BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALEXANDER JOHN MITCHELL, Claimant, v. LOUIE'S PIZZA & ITALIAN RESTAURANT, Employer, and AUTO OWNERS INSURANCE CO., Surety, Defendants.	**IC 2020-017805** **ORDER** FILED JUL 31 2023 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper 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, IT IS HEREBY ORDERED that:

1. When the totality of the evidence is considered, Claimant has proven his entitlement to permanent disability benefits for a 8% whole person rating.

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

IT IS SO ORDERED.

DATED this the 28th day of July, 2023.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2023, a true and correct copy of the foregoing **ORDER** was served by email transmission and regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ALEXANDER JOHN MITCHELL, Claimant, v. LOUIE'S PIZZA & ITALIAN RESTAURANT, Employer, and AUTO OWNERS INSURANCE CO., Surety, Defendants.	**IC 2020-017805** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** FILED JUL 31 2023 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on December 5, 2022. Patrick George represented Claimant at the hearing. Bradley VandenDries represented Defendants. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. Post-hearing depositions were taken. The matter came under advisement on June 20, 2023.

ISSUE

The issue for resolution, as per the parties at hearing, is the determination of the extent of Claimant's permanent partial disability benefits to which he is entitled.

CONTENTIONS OF THE PARTIES

The parties agree Claimant cut his right hand in the course and scope of his employment. The injury resulted in permanent nerve damage in that hand, for which Claimant received a two-percent whole person impairment rating.

The parties could not agree upon a permanent partial disability rating for the injury. Claimant argues he is entitled to a 19% PPD rating, inclusive of his PPI. Defendants argue Claimant is entitled to a PPD rating of between 2.5 and 7.5%, inclusive of PPI.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's testimony, both at hearing and in prehearing deposition (JE 30);
2. The post-hearing deposition testimony of witnesses Vermon Esplin, M.D. (January 6, 2023), Cali Eby, M.P.A. (January 24, 2023), Mary Barros-Bailey, Ph.D. (April 5, 2023), and Rodde Cox, M.D. (April 14, 2023); and
3. Joint exhibits (JE) 1 through 42 admitted at hearing.[1]

Objections made during depositions, as well as in briefing, (see fn 1, below) are hereby OVERRULED, with the exception of the questions in Dr. Cox's deposition beginning on line 16 of page 33 and continuing through line 1 of page 34; objection to those questions are SUSTAINED. (Also, as an observation for future reference, the statement "object to the form," without further elaboration, is not, in this Referee's view, a proper objection and typically will not be sustained, or even considered.)

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[1] Claimant objected to JE 33, the Barros-Bailey report, as being untimely filed. After oral argument the objection was overruled at hearing and the exhibit was admitted. In his opening brief, Claimant renewed his objection. After further consideration, the renewed objection is again overruled.

FINDINGS OF FACT

1. At the time of hearing Claimant was 24 years old, married with a three-year-old son, living in Meridian, Idaho. Claimant graduated from high school in 2016. He then attended College of Western Idaho, where he earned an associate degree in general business. At the time of hearing, Claimant was pursuing a bachelor's degree in information technology management with a certificate in business analytics at Boise State University. His GPA at the time of hearing was 4.0. He was intending to graduate in the fall of 2023 or sooner. He was also toying with the idea of perhaps obtaining an Interdisciplinary Master's degree thereafter.

2. As a teenager, Claimant worked various jobs such as usher at a movie theater, a line cook at Café Zupas, and unloading trucks for Walmart. He then went to work for Employer in 2016 and worked there until January 2021.

3. On June 6, 2020, while working for Employer, Claimant slipped and fell. As he was falling, the back of his right hand struck the serrated edge of an aluminum foil box, which severed the ulnar nerve. Eventually, Claimant underwent surgery to have the ulnar nerve neuroma which had developed as a result of the accident excised and "buried" into surrounding muscle tissue.[2] Post surgery Claimant continued to experience negative effects of the injury. Claimant testified to numbness in the dorsal ulnar area of his right hand, decreased sensation to light touch, pain and cramping when doing activities such as extended typing, and dysfunction with many activities of daily living due to weakness and loss of grip strength.

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[2] At the same time, Claimant had a non-industrially related carpal tunnel release based on findings from a nerve conduction study done pre-surgery.

4. After surgery, Claimant continued to work at various jobs while attending school, including his time-of-hearing job as an Amazon delivery driver. He also enjoyed computer gaming in his spare time.

