BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH MCCULLOUGH, Claimant, v. GLANBIA FOODS, INC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Surety, Defendants.	**IC 2018-016751** **IC 2018-026619** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** FILED AUG 19 2022 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Sonnet Robinson. A hearing was conducted on September 15, 2021. Claimant, Joseph McCullough, was represented by Matt Vook of Twin Falls. David Gardner of Pocatello represented Defendants. The matter came under advisement on July 15, 2022 and is ready for decision.

ISSUES[1]

1. Whether Claimant's condition was caused by an accident arising out of and in the course of employment as defined by Idaho Code § 72-102(17);
2. Whether the condition or disability for which Claimant seeks compensation is due,

[1] Claimant withdrew or did not argue the issue of attorneys' fees, medical benefits, temporary disability benefits, and whether the Commission should retain jurisdiction.

in whole or in part, to an injury, infirmity, disease, or condition unrelated to the alleged May 27, 2018 and September 7, 2018 accidents;

3. Whether Claimant's condition resolved following the May 27, 2018 and September 7, 2018 accidents;

4. Whether Claimant is entitled to:

   a. Permanent partial impairment (PPI);

   b. Permanent partial disability (PPD), including whether Claimant is totally and permanently disabled.

CONTENTIONS OF THE PARTIES

Claimant contends that the May 27, 2018 injury has decreased his function and increased his pain. While Claimant admits he has a prior low back injury in 2014, Claimant's new 2018 injury is a permanent aggravation of this condition for which Defendants owe benefits. Claimant's PPI for his low back is 8%, with 2% apportioned to the 2018 injury, but his restrictions are exclusively the result of the 2018 injury. Claimant is totally and permanently disabled because it would be futile for him to look for work.

Defendants argue that Claimant's current condition is the same condition that he has been treating for since 2014; Claimant complained of low back pain just three days prior to the alleged accident. Claimant has not met his burden to show his current condition is a result of the 2018 accident.

Claimant did not file a reply brief.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;

2. Joint exhibits (JE) 1-17;

3. The post-hearing depositions of Benjamin Blair, MD, James Bates, MD, and Delyn Porter, MA, taken by Claimant;

4. The post-hearing depositions of Matthew Williamson, DO, and Tom Faciszewski, MD, taken by Defendants.

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

FINDINGS OF FACT

1. Claimant was fifty-seven years old at the time of hearing and a resident of Shoshone, Idaho. Tr. 18:5-8.

2. **Pre-Injury Medical Records.** Claimant suffered an accident and injury on March 3, 2014 to his low back. JE 5:15. Claimant presented to the ER for evaluation on May 27, 2014 and reported he had experienced increased low back pain when bending over an engine to replace a part two months earlier. *Id.* at 88. Claimant reported low back pain which radiated down his right leg, occasionally all the way to his heel, and numbness and weakness in his right leg. *Id.* Claimant was out of work and seeing a vocational rehabilitation specialist. *Id.* An MRI revealed multiple level disc bulging, most notably an L5-S1 protrusion which compressed the nerve root and T11-T12 disk extrusion with "mass effect in the anterolateral spinal cord itself." *Id.* at 89. Claimant was prescribed Norco, Flexeril, and Prednisone, and to follow up with a surgeon regarding steroid shots or surgery for his condition. *Id.*

3. Claimant followed up the next day with Douglass Stagg, MD. Dr. Stagg took a history of the injury, examined Claimant, and reviewed the MRI from the previous day. *Id.* at 104. Claimant reported his pain was an 8 out of 10, and that he had pain into his legs. Claimant's lumbar

range of motion was limited to 45 degrees due to pain. JE 7:401. Dr. Stagg diagnosed herniated disks at T11-12, T12-L1, and L5-S1 with bilateral radiculopathy. JE 5:105. Dr. Stagg wrote he wanted to get Claimant referred to Dr. David Verst "as quickly as possible" for an evaluation. *Id.*

4. Claimant saw Dr. Verst on June 4, 2014. *Id.* at 112. Dr. Verst diagnosed degenerative disc disease, facet syndrome, herniated nucleus pulposus, and spinal stenosis. *Id.* at 114. Dr. Verst recommended physical therapy and injectional therapy, and scheduled Claimant for follow-up in four to six weeks. *Id.* at 115.

5. Claimant was referred to the Industrial Commission Rehabilitation Division (ICRD) on June 9, 2014. *Id.* at 31.

6. Claimant attempted steroid injections, but they were unsuccessful, and Dr. Verst recommended surgery on July 14, 2014. *Id.* at 120. Claimant underwent a laminectomy at T11, T12, L2, and a hemilaminectomy at L3, L4, and L5 on August 11, 2014. *Id.* at 122.

