

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM DALE FORD,)
)
 Claimant,)
)
 v.)
)
 CONCRETE PLACING COMPANY, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
 _____)

IC 2005-518336
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

Filed June 10, 2010

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on January 19, 2010. Claimant was present and represented by Richard S. Owen of Nampa. Kimberly A. Doyle of Boise represented Employer and Surety at hearing. The parties presented oral and documentary evidence and two post-hearing depositions were taken. Claimant and Defendants then each submitted post-hearing briefs, after which Claimant submitted a reply brief. This matter came under advisement on March 29, 2010.

ISSUES

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

1. Whether and to what extent the condition(s) for which Claimant received medical treatment were caused by the August 1, 2005 accident;
2. Whether and to what extent Claimant's condition is due to an underlying degenerative condition or a subsequent injury;
3. Whether apportionment for a pre-existing degenerative condition is appropriate and the extent thereof;
4. Whether and to what extent Claimant is entitled to past and future medical care;
5. Whether Claimant is entitled to benefits for permanent partial impairment and, if so, whether Claimant is entitled to benefits for disability in excess of impairment, and the extent thereof; and,
6. Whether the Commission should retain jurisdiction beyond the Statute of Limitations.

CONTENTIONS OF THE PARTIES

Claimant contends that his 2009 left shoulder replacement surgery was required as a result of his 2005 industrial accident. He had no trouble with his left shoulder prior to the industrial injury, but experienced continued pain and limited range of motion afterward. Claimant's symptomatology was not relieved, even after arthroscopic surgery in 2006, until the 2009 shoulder replacement surgery.

Defendants contend that Claimant's pain and limited range of motion are due to a preexisting degenerative condition in his left shoulder, and that any work-related injury was temporary, having healed after the 2006 arthroscopic surgery.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant;
2. The testimony of Claimant taken at the hearing;
3. Joint Exhibits A-W admitted at the hearing;
4. The post-hearing deposition of Sean M. Hassinger, M.D., taken by Claimant on January 19, 2010; and
5. The post-hearing deposition of Jeffrey Hessing, M.D., taken by Defendants on January 21, 2010.

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 Commission.

FINDINGS OF FACT

1. Claimant was 41 years of age and resided in Caldwell at the time of the hearing.
2. Claimant finished eighth grade and obtained his G.E.D. in 1991. He has worked as a fast food cook, a house mover and a construction laborer, among other jobs. Since obtaining his commercial driver's license, sometime before October 2004, Claimant has primarily worked as a truck driver. He was employed by Miller Brothers Trucking at the time of the hearing.
3. Prior to working for Employer, Claimant had a history of right shoulder pathology and right shoulder surgery; however, Claimant's left shoulder was asymptomatic.
4. On August 1, 2005, while working for Employer, Claimant felt a debilitating pain originating in his left shoulder, extending from his elbow to his neck, while scraping dirt into a

mailbox hole with a shovel. He told his supervisor about it, but did not immediately seek medical attention because he wanted to keep his job and thought it would get better.

5. On August 12, 2005, Claimant still had pain in his left shoulder, so he went to Employer's designated medical care facility, Primary Health. Claimant was examined by Jim Yerger, M.D., a family practice physician. After reviewing x-rays of Claimant's left shoulder, Dr. Yerger diagnosed a separation of the left acromioclavicular ("AC") joint and a "likely" left rotator cuff tear. Exhibit L, p. 192. Dr. Yerger established restrictions limiting Claimant from reaching above shoulder level or pushing or pulling with his left arm or shoulder, and allowing only occasional reaching below shoulder level.

