BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONALD PACKER, Claimant, v. KIEWIT MINING GROUP, INC., Employer, And OLD REPUBLIC INSURANCE COMPANY, Surety, Defendants.	**IC 2019-016654** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED JULY 8, 2022**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned this matter to Referee Douglas Donohue. A hearing was held on May 19, 2021. James Arnold represented Claimant. David Gardner represented Defendants. The parties presented testimonial and documentary evidence. The parties took a post hearing deposition and submitted briefs. The case came under advisement on March 14, 2022, and is ready for decision.

ISSUES

The issues to be decided as amended at hearing are:

1. Whether the condition for which Claimant currently seeks benefits was caused by the industrial accident;
2. Whether and to what extend Claimant is entitled to:
   a. Permanent partial impairment,
   b. Permanent partial disability; and
3. Whether apportionment for a pre-existing condition is appropriate under Idaho Code §72-406.

The parties reported at hearing that all other noticed issues have been resolved.

CONTENTIONS OF THE PARTIES

Claimant contends he injured his low back on June 9, 2019. He was driving a mining truck which hit a bump. His seat bottomed out and injured his back. This is an accepted claim; medical

care, TTD, and 7% PPI have been paid. Surgery helped, but Claimant retains pain and radiculopathy which restricts his activities. Dr. Benjamin Blair, M.D. opined Claimant's condition is 100% related to the accident. Claimant's restrictions result in permanent disability. Delyn Porter opined Claimant's disability should be rated at 88.1% whole person and that Claimant is an odd-lot worker.[1] Apportionment is not applicable under these facts.

Defendants acknowledge and accept the accident of June 9, 2019. They contend that apportionment is appropriate under Idaho Code §72-406. Dr. Tom Faciszewski, M.D. opined that 90% of Claimant's condition was caused by preexisting degenerative disc disease. A vocational evaluation overrates Claimant's disability. Defendants object to Claimant's odd-lot claim as it was not raised at or before hearing.

EVIDENCE CONSIDERED

The record in the instant case included the following:

- Oral testimony at hearing of Claimant;
- Joint exhibits 1 through 18 admitted at hearing; and
- Deposition testimony of treating physician Benjamin Blair, M.D.

All objections raised in post-hearing depositions are OVERRULED.

Referee Donohue 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 was employed by Employer driving truck for the mine. These mine trucks had a 100-ton carrying capacity. He usually worked 12- to 15-hour shifts. Weekly hours averaged

[1] Odd-lot qualification is a new issue, first requested at the end of Claimant's post-hearing brief. It was not raised in Claimant's Complaint, Request for Calendaring, Notice of Hearing, nor requested at any time during the hearing. Claimant's Reply Brief appears to properly withdraw any claim for odd-lot disability.

about 40. The job also involved lifting chock blocks weighing about 35 pounds each.

2. On June 9, 2019 he hit a bump or pothole in a mine road. His seat bottomed out. He felt immediate pain in his low back. He finished hauling the load and reported the event to a supervisor.

3. Employer offered medical care. Claimant declined it on that day but accepted it the next day. Two of Employer's safety officers made the doctor's appointment and drove him there.

4. Claimant returned to light duty for a few days. He asked to be allowed to return to his truck. He was allowed to "take it easy" as he drove truck. Safety officers would drive him to physical therapy about three days per week. He continued to work until surgery in November 2019.

5. About two months after surgery Claimant returned to work. Pain was significant. After six weeks of full shifts Dr. Blair restricted him to eight-hour days. Employer was unable to accommodate that restriction.

Post-Accident Medical Care: 2019

6. On June 10, 2019 Claimant sought medical care at Workmed Clinic. The nurse practitioner examined Claimant and diagnosed right sciatica related to work injury.

7. After two massage therapy visits Claimant returned to Workmed on June 13. Randall Fowler, M.D. examined him. An X-ray revealed mild degeneration with scoliosis. Dr. Fowler added neuropathy and obesity to Claimant's diagnoses. He released Claimant to full duty but suggested he pay attention not to aggravate it.

8. On June 17 Claimant visited Eric Bowman, D.C. Three more visits followed.

9. On June 24 Claimant reported he had worked modified duty with no change in his pain. Examination showed Claimant reported a nonanatomical sensory deficit in his right leg. Physical therapy was substituted for massage therapy.

10. On July 9 Claimant reported to Dr. Fowler that the physical therapy was not helping. He had resumed driving mine truck. After examination Dr. Fowler added lumbosacral radiculopathy at S1 to the list of diagnoses.

