BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID ANTHONY COLE, Claimant, v. HERCO, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-025695** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** June 6, 2014

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee LaDawn Marsters, who conducted a hearing in Lewiston on March 29, 2013. Claimant was present and represented by Scott Chapman of Lewiston. Mark T. Monson of Moscow represented Employer and Surety (collectively, Defendants). The parties presented oral and documentary evidence. Post-hearing depositions were taken, and the parties submitted briefs. This matter initially came under advisement on December 23, 2013. Thereafter, the Referee reopened the record, seeking more information from the parties concerning the dates of prior temporary disability and permanent impairment payments, and the case was removed from advisement status until May 8, 2014, following the filing of the parties' Stipulation Regarding Additional Evidence.

ISSUES

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

1. Whether Claimant is medically stable and, if so, the date on which he became so;

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

    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.

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

CONTENTIONS OF THE PARTIES

Claimant contends that he has not received adequate medical care for his industrial condition, that he is not medically stable, and that he is entitled to additional medical care to diagnose and treat his neck and left shoulder pain, left upper extremity numbness, and other symptoms. He also asserts entitlement to temporary disability benefits until he reaches medical stability. In the event the Commission finds Claimant is medically stable, Claimant further asserts that he is totally and permanently disabled as an odd-lot worker.

Defendants counter that no further treatment is advisable for Claimant's industrial injury. Although he continues to experience left-sided symptoms, these are from preexisting degeneration unrelated to his industrial injury. Also, Defendants have provided all reasonable care requested by Claimant's physicians, plus PPI of 7% of the whole person. Further, he is not totally and permanently disabled. Therefore, Claimant is medically stable and not entitled to further benefits.

OBJECTIONS

All pending objections are overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony taken at hearing of Claimant and his wife, Teresa Cole;

2. Claimant's Exhibits (CE) 1 through 13 admitted at the hearing;

3. Defendants' Exhibits (DE) 1 through 12 admitted at the hearing; and

4. The transcripts of the post-hearing deposition testimony of Wade Beeler and Richard J. Weiland, Jr., M.D. taken on April 8, 2013; John McNulty, M.D. taken April 23, 2013; and J. Gerald McManus, M.D. taken on June 10, 2013.

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 full Commission.

FINDINGS OF FACT

1. **Vocational history.** Claimant was 50 years of age and residing in Clarkston, Washington at the time of the hearing. He left high school during the tenth grade to go to work. "I asked my dad for lunch money and he told me to get a job." Tr., p. 60. Claimant was passing all of his classes at the time. He subsequently obtained his GED. Other than specific training provided through his employment, Claimant has not received any other formal education.

2. Claimant worked as an equipment operator for Herco, a paving company, from May 2006 through October 15, 2010. His job involved shoveling and raking gravel and asphalt, and operating compactors, asphalt rollers and other equipment. Some of the machines he operated sat several feet off the ground so he would have to climb up to operate them. Claimant did not return to Herco following his subject industrial injury. He earned $18.25 per hour.

3. At one point, Claimant had a CDL, but he lost it after testing positive for marijuana. At the time of the hearing, he was barred in Washington from reapplying until 2052.

4. Prior to his employment at Herco, Claimant worked for other concrete, asphalt and construction companies, as a laborer. In the distant past, Claimant worked in fruit and produce plants. He has also worked as a cleanup laborer at the Hanford Site in Washington, and, for a few months, for a company that constructed steel buildings in Texas. Much of Claimant's work, including his work at Herco, has been seasonal, with winter layoffs.

5. Claimant has been married to Teresa Cole since 1985. They have three grown children.

6. **Prior injuries and illnesses.** Claimant had a few industrial accidents resulting in injuries prior to this claim. Most of these injuries healed without permanent impairment. He does have residual pain from two industrial right hip injuries, but none of his prior injuries prevented him from working for more than a couple of weeks. As to his hip injury, Claimant explained, "…I have to be very careful how I lean, bend over. I can feel it in my hip. I got a soft spot I call it." Tr., p. 27.