6. On August 18, 2005, Claimant was examined by Scott Lossmann, M.D., a family practice physician working for the Primary Health Specialist Center. Claimant had 5/10 pain, mainly when raising his left arm above chest level in forward or side position. Dr. Lossmann diagnosed left rotator cuff sprain and a minimal AC sprain and placed Claimant in a sling for 48 hours. He also prescribed anti-inflammatories and a muscle relaxer, and issued restrictions upon Claimant's return to work after the sling was removed. In addition, Dr. Lossmann opined that Claimant's left shoulder injury was "reasonably and medically related to his work," that Claimant had not yet reached maximum medical improvement ("MMI"), and that he did not expect any resulting impairment or disability.

7. Claimant continued to treat with Dr. Lossmann until October 11, 2005, when Dr. Lossmann referred him to Jeffrey Hessing, M.D., a shoulder specialist. Under Dr. Lossmann's care, Claimant underwent physical therapy sessions, received an injection into his left shoulder for pain relief and continued taking his prescribed medications. By the time he referred Claimant

to Dr. Hessing, Dr. Lossmann had determined that Claimant was at MMI for his rotator cuff sprain, but not for his AC joint strain. Claimant was still experiencing 5/10 pain over his AC joint and was frustrated because the pain was preventing him from sleeping at night. As a result, Dr. Lossmann increased Claimant's restrictions.

8. On October 18, 2005, Claimant presented to Dr. Hessing with pain and limited use and motion of his left shoulder. Upon review of Claimant's August 12, 2005 x-rays, Dr. Hessing found "...some degenerative changes with widening in the AC joint...glenohumeral relationships are well-preserved though without obvious fracture or dislocation." Exhibit D, p. 21. He diagnosed rotator cuff impingement syndrome with degenerative AC joint changes and underlying impingement, ordered an MRI, prescribed medication for pain, and kept Claimant on light duty. Dr. Hessing opined that the AC changes pre-existed Claimant's injury and that Claimant had torn his rotator cuff as a result of the industrial accident.

9. On November 9, 2005, Dr. Hessing reviewed with Claimant the findings from his MRI. It showed "marked labral pathology with tearing" as well as significant degenerative changes in the AC and glenohumeral joints. As a result, Dr. Hessing altered his diagnosis and wrote, "I believe at least the labral tearing is related to [Claimant's] work injury last summer." Exhibit D, p. 23. Dr. Hessing recommended arthroscopic surgery, primarily to debride the labral tear, but also to decompress Claimant's left shoulder, excise the distal clavicle and inspect and repair the rotator cuff. According to Dr. Hessing, "Certainly any long term impairment will need to be apportioned because of the significant pre-existing degenerative changes present in [Claimant's] joint." *Id.*

10. Claimant underwent left shoulder arthroscopic surgery by Dr. Hessing on January 3, 2006. Dr. Hessing found a large labral tear, cartilage changes to the humeral head, significant degenerative changes on the glenohumeral joint (a few areas of bare bone and marked cartilage changes), and hypertrophic synovial tissue throughout the joint. In the subacromial space Dr. Hessing found marked inflammatory debris and bony impingement. He also found marked underlying impingement and hypertrophy medial to the AC joint. Dr. Hessing debrided the labrum and the hypertrophic synovial tissue, and removed all loose cartilage fragments. He also decompressed the AC joint, smoothed down frayed-up areas on the rotator cuff, and excised about half an inch of the distal clavicle.

11. Claimant was off work for two weeks, then returned to “one-armed” work on or about January 20, 2006. He performed tasks such as chopping weeds, pressure washing trucks and chipping concrete out of agitator trucks.

12. On February 16, 2006, and again on March 17, 2006, Dr. Hessing examined Claimant. Each time, he reported that Claimant was making fair gains in strength, but that Claimant seemed concerned about his progress because of his persistent pain. Also each time, Dr. Hessing recommended strength exercises and maintained Claimant on light duty restrictions. Dr. Hessing noted after the earlier visit, however, that Claimant would remain somewhat symptomatic, indefinitely, due to the arthritis in his glenoid. After the next visit, Dr. Hessing predicted that Claimant would reach MMI within 4-6 weeks.