11. On July 16 an MRI showed degenerative conditions worse on left than right. At L5-S1 a "probable subtle left paracentral annular tear" was noted.

12. On November 19 Dr. Blair performed surgery. Procedures included laminectomies at L2 through L5, facetectomies and foraminotomies at L2, L3, and L5, and a discectomy at L4-5. (The operative note appears erroneous in stating the discectomy occurred at L5-S1. Whichever level is correct, the difference does not impact the outcome here.)

Medical Care: 2020 - Hearing

13. From January 8 through March 10, 2020 Claimant attended physical therapy. He had become further deconditioned after his accident and surgery.

14. On May 27, 2020 Claimant returned to Dr. Bowman for chiropractic care. This single visit was not repeated until August 18 2020 for another single visit.

Medical Opinions

15. On October 8, 2019 Tom Faciszewski, M.D. reviewed records and examined Claimant for forensic purposes. Examination showed Claimant to be credible in his reports of symptoms. Dr. Faciszewski opined that the MRI showed Claimant's stenosis was due to congenitally short pedicles; this condition and Claimant's obesity were non-industrially related preexisting conditions; Claimant's right L4-5 lateral recess stenosis with L5 radiculopathy was aggravated by the June 9, 2019 accident. He emphasized the radiculopathy was "in a neurogenic claudicatory fashion." He recommended an L4-5 laminectomy related to the aggravation from the accident. Claimant was not at MMI.

16. On November 19, 2019 Dr. Blair wrote,

> Although I wholeheartedly agree with Dr. Faciszewski that the degenerative changes and congenital stenosis preexisted the June 9, 2019 work-related injury, by Mr. Packer's relayed history and confirmed by records that I have reviewed to date, Mr. Packer was relatively asymptomatic prior to the June 9, 2019 injury. Therefore, I believe the June 9, 2019 injury caused an aggravation of his underlying preexisting asymptomatic degenerative changes and stenosis to cause it to become symptomatic and seek further treatment.

17. On March 26, 2020 Br. Blair released Claimant to "full work duties" with an 8-hours-per-day maximum.

18. On April 19, 2020 Dr. Blair rated Claimant for PPI. He assigned 7% whole person PPI without apportionment.

19. On May 12, 2020 Dr. Blair repeated his opinion against apportionment. He acknowledged the presence of preexisting degenerative conditions but reasoned that Claimant was "relatively asymptomatic" before the accident, echoing his earlier opinion. Dr. Blair admitted he is without supporting medical literature, but he considered such unnecessary given that most patients have degeneration without symptoms. He noted that Claimant had symptoms directly post-injury. He opined that the timing of these symptoms makes it more likely than not that the accident caused an aggravation of the degenerative condition. He opined that but for the accident Claimant would not have become symptomatic and would not have needed treatment.

20. A second chiropractic visit occurred on May 27, 2020. This was again for neck pain, but Dr. Bowman treated everything, neck to lower thoracic spine.

21. On June 22, 2020 Dr. Blair circled "Yes" to show he "concur[red] with the findings/results of this FCE" of June 4.

22. On August 18, 2020 Wesley Bowman, D.C. treated Claimants entire spine

and shoulders.

23. On December 18, 2020 Dr. Faciszewski again conducted a forensic examination of Claimant and reviewed additional medical records and Claimant's deposition. While he disagreed with Dr. Blair's diagnosis, he agreed with a 7% PPI. He opined that the L4-5 laminectomy was required by the industrial accident. He opined that additional lumbar surgery was either unrelated to the accident or unnecessary. He agreed with Dr. Blair's restriction of full duty no more than eight-hours per day. He opined that the FCE suggested limitations of sedentary work with 40-pound lift and carry and 30-pound lift knee to waist occasionally. He opined that these limitations were linked to obesity and preexisting lumbar conditions and not to the accident.

24. In deposition Dr. Blair well explained his opinion that no apportionment of PPI was appropriate; it does not matter that Claimant's preexisting spinal stenosis was related to obesity and deconditioning; it was aggravated by the accident where it had been mostly asymptomatic before and, coupled with the herniated disc which was caused by the accident, surgery was required to relieve these painful problems. He well explained that ease and efficiency were good reasons for performing surgery at adjacent levels once the L4-5 procedure had begun. He well explained that medical literature supporting his opinion is likely absent because the scientific studies look for a P value of less than 0.5% and his opinion is expressed merely to a likelihood—51%.

Prior Medical Care

25. On March 27, 2019 Claimant visited a chiropractor Eric Bowman, D.C. He complained of neck pain. Nevertheless, Dr. Bowman treated Claimant's entire spine and both shoulders.