7. Claimant is deaf in his right ear, and he has difficulty keeping his balance, due to a virus (viral labyrinthitis) he contracted in 2008. As a result, Claimant walks more slowly than he used to, he has to take shorter steps, and he cannot turn around very fast.

8. Claimant has no history of cervical spine problems. Although a medical record from 2009 bears a heading indicating Claimant reported a neck injury, a closer review of it and related records reveals no evidence of any neck pain report, treatment or diagnosis. This document is insufficient to establish that Claimant has any past or preexisting cervical spine conditions.

INDUSTRIAL INJURY

9. On September 15, 2010, Claimant was raising the screed on a paver when "it felt like somebody slugged me in the shoulder." Tr., p. 33. He stopped the paver, told the owner (Bud Winstrom), and assessed his left shoulder. He had good motion and strength so, after a few minutes, he returned to work even though his shoulder was still sore and "charley horsed." Tr., p. 35. Also, Claimant noticed that if he leaned his head way back, his arm would fall asleep.

10. Claimant continued to work, without improvement, for four weeks. After he finished the job he was on and started a new one, his arm numbness became a safety concern to him. "…[W]hen we finished that job and we started doing patching, and it requires looking up into the truck, a lot of looking up, and I became to where I was unable to safely operate the piece of equipment I was in." Tr., p. 35. He was operating a small skid steer loader at the time, scooping asphalt and transporting it to patch sites. "…[W]hen I tried to look up into the truck, my arm was falling asleep and I couldn't feel the controls." Tr., p. 36.

11. **Richard J. Weiland, Jr., M.D. (family practitioner).** Claimant consulted Dr. Weiland about his symptoms on October 18, November 4, and December 21, 2010. Dr. Weiland had treated Claimant in the past, and had performed Claimant's past DOT physicals. Following examination, Dr. Weiland diagnosed "ditch digger's neck" and ordered MRIs on Claimant's shoulder and back, which demonstrated a C5-6 disc herniation and a C6-7 disc protrusion with foraminal narrowing. CE3, 1-2. Claimant declined pain medications. Dr. Weiland diagnosed an acute neck injury, prescribed Flexeril for muscle spasm, and referred Claimant to Greg Dietrich, M.D., an orthopedic surgeon, for a surgical consultation.

12. **Chip Wahlberg, P.T. (physical therapist).** Claimant participated in physical therapy for about five weeks initially, from November 23, 2010 through December 29, 2010.

Mr. Wahlberg noted that most of Claimant's symptoms were related to his thoracic spine, left shoulder, and left elbow.

13. On December 22, 2010, Claimant reported to his physical therapist that his shoulder and thoracic area symptoms were improving, but his neck pain and tension headaches were worse. "The tension headache is referred from the back and radiated up into the cranial region. He presents himself with very tight myofascial areas in the cervical area but no muscle spasm noted." CE3, 13. Claimant had also discussed his headaches with Dr. Weiland and Dr. Flinders.

14. Claimant recalls that his symptoms worsened immediately following his physical therapy sessions, so he quit going. Claimant returned for a few more sessions between January 24, 2011 through February 7, 2011. He maintains that physical therapy did not improve his condition, so he never returned. On January 26, 2011 Mr. Wahlberg wrote, "David is still having a lot of issues with discomfort in the cervical thoracic, and left shoulder region. His objective findings show consistent impingement of the left C5-6." DE-111.

15. **Gregory D. Dietrich, M.D. (orthopedic surgeon).** Dr. Dietrich evaluated Claimant on November 19, 2010, December 28, 2010, and January 11, 2011. "His MRI scan demonstrates some degenerative disc disease at C5-6 with a disc protrusion, right-sided. At C6-7 he does have a disc protrusion. This is somewhat central. It does have somewhat of an acute boggy appearance. There is fairly significant left-sided foraminal narrowing." CE7, 2. Dr. Dietrich diagnosed acute cervical spine pain and radiculopathy. "Acute onset of neck pain and radiculopathy. I think this is probably secondary to this C6-7 disc protrusion and impingement of the C7 root in the foramen." CE3, 9. He referred Claimant for physical therapy, and to Craig Flinders, M.D., a pain specialist, for steroid injections.