13. On April 21, 2006, Claimant saw Dr. Hessing for a “Final Evaluation.” Exhibit D, p. 37. Claimant had good strength, negative impingement signs and satisfactory left shoulder function, even though he still complained of pain and stiffness. As Dr. Hessing had predicted, he

found Claimant had reached MMI, gave him a cortisone injection, and released him without restrictions, allowing him to do “just what he can tolerate.” *Id.*

14. Dr. Hessing attributed Claimant’s residual symptoms to preexisting degenerative arthritic changes in the glenohumeral joint and opined that Claimant’s work injury, on the other hand, had healed. “Any residual treatment that I believe he might need for his shoulder is required because of his degenerative changes and not his work injury.” *Id.* Accordingly, Dr. Hessing assigned a whole person impairment rating of 8%, attributing half each to Claimant’s preexisting degenerative condition and the industrial accident. Nevertheless, by the time of his deposition, Dr. Hessing had decided that none of Claimant’s symptoms, not even the labral tear, were related to the industrial accident, and he did not recall having assigned an impairment rating.

15. Although Claimant returned to driving a flatbed truck for Employer, including loading and heavy lifting, his range of motion in lifting his arm straight up was restricted and getting worse, and Claimant was concerned that his symptoms were not improving. So, on September 20, 2006, Claimant again followed up with Dr. Hessing. Upon examination and x-ray review, Dr. Hessing found “progressing narrowing in the glenohumeral joint” and cogwheeling. Exhibit D, p. 40. Dr. Hessing determined that Claimant “appears to have flared his arthritic shoulder joint . . . secondary to preexisting degeneration noted at arthroscopy.” *Id.* He administered an injection of cortisone, Kenalog and xylocaine and provided Celebrex.

16. On four follow-up visits, from August 24, 2007 through August 18, 2008, Dr. Hessing or other orthopedic surgeons in his office, Jared Tadge, M.D. or Joseph G. Daines, Jr.,

M.D., treated Claimant for residual pain. Claimant received pain injections into the affected shoulder during three of these appointments.

17. Unfortunately, each pain injection lost its effectiveness more quickly than the last. In addition, Claimant's ability to obtain this type of pain relief was limited by the high cost, as Surety had terminated his benefits. Even though he was unable to consistently treat his pain symptoms, Claimant continued to work for Employer until December 2008, when he was laid off. Jobs that aggravated his condition most were those that required him to extend his left arm out in front of him, like shoveling, raking, fine grading and pressure washing.

18. In January 2009, Claimant was directed to obtain an MRI for evaluation of cardiac symptoms. He had to cancel the procedure because he was unable maintain his left arm over his head for 1 – 1 ½ minutes. This situation motivated Claimant to seek additional treatment for his left shoulder condition. Toward that end, Claimant sought additional workers' compensation benefits.

19. In a letter addressing Claimant's attempt to obtain workers' compensation coverage for additional left shoulder treatment, Dr. Hessing opined that Claimant's continued pain symptomatology was not caused by the industrial accident. According to Dr. Hessing, the industrial accident only temporarily aggravated Claimant's preexisting shoulder degeneration. Dr. Hessing predicted that Claimant would probably eventually require a left shoulder replacement, but noted, "it shouldn't be paid for by the WC carrier in my opinion." Exhibit D, p. 46.

20. On February 10, 2009, Claimant was examined by Sean M. Hassinger, M.D., an orthopedic surgeon. Claimant described severe throbbing pain in his left shoulder. Following

examination and x-ray review, Dr. Hassinger diagnosed significant avascular necrosis (“AVN”) of the left humeral head, prescribed pain medication and ordered an MRI. After reviewing the MRI findings, however, Dr. Hassinger changed his diagnosis to left shoulder arthritis and recommended shoulder replacement surgery.