5. Orthopedist and hand surgeon Vermon Esplin, M.D., examined Claimant and assigned him permanent restrictions of no climbing ladders or tasks requiring repetitive strong gripping/handling with Claimant's right hand. Claimant was restricted in lifting to 35 pounds occasionally, and 10 to 20 pounds frequently with his right hand after a functional capacity evaluation was performed. Dr. Esplin also assigned Claimant a 2% whole person impairment rating. Dr. Esplin prepared a report and was deposed.

6. Claimant was also seen by Defendants' IME physician, Rodde Cox, M.D., a physical medicine and rehabilitation physician from Boise. Dr. Cox assigned Claimant no restrictions but did agree Claimant was entitled to a 2% whole person impairment rating. Dr. Cox prepared a report and was deposed.

DISCUSSION AND FURTHER FINDINGS.

7. 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.

8. 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).

9. The extent and causes of permanent disability are factual questions committed to the particular expertise of the Commission, which considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. *See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997); *Thom v. Callahan,* 97 Idaho 151, 155, 157, 540 P.2d 1330, 1334, 1336 (1975). The burden of establishing permanent disability is upon Claimant. *Seese v. Idaho of Idaho, Inc.,* 110 Idaho 32, 714 P.2d 1 (1986). The Idaho Supreme Court in *Sharp v. Thomas Brothers Plumbing,* 170 Idaho 343, 510 P.3d 1136 (2022), reiterated that Claimant's disability assessment should be performed as of the date of hearing. *See also, Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012).

MEDICAL EXPERTS REVIEW AND ANALYSIS

10. In the present case, each party hired vocational experts who prepared reports and were deposed. Claimant retained Cali Eby, M.P.A., and Defendants retained Mary Barros-Bailey, Ph.D. Each expert considered the various restrictions and opinions

of the competing medical professionals involved in this case. Both agreed that if Dr. Cox's opinions were used, Claimant would have no permanent partial disability because Dr. Cox felt Claimant had no permanent restrictions affecting his future employability. The vocational experts disagreed on the extent of Claimant's permanent disability if Dr. Esplin's opinions were given greater weight. As such, it is appropriate to first examine the competing physician opinions before considering the vocational expert testimony and reports, if necessary.

Dr. Esplin

11. Claimant hired Dr. Esplin for an independent medical examination and impairment rating. On May 17, 2021, Dr. Esplin examined Claimant after reviewing pertinent medical records, including surgical and treatment notes of Dustin Judd, M.D., nerve conduction studies, and a functional capacity evaluation performed by Wright Physical Therapy. Upon examination, Dr. Esplin initially felt Claimant's continued weakness and loss of dexterity in his right hand was either due to muscle damage or damage to the motor nerve branch to certain hand muscles. Dr. Esplin suggested an EMG/NCS to rule out muscle or motor branch nerve injury.

12. After the EMG/NCS was performed, Dr. Esplin again saw Claimant in January 2022. Claimant was complaining of decreased endurance with right-handed activities, with persistent numbness/tingling, and pain when doing various daily living activities, and lifting limitations. Dr. Esplin noted the nerve studies found evidence of bilateral carpal tunnel syndrome but no muscle or motor branch nerve injury. Dr. Esplin (like Dr. Judd) felt the carpal tunnel was not associated with Claimant's industrial injury.

13. Dr. Esplin rated Claimant's condition, which he described as a loss of function of Claimant's superficial ulnar nerve branch after surgery to excise the neuroma and bury the nerve in soft tissue, resulting in permanent loss of sensation of the affected nerve branch, at 2% whole person impairment.

14. Dr. Esplin also recommended Claimant avoid jobs which required ladder climbing or tasks involving repetitive strong gripping and handling with Claimant's right hand. Due to Claimant's complaints of fatigue when keyboarding, Dr. Esplin also suggested Claimant rest for 15 to 30 minutes after each hour of continuous keyboarding. Claimant was restricted to lifting over 35 pounds occasional, 10 to 20 pounds frequent with his right hand, which were in line with the FCE findings and Claimant's own perceived limits.

15. Dr. Esplin was deposed on January 6, 2023. Therein, he described how the neuroma causes pain with movement due to the application of pressure on the neuroma, which, while buried in soft tissue, is still impacted by changing pressure or tightening of the surrounding tendons or muscles of the hand. He explained gripping causes pressure which causes increased pain at the site of the neuroma, which in turn causes avoidance of that activity, and thus a loss of function. Dr. Esplin cited to a treatise on hand surgery which noted that a "simple hypersensitive neuroma in a finger amputation may impair function of the whole hand." Esplin Depo. p. 22. Dr. Esplin felt the same principle applied to Claimant.[3]

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[3] Dr. Esplin also noted that Claimant's carpal tunnel release surgery resulted in lengthening of Claimant's ligament, therefore Claimant must exert more force to get the same amount of grip he had before surgery. While physical therapy generally helps to recover lost grip strength, "sometimes there is a little bit less of a grip strength because things have changed around the fulcrum of the wrist." *Id* at p. 35.