7. On August 20, 2014, Claimant returned to Dr. Verst and complained of mild right lower extremity pain and moderate back pain. *Id.* at 131. Dr. Verst prescribed Duricef and home exercises. *Id.* Claimant followed up again on September 10 and continued to complain of moderate back pain and right lower extremity pain. *Id.* at 132. Claimant also reported he lifted his wife when she had a seizure, which increased his pain. *Id.* Dr. Verst ordered a repeat MRI, physical therapy, and a hose stocking for Claimant's left lower extremity swelling. *Id.*

8. On September 24, 2014, Dr. Verst reviewed the MRI and opined Claimant likely had a recurrent herniated nucleolus pulposis L5 right and spinal stenosis secondary to the surgery. *Id.* at 140. Claimant's complaints remained the same. *Id.* Dr. Verst recommended epidural injections at L4-L5 and L5-S1. *Id.* Claimant was injected and reported relief for two days, but thereafter complained of right lower extremity pain. *Id.* at 148.

9. On December 10, 2014, Claimant continued to report back pain and lower right extremity pain, and Dr. Verst recommended a CT myelogram of Claimant's lumbar spine. *Id.* at 151.

10. On January 28, 2015, Dr. Verst recorded that Claimant continued to complain of lower extremity pain and back pain, but that his CT and MRI "do NOT demonstrate evidence of nerve encroachment." *Id.* at 158 (emphasis in original.) Dr. Verst wrote that Claimant continued to struggle with chronic and neuropathic pain, but that Claimant also had risk factors for chronic and neuropathic pain such as obesity, heavy smoking, and hypertension. *Id.* Dr. Verst recommended Claimant undergo a trial with a neurostimulator and start a chronic pain management treatment program. *Id.* at 159.

11. Claimant saw Paul Montalbano, MD, for an independent medical exam (IME) at surety's request on February 18, 2015. *Id.* at 160. Dr. Montalbano took a history from Claimant, reviewed records, and made recommendations. Claimant complained of mid and low back pain, and lower extremity symptomology, right greater than left; Claimant had numbness and tingling and reported his pain at "5 to 8 out of 10." *Id.* Dr. Montalbano recommended a bone scan, an MRI of Claimant's thoracic spine, and an X-ray of Claimant's low back. *Id.* at 162.

12. On February 25, 2015, Dr. Montalbano reviewed the studies he had recommended and wrote "[b]ased on the above imaging studies, I would not recommend a spinal cord stimulator. In my opinion, the majority of his symptomology emanates from the cord signal changes at the level of T12." On March 4, 2015, Dr. Montalbano elaborated and recommended Claimant see a physiatrist and wrote that the "majority of symptomatology is really deconditioning as well as morbid obesity." *Id.* at 167.

13. At follow-up on March 19, 2015, Dr. Verst maintained that Claimant was a good candidate for both a spinal cord stimulator and chronic pain management. *Id.* at 168. Dr. Verst wrote Claimant's options were a neurostimulator, continued pain management, or further surgery. *Id.* at 169.

14. Claimant saw David Jensen, DO, on April 30, 2015. *Id.* at 172. Claimant reported he had not started physical therapy yet and wanted to increase his pain medication because he had felt worse since stopping Gabapentin and starting Lyrica. *Id.* at 172. At the time of this appointment, Dr. Jensen recorded Claimant was prescribed Norco, Lorazepam, Gabapentin, Oxycodone, Ambien, and Lyrica. *Id.* Claimant rated his pain at a 5 and walked with a cane. *Id.* Dr. Jensen wrote that Claimant needed to go through a conditioning program, and that he wanted to taper Claimant off of narcotics. *Id.* at 173. Claimant started physical therapy on May 11. *Id.* at 179.

15. Claimant returned to Dr. Verst's office on May 12, and saw Shanoah Requa, LPN. Claimant was requesting more pain pills because he had tried to wean off his narcotics, but could not tolerate it, and because of that he took more of "the other one" and was completely out of his medications. *Id.* at 176. LPN Requa refilled Claimant's narcotic medication. *Id.*

16. Claimant followed-up with Dr. Jensen on July 9, 2015 and reported physical therapy had made things worse because they had added an aerobic element which he could not tolerate. *Id.* at 181. The only improvement was less hyperesthesia in his leg. Dr. Jensen wrote:

> I do not feel like the patient is making any substantial progress. Over the last two months I have been unable to get him to wean off of narcotics. We tried and he called back stating he had to have them. I have tried some other sleeping aids. I discussed with him that I do not feel like we're making any substantial progress. I feel like the thing that would be most useful for him to undergo would be a comprehensive inpatient pain program… where he would get comprehensive therapy, psychological help and support on a frequent constant basis, which I think

> he needs and may have a better chance of being able to wean him off his narcotics and get him functional. That would be my recommendation.

Id. at 182.

17. On September 2, 2015, Claimant underwent an evaluation for work hardening with a psychologist, Robert Calhoun, PhD, physical therapist, Suzanne Kelly, DPT, and physician, Kevin Krafft, MD.