21. Claimant underwent left shoulder replacement surgery by Dr. Hassinger on February 25, 2009. In surgery, Dr. Hassinger found a significantly swollen and inflamed biceps tendon, extensive wear on the humeral head with some collapse “consistent with AVN” and glenoid wear. Exhibit G, p. 89. Dr. Hassinger changed his diagnosis, again, back to left shoulder AVN, along with left shoulder biceps tenosynovitis.

22. Post-operatively, Claimant’s pain was greatly relieved, though not eliminated, and his range of motion improved “100%.” Transcript, p. 35.

23. In an open letter dated June 1, 2009, Dr. Hassinger confirmed his diagnosis of AVN and concluded, “In the absence of any other preexisting factors for AVN, I feel that [Claimant’s] severe degeneration with AVN of his left shoulder was most likely related to his work injury.” Exhibit F, p. 80. However, by the time of his deposition, Dr. Hassinger changed his diagnosis, for the third time. This time, he posited that Claimant had post-traumatic arthritis and that the industrial injury initiated “a series of events that [led] to rapid degeneration of the joint.” Hassinger Dep., p. 17.

24. Dr. Hassinger released Claimant to work on April 21, 2009, without restrictions, because Claimant’s job did not involve heavy or repetitive overhead lifting. He opined that Claimant reached MMI on June 22, 2009, and assessed a 14% whole person impairment rating, all attributable to the industrial injury.

25. On December 1, 2009, Claimant again followed up with Dr. Hassinger, who told him he would need additional corrective shoulder surgery in the future. However, Dr. Hassinger was unable to predict exactly when such surgery would become necessary.

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).

Medical causation/underlying degenerative condition.

A claimant must prove not only that he or she suffered an injury, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995).

The employer is not responsible for medical treatment that is not related to the industrial accident. *Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997). The

fact that a claimant suffers a covered injury to a particular part of his or her body does not make the employer liable for all future medical care to that part of the employee's body, even if the medical care is reasonable. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 563, 130 P.3d 1097, 1101 (2006).

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). "The fact that [claimant's] spine may have been weak and predisposed him to a ruptured disc does not prevent an award since our compensation law does not limit awards to workmen [or women] who, prior to injury, were in sound condition and perfect health. Rather, an employer takes an employee as he [or she] finds him [or her]. *Wynn v. J.R. Simplot Company*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983).

26. In his opening brief, Claimant cites the Industrial Commission's decision in *Swenson v. Hiddleston and Son, Inc.*, 200 IIC 0225 (05-06-2009), and others, for the proposition that a progressive preexisting degenerative condition aggravated by a seemingly minor industrial injury is compensable under Idaho Workers' Compensation Law. In *Swenson*, the Commission held the claimant's knee replacement surgery was causally related to the industrial injury, even though he had a history of prior problems with that knee, in part because the knee had been asymptomatic for approximately 17 years prior to the industrial accident.

27. The Referee agrees that *Swenson* embodies an appropriate application of the relevant law, but also notes that it is the claimant's burden to prove that an accident as defined by Idaho Code § 72-102(17) aggravated the preexisting condition. *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 133, 879 P.2d 732, 736 (1995). The claimant in *Madison v.*

Employer, 2004 IIC 0188 (03-08-2004) was unable to carry this burden of proof and was not awarded workers' compensation benefits. In that case, like this one, Dr. Hessing testified that the industrial accident did not aggravate the claimant's preexisting shoulder condition. Dr. Hessing's opinion in *Madison* was unchallenged. In addition, there was evidence that the claimant had sought treatment for pain in the relevant shoulder within a couple of years prior to the industrial injury.

28. Claimant's testimony regarding the occurrence of an industrial accident causing left shoulder pain on August 1, 2005 is credible and is not contested by Defendants. However, Defendants argue that Claimant's industrial injury to his left shoulder was repaired, and his related symptomatology cured, by or before his 2006 arthroscopic surgery. Defendants contend that Claimant's residual symptomatology was the result of preexisting arthritis and other degenerative changes, and that he would have required the same treatment even in the absence of the industrial injury. For the following reasons, the Referee disagrees.