16. **Craig Flinders, M.D. (anesthesiologist).** Between December 13, 2010 and May 10, 2011, Claimant underwent a total of four steroid injections,[1] by Dr. Flinders. On initial evaluation, Dr. Flinders opined Claimant's symptomatology is "suggestive of a discogenic radiculitis." DE-21. Long-term, Claimant's condition did not improve with steroid injections. However, his medical records suggest that, following his last two injections, he temporarily improved.

17. Dr. Flinders also administered a psychological evaluation. He interviewed Claimant and administered a number of standardized tests. Based upon Claimant's responses, Dr. Flinders strongly opined that Claimant's psychological state is not unduly influencing his symptom reports. "He does not make use of somatization as a psychological defense, there is no evidence or factors related to secondary gain, and there is nothing indicating that any of his symptoms are psychogenic." DE-26. Although Claimant may be experiencing some anxiety, Dr. Flinders did not believe Claimant has any psychological disorder and he did not believe Claimant would benefit from psychological treatment.

18. **William Bozarth, M.D. (neurologist).** Claimant underwent an EMG/nerve conduction study on January 5, 2011 by Dr. Bozarth, who opined in his report, "This study does not reveal evidence to suggest radiculopathy, plexopathy or peripheral neuropathy causing denervation. There is a suggestion of a mild generalized sensory neuropathy." CE3, 17. Dr. Deitrich noted this study was "fairly unrevealing" but he was concerned because Claimant was so miserable. He opined that several findings from his October 2010 MRI could be a potential pain source and ordered a repeat MRI with discograms. "Certainly his symptoms seem

[1] Dr. Flinders administered an injection at C6-7 on December 13, 2010, and injections at C7-T1 on March 28, 2011, April 13, 2011, and May 10, 2011. On June 1, 2011, Dr. Flinders noted, "He relates that his neck pain has improved significantly. He does have occasional upper extremity pain and numbness, but overall reports marked improvement." DE-32.

to be more significant than seems obvious on this MR." DE-19. Dr. Dietrich had not ruled out surgery as of his last evaluation of Claimant.

19. **T. William Hill, M.D. (neurosurgeon).** Dr. Dietrich referred Claimant to Dr. Hill for a second opinion. Ultimately, Claimant treated with Dr. Hill from February 17, 2011 until June 30, 2011.

20. Initially, Dr. Hill noted Claimant's pain was severe enough that it interfered with his sleep and that his steroid injection had not provided any significant improvement. (Claimant had only undergone one injection by this time, at C6-7.) Claimant had no paraspinal muscle spasm, but he did have "decreased range of motion with pain on turning and tilting to the left…some increase in the dysesthesias into his left hand especially the web between the first and second digits with tilting to the left…some pain which is increased with extension partially relieved with flexion…[and]…some pain on percussion over the spinous processes posteriorly." DE-36. Dr. Hill opined, "The patient has cervical disc disease with disc herniations at C5-6 and C6-7 with some foraminal narrowing especially on the left at C6-7." DE-37. "He certainly has evidence of nerve root compression with bilateral foraminal narrowing at C5-6 and more obvious narrowing of the neuroforamina at C6-7 on the left." DE-38. Dr. Hill prescribed an anti-inflammatory and ordered copies of Claimant's EMG/nerve conduction study report.

21. On review of Claimant's EMG/nerve conduction study report, Dr. Hill acknowledged that it evidenced only mild changes. However, he nevertheless believed that "the degree of changes on his MRI scan which show significant foraminal narrowing at C5-6 and C6-7, bilaterally at C5-6 and significantly more severely involving C6-7 on the left that his symptoms are directly related to that." DE-42. Dr. Hill ordered another MRI, which returned results similar to the first round. After reviewing the films, Dr. Hill disagreed with some of the

reporting radiologist's findings. "I do disagree with the radiologist's reading. I think there is significant narrowing of the neuroforamina at C4-5 on the left with an osteophyte there as well as narrowing of the foramen at C5-6 and C6-7." DE-44. Dr. Hill also noted that the disc protrusion was to the right, and Claimant was reporting some right-sided pain.