18. Dr. Calhoun performed a psychological pain evaluation; he conducted an interview and administered the MMPI-II. Dr. Calhoun wrote that Claimant had several significant psychological and behavioral factors that impacted Claimant's pain and function: "most notable is this patient's heightened state of emotional distress characterized by anxiety, frustration, somatoform tendencies, and anger… cognitively, the patient is highly somatically focused." *Id.* at 194. Dr. Calhoun recorded that Claimant had significant illness conviction and that Claimant believed there was something wrong with his spine which was causing his pain. Dr. Calhoun thought Claimant was a marginal candidate for work hardening because of his illness conviction and fear of movement and pain. Dr. Calhoun recommended cognitive behavioral pain management therapy and that Claimant be weaned off opioids because he "certainly is very dependent." *Id.* at 195. Lastly, Dr. Calhoun wrote: "due to the multiple personality, cognitive, affective, [and] behavioral factors impacting his pain problem and ongoing level of debilitation, the patient is not likely to get a good outcome following further invasive medical procedure. From a psychological perspective, he certainly is not appropriate for neural augmentative device for pain control." *Id.*

19. Claimant underwent a STARS rehabilitation evaluation by Suzanne Kelly, DPT. *Id.* at 196. DPT Kelly noted Claimant shook during range of motion and muscle testing, but not during his interview or functional tests. Claimant walked with a single point cane and was hypersensitive on his lower right leg. She also noted Claimant had "[i]nconsistencies for symptom

magnification screening: positive for superficial and non-anatomical tenderness, positive for rotation, positive for distraction, and regional weakness." *Id.* at 198. Dr. Krafft also evaluated Claimant and recommended Claimant for a quota-based work hardening program and to wean off narcotics; Dr. Krafft recorded Claimant's lumbar tenderness, limited range of motion, and a paravertebral muscle spasm. *Id.* at 203.

20. After participating in in the program for a few weeks, Dr. Krafft ordered an MRI when Claimant complained of increased pain. The MRI showed a "there may be a new disk herniation, extrusion, or recurrent disk." *Id.* at 222. Dr. Verst examined Claimant on November 23, 2015 and opined that Claimant was not a surgical candidate because of scar tissue around his nerve roots, but that a neurostimulator trial would be appropriate. *Id.* at 227.

21. On December 12, 2015, Dr. Jensen wrote that he had tried to wean Claimant off narcotics and failed. JE 7:453. Dr. Jensen recorded: "I sent him to the Life Fit for [sic] program and they terminated his treatment as well and were not able to wean him off." *Id.* Dr. Jensen wrote Claimant needed to be transferred to a pain clinic. *Id.* at 454.

22. On December 16, 2015, Claimant reported to ICRD that he was up to five pain pills a day to control his pain. *Id.* at 47.

23. Claimant underwent a psychological re-evaluation with Dr. Calhoun on March 2, 2016 to investigate whether a neurostimulator would be appropriate. Dr. Calhoun reported "[n]othing has changed significantly psychosocially" and that Claimant had recently been offered a job as a mechanic. JE 5:234. Dr. Calhoun in relevant part opined that Claimant was not a good candidate for a stimulator because of his "significant somatoform pain disorder, associated heightened somatic focus, passive coping, and diffuse pain complaints… there is really no chance

he would come off these medications or have a long-term positive outcome with the dorsal column stimulator." *Id.* at 237.

24. David Bauer, MD, performed an IME on April 14, 2016 at surety's request. *Id.* at 238. As a part of the exam, Claimant filled out a pain questionnaire. Claimant reported his pain significantly interfered with working, sitting and standing, bending, stooping, squatting, walking, running, and with recreation. *Id.* at 262. Dr. Bauer opined that Claimant had a lumbar strain which resolved and that his current symptoms were due to the surgery that was performed and were significantly enhanced by his abnormal psychological condition. *Id.* at 258. Dr. Bauer opined that there were no objective findings on examination and that his "subjective complaints are out of proportion to the objective findings. His extreme tenderness to very light tough is not physiologic. I was not able to complete the examination due to his symptom exaggeration." *Id.* at 259. Dr. Bauer did not recommend a spinal cord stimulator or any further treatment other than weaning Claimant off of narcotics. *Id.* Dr. Bauer found Claimant at MMI and rated Claimant at 6% whole person impairment with no restrictions: "there is no objective or physiologic reason that [Claimant] is not capable of gainful employment." *Id.* at 260. Dr. Calhoun reviewed and agreed with Dr. Bauer's IME. *Id.* at 266.

25. On June 24, 2016, Claimant reported to his primary care physician he was up to four pain pills a day and Claimant was limping at the appointment. JE 6:331, 334. Claimant's then current medications were Ambien, Cymbalta, Gabapentin, Hydrocodone, and Lisinopril. *Id.*

26. Claimant worked for CNT in Twin Falls for approximately six weeks in November and December 2016. JE 5:54. Claimant started work at Ron's Auto and Truck Repair in Twin Falls in February 2017. *Id.* at 55.

27. On May 4, 2017, Claimant was examined by Tyler Frizzell, MD. Dr. Frizzell noted Claimant's gait was weak and antalgic, that he had decreased motor strength on his lower extremities, very limited range of motion, and was hypersensitive on his right leg. *Id.* at 279. Dr. Frizzell ordered an MRI of Claimant's lumbar and thoracic spine. *Id.* at 270. After reviewing Claimant's MRIs, Dr. Frizzell recommended a spinal cord stimulator and issued restrictions of lifting no more than 25 pounds occasionally and 10 pounds frequently. *Id.* at 277.