29. First, Claimant's uncontroverted testimony establishes that Claimant had no known history of left shoulder pathology prior to his industrial accident.

30. Although Dr. Hassinger's testimony is not without inconsistencies, he has clearly expressed his view that the subject accident aggravated Claimant's underlying degenerative condition and was responsible for initiating the cascade of changes that lead to rapid deterioration of Claimant's shoulder. *See*, Hassinger deposition, p. 17. Dr. Hassinger opined that the subject accident was responsible for causing, or accelerating, the need for the total joint replacement.

More problematic is the testimony of Dr. Hessing. Claimant's counsel artfully invited Dr. Hessing to opine, as he apparently has in other cases, that the subject accident was the "straw breaking the camel's back", or in Dr. Hessing's vernacular, the "snowball on the mountain" that initiates an avalanche. Clearly, Claimant's counsel hoped to establish medical causation by eliciting from Dr. Hessing testimony that the subject accident, insignificant though it might be, was nevertheless responsible for destabilizing Claimant's pre-injury condition such that he required shoulder replacement surgery sooner than he would have otherwise needed. At first blush, Dr. Hessing appears to have successfully resisted counsel's efforts to get him to go down this path. Although Dr. Hessing acknowledged that it is within the realm of the possible that the subject accident constituted an event precipitating the need for surgery, he was more inclined to believe that Claimant's pre-existing shoulder arthritis was already at an "end stage" prior to the subject accident, and that the subject accident did nothing to hasten Claimant's need for shoulder surgery. *See*, Hessing deposition, p. 23. However, in further discussion of the contribution of the subject accident to the need for the joint replacement surgery, Dr. Hessing revealed that it is his view that the subject accident is responsible for contributing to Claimant's need for shoulder replacement surgery:

Q. (By Mr. Owen): Let me ask you this question, Dr. Hessing. If we believe Mr. Ford, that he didn't have symptoms beforehand and after his accident he did have, do you agree with the proposition that the work comp carrier is then responsible to make his symptoms go away?

Q. Ms. Doyle: Objection. Doesn't that call for a legal conclusion?

Q. (By Mr. Owen): You can go ahead, sir.

A. Well, my answer is, no, I don't believe he did or workers' comp would have to pay for every total joint that's done in this country. Because I can tell you, I just don't believe that what I saw three months after injury is the primary source of pain in that gentleman's shoulder.

Q. Okay. Even though he was asymptomatic beforehand?

- A. Even though he was.
- Q. All right.
- A. It was not the primary cause of what caused his pain.
- Q. Okay. It's true, isn't it, Dr. Hessing, that if this man had experienced no accident of any kind and he had continued to go on, that it is very, very difficult to tell when the shoulder would have become symptomatic?
- A. I'm not sure what you're asking me. Can I tell when a shoulder is going to be symptomatic?
- Q. Without an accident, yes, sir.
- A. I don't think anybody can answer that.

(Emphasis supplied)

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- Q. (By Mr. Owen): One point of clarification, doctor. You used the snowball-on-the-hill analogy. Is that kind of like the straw that breaks the camel's back analogy? Is that how you see this case?
- A. Well, I believe what it means is that sometimes – really, a very minor event that starts a cascade. And, you know, I think we all realize that in that scenario with the snowball that causes this disaster. It's the snow that was building up.
- Q. Okay.
- A. And I think that the snow building up, it's the arthritis in the joint that really starts this process.
- Q. Is that the analogy that you think is applicable to Mr. Ford's case?
- A. Yeah. Again – but I know where you're going with that, Counsel, and I'm not going to let you take it where that's the cause that set it off, because I don't believe that – I believe that eventually something would have happened and he would have had symptoms in this joint even without the accident.
- Q. Something would have happened?
- A. He would have had symptoms without the accident.
- Q. But it would have been something that would have happened, Doctor; right?
- A. He might have woke up with it one day. I don't know.”

