stress and physical tension." Claimant reported to Dr. Calhoun that he had PTSD. After testing Dr. Calhoun opined, ". . . he does not meet diagnostic criterion for posttraumatic stress disorder." He recommended counselling sessions. After some counselling, Dr. Calhoun on November 14 recommended that Claimant be released to work in order to assist his psychological improvement but he deferred to Dr. Manos whether Claimant was physically able to return to work and at what level. Counselling sessions continued through March 12, 2012. Dr. Calhoun identified stressors other than the assault. It is unclear whether he would opine Claimant's psychological condition and need for counselling were caused by the assault.

23. A physical therapist's note dated November 23 noted treatment to the trapezius

and rhomboids, "more on L. [left] side." Thereafter, therapy might focus left, right or bilaterally.

24. On December 1 Dr. Kimsey referred to PTSD issues "regarding being assaulted" at work. This represented Claimant's reassignment of supposed causation for the alleged PTSD.

25. On December 6 Dr. Manos examined Claimant. He noted that he expected Claimant to be at MMI in four weeks. He released Claimant to a "trial" of full-duty work.

26. On December 9 a physical therapist's note recorded that Claimant reported he had worked his "first full shift at work yesterday."

Medical Care: January – March 2012

27. On January 30 Dr. Rogers performed a right C6 epidural steroid injection.

28. Continuing from 2011 Claimant remained in physical therapy, primarily massage therapy, until the end of March. A physical therapist's note recorded that Claimant was involved in a car accident on April 4 which interrupted additional physical therapy.

29. On March 28 Arden Mahaffey, D.O., reviewed records generated in the 10 years immediately preceding this evaluation, administered tests, and examined Claimant at Surety's request. She opined Claimant's complaints were consistent with objective findings—without symptom magnification; Claimant's condition was not related to the industrial injury; it may require additional treatment which also would be unrelated to the industrial injury. Given the prior medical records, Dr. Mahaffey opined Claimant's condition was not aggravated by the industrial injury; MMI had been achieved, but overall prognosis was poor; a rated 8% whole person PPI was entirely preexisting.

Medical Care: April – December 2012

30. On April 2 Dr. Rogers performed a C7-T1 epidural steroid injection.

31. On April 17 Dr. Manos performed trigger point injections.

32. On May 23 Claimant reported to Dr. Marsh's PA that he had been "rear-ended

by a semi." (On April 6 Dr. Manos' PA used "sideswiped.") Claimant linked this to a 50% **decrease** in his neck and shoulder pain. (Throughout the record, Claimant has substituted numbers for adjectives to describe his pain or improvement. These are, of course, entirely subjective. They are not deemed to represent actual numerical values.)

33. On June 18 right-shoulder x-rays showed calcific tendinitis adjacent to the greater tuberosity.

34. A July 11 visit to Michael Shevlin, M.D., upon referral from Sam Summers, M.D., suggested a possible rotator cuff problem. A cortisone injection was performed, but the additional pages of the examination notes are missing from the record.

35. On August 20 Dr. Marsh examined Claimant and provided an injection of lidocaine and Depo-Medrol to the right subacromial space.

36. On November 26 a right shoulder MRI showed "severe degenerative of the acromioclavicular joint." Specifically, it reported a calcification within the anterior lateral supraspinatus tendon, moderate subscapularis tendinopathy with a tear, and minimal supraspinatus and infraspinatus tendinopathy without a tear.

Medical Care: 2013 - Hearing

37. Claimant resumed physical therapy in early January 2013 and continued for about five weeks.

38. In March and June 2013 Claimant reported to Dr. Kimsey that he had been approved for Social Security Disability and PERSI Disability, respectively. In September he told Dr. Kimsey he was "grateful he is not working" for Employer anymore.

39. On November 4, 2013 Dr. Martinez responded to a check-the-box request from Surety which indicated he agreed with the IME panel opinions.

40. On July 8, 2014 Richard Radnovich, D.O., reviewed records and examined Claimant at the request of Claimant's former attorney, now deceased. Dr. Radnovich's examination finding of right deltoid atrophy is the first of record; otherwise it appears consistent with other physicians' observations. He opined Claimant's condition was caused by the industrial injury. He rated Claimant's neck PPI at 17% whole person and subtracted 1% for preexisting apportionment; he added 1% for the shoulder condition. He recommended restrictions which precluded frequent extremes of cervical motion, exposure to low frequency vibrations, overhead work or lifting of 30 pounds at or above the shoulder. These he related to the neck and shoulder condition. He did not opine about restrictions from other potential causes or conditions. He recommended ongoing treatment.

Prior Medical Care

41. Medical records show multiple instances in which Claimant sought care after an injury at work. Except as noted below, none are relevant to the current condition for which he seeks benefits. Claimant has a longstanding low back condition, spondylolisthesis at L5-S1, which had caused intermittent pain and symptoms requiring medical attention.