28. On October 2, 2017, Claimant was examined by his primary care physician, Dr. Ziebarth, and reported that he was still taking ibuprofen and hydrocodone three times a day to control his back pain; Claimant reported his back pain was worsening and occurred persistently. JE 6:336. Dr. Ziebarth reiterated Dr. Frizzell's restrictions and Claimant reported he "didn't know he was on a weight restriction because it was only suggested." *Id.*

29. Doug Crum issued a vocational report on Claimant's behalf on April 11, 2018. Mr. Crum recorded Claimant had been working at Glanbia Foods since August 2017. JE 5:291. Claimant reported the job was lighter duty than automotive repair, that he avoided heavy lifting at work, and that he needed help on a daily basis at Glanbia. Claimant also reported his employer was "somewhat aware" of his restrictions, that his job required lifting up to 30 pounds regularly, and that he planned on working there as long as he could. *Id.* Mr. Crum wrote that Claimant was somewhat exceeding his restrictions at Glanbia, was still highly symptomatic, and required pain medications to function. *Id.* at 296. Mr. Crum opined Claimant had lost 64% of his labor market access as a result of the March 2014 industrial accident. *Id.*

30. On May 22, 2018 Claimant signed a settlement to resolve his 2014 claim. *Id.* at 77.

31. On May 24, 2018, Claimant returned to his primary care physician. Dr. Ziebarth. JE 6:351. Regarding his March 2014 injury, Claimant reported he "still" had pain, which was

persistent and sharp and in his low back, left foot, calf, and thigh, and his right foot, calf, and thigh. *Id.* Claimant signed an opioid use agreement, and his prescriptions were refilled. *Id.*

32. **Subject Injury – Low Back/Hip.** On May 27, 2018, Claimant was lifting at work when he suffered a low back injury. JE 1:1.

33. On June 14, 2018, Claimant was examined by Brian Johns, MD. JE 7:480. Claimant reported "slight back pain" from his 2014 industrial injury. *Id.* Regarding his current condition, Claimant described the incident started when he tried to lift a 500-pound engine with a coworker and that the next day he "kind of felt something" but as time passed it hurt worse and now he couldn't even walk. *Id.* Dr. Johns summarized Claimant's 2014 injury treatment, and wrote "he was on restrictions until August of 2017." *Id.* at 481. Dr. Johns opined that Claimant was most likely experiencing an exacerbation of his prior injury. *Id.* at 482.

34. Claimant returned to Dr. Johns on June 21, 2018 and reported his pain was getting worse and radiating from his right side to his left side. *Id.* at 492. Dr. Johns diagnosed a hip injury but also noted "chronic bilateral low back pain with right sided sciatica." *Id.* at 493. Dr. Johns recorded Claimant's presentation was "more dramatic" and mildly positive for Waddell's signs; Dr. Johns suspected nonorganic factors were contributing at least in part to Claimant's presentation. *Id.* at 494. Dr. Johns ordered MRIs of Claimant's lumbar and thoracic spine. *Id.*

35. On June 25, 2018, Claimant presented for the results of his MRI and reported he had never had right sided leg pain previously and that this was a new symptom since his 2018 injury. *Id.* at 503. Dr. Johns noted the MRIs showed "mild advancement" of Claimant's degenerative changes, but nothing acute. *Id.* Dr. Johns wrote

> [m]aybe nerve root irritation, but true sciatica seems more likely based on his exam. I'm going to give him a burst of prednisone, and get him into some physical therapy. Causation will be a difficult question in this case, as there are degenerative changes, and apparently a long history of chronic back pain.

Id. at 504.

36. On July 2, 2018, Claimant presented for his physical therapy evaluation as prescribed by Dr. Johns. JE 9:570. Claimant reported to the physical therapist that he felt immediate and severe pain in his right leg and back when he was injured. *Id.* Claimant reported he had never really recovered from his first injury and had chronic low back pain since that injury, but that his pain was worse after the most recent injury. *Id.*

37. **Subject Injury – Chemical Burn.** On September 8, 2018, Claimant presented to the emergency room for a chemical burn to his lower extremities that he suffered at work. JE 7:521. Claimant was given burn cream and released. *Id.*

38. Claimant presented on September 10, 2018 to Todd Hastings, DO, for evaluation of his chemical burn to his right lower ankle and foot and bilaterally on his buttocks. *Id.* at 508. Dr. Hastings noted it appeared to be healing well. *Id.* On September 17, 2018, Claimant reported he was improving. *Id.* at 545. On September 24, Dr. Hastings found Claimant ready to return to work with regard to his burn and no impairment associated with the injury and no restrictions. *Id.* at 547.

39. On October 15, 2018, Claimant presented to Tom Faciszewski, MD, for an IME at the request of Defendants. Dr. Faciszewski reviewed records, conducted an interview and examination, and issued opinions. JE 11. Claimant reported he felt tightness in his low back after the injury, but the next day "he felt he screwed something up," and reported the injury a week and half later. JE 11:600. Claimant reported he went back to work with restrictions after his 2014 injury. *Id.* at 601. Claimant said his current worst pain was 10/10 and averaged a 6/10 and that his pain was constant; Claimant reported his pain for his prior low back injury was at worst at 10/10 and on average a 6/10. *Id.* Dr. Faciszewski diagnosed Claimant with a temporary exacerbation of

his prior low back injury, that Claimant was at MMI for his lumbar strain, and no further treatment was necessary. *Id.* at 605.