(Emphasis supplied)

The deposition testimony quoted above reveals that Dr. Hessing is of the view that Claimant would have eventually required shoulder replacement surgery, the occurrence of the subject accident notwithstanding. However, his answer clearly implies that the occurrence of the subject accident did have an impact on the timing of Claimant's need for surgery. To paraphrase Dr. Hessing, if the subject accident had not occurred, Claimant would eventually have required shoulder replacement surgery anyway. Although, by this testimony, it may have been Dr. Hessing's intention to denigrate the importance of the subject accident in explaining the etiology of Claimant's shoulder condition, he nevertheless acknowledges that it was the accident and not something else that initiated Claimant's onset of symptomatology. Idaho law makes it clear that in such circumstances, Claimant has met his burden of proving entitlement to medical treatment. *See, Bowman v. Twin Falls Construction Company, Inc., supra.; Wynn v. J.R. Simplot Company, supra.* Dr. Hessing believes that since the Claimants' shoulder was going to develop symptoms in the shoulder at some point in the near future anyway, it is improper to assign responsibility for Claimant's need for surgery to the subject accident, an event which was only minimally responsible for accelerating the need for surgery. However, as noted above, Dr. Hessing's views about the propriety of assigning responsibility to the accident do not amount to a correct statement of Idaho Law.

It is also worth noting that although Dr. Hessing appears to insist that the contribution of the subject accident is insignificant, he has nevertheless found it appropriate to apportion Claimant's impairment equally between the pre-existing condition and the subject accident. Although, as developed infra, the Referee does not accept Dr. Hessing's opinion on

apportionment, the fact that he made such contradictory proclamations casts doubt on the credibility of his opinion on causation.

Apportionment.

Here, Dr. Hessing is the only physician who has opined that Claimant's pre-existing condition entitled him to an impairment rating. Dr. Hessing proposed that Claimant's impairment rating for his shoulder injury should be apportioned on a 50/50 basis between the subject accident and his documented pre-existing condition. However, Dr. Hessing's testimony in this regard is without foundation, and the Referee finds it unpersuasive. Dr. Hessing testified:

Q. Okay. The last question I have for you, doctor, is Dr. Hassinger said that he would have given Mr. Ford a 14 percent whole person impairment and wouldn't apportion any of that to a preexisting condition. Do you agree or disagree with that?

A. I disagree with that.

Q. Okay. What do you think it should have been? Maybe not the impairment, I guess I'm really just talking about the apportionment.

A. Yeah, I would have – my routine, I would have taken his range of motion – and I don't know if I did that or not. I could go look. Did I give an impairment at all?

Q. I don't believe so.

A. I would have taken his range of motion, which certainly would have been limited, and I would just opine that probably would have been in the range of 8 to 10 percent. And then I would have said half of that was preexisting. I don't know how else to call that. In my practice for 25 years, I've just said 50/50 in those scenarios. So I would have ended up somewhere in the range of 4 to 5 percent in the upper extremity as his impairment related to his accident."

First, Dr. Hessing did not perform a clinical examination necessary to assess the extent and degree of Claimant's permanent physical impairment. Rather, he speculated that Claimant's impairment would probably be in the range of 8% to 10%, based on his recollection of the salient aspects of Claimant's condition. Dr. Hessing's testimony contains no information concerning

objective measurements and other considerations that typically go into the calculation of an impairment rating under the AMA Guides. More importantly, on the issue of how Claimant's impairment rating should be apportioned between the subject accident and the pre-existing condition, Dr. Hessing provided an answer that is entirely speculative. He commented that it has simply been his general practice over a period of 25 years to split impairment ratings in such cases between a pre-existing condition and an industrial accident on a 50/50 basis. Dr. Hessing's application of such a generalized rule to the facts of this particular case lacks foundation and is speculative.

Accordingly, since there is no credible evidence that Claimant suffered from a pre-existing physical impairment, apportionment is not appropriate.