16. When explaining why Claimant's grip strength was consistently reduced on all testing done by various providers and examiners, Dr. Esplin testified the pressure of gripping caused the nerve to "zing" or "stab" Claimant, and the sensation was enough to cause Claimant to stop gripping. It was pain, not weakness, that resulted in Claimant's grip strength reduction.

17. Dr. Esplin agreed that Claimant's cut nerve was sensory only – it did not impact muscle function – but it did result in loss of sensation and numbness in the dorsal ulnar nerve branch of Claimant's right hand.

18. When assigning restrictions, Dr. Esplin relied on FCE results, his examination, and Claimant's subjective history.

19. In cross-examination, Dr. Esplin recognized that if Claimant was in a non-labor-intensive job where he would be able to protect his neuroma, it could be less symptomatic.

Dr. Cox

20. Defendants hired Dr. Cox to perform an independent medical evaluation of Claimant for the purpose of obtaining an impairment rating. The evaluation took place on May 7, 2021.

21. After reviewing medical records, Dr. Cox took an oral history from Claimant and performed an examination, including five position grip strength testing on a Jamar dynamometer. Claimant demonstrated decreased right hand grip strength on all five positions.

22. Dr. Cox felt Claimant was at maximum medical improvement and rated him with a 2% whole person permanent impairment.

23. Dr. Cox found no "objective basis to warrant any permanent work restrictions or work limitations." JE 31, p. 278.

24. Dr. Cox was deposed on April 14, 2023. Therein, he noted the dorsal ulnar cutaneous nerve, such as Claimant severed, supplies feeling to the back portion of the hand below the ring and little finger, and is purely a sensory nerve which "doesn't provide any power to the muscles, so it doesn't have any impact on strength or function of the muscles." Cox Depo. p. 12.

25. On examination, Dr. Cox did not find any obvious atrophy in Claimant's right hand and felt his strength was intact on strength testing.

26. Dr. Cox spent considerable time discussing work restrictions and work limitations, basing much of his testimony on the *AMA Guide to the Evaluation of Workability and Return to Work*. He noted that work restrictions are based on risk, so even though a person might physically be able to do certain tasks, the person should avoid the task because of risk of harm to the individual or other coworkers. Dr. Cox felt Claimant's condition posed no risk to himself or others by working full duty in any job.

27. Dr. Cox contrasted work restrictions with what he called work limitations, which he claimed "are placed on people" based on capacity. As he put it, "limitations you place on people if … they are physically unable to do something, then that would be the basis for a limitation." Cox Depo. p. 21. He goes on to note that limitations "are described by the provider" and are "based on objective findings such as loss of range of motion or true neurologic weakness." *Id.* Because Dr. Cox determined Claimant did not have any true neurologic weakness he had no work limitations, in addition to having no need for work restrictions.

28. When asked if Claimant's pursuit of an information technology degree with keyboarding, programming, and "things of that nature" would warrant any work restrictions or work limitations, Dr. Cox testified because Claimant had no "objective findings of such things as

loss of range of motion through a neurologic weakness" he would have no limitation in "his ability to perform those activities." *Id* at 22.

29. Dr. Cox had no explanation for why Claimant would have tiredness in his hand with prolonged typing, other than perhaps his carpal tunnel syndrome. He did, however, concede that Claimant could have pain with prolonged typing.

30. Dr. Cox also elaborated in his testimony on the interrelated subjects of capacity and tolerance. Dr. Cox found no objective evidence that Claimant had limitations in his capacity, which he described as "loss of range of motion or a neurologic true loss of strength." *Id.* at 26. Instead, Dr. Cox felt Claimant had "some impact in his tolerance to activity based on pain." *Id.* Dr. Cox went on to explain that tolerance is hard to measure, so it is not something that he could "place … limitations on [Claimant] because it's a psychophysiologic[al] concept. It's not an objective finding. It's based on the individual person." *Id.*

31. Dr. Cox testified that Claimant's pain from his neuroma was a tolerance factor rather than a true neurologic weakness. He explained his dispute with Dr. Esplin's opinion on work "restrictions" was actually a dispute over tolerance, which is not measurable and therefore cannot be the basis for placing limitations (or restrictions as per Dr. Esplin) on Claimant.