40. On January 23, 2019, Claimant presented to Benjamin Blair, MD, for an IME at the request of Claimant. JE 12. Dr. Blair reviewed records, conducted an interview and examination, and issued opinions. Dr. Blair wrote Claimant was functioning at a very physical job "without difficulty" prior to the most recent industrial accident. *Id.* at 614. Claimant reported an immediate onset of low back discomfort with the injury that got worse over the next few days. *Id.* Claimant reported he had no limitations at work and that he passed a pre-employment physical examination without restrictions. *Id.* at 615. Dr. Blair opined that Claimant had suffered a permanent aggravation of his previous industrial injury, but that Claimant was at MMI and that he recommended no further treatment. Dr. Blair issued restrictions of no lifting more than 25 pounds and no repetitive bending, twisting, or squatting. Dr. Blair declined to apportion Claimant's low back condition because although he did have a previous injury, it was Dr. Blair's understanding that Claimant had no restrictions and was operating without difficulty prior to the most recent accident. *Id.* at 617.

41. On October 12, 2020, Claimant presented to James Bates, MD, for an IME at the request of Claimant. JE 13. Dr. Bates reviewed records, conducted an interview and examination, and issued opinions. Claimant reported the injury to Dr. Bates as "fe[eling] something different in the legs and back" which gradually got worse. *Id.* at 618. Claimant reported his 2014 injury and that he had pain in his back and legs prior to the 2018 injury, but that his functional level had decreased since the 2018 accident. *Id.* Claimant reported that prior to the injury he was taking approximately two to three pain pills a day but was up to five a day. *Id.* at 619. Dr. Bates opined Claimant suffered an exacerbation of his previous injury, was medically stable, required no further

treatment, and was entitled to an 8% impairment rating with 2% attributable to the 2018 injury and 6% attributable to the 2014 injury. *Id.* at 636-637. Dr. Bates issued restrictions of no lifting more than 25 pounds occasionally, only occasional bending, twisting, and squatting, frequent change of position, and sitting, standing, walking limited to 30 minutes a time. Dr. Bates recorded that Claimant had no prior restrictions or limitations for his 2014 injury based on his review of the records. *Id.* at 637-638.

42. On June 2, 2021, Matthew Williamson, DO, issued a report at the request of Defendants. JE 14. Dr. Williamson is a board certified radiologist and reviewed the multiple MRIs issued as a result of both the 2014 and 2018 injuries. *Id.* Dr. Williamson wrote regarding the 2018 MRIs: "[i]n comparison to the other studies, there are no changes. Specifically, all these findings are chronic without acute or new abnormalities present." *Id.*

43. Claimant commissioned a vocational report from Delyn Porter, which he completed on August 29, 2019. JE 15. Mr. Porter noted Claimant was a high school graduate originally from California and that he had spent most of his working life in mechanical trades. *Id.* at 648-650. Claimant reported to Mr. Porter that he was asymptomatic prior to the 2018 accident and had no restrictions. *Id.* at 651. Mr. Porter opined that Claimant met the criteria for odd lot total and permanent disability because he had lost 91% of his relevant labor market as a result of Dr. Blair's restrictions and suffered wage loss of 35.2%. Mr. Porter also opined that Claimant's overall permanent partial disability (PPD) was 78.3%. Mr. Porter weighted Claimant's loss of labor market heavier in his calculation of PPD because it was so significant. *Id.* at 670.

44. On November 18, 2020, Mr. Porter issued an addendum as a result of Dr. Bates' IME. *Id.* at 671. Mr. Porter opined that a result of the restrictions identified by Dr. Bates, Claimant remained totally and permanently disabled as an odd lot worker. *Id.* at 676.

45. Claimant was deposed on May 7, 2020 via Zoom. JE 17. Claimant testified he had no restrictions from the 2014 work accident. Clt Depo., 18:17-19. When Claimant was asked if he was sure about that, he responded "Well, no, because I never received a paper from the doctor saying that I had permanent restrictions." *Id.* at 30:1-3. When asked about the 2014 accident, Claimant testified he was in such pain that he thought he was having a heart attack and was going to "check out." *Id.* at 27:1-15.

46. Claimant did not recall his May 24, 2018 visit to his primary care physician three days prior to the industrial accident. *Id.* at 34:13-17. When asked why Claimant was on hydrocodone prior to his 2018 industrial injury Claimant responded: "I believe it was for my back at the time that I was -- I don't know. I don't -- I don't know." *Id.* at 35:8-10. Claimant did not know what "chronic narcotic use" meant. Claimant reported his pain prior to the 2018 injury was "dull" and not like it was now. *Id.* at 37:6-15. Claimant reported he still had sharp pain from his chemical burn, but understood he had no restrictions related to that injury. *Id.* at 46:17-47:25. Claimant denied that he had ever worked with someone from the Industrial Commission's rehabilitation division. *Id.* at 60:4-8.

47. At hearing, Claimant testified regarding his awareness of his 2014 restrictions as follows:

> Q: [Mr. Gardner] Okay. So, would you agree that your low back pain from the March 2014 accident never resolved prior to your accident at Glanbia?
>
> A: Yes and no.
>
> Q: You weren't pain free.
>
> A: I wasn't pain free.
>
> Q. And you weren't limitation free?
>
> A: Right.