Medical care.

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her 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 was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

In *Sprague*, the following factors were found to be relevant to the determination of whether the particular care at issue in that case was reasonable: (1). A claimant should benefit from gradual improvement from the treatment rendered. (2). The treatment was required by a claimant's treating physician. (3). The treatment was within the physician's standard of practice and the charges were fair and reasonable.

Gradual improvement.

37. The evidence demonstrates that Claimant has improved in a meaningful way from his shoulder replacement surgery on February 25, 2009. While certainly not medical evidence, Claimant's testimony is nonetheless revealing regarding his gradual improvement, or lack thereof, following April 2009. He testified that the left shoulder replacement surgery reduced his pre-surgical pain "a lot" and improved his range of motion "100%." Transcript, p. 35. In addition, Dr. Hassinger's records and deposition testimony indicate that Claimant's pain and range of motion greatly improved after the surgery. He released Claimant to work with no restrictions on April 21, 2009, approximately 7 weeks post-surgery, and determined Claimant reached MMI on June 22, 2009.

38. Even though the record indicates Claimant is still experiencing some symptoms after his 2009 surgery, it establishes both that Claimant's condition has gradually improved, and that he had reached MMI at the time of hearing. The Referee finds that Claimant has established the first criterion of *Sprague*.

Treatment is required.

39. Defendants argue that even though the 2009 surgery was “required” by the surgeon who performed the procedure, in the sense that the physician recommended the procedure for Claimant, it was nevertheless not medically reasonable. Based upon Dr. Hessing’s testimony, the procedure undertaken by Dr. Hassinger to reconstruct Claimant’s shoulder had “fallen out of favor” in the medical community. Hessing Dep., p. 29. This statement, however, was not supported by any other evidence in the record. Further, Dr. Hessing also opined Claimant would require replacement of his left shoulder at some point, but counseled delaying the procedure as long as possible due to Claimant’s young age.

40. In this case, the testimony of the surgeon who performed the replacement surgery, later validated by Claimant’s post-surgery improvement, carries greater weight than that of Dr. Hessing arguing against the suitability of the specific procedure performed on Claimant. The Referee finds, based on credible medical evidence, that the left shoulder replacement surgery Claimant underwent was required by his treating physician.

Standard of practice.

41. The third prong of *Sprague* is that the procedure at issue must be within the standard of practice and the charges, therefore, must be fair and reasonable. Dr. Hassinger is an orthopedic surgeon and the shoulder replacement procedure he performed on Claimant is within his standard of practice. Further, there was no objection to the fairness or reasonableness of the charges for this procedure, as set forth in Joint Exhibit “B.” As a result, Claimant has met his burden of proving the third prong.

42. The Referee finds that the 2009 shoulder replacement surgery performed on Claimant constitutes reasonable and necessary medical care pursuant to Idaho Code § 72-432, and that Claimant is entitled to past and future reasonable and necessary medical care for his August 1, 2005 industrial accident.

Temporary total disability.

43. Although not listed as an issue at hearing, Claimant asserted his entitlement to temporary total disability benefits in his post-hearing brief. There being no objection from Defendants, the Referee here addresses the issue.

44. Idaho Code Sections 72-408 and 409 provide time loss benefits to an injured worker who is temporarily totally disabled. The evidence establishes that Claimant is entitled to such benefits from the date of his shoulder replacement surgery, February 25, 2009, until the date Dr. Hassinger released him to return to work, April 21, 2009.

Permanent partial impairment/disability in excess of impairment.

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 non-medical factors, has reduced the claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability

from the industrial injury or occupational disease. “Permanent impairment” is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. “Evaluation (rating) of permanent impairment” is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker’s personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

45. As Claimant’s attorney conceded in his brief, Claimant is ineligible for disability benefits in excess of impairment because he had a better paying job at the time of the hearing than he had before. Therefore, the only question is whether and to what extent Claimant is entitled to compensation for permanent impairment.