Vocational Factors

26. Born January 23, 1964 Claimant was 57 years of age at the time of hearing.

27. Claimant is a high school graduate.

28. Claimant maintains a CDL.

29. Essentially, he has operated heavy equipment his entire work life.

30. Claimant received assistance from ICRD consultant Susan Burt. She opened a file on April 23, 2020. She attempted to help Claimant return to work with the 8-hour maximum as a daily work restriction from Dr. Blair. Claimant had applied for Social Security Disability benefits. Upon receipt of the FCE Claimant stated he wanted to wait on any job search.

Vocational Experts

31. On July 22, 2020 Delyn Porter evaluated Claimant's employability. He opined that the FCE results would limit Claimant to 67 sedentary jobs in his local labor market, a loss of access of 97.9%. Lifting restrictions account for an 86.2% loss of access. He opined wage loss of 46% and 35.2% respectively. Mr. Porter deviated without explanation from the standard which averages the two factors. Defendants produced no expert testimony on the subject of Claimant's claim for permanent disability.

DISCUSSION AND FURTHER FINDINGS OF FACT

32. 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). Uncontradicted

testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447–48, 74 P.2d 171, 175 (1937). *See also Dinneen v. Finch*, 100 Idaho 620, 626–27, 603 P.2d 575, 581–82 (1979); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998).

33. Claimant makes a good first impression. He is a credible witness.

Causation

34. A claimant bears the burden of proving that 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).

35. If the accident and injury made symptomatic a previously asymptomatic condition, the accident is held to cause an aggravation, exacerbation, or acceleration of the condition and is compensable. *Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983).*

36. Here, Drs. Blair and Faciszewki agree Claimant suffered a disc herniation caused by the accident. Their difference of opinion regarding apportionment reflects Dr. Faciszewski's

focus on the scientific or anatomic cause. He opined for a 90% apportionment to preexisting causes—degenerative disease and obesity.

37. Dr. Blair opined for no apportionment. He reasoned that but for the accident Claimant would not have incurred the constant, unrelenting back pain and radiculopathy. Moreover, but for the accident Claimant's preexisting degenerative condition would not have become significantly symptomatic.

38. Dr. Blair offers the persuasive opinion which is consistent with the case law. Taking the worker as one finds him, it does not matter that he had a preexisting condition or was otherwise predisposed to be vulnerable to injury.

39. The evidence shows a single chiropractic visit involving treatment to Claimant's lumbar spine before the accident. On the occasion of that March 27, 2019, visit, Claimant's presenting complaint was of neck pain, as reflected in the patient information questionnaire filled out by Claimant on that date. (J.E. 18 at 324). However, Dr. Bowman's treatment note reflects that Claimant reported diffuse pain involving his entire spine:

> Chief complaint: posterior cervical (neck), upper thoracic, mid thoracic, lower thoracic, lumbar, right posterior shoulder and left posterior shoulder aching and tightness/stiffness discomfort. (J.E. 18 at 325).

Dr. Bowman administered Chiropractic Manipulative Therapy (CMT) to the neck, as well as the other areas of Claimant's back. The Commission finds this note insufficient to establish that Claimant had significant low back symptomatology on a pre-injury basis. First, it is the only pre-injury medical record which reflects treatment for low back pain. Second, Dr. Bowman's recitation of Claimant's complaints is not reflected in Claimant's handwritten self-report prepared the same day. Defendants point to potential evidence—which they were unable to obtain—which may suggest that Claimant's condition was symptomatic before. Such speculation does not establish

that point.

40. The preponderance of evidence shows that Dr. Blair's opinion should carry more weight. Claimant's preexisting degenerative condition was aggravated and became symptomatic as a result of the accident.

Medical Care

41. A claimant is entitled to reasonable medical care for a reasonable period of time for an industrial injury. Idaho Code §72-432. Future medical benefits for merely palliative care may be awarded. *Rish v Home Depot*, 161 Idaho 702, 390 P.3d 428 (2017). 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 v. Independent School District No. 1*, 154 Idaho 917, 303 P.3d 605 (2013); *Rish v Home Depot*, 161 Idaho 702, 390 P.3d 428 (2017). 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) (limited and overruled on other grounds by *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015)).

42. The record shows it likely that Claimant's medical care was reasonable and necessary and related to the industrial accident.

43. Claimant did not show it likely he will need future medical care.

Permanent Impairment and Disability

44. 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).

Impairment is an inclusive factor of permanent disability. Idaho Code § 72-422.