Q: Dr. Frizzell had given you I believe a 25 pound restriction?

A: Is that from the 2018.

Q: Yes. That was in July of '17 he gave you a 25 pound restriction.

A: No.

Q: No?

A: No. That is not true.

Q: But you relied on that restriction - -

A: No… No. No. That's - - that's not - - there was no restriction prior to that. There was none… I even thought there was, because while I was doing my orientation with Loren Walker, I had called my wife at lunchtime and she had talked to my past lawyer and told him that I found a job, blah, blah, blah, and he says, well, is he going by his weight restrictions and she was unaware that I was under weight restrictions and I was unaware that I was under weight restrictions. So, after I got off the phone I went in and talked to Loren and told him that I was unaware that I was under any kind of weight restriction, that I didn't know if there was or there wasn't. So, I got with my lawyer. Come to find out it was just an advisory, not a prescription, and so we went to - - after Loren and I went and talked to HR… and we had a meeting and they decided because there was no paperwork and they were aware that I was taking the medication, that this is just - - we will act like it never happened.

…

Q: But is there anything that documents this? Did you - - was there any paperwork that you completed indicating that you had no restrictions?

A: I had no restrictions.

Q: Well, I'm just basing on what Dr. Frizzell put in his report where he did give us some restrictions.

A: That's - - that's - - honest. That's not true.

Q: Well - - and maybe you didn't know about them.

A: Nor my - - my lawyer.

Tr. 50:8-52:10.

48. Dr. Blair was deposed on October 6, 2021. Dr. Blair testified that Claimant had prior back problems but was working without restrictions per his understanding before the 2018 accident. Blair Depo., 6:23-7:9. Dr. Blair opined no additional medical treatment was necessary because the accident did not "cause any new major change" in Claimant's pinched nerves. *Id.* at 9:12-16. Dr. Blair agreed that the restrictions he issued as a result of the 2018 accident were similar to the restrictions Dr. Frizzell gave as a result of the 2015 accident. *Id.* at 19:16-18. Dr. Blair opined that Claimant had no abnormal findings on his physical examination. *Id.* at 19:22-25. Regarding his opinion that Claimant suffered a permanent aggravation, Dr. Blair explained that his opinion was "mainly" based on Claimant's reports and also the medical records post-injury. *Id.* at 21:25-22:9. Dr. Blair explained that even Dr. Faciszewski opined he had a temporary aggravation due to the 2018 accident, it was Dr. Blair's opinion that the aggravation was permanent, and Claimant was worse after the 2018 injury. *Id.* at 22:15-23:1. Dr. Blair thought Dr. Frizzell's restrictions were "restrictions that he didn't need." *Id.* at 23:2-5. Dr. Blair reiterated that his opinion was based on Claimant's increased reports of pain after the 2018 injury. *Id.* at 27:2-21.

49. Dr. Bates was deposed on November 16, 2021. Dr. Bates also opined Claimant needed no further treatment. Bates Depo., 10:21-11:2. Dr. Bates opined Claimant's aggravation was permanent because he was still symptomatic two years after the accident. *Id.* at 10:9-20. Dr. Bates confirmed he was unaware of any prior restrictions for Claimant at the time he authored his report. *Id.* at 13:6-12. Dr. Bates did not review the report from May 24 just prior to the injury with Claimant's primary care physician wherein he complained of pain down both his legs and in his low back and opined he'd "have to do a closer evaluation" of that record before stating whether or not it impacted his evaluation of Claimant. *Id.* at 23:2-17.

50. Dr. Faciszewski was deposed on December 14, 2021. Dr. Faciszewski found Claimant's inability to heel or toe walk "unusual" because that did not "fit specifically with any neurologic pattern." Faciszewski Depo., 12:17-25. Dr. Faciszewski explained Claimant had "give-away cog wheel weakness" which implied a nonorganic component to his pain; Claimant had positive Waddell's signs on four out of five of the tests Dr. Faciszewski administered. *Id.* at 13:7-14:6. Dr. Faciszewski opined Claimant only suffered a temporary exacerbation because he already had chronic back pain, non-organic findings documented by himself and Dr. Johns, and no changes on his MRI as a result of the 2018 injury, only chronic findings. *Id.* at 14:23-15:16. Dr. Faciszewski agreed someone could experience a change in symptomology which would not be captured on an MRI but further opined "[i]f someone has ongoing symptoms, one has to determine whether they're due to an organic nature or nonorganic first. And in this specific case, the nonorganic findings are overwhelming, and he does not have any MRI findings that are acute in nature." *Id.* at 20:5-10.

51. Dr. Williamson was also deposed on December 14, 2021. Dr. Williamson reaffirmed all the opinions in his letter of June 2, 2021, that Claimant's 2014 through 2018 MRIs showed no change. Williamson Depo., 8:1-9:12. Dr. Williamson confirmed he never examined Claimant and that he never reviewed the report or deposition of Dr. Blair. *Id.* at 11:5-19. Dr. Williamson agreed that a patient could have a change in symptoms that does not show up on an MRI. *Id.* at 11:20-23.