22. Dr. Hill prescribed a muscle relaxant and took Claimant off anti-inflammatories. He also recommended more physical therapy and at least two more steroid injections. Claimant declined the physical therapy referral because he believed his prior attempt made him worse. He did, however, obtain three more steroid injections (as noted, above). Dr. Hill kept Claimant on his medications and added Amitriptyline to help him sleep. He also noted, with respect to causation, "…the disc herniation at C5-6 is on the right side and his symptoms are on the left and I think that his symptoms are due more to the foraminal narrowing secondary to degenerative disc disease and resultant narrowing of the foramen brought on from his work injury." DE-46. Further, "The patient's symptoms fit best with a C4-5, C5-6 levels [*sic*] given the fact that he has pain and tenderness in the deltoid region into the insertion down into the biceps." *Id.*

23. On June 3, 2011, Claimant reported significant improvement. He was sleeping better and medications were helping ease his muscle tension and pain. However, he still had posterior cervical pain on the left side radiating into the shoulder on extending his neck. Dr. Hill opined Claimant may be physically ready to attend classes, but he was still not ready to return to heavy construction work. Dr. Hill again suggested physical therapy, but Claimant declined in favor of home exercises, icing, and a massager. "I have asked him to increase his activities at home but not doing any major lifting nor climbing ladders. If he tolerates that then I think it will be good evidence that he is making satisfactory progress." DE-47.

24. On his last visit (at the end of June 2011), Claimant reported he had participated in some physical therapy. "He still has significant neck stiffness and pain. His left shoulder pain has recurred after the initial effects from the surgical epidural steroids but he feels that it is still better than when he first came to see me and would like to be released for job retraining or schooling. I think that is appropriate." DE-51. Dr. Hill restricted Claimant from lifting more than 25 pounds and required that he be able to change positions frequently. He opined that if Claimant's symptoms do not resolve, then an anterior cervical discectomy, partial corpectomy and bilateral foraminotomies with interbody fusion and plating at C5-6 and C6-7 would be indicated "due to a combination of disc herniation at C5-6 and bilateral foraminal narrowing at C5-6 and C6-7." DE-51. Dr. Hill released Claimant for reschooling starting July 5, 2011, but opined that Claimant would not be medically stable for at least six more weeks. As discussed, below, Claimant was unable to drive the distance necessary to obtain additional training so he remained unemployed, with no new vocational skills.

25. **Gerald McManus, M.D. (orthopedic surgeon).** On July 8, 2011, Dr. McManus performed an IME at Defendants' request. Following a records review, he interviewed and examined Claimant. Dr. McManus opined that Claimant's symptoms were the result of an aggravation of his preexisting degenerative condition and that they would wax and wane and would likely resolve without surgery. He noted that Claimant's imaging was more indicative of right-sided symptoms than left-sided symptoms, however, and that there was no evidence for left-sided radiculopathy attributable to his cervical spine.

26. Dr. McManus opined that Claimant was medically stable from his industrial injury and that no further treatment would improve his cervical spine condition. He assessed 7%

whole person PPI and restricted Claimant from lifting more than 25 pounds above shoulder height.

27. On July 21, 2011, Dr. McManus indicated in a check-box letter provided by Surety that Claimant's restrictions due to his left upper extremity impairment would prevent him from returning to his job as an equipment operator. His restrictions are somewhat difficult to discern. He clearly indicated that Claimant's maximum lifting, on an occasional basis (1%-33% of the time), should not exceed 25 pounds. Also, he restricted Claimant's overhead activities to an occasional basis and opined that Claimant could reach on a frequent basis (34%-67% of the time). Under "other restrictions," Dr. McManus attempted to clarify his lifting restriction by writing "maximum lift chest height or lower rarely (0-10% of time)." DE 77.