32. Finally, Dr. Cox elaborated on his strength testing using the Jamar Dynamometer. He noted the five positions are designed to test grip strength with the fingers in five separate positions from muscles shortened to muscles mid position, and muscles extended. Ideally, a person gripping from each of the positions with full effort should produce a bell curve, with greatest strength in the mid position and less strength with contracted and extended grip. According to Dr. Cox, anything other than a nice bell curve of strength through the five positions indicates lack of effort. Claimant did not produce a symmetrical bell curve with either hand. In the positions

from one to five, Claimant's right hand grip measurements in kilograms were 12, 18, 20, 18, and 18 (one number shy of a bell curve).[4] Claimant's left hand grip measurements were 34, 38, 35, 34, and 28 (not a symmetrical bell curve).

33. In cross examination, Dr. Cox acknowledged Claimant may well have pain with gripping, but he felt there was no neurologic reason for his perceived weakness. He did not acknowledge that pain present in each position of testing could limit effort due to tolerance.

Physician Analysis

34. As Dr. Cox noted, the discrepancy herein between the two physicians centers on terminology and perspective. Dr. Esplin looked at the FCE results, his examination of Claimant, and Claimant's subjective complaints and then fashioned a set of "work restrictions" for Claimant. Dr. Cox opined Claimant was not entitled to any "work restrictions" because there was no objective evidence that he had a condition which would pose a risk to himself or others were he to pursue employment at full capacity. Work restrictions could only be imposed based on this risk of harm.

35. To begin, nothing in the record seriously disputes Claimant's complaint of pain from his neuroma with certain activities such as prolonged typing or writing, or repetitious hard gripping, or certain activities of daily living. Claimant's complaints of pain limiting those activities were uncontested. Claimant's perceived capacity for certain activities has been reduced by his level of tolerance to pain caused by his work accident. Because Claimant's pain, and his tolerance thereto, affects his perceived capacity for certain activities involving his right hand, jobs requiring more repetition of activities which are painful to Claimant than his tolerance to such

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[4] Claimant's test scores with the FCE, Dr. Esplin and Dr. Cox were all similar, with Claimant's right hand capable of exerting roughly half of his non-dominant left hand grip scores. Dr. Cox noted that Claimant could have failed to exert maximum effort in each of the three test sessions.

pain will permit him to push through would be considered beyond Claimant's perceived "capacity," at least in the everyday meaning of capacity, limitations, and tolerance.

36. Dr. Cox correctly noted that work restrictions are based on the risk of harm to the injured employee or others, (or even property). Restrictions tell the employee and the employer the safe limits of activity for the injured worker. Typically, the employee is capable of exceeding those limits, but it would be unwise to do so, at least in the opinion of the doctor imposing such restrictions. However, limitations are different, as noted by Dr. Cox. Limitations are imposed, not by a doctor, but by the injured worker's reality. If a worker cannot lift more than, say 50 pounds, it is not because the doctor told the worker he could not lift more – it is because when the worker tried to, for whatever reason he could not. It was beyond his capacity to lift that weight.

37. Dr. Cox was also correct when he testified that limitations are *described* by the provider. He was incorrect when he said limitations were *placed* on a worker by the provider. A provider may *convey* that doctor's understanding of the injured worker's limitations to employers to inform the employer of such limitations, but the provider does not impose or place limitations on the worker.[5]

38. Dr. Esplin took FCE results deemed valid, his own observations on examination, and Claimant's subjective history when fashioning, or summarizing, a list of upper limits for Claimant's activities. It does appear from the record that Dr. Esplin was citing Claimant's limitations based on Claimant's perceived capacity, and not his risk of harm, when he labeled

[5] Dr. Cox's testimony was informed by his reading of the *AMA Guides to Workability*, as discussed above. That book is not in evidence beyond the excerpts quoted by Dr. Cox in his deposition. Furthermore, the Guide is not definitive, nor is it in any way binding on the Commission. Excerpts taken from the book without further context are not deemed persuasive authority in this instance.

Claimant's limitations as restrictions. In that respect, Dr. Esplin's categorization was technically inaccurate. However, labels aside, Dr. Esplin's testimony was persuasive.

39. When Dr. Cox stated in his report (JE 31, p. 278) that "[t]here does not appear to be any objective basis to warrant any permanent work restrictions or work limitations" his opinion disregarded any subjective basis for work restrictions, and ignored Claimant's acknowledged pain complaints which serve to self-limit his work capacity in certain employments. In contrast, Dr. Esplin, although perhaps too broadly defining a work restriction, more accurately described Claimant's work impediments based on real world testing, sound medical causation opinions for Claimant's ongoing symptoms and limitations, and a complete analysis of the difficulties Claimant would have in various employment situations.