46. Both Dr. Hessing and Dr. Hassinger agreed that Claimant’s left shoulder condition merits a permanent impairment rating. Dr. Hessing assessed 8% of the whole person, and Dr. Hassinger assessed 14%. Dr. Hessing also provided deposition testimony that, in cases like Claimant’s, 8-10% is appropriate. Since Dr. Hessing provided no explanation for rating Claimant at the low end of his scale, the Referee adopts 10% of the whole person as Dr. Hessing’s impairment rating in this case. The evidence is insufficient to determine how either physician calculated Claimant’s permanent impairment rating. As a result, the Referee finds it

appropriate to average the given ratings, and concludes that Claimant suffers 12% permanent partial impairment of the whole person.

Retention of jurisdiction.

The Idaho Supreme Court has advised, “It is prudent practice for the Industrial Commission to retain jurisdiction in cases where there is a probability that medical factors will produce additional physical impairment in the future.” *Horton v. Garrett Freightlines, Inc.*, 106 Idaho 895, 897, 684 P.2d 296, 298 (1984). “Neither physical impairment nor disability is permanent until the point when no further deterioration or change can be expected.” *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 968, 751 P.2d 113, 116 (1988). Further:

In a situation where the claimant’s impairment is progressive and, therefore, cannot adequately be determined for purposes of establishing a permanent disability rating, it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the claimant’s condition is nonprogressive. However, under I.C. Section 72-425, the Commission is allowed to make an appraisal of an ‘injured employee’s present and probable future ability to engage in gainful activity’ and base its evaluation rating upon that appraisal.

Hodges v. W.B. Savage Ranches, 116 Idaho 679, 682, 778 P.2d 801, 804 (1989).

47. In this case, Claimant testified that Dr. Hassinger told him he would need additional corrective left shoulder surgery at some undetermined point in the future. The Referee does not doubt Claimant’s testimony, but it does not rise to the level of medical testimony or opinion. Therefore, there is still inadequate evidence to support Claimant’s request. For example, the record does not establish that Claimant’s condition is likely to produce additional physical impairment in the future, or that the proposed replacement would be due to further deterioration or change in Claimant’s condition as opposed to wearing out of the implanted parts themselves. The record is likewise void of evidence

that might support an award under I.C. § 72-425. As a result, the Referee declines to recommend retaining jurisdiction in this case.

CONCLUSIONS OF LAW

1. Claimant has proven that his 2005 shoulder injury is due to the industrial accident and not to his preexisting underlying degenerative condition.
2. Claimant has proven his entitlement to past and future medical benefits for his shoulder condition.
3. Claimant has proven his entitlement to temporary total disability benefits from February 25, 2009 through April 21, 2009.
4. Defendants are liable for permanent partial impairment in the amount of 12% of the whole person.
5. Claimant has failed to prove that jurisdiction of this case should be retained by the Industrial Commission.

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 __30th__ day of April, 2010.

INDUSTRIAL COMMISSION

_____/s/_____
Michael E. Powers, Referee

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 2010, 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:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

KIMBERLY A DOYLE
PO BOX 6358
BOISE ID 83707-6358

ge

Gena Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM DALE FORD,)
)
 Claimant,)
)
 v.)
)
 CONCRETE PLACING COMPANY, INC.,)
)
 Employer,)
)
 and)
)
 LIBERTY NORTHWEST INSURANCE)
 CORPORATION,)
)
 Surety,)
)
 Defendants.)
)
 _____)

IC 2005-518336

ORDER

Filed June 10, 2010

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers 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 recommendation of the Referee. The Commission concurs with this recommendation. 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 has proven that his 2005 shoulder injury is due to the industrial accident and not to his preexisting underlying degenerative condition.
2. Claimant has proven his entitlement to past and future medical benefits for his shoulder condition.
3. Claimant has proven his entitlement to temporary total disability benefits from February 25, 2009 through April 21, 2009.