28. On July 29, 2011, after reviewing Dr. McManus' report, Dr. Hill returned a check-box letter to Surety indicating that he agreed with Dr. McManus' findings.

29. As a result of Dr. McManus' opinions, Surety ceased paying TTD benefits on July 26, 2011, and initiated PPI payments. Claimant accepted his first PPI payment on August 2, 2011, and successive payments through February 24, 2012.

30. **John M. McNulty, M.D. (orthopedic surgeon).** On June 14, 2012, Dr. McNulty performed an IME at Claimant's request. He interviewed Claimant, reviewed his medical records, and performed an examination. He opined that Claimant's symptoms are primarily left-sided, yet his MRI films primarily demonstrate evidence for symptomatology on the right. He also opined that, having observed Claimant for signs of symptom exaggeration or inconsistent behavior, he found Claimant to be a credible individual. Ultimately, Dr. McNulty opined that Claimant's condition is not medically stable and that he needs further workup to determine whether Claimant is a surgical candidate.

31. **Dr. Weiland's testimony.** As discussed, above, Dr. Weiland treated Claimant following his industrial cervical spine injury. He also examined Claimant on March 14, 2013 after reviewing the IME reports of Drs. McManus and McNulty. Dr. Weiland then testified, via post-hearing deposition, on April 8, 2013. Dr. Weiland opined that, given Dr. Dietrich and Dr. Hill's findings and opinions, along with Claimant's persistent left upper extremity symptoms, surgical intervention is appropriate.

32. Dr. Weiland acknowledged statements in the reports of Drs. McManus and McNulty to the effect that Claimant's imaging is more consistent with right-sided symptoms than left-sided symptoms, but he explained that "frequently, they don't correspond well." Weiland Dep., p. 16. "…I think that doesn't necessarily preclude this from being related." *Id.* at 17. "And, in fact, I don't think Dr. McNulty would have recommended further imaging if he had felt that was the end of the issue." *Id.* at 17-18. Likewise, Dr. Weiland opined that Claimant's relatively benign EMG/nerve conduction study results do not rule out radiculopathy in his left upper extremity.

33. **Claimant's testimony.** At the hearing, Claimant's arm felt sore, charley-horsed, and weak. His back hurt. "Occasionally in the mornings it doesn't feel too bad; but as soon as I start trying to do anything, it's sore. I don't hardly want to use my arm for nothing." Tr., p. 44. Additionally, Claimant's entire left side is now affected. "…[I]t's affected my leg and my foot now, my left side, it's half asleep. I have lost significant muscle mass, nerve sensory [*sic*]." Tr., p. 47. He described his symptoms as mainly left-sided and "arthritic". Tr., p. 77. His left thumb, index, and middle fingers are stiff and painful. It hurts to move them. He also has constant numbness between his thumb and forefinger on both the palm and back of his left hand, as well as other symptoms.

34. Claimant believes his medical care was inadequate. "I need to know what's going on, I don't even know what's going on. I keep getting worse and worse and nobody can tell me nothing." Tr., p. 45.

35. As a result of his industrial injuries, Claimant's life has changed. He has not returned to work, and he does not do much yard work anymore, either. He recently had to pay someone to reroof his house, which he would have done, himself, prior to injury. "I was in the roofer's union at one point and I have done flat roofs single ply." Tr., p. 49. Now, he can hardly put away the dishes with his left arm, and he has trouble lifting a gallon of milk with his left arm. Claimant cannot walk more than a couple hundred feet before he becomes too uncomfortable. He can stoop and bend, but not like he did before his accident. Driving is difficult. "I'm tensed up constantly to protect my back, potholes, man holes, water valves, dodging them all." *Id.* Claimant's tension often leads to a headache. He did not have these symptoms before his industrial accident.

36. Claimant spends most of his time in his recliner, either on the edge of the chair or fully reclined on his back. He sleeps in his recliner ten hours, clear through the night, then takes a 1½ hour nap during the day. If he sleeps in the bed, he ends up in a position in which his arm and leg go to sleep and he wakes up with a headache.