52. Delyn Porter was deposed on February 16, 2022. Mr. Porter reiterated his opinion that Claimant lost 91.3% of his labor market and 35.2% wage loss as a result of Dr. Blair's restrictions against lifting more than 25 pounds and no repetitive bending, lifting, or squatting. Porter Depo., 10:2-11:12. Mr. Porter opined Claimant was totally and permanently disabled via

the odd lot method based on both restrictions from Dr. Blair and Dr. Bates. *Id.* at 11:20-13:25. Mr. Porter confirmed he did not review Dr. Frizzell's, Dr. Verst's, nor Mr. Crum's records or reports and that he was not aware of Claimant's prior 2014 low back injury and claim when he prepared his report. *Id.* at 17:17-19. Mr. Porter agreed that those records "may" impact his pre-injury labor market access calculations. *Id.* at 18:2-8.

53. **Credibility.** Claimant's credibility is drawn into question by the numerous inconsistencies in his reports to medical and vocational professionals, his evasive testimony, and the multiple reports of Waddell's signs and exaggeration from Claimant's physicians over time.

54. Regarding the May 27, 2018 accident, Claimant reported to Dr. Johns that he "kind of felt something" at the time of injury. Claimant reported to Dr. Faciszewski that he felt tightness at the time of injury and the next day felt worse. Claimant reported to his physical therapist that he suffered immediate and severe pain in his low back and right leg and reported a similar description to Dr. Blair. Claimant did not report his injury to Employer until June 12, 2018 making his reports of immediate pain less credible. JE 1:1.

55. In April 2018 Claimant reported to Doug Crum that he avoided heavy lifting at Employer, that he needed help on a daily basis, and that his Employer was "somewhat aware" of his restrictions. Claimant reported to his physical therapist that he had never really recovered from his 2014 low back injury. On May 24, just three days prior to the industrial injury in question, Claimant reported he still had pain in his right calf, foot, thigh, left calf, foot, and thigh, and low back and required narcotic medication to control the pain. However, Claimant reported to Dr. Blair that he was working at Employer without difficulty. Claimant reported to Mr. Porter he was asymptomatic prior to the 2018 injury. Claimant reported to Dr. Johns he only had slight back pain prior to the 2018 injury and had never had right sided leg pain prior to the 2018 injury. Claimant's

later reports of full functioning and slight pain at the time of his 2018 injury are less credible than his contemporaneous reports of daily help and persistent, sharp pain.

56. DPT Kelly, Dr. Bauer, Dr. Calhoun, Dr. Johns, and Dr. Faciszewski all reported signs of exaggeration, Waddell's signs, or other indications of nonorganic causes for Claimant's pain.

57. Claimant's testimony was often evasive and lacked internal consistency. At deposition Claimant replied he didn't know why he was on hydrocodone while simultaneously admitting it was because of his low back. At hearing Claimant repeatedly insisted he was not under restrictions but admitted his 2014 attorney did inform him about his restrictions, that he informed Employer about his restrictions, but that "they," meaning Employer, decided to ignore them. Claimant immediately then stated again that he wasn't aware of his restrictions and his 2014 lawyer wasn't aware of his restrictions.

58. Where Claimant's testimony contradicts the medical record, the medical record will be relied upon; contemporaneous reporting will be given more weight than later recollections.

DISCUSSION

59. A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993). Claimant must adduce medical proof in support of his claim, and he must prove his claim to a reasonable degree of medical probability. *Dean v. Dravo Corporation*, 95 Idaho 558, 511 P.2d 1334 (1973). The permanent aggravation of a pre-existing condition is compensable. *Bowman v. Twin Falls Construction Company, Inc.*, 99 Idaho 312, 581 P.2d 770 (1978).

60. The Industrial Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Rivas v. K.C. Logging*, 134 Idaho 603, 608, 7 P.3d 212,

217 (2000). "When deciding the weight to be given an expert opinion, the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 737, 40 P.3d 91, 95 (2002).

61. Claimant has failed to prove his claimed condition arose from an accident out of and in the course and scope of employment with Employer. Claimant's proffered evidence that the 2018 accident was the cause of his current condition are his claims his pain has increased and his function has decreased, and even this evidence is controverted by other evidence of record. Despite his arguments, Claimant's pain and functionality did not appear to have changed after the 2018 injury but remained the same. There is no objective evidence of acute injury on Claimant's imaging. Claimant's IME physicians admitted they relied on his subjective reports as the basis for their opinions, and further, neither physician had all the relevant facts when issuing their opinions.