42. In August 2002 Claimant sought mental health care from Mark Kimsey, M.D. He recorded a history of such care intermittently since age 15. Psychotropic medications had been prescribed. Claimant had self-medicated with illegal drugs in the past, but claimed to have been clean and sober for six years. Dr. Kimsey provided ongoing treatment for mental health issues and hepatitis C. The notes suggest Claimant ties his appraisal of his well-being to fishing. The notes provide an informative window into Claimant's life as well as the waxing and waning of symptoms for various conditions tangential to Dr. Kimsey's treatment. Claimant was still receiving treatment for mental health issues at the time of the assault;

his last visit before is dated January 28, 2011 when Dr. Kimsey scheduled his next appointment for April 29. Claimant's first visit after is dated June 2, 2011. The frequency and irregularity of Claimant's visits was highly variable. The most recent medical note from Dr. Kimsey is dated March 20, 2015.

43. Since 2002 Claimant's regular treating physicians have been David Hill, M.D., and Charlie Frost, P.A. These records show a neck and upper back injury with symptoms into his arms. Symptoms waxed and waned.

44. Seeking treatment in May 2003, Claimant reported a workers' compensation injury to his neck had occurred on January 5, 2003. Examination and MRI noted a degenerative, nonsurgical, cervical spine with osteophytes and disc bulges "likely to entrap the right C4 and C6 nerve rootlets."

45. Dr. Hill declared Claimant medically stable without permanent impairment in June 2003.

46. In March 2010 Claimant visited Dr. Manos for complaints related to a degenerative lumbar condition.

47. In May 2010 Claimant visited Primary Health complaining of chronic neck and upper back pain since a 2002 workers' compensation injury. Upon examination, PA Barnes found tender paraspinal muscles bilaterally and limited range of neck motion in all directions. After checking Claimant's prescription history with the Board of Pharmacy PA Barnes allowed a Norco prescription to be filled.

48. Also beginning in May 2010 Claimant visited McKim Chiropractic with complaints of neck pain and bilateral radicular symptoms arising, by history, from the 2002 workers' compensation injury. Keith McKim, D.C., scheduled three visits per week

for five weeks.

49. In June 2010 Claimant visited Primary Health complaining of chronic neck pain radiating into his left shoulder. He had been seen elsewhere but was requesting a non-narcotic analgesic such as Tramadol in place of the Norco which had been previously prescribed. Generally, Primary Health showed a cautious reluctance to prescribe narcotics and sometimes refused to do so when Claimant asked.

50. A June 5, 2010 MRI showed degenerative disc disease C3-4 through C6-7.

51. On June 10, 2010 Dr. Montalbano reviewed records and examined Claimant at a Surety's request pertaining to earlier–2002 and 2003–workers' compensation claims involving a neck and shoulder condition. He opined Claimant's condition was nonindustrial.

52. On August 30, 2010 Claimant began visiting Dr. Marsh for pain control of chronic neck pain about C5-6 and potential radicular symptoms. Claimant attributed it to a 2002 workers' compensation accident, but Dr. Marsh disagreed. Dr. Marsh noted Claimant's reported history of drug abuse and cautiously allowed reasonably light doses of Norco. He recommended physical therapy and discussed the possibility of an EMG. On October 4 Dr. Marsh warned Claimant against self-adjusting his narcotic prescription above the prescribed amount.

53. Claimant's last—before the assault—visit of record with Primary Health occurred on January 13, 2011. Dr. Martinez issued a return to work order without restriction related to a fractured right 5^{th} toe.

Vocational Factors

54. In January 2012 ICRD was contacted by Surety, but Claimant did not participate. His file was closed because he had returned to work at his time-of-injury position without restrictions.

DISCUSSION AND FURTHER FINDINGS OF FACT

55. 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).

56. Claimant provided physicians with histories which were variously incomplete, but not frankly inconsistent, in the first few months after the assault. The event itself was amply documented and witnessed. Its occurrence was not in dispute.

57. Claimant reported his prior drug use to physicians. They appeared to be diligent in monitoring his narcotic use. His urine screens were consistent with the prescriptions and negative for illicit use of drugs. Since the assault, he has been imperfectly compliant in restricting himself to prescribed amounts of narcotics. The record does not show Claimant exhibiting the drug-seeking behavior evident in other recent cases. *See e.g., Harris v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 604 (2013); *Erickson v. ISIF*, IC 2007-012947, January 19, 2016.

58. Claimant has a common and likeable gift for exaggeration. Two examples illustrate: Feeling poorly, he told a physician he felt like "hammered duck shit." At hearing he testified the young man who assaulted him "could destroy an anvil using his bare hands." Although these colorful expressions do not seriously undercut his credibility, Claimant's tendency for exaggeration does diminish the impact of his claim that he needed a whole new pain scale to describe his symptoms post-assault. Outside of courtroom testimony, one would likely find him an engaging storyteller. This gift is less appreciated when he is under oath.