37. Claimant has tried medications, including prescription pain killers, but none have helped. He takes ibuprofen about three times per week. He has blurry vision that he speculates may be due to a medication he took following his industrial injury. He has not seen a physician regarding this condition. Claimant uses marijuana a few times per week, sometimes less, and he also smokes about a pack and a half of cigarettes per day. He has smoked for more than 30 years, but not necessarily at the rate he was smoking at the time of the hearing.

38. Claimant has not filed for unemployment benefits because he cannot satisfy the criteria that he must be physically able and available for work. His SSDI claim was recently denied, and Claimant intends to appeal that decision. Claimant's income has consisted of an early withdrawal from his IRA and approximately $9,000 of savings. Also, his wife took a job.

39. Claimant believes there is no work he can do, in his current condition. "I can't even keep my left arm on the steering wheel for a significant amount of time." Tr., p. 45. Claimant testified that Dr. McManus' 25 pound above-shoulder lifting restriction would preclude him from doing his prior jobs with Herco and his previous employer. Moreover, he did not believe he could even lift 10 pounds above shoulder height with his left shoulder.

40. Claimant thinks he may be able, physically, to do a one-armed desk job. He can sit for 2½-3 hours at a time. He has no trouble reading, and he uses a computer to send emails and search the Internet. He also knows some German. He can manipulate small, light objects with both hands, but he can only lift with his right arm.

41. Claimant has not looked for employment. He has turned down two job offers from another paving company because he is physically unable to do the work.

42. **Wade Beeler (ICRD consultant).** In spring-summer 2011, Mr. Beeler recommended that Claimant get some retraining. Toward that end, Claimant travelled to Walla Walla Community College for a placement test. He tested very well. Nevertheless, Claimant did not follow up. "Just the two and a half hours to take the placement test was all I could stand. I went home that evening and I didn't get out of my chair all night." Tr., p. 57. Also, Claimant was concerned about the cost. Mr. Beeler referred him for public assistance (through the "TICO" program which is no longer administered), but Claimant was denied because, he believes, he did not meet the financial criteria.

43. Mr. Beeler also suggested other possibilities. He thought that Claimant may be a good fit for a quality control tech position with a local construction company, but he was unsure whether the job would require lifting beyond Claimant's restrictions. Claimant thought it would. He has seen quality control employees lifting 40-50 pound boxes. Also, he has no knowledge of specs for "rocks, oil, or anything else related to asphalt." Tr., p. 63. Claimant conceded he might be able to be trained to do this job. Mr. Beeler also suggested a pharmacy tech program and a phlebotomist program, but Claimant did not recall this at the hearing. Mr. Beeler went over these possibilities with Claimant. However, they did not spend much time discussing vocational options because, although Claimant vacillated between wanting surgery and not wanting surgery, Mr. Beeler believed Claimant wanted to obtain more medical care when he prepared his final notes in Claimant's case.

DISCUSSION AND FURTHER FINDINGS

The provisions of the 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). However, the Commission is not required to construe facts 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).

44. **Reasonable medical care.** Claimant carries the burden of proving, to a reasonable degree of medical probability, that the injury for which benefits are claimed is causally related to an accident arising out of and in the course of employment. *Wichterman v. J.H. Kelly, Inc.,* 144 Idaho 138, 158 P.3d 301 (2007). It is clear that in order to recover medical benefits, the injured worker must prove both that the need for medical care is causally related to

the accident and that the medical care is "reasonable." See *Henderson v. McCain Foods, Inc.,* 142 Idaho 559, 130 P.3d 1097 (2006).

45. Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment is reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

46. The Idaho Supreme Court has held that medical treatment is reasonable when three circumstances exist: 1) the claimant made gradual improvement from the treatment received; 2) the treatment was required by the claimant's physician; and 3) the treatment received was within the physician's standard of practice, and the charges were fair, reasonable and similar to charges in the same profession. *Id.* Where, as here, the desired treatment has not yet been rendered, the Commission should determine what is reasonable based upon the totality of the circumstances.