45. The preponderance of evidence in the record supports the 7% PPI rating which both doctors, albeit for different reasons, agree upon.

46. As explained in the Causation section above, apportionment under Idaho Code § 72-406 is not appropriate under these facts and circumstances.

47. "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 as provided by Idaho Code § 72-430.

48. 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).

49. 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).

Where preexisting impairments produce disability, all impairments and disability should be accounted for with a subtraction back for the compensable portions. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008).

50. Here, Dr. Blair released Claimant to full duty with a maximum 8-hour-per-day restriction. Claimant had returned to full-duty, longer hours after surgery. The hourly maximum was not given until after Claimant tried to return to his regular 12- to 15-hour shifts. Only after Employer could not accommodate an 8-hour shift did Claimant stop working.

51. Dr. Blair's circle "yes" to agree with the FCE findings does not of itself constitute a restriction. Dr. Blair's testimony about his agreement with these findings shows that occasional lifting/carrying 40 pounds and lifting knee to waist of 30 pounds were reasonable restrictions.

52. Mr. Porter's analysis of Claimant's loss of labor market access and loss of earning capacity appears reasonable. Without explaining why, he deviated from the convention of averaging of these numbers, so his basis for his ultimate disability numbers is not shown to be reasonable. Averaging wage loss and labor market loss, the permanent disability numbers calculate to 72% if only sedentary work is considered and 61% if light duty within the lifting restrictions is considered.

53. Analyzing all medical and non-medical factors, the Referee finds the preponderance of evidence supports the higher of these two numbers. After a long career of hard work, Claimant's back was done in by a discrete accident. Claimant's permanent disability, inclusive of 7% PPI should be rated at 72%.

Apportionment

54. Idaho Code § 72-406 allows apportionment of partial permanent disability where a preexisting physical impairment causes an increase of disability, in severity or duration, to the effects

of a compensable claim.

55. As set forth in the Causation section above, a basis for apportionment has not been shown. The preexisting condition has not been shown to have been symptomatic or requiring treatment before the accident. Dr. Blair opined that the preexisting condition was aggravated permanently by the accident, and surgery was performed to alleviate it.

CONCLUSIONS

1. Claimant suffered injury from a compensable accident on June 9, 2019;

2. The accident caused a herniated lumbar disc and permanently aggravated a preexisting degenerative lumbar condition;

3. Medical care to the date of MMI was reasonable, but a likelihood of future medical care has not been established;

4. Claimant is entitled to PPI rated at 7% of the whole person; and

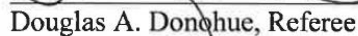
5. Claimant is entitled to permanent disability rated at 72% of the whole person, inclusive of PPI.

RECOMMENDATION

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

DATED this ___24th___ day of May, 2022.

INDUSTRIAL COMMISSION



Douglas A. Donohue, Referee

ATTEST: [signature]

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __8th______ day of___July_________, 2022, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic Mail upon each of the following:

JAMES ARNOLD
PO BOX 1645
IDAHO FALLS, ID 83403-1645
jcarnold@ppainjurylaw.com
josie@ppainjurylaw.com

DAVID GARDNER
333 S MAIN STREET STE 2000
POCATELLO, ID 83204
dgardner@hawleytroxell.com

mm

___*Mary McMenomey*_____

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DONALD PACKER, Claimant, v. KIEWIT MINING GROUP, INC., Employer, And OLD REPUBLIC INSURANCE COMPANY, Surety, Defendants.	**IC 2019-016654** **ORDER** FILED JUL 08 2022 INDUSTRIAL COMMISSION

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

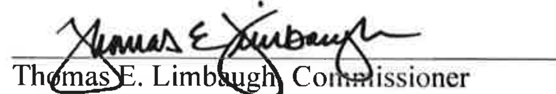
1. Claimant suffered injury from a compensable accident on June 9, 2019;
2. The accident caused a herniated lumbar disc and permanently aggravated a preexisting degenerative lumbar condition;
3. Medical care to the date of MMI was reasonable, but a likelihood of future medical care has not been established;
4. Claimant is entitled to PPI rated at 7% of the whole person; and
5. Claimant is entitled to permanent disability rated at 72% of the whole person, inclusive of PPI.

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

DATED this 7th day of July, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman



Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2022, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic mail upon each of the following:

JAMES ARNOLD
PO BOX 1645
IDAHO FALLS, ID 83403-1645
jcarnold@ppainjurylaw.com
josie@ppainjurylaw.com

DAVID GARDNER
333 S MAIN STREET STE 2000
POCATELLO, ID 83204
dgardner@hawleytroxell.com

mm