62. Claimant's reports of increased pain as a result of the 2018 accident are not reflected in the record. Claimant reported to Dr. Ziebarth on May 24 that he had persistent, sharp pain in his right foot, calf, and thigh, left foot, calf, and thigh, and his low back. Dr. Ziebarth was prescribing Claimant hydrocodone for his pain at this time, which he was taking daily. Claimant continues to complain of pain in the same locations and still takes hydrocodone daily. Claimant reported to Dr. Montalbano in 2015 that his pain was 5 to 8 out of 10 and reported to Dr. Blair in 2019 that his pain was 4-8 out of 10, seemingly overall less painful. Claimant reported to Dr. Faciszewski that his pain prior to the 2018 accident was at worst 10/10, average was 6/10, and best was 5/10; Claimant reported after the 2018 accident his pain was at worst 10/10, average was 6/10, and best was 5/10, the exact same. Claimant, despite claiming it was a new symptom, experienced pain down his right leg both prior to and after his 2018 accident. Claimant claims he is only now up to

five pain pills a day, which had never happened prior to the 2018 injury; Claimant reported to ICRD in 2015 he was up to five pain pills at that time and up to four to his primary care physician in 2016. The records both individually and when read as a whole fail to demonstrate an increase in pain attributable to the 2018 accident; Claimant reported the same pain and symptoms after both injuries.

63. Claimant's claim of decreased function is also suspect. When Claimant presented for work hardening in September of 2015, Claimant walked with a single point cane. Claimant was unable to tolerate aerobic activity. Claimant reported to Dr. Bauer that he struggled with essentially every physical activity, including sitting and standing, because of his 2014 injury. Claimant was unable to wean off narcotics due to his pain from his 2014 injury despite multiple attempts and recommendations to do so. Dr. Frizzell recorded that Claimant's lumbar spine had very limited range of motion, decreased motor strength in his lower extremities, and a weak and antalgic gait. Claimant reported to Mr. Crum he required help at work on a daily basis. Claimant's later reports to Mr. Porter and Dr. Blair that he was operating without difficulty prior to the 2018 injury are not credible in light of what he reported at the time of his 2016 and 2017 examinations.

64. There is no objective evidence of injury due to the 2018 accident. Claimant's 2018 MRIs do not show acute injury, only "mild advancement" of Claimant's degenerative changes. Dr. Blair documented no abnormal findings on exam and opined the accident did not "cause any new major change." The records fail to document any objective physical evidence of injury from the 2018 accident.

65. Claimant's experts opined that Claimant suffered a permanent aggravation of his pre-existing condition. However, both experts were missing critical information when issuing their opinions. Dr. Blair admitted at deposition that the sole basis for his opinion was Claimant's

increased reports of pain after the 2018 accident. As discussed above, Claimant's increased reports of pain are not born out by the medical records. Dr. Bates did not know Dr. Frizzell issued Claimant restrictions as a result of his previous injury and did not have the May 24, 2018 Dr. Ziebarth record when issuing his opinions; Dr. Bates testified that he'd have to do a "closer evaluation" of that record to see whether it impacted his opinions. Dr. Bates' deposition testimony raises the question of whether he still holds his opinion to a degree of reasonable medical probability after learning about Dr. Ziebarth's record. Neither expert's opinion takes into consideration all relevant facts and are inadequate to prove Claimant's current condition is a result of the 2018 accident.

66. Lastly, Claimant's insistence that he did not know about his restrictions as a result of his 2014 injury is irrelevant to causation and a red herring. Whether Claimant was "aware"[2] of his restrictions has no bearing on whether or not his current symptoms are attributable to the 2018 accident versus his pre-existing condition. Employer cannot be held responsible for injuries or conditions which were not caused or permanently aggravated by the work accident. Claimant's burden of proof regarding medical causation does not change; Claimant must prove his current condition was caused by the 2018 accident, which he has failed to do.

67. Claimant has proven he suffered a chemical burn in the course and scope of his employment on September 8, 2018. This condition resolved as of September 24, 2018 without impairment or restrictions per Dr. Hastings.

68. **PPI.** Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered

[2] Claimant discussed his restrictions with his primary care physician in October 2017, explained that he followed his restrictions of lighter duty to Mr. Crum in April of 2018, and gave a lengthy explanation at hearing that he knew about his restrictions and his Employer decided to ignore his restrictions during orientation at the Glanbia, while also simultaneously insisting that he had no restrictions. There is no evidence the restrictions issued by Dr. Frizzell were ever lifted or were "suggested" as opposed to "prescribed."

medically stable. See Idaho Code § 72-422; *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Claimant has failed to prove his low back condition is the result of his 2018 injury and is therefore not entitled to permanent impairment. Claimant was not issued any permanent impairment as a result of his chemical burn.

69. **PPD**. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. 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, 294, 766 P.2d 763, 764 (1988).

70. Claimant cannot have permanent partial disability without a corresponding finding of impairment. Claimant has suffered no permanent partial disability.

CONCLUSION OF LAW

1. Claimant has failed to prove his current condition is a result of his 2018 accident;

2. All other issues are moot.

RECOMMENDATION

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

DATED this 8th day of August, 2022.

INDUSTRIAL COMMISSION

Sonnet Robenson

Sonnet Robinson, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSEPH MCCULLOUGH, Claimant, v. GLANBIA FOODS, INC, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Surety, Defendants.	**IC 2018-016751** **IC 2018-026619** **ORDER** FILED AUG 19 2022 INDUSTRIAL COMMISSION

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

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

1. Claimant has failed to prove his current condition is a result of his 2018 accident.
2. All other issues are moot.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 18th day of August, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:
Paul Jeffries
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of August 2022, a true and correct copy of the foregoing **ORDER** was served by *E-mail transmission* and by regular United States Mail upon each of the following:

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