59. Where contemporaneously recorded written evidence is inconsistent with his testimony, the written evidence receives more weight.

PTSD Claim

60. Neither Claimant's Complaint nor Amended Complaint alleges a psychological injury. Claimant's answers to interrogatories show that Claimant was expressly asked about physical and psychological injury and that he responded by identifying only physical injuries.

61. Psychological injury is governed by a specific statute, Idaho Code § 72-451, in Idaho Worker's Compensation Law. As such, it is customarily identified as a specific issue, separate from general medical care benefits, in pleadings and in any Notice of Hearing.

62. The absence of any such indication, before hearing, by Claimant that he would allege a claim for psychological benefits precludes consideration of the issue by the Commission.

63. *Arguendo,* Claimant asserted to Dr. Calhoun that he suffered PTSD. Dr. Calhoun unequivocally opined that Claimant does not qualify for that diagnosis under *DSM-IV* or another edition. Claimant asserted to Dr. Kimsey that he suffered PTSD. Dr. Kimsey added that diagnosis to his list of psychological diagnoses without expressly finding the required criteria or identifying a specific cause or treatment separate from Claimant's pre-existing psychological conditions and care. Moreover, Claimant initially linked PTSD to events in his remote childhood. Neither Dr. Kimsey nor any other physician of record opined about potential causes of Claimant's claimed PTSD. Claimant failed to show he was entitled to any benefits pursuant to Idaho Code § 72-451.

Notice/Statute of Limitation Issue

64. Just as Claimant will not be heard to raise an issue without adequate notice, Defendants' belated focus at and after hearing upon a couple of typographical errors in Claimant's Complaint and other documents, which erroneously state an earlier date for the date

of the accident, does not create a cognizable issue. Defendants have not shown prejudice arising from the typographical errors. Indeed, as is evident below, Defendants were well prepared to show the limits of Claimant's entitlement to medical care and Claimant's failure to meet his burden of proof regarding a causal link between ongoing symptoms and the compensable accident as well as Claimant's failure to show compensable PPI and permanent disability.

Causation

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

66. Claimant was noted to have a degenerative cervical spine condition as early as 2002 which intermittently caused neck, upper back, right arm, and other symptoms before and after the assault.

67. Medical opinion sufficiently provided a causal link for some symptoms arising immediately after the assault. The record supports a likely causal connection between the assault and a strain or sprain of soft tissue, including the muscles, tendons, and/or ligaments.

Treatment was complicated by the underlying degenerative condition which was, at most, temporarily aggravated by the assault. The opinions of Dr. Manos and other treating physicians are entitled to significant weight. However, they are dependent largely upon Claimant's subjective reporting and history. Dr. Radnovich's belated examination and limited records review came too late for his opinions to be of significant weight. For purposes of establishing causation, Dr. Manos' opinion is accepted as having more weight than Dr. Mahaffey's relating to the question of exacerbation or aggravation of the underlying degenerative condition. However, Dr. Mahaffey's opinion that there had been no such exacerbation or aggravation is deemed of greater weight when determining whether such exacerbation or aggravation resulted in permanent ill effects. Dr. Manos did not unequivocally opine that such exacerbation or aggravation was permanent; Dr. Mahaffey did not observe it clinically upon examination or by her records review. Thus the record supports that such exacerbation or aggravation was present for a period of time and had resolved by the time of her examination.

Medical Care Benefits and Maximum Medical Improvement

68. An employer is required to provide reasonable medical care for a reasonable time. Idaho Code § 72-432(1). A reasonable time includes the period of recovery, but may or may not extend to merely palliative care thereafter, depending upon the totality of facts and circumstances. *Harris, supra*. One factor among many in determining whether post-recovery palliative care is reasonable is based upon whether it is helpful, that is, whether a claimant's function improves with the palliative treatment. *Id.*; *see also*, *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 591 P.2d 143 (1979)(overruled by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015) to the extent *Sprague* suggested its articulated factors were exclusive.)

69. After the first few months of treatment, the record shows that all treatment was

merely palliative and provided only temporary relief. Medical care was provided for both the soft-tissue injury as well as the underlying degenerative condition through the date of medical stability established by Dr. Mahaffey. The record shows Dr. Mahaffey's MMI date of March 28, 2012 is appropriate; by that time medical care had become merely palliative and provided only temporary relief.

70. Sometime before Dr. Mahaffey's evaluation and consistently thereafter, Claimant's function did not improve. Indeed, in early 2013 he pursued Social Security and PERSI disability claims instead of attempting to increase his function.