47. There is no dispute that, at least initially, Claimant's cervical spinal pain and upper extremity symptoms were related to his industrial injury. Drs. McNulty and Weiland have recommended additional diagnostic care to determine the best treatment course for Claimant's ongoing symptoms. They, as well as Dr. Hill, have opined that, depending upon Claimant's symptoms, surgery may be a reasonable option. They rely primarily upon Claimant's clinical presentation to support their opinions. Dr. McNulty noted:

> Mr. Cole's clinical picture is consistent with a left-sided cervical radiculopathy. He has marked restriction in range of motion of his cervical spine. He has weakness of left wrist flexion and elbow extension as well as sensory loss in the first dorsal webspace. He also has atrophy in his left arm and forearm. These are

> physical exam findings consistent with a cervical radiculopathy. The unfortunate part for Mr. Cole is that the diagnostic studies (MRI, EMG/NCVS) do not correlate well with his physical exam findings. I have reviewed the 3/4/2011 MRI and agree that the C5-6 through C6-7 findings are midline and right-sided.

CE12, 6.

48. Defendants contend Dr. Hill concurred in Dr. McManus' opinion that any additional treatment would not be reasonably related to Claimant's industrial injury because he indicated, in a check-box letter provided by Surety, that he agreed with the findings in Dr. McManus' report. Dr. Hill's opinion, as evidenced in his chart notes, was inconsistent with many points addressed in Dr. McManus' report, and nothing in the record illuminates why he may have changed his position. Without some explanation from Dr. Hill, the Referee declines to allocate much weight to that document. Dr. Hill's chart notes provide more credible evidence of his opinions than does the check-box letter.

49. To determine whether the care required by these physicians is "reasonable," the Commission must ascertain whether it is likely to be efficacious. In other words, if, from the medical evidence adduced by Claimant, it appears more probable than not that the recommended care will improve Claimant's condition, then the care is "reasonable."

50. At the time of the hearing, Claimant was not receiving any treatment, including palliative care, for his cervical spine and upper extremity symptoms. In the past, he received some relief from epidural steroid injections. Medications were somewhat helpful, as well, but Claimant still experienced significant symptoms. At the time Claimant left Dr. Hill's care, Dr. Hill did not believe he was medically stable. He hoped for further improvement in Claimant's condition which, according to Claimant's credible testimony, as well as the observations of Drs. McNulty and Weiland, never materialized.

51. Dr. McManus, on the other hand, opined that no further treatment was reasonable because the exact structural damage underlying Claimant's symptoms had not been identified by sufficient objective measures. Further, he asserts that even if additional objective testing reveals a structural source, it would nevertheless be inadequate to establish a link with Claimant's industrial injury, as opposed to a subsequent event.

52. The Referee finds the opinions of Drs. Weiland, McNulty, and Hill most persuasive. Claimant is a credible witness without any relevant preexisting conditions, and the record does not reveal any potential material subsequent events. Furthermore, Dr. McManus concedes that Claimant's condition is due to a combination of preexisting degeneration plus industrial aggravation, with a prognosis for ongoing intermittent problems. His assertion that Claimant must simply live with these debilitating symptoms, in the presence of the opposing medical evidence in the record, is not persuasive.

53. Claimant has established that his ongoing cervical spine problems are, at least in part, causally related to the subject accident. Claimant has also established that additional diagnostic evaluation for his cervical spine and upper extremity symptoms is needed to assess his treatment options. Therefore, Claimant has proven that he is entitled to additional diagnostic, and perhaps other, treatment related to his upper spine and upper extremity symptoms, as recommended by Drs. Weiland, Hill, and McNulty.

54. **Maximum medical improvement.** As of June 30, 2011, Claimant was not medically stable, as per Dr. Hill. Dr. McManus opined that Claimant reached MMI in July 2011. Claimant only became medically stable, in terms of these proceedings, if his symptoms were not likely to significantly change, even with treatment, in the near future, or if Claimant denied Dr. Hill's recommendation for additional care.

55. It was determined, above, that Claimant's symptoms are likely to improve with additional treatment. Further, Claimant never denied medical care (other than physical therapy, which is understandable based upon his increased pain). Wade Beeler testified that Claimant vacillated between wanting surgery and believing he may be able to live with his condition. Quite reasonably, Claimant was concerned about the potential for a bad surgical outcome and he intended to pursue retraining while he waited to see if he would heal without further treatment. Around this time, Surety denied further benefits. Claimant lacked the means to obtain more treatment independently, so he did not return to his physician.

56. At the time of the hearing, Claimant wished to follow up on Dr. Hill's recommendation that he consider surgery upon persistence/recurrence of his symptoms. Claimant was prevented from following up earlier because Surety denied further benefits while he was still in the six week wait-and-see period recommended by Dr. Hill.

57. Claimant has proven that, from the date of his industrial accident until the time of the hearing, he was not medically stable. As a result, no permanent impairment or disability can yet be assessed.

58. **Temporary Total Disability (TTD).** Idaho Code §§ 72-408 and 409 provide time loss benefits to an injured worker who is temporarily totally disabled. Under *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), once a claimant establishes by medical evidence that he is within a period of recovery from the industrial accident, he is entitled to TTD benefits *unless* and *until* evidence is presented that he has been medically released for light work and (1) that an employer has made a reasonable and legitimate offer of suitable employment to him or that (2) there is employment available in the general labor market which

claimant has a reasonable opportunity of securing, and which is consistent with his physical abilities.

59. Here, it has been determined that Claimant has not yet achieved medical stability since his industrial accident. In addition, Dr. McNulty opined that, as a result of his spine and upper extremity symptoms, Claimant is relegated to sedentary work with minimal rotation of his neck and limited repetitive reaching and grasping with his left upper extremity, rendering him unable to return to his time-of-injury job. Notably, Dr. McManus' restrictions as of early July 2011 also preclude Claimant from his time-of-injury occupation.

60. The Referee finds Claimant is entitled to TTD payments from September 15, 2010 through the date of medical stability, with credit for TTD and PPI payments already rendered through July 26, 2011, until such time that Defendants can meet their burden of proof under *Maleug.*

61. All other issues are moot.

CONCLUSIONS OF LAW

1. Claimant is entitled to additional reasonable and necessary medical care, including diagnostic treatment, for his industrial neck and shoulder conditions.

2. Claimant has proven that he has not reached medical stability since his September 15, 2010 industrial accident.

3. Claimant is entitled to temporary total disability benefits from September 15, 2010, until such time that he reaches medical stability and the *Malueg* criteria are satisfied, with credit for TTD and PPI payments already rendered through July 26, 2011.

4. All other issues are 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 _2nd_ day of June, 2014.

INDUSTRIAL COMMISSION

_/s/_____
LaDawn Marsters, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the __6th_____ day of June, 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:

SCOTT CHAPMAN
RANDALL BLAKE & COX
PO BOX 446
LEWISTON ID 83501-0446

MARK T MONSON
MOSMAN LAW OFFICES
PO BOX 8456
MOSCOW ID 83843-8456

sjw

_/s/_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID ANTHONY COLE, Claimant, v. HERCO, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	**IC 2010-025695** **ORDER** June 6, 2014

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

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

1. Claimant is entitled to additional reasonable and necessary medical care, including diagnostic treatment, for his industrial neck and shoulder conditions.

2. Claimant has proven that he has not reached medical stability since his September 15, 2010 industrial accident.

3. Claimant is entitled to temporary total disability benefits from September 15, 2010, until such time that he reaches medical stability and the *Malueg* criteria are satisfied, with credit for TTD and PPI payments already rendered through July 26, 2011.

4. All other issues are moot.

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

DATED this __6th____ day of ___June_____, 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 __6th____ day of ____June_____, 2014, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

SCOTT CHAPMAN
RANDALL BLAKE & COX
PO BOX 446
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sjw _/s/_____