71. Moreover, the palliative care appears to have become increasingly related to the nonindustrial degenerative condition rather than to the soft-tissue injury arising from the assault. Claimant failed to provide medical testimony to rebut Dr. Mahaffey's opinion that, at the time of her examination, Claimant's condition and treatment was related to the underlying degenerative condition and not to the assault. Claimant failed to show eligibility for continued palliative care.

Temporary Disability

72. Eligibility for and computation of temporary disability benefits are provided by statute. Idaho Code §72-408, *et. seq*. Upon medical stability, eligibility for temporary disability benefits does not continue. *Jarvis v. Rexburg Nursing*, 136 Idaho 579, 38 P.3d 617 (2001). An injured worker who is unable to work while in a period of recovery is entitled to temporary disability benefits under the statutes until he has been medically released for work and Employer offers reasonable work within the terms of the medical release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986). The statute requires a five-day waiting period before temporary benefits become payable. Idaho Code § 72-402.

73. TTD benefits were identified as an issue in Claimant's Complaint. However, Claimant did not expressly identify a dispute over nor provide evidence of TTD benefits allegedly unpaid. His identification of a dispute about the MMI date does not, by itself, reasonably provide notice of an ongoing TTD dispute.

Permanent Impairment

74. Permanent impairment is defined and evaluated by statute. Idaho Code §§ 72-422 and 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989); *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

75. Dr. Mahaffey provides the persuasive opinion about PPI. Dr. Manos' check-the-box response suggests his agreement with Dr. Mahaffey. Claimant's 8% PPI is entirely related to the underlying degenerative condition which, by the March 28, 2012 date of MMI, had returned to baseline, and no PPI is ratable for the soft-tissue injury which had resolved.

76. Claimant failed to meet his burden of establishing that he was likely eligible for permanent impairment benefits.

Permanent Disability

77. **"**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.

78. The test for determining whether a claimant has suffered a permanent

disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 766 P.2d 763 (1988). In sum, the focus of a determination of permanent disability is on a claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

79. Permanent disability is defined and evaluated by statute. Idaho Code §§ 72-423 and 72-425 *et. seq.* Permanent disability is a question of fact, in which the Commission considers all relevant medical and non-medical factors and evaluates the purely advisory opinions of vocational experts. *See*, *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. ISIF*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon a claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

80. Claimant's failure to establish permanent impairment resulting from the assault precludes an award of permanent disability benefits.

81. Absent a finding of permanent disability, the apportionment issue is moot.

CONCLUSIONS

1. Claimant suffered a soft-tissue injury and a temporary aggravation of a pre-existing degenerative neck condition in a compensable accident which occurred on February 21, 2011;

2. Claimant and Defendants raised new issues at hearing. To be given consideration, these could and should have been raised timely. Defendants were not prejudiced by typographical errors in Claimant's documentation;

3. Claimant is entitled to medical care, including palliative care through the date

of medical stability, March 28, 2012;

4. Claimant failed to show Defendants were liable for unpaid TTD benefits;

5. Claimant failed to show he is entitled to permanent partial impairment or permanent partial disability as a result of the compensable accident; and

6. An issue of apportionment of permanent disability is moot.

RECOMMENDATION

Based on 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 4th day of February, 2016.

INDUSTRIAL COMMISSION

__/s/_____
Douglas A. Donohue, Referee

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2016, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

BRYAN S. STORER
4850 N. ROSEPOINT WAY, STE. 104
BOISE, ID 83713

NEIL D. MCFEELEY
P.O. BOX 1368
BOISE, ID 83701

dkb

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK M. OLSEN, Claimant, v. IDAHO DEPARTMENT OF HEALTH & WELFARE, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2011-005369** **ORDER** Filed February 18, 2016

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue 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:

7. Claimant suffered a soft-tissue injury and a temporary aggravation of a pre-existing degenerative neck condition in a compensable accident which occurred on February 21, 2011.

8. Claimant and Defendants raised new issues at hearing. To be given consideration, these could and should have been raised timely. Defendants were not prejudiced by typographical errors in Claimant's documentation.

9. Claimant is entitled to medical care, including palliative care through the date of medical stability, March 28, 2012, but not afterward.

10. Claimant failed to show Defendants were liable for unpaid TTD benefits.

11. Claimant failed to show he is entitled to permanent partial impairment or permanent partial disability as a result of the compensable accident.

12. An issue of apportionment of permanent disability is moot.

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

DATED this 18th 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 18th day of February, 2016, a true and correct copy of the **ORDER** was served by regular United States Mail upon each of the following:

BRYAN S. STORER
4850 N. ROSEPOINT WAY, STE. 104
BOISE, ID 83713

NEIL D. MCFEELEY
P.O. BOX 1368
BOISE, ID 83701

dkb

__/s/_____