40. When the record as a whole is considered, more weight is given to the opinions of Dr. Esplin than those of Dr. Cox.

VOCATIONAL EXPERT REVIEW AND ANALYSIS

Cali Eby

41. Claimant's vocational expert, Cali Eby, prepared a vocational assessment report dated April 11, 2022. Ms. Eby reviewed relevant medical records, interviewed Claimant, and considered his complaints and self-described limitations, considered relevant factors such as his education, vocational history, and transferable skills. She then utilized reference materials such as the *Dictionary of Occupational Titles* (DOT), Occupational Employment Quarterly (OEQ 2021), Occupational Requirements Survey, and O*NET, which she described as a national database of occupational characteristics maintained by the Department of Labor. She conducted a labor market analysis and earning capacity evaluation. She wrapped up her report with her conclusion that Claimant had lost 38% of his labor market access but no loss of income.

Averaging the two components of labor market access - Claimant's labor market was the Treasure Valley - and income loss, Ms. Eby determined Claimant suffered a 19% permanent partial disability (inclusive of impairment) as the result of his work accident.

42. In reaching her finding that Claimant lost 38% of his labor market, Ms. Eby considered Claimant's past employments such as line cook, food prep, delivery driver, and stocker at Walmart, which she felt gave him transferable skills such as cashiering, using kitchen equipment, following recipes, knowing quantities, and using his hands for chopping and cutting. Claimant had knowledge of food service operations, including assessing equipment functioning, checking for quality, food safety and money handling. She then looked at restrictions given by Dr. Esplin and determined which jobs she felt Claimant had the skills to perform but were nevertheless precluded by Dr. Esplin's restrictions. The job pool utilized by Ms. Eby included cook (fast food and restaurant), food prep worker, dishwasher, cashier, customer service rep, stock clerk, and data entry. As noted above, Ms. Eby determined 38% of those jobs had requirements in excess of Claimant's restrictions.

43. While Ms. Eby acknowledged Claimant was working toward a college degree, she listed his education level as "high school plus some college, no degree." She also pointed out Claimant had "good computer skills." JE 27, p. 249.

44. Ms. Eby was deposed on January 24, 2023. She acknowledged that when she prepared her report Claimant had not yet been seen by Dr. Cox. She agreed that if Dr. Cox's opinion of no permanent restrictions was adopted, Claimant would have no permanent disability.

45. In discussing her interview with Claimant, Ms. Eby noted he had an associate degree and was working toward a bachelor's degree in internet technology. She was aware

Claimant had "good grades" and was "focusing entirely on school."[6] Eby Depo. p. 11. Ms. Eby was also aware that Claimant was anticipating graduating with his IT degree in 2023.

46. In spite of Claimant's current status in his education and future plans, his associate degree, and the fact that Claimant's prior employment had been the types of jobs typical for young persons as they focus on their education, and not a career path, Ms. Eby testified that she did not consider any computer-related jobs for Claimant, because his "current transferrable skills were at lower levels, like customer service and data entry." Eby Depo. p. 15. Likewise, she included no jobs for which Claimant would qualify once he obtained his IT degree, because at the time of her interview, it was not "imminent." Her rationale was that "a lot of things could happen between the time that I met with him and when he might graduate, so it would be speculative … to include those types of jobs…." *Id.* She also did not consider paraprofessional jobs because Claimant had never worked in any computer job.

47. Ms. Eby felt it was best to simply consider the jobs Claimant had done in the past where he had demonstrated that he could secure such types of employment and had experience doing so, even though she recognized that Claimant was "quite young and early in his career" so that he had "more opportunity in the future than some other workers." *Id.* at p. 17.

48. Ms. Eby recognized Claimant was very nice and presented well. She testified that "when he graduates with his degree, … he'll, hopefully, be able to find work in the field that he has been pursuing." *Id.*

49. By her own admission, transferability analysis, where past job skills acquired can be used to gain employment in other fields, was an important part of Ms. Eby's analysis.

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[6] Also from her report, Ms. Eby knew that Claimant had more than just "good grades," he had won a cyber security challenge which awarded him enough money that he quit working for a time. JE 27, p. 246.

She felt particularly with Claimant such analysis was vital given his young age. She noted in such situations, she did not want "to just look at the jobs [Claimant has] done" but also consider "what else [he's] reasonably had access to." *Id.* at 23.

50. In cross examination, Ms. Eby acknowledged her analysis focused on where Claimant was at educationally, physically, and employment wise at the time of her interview with him in February 2022. She further agreed that even at the date of her interview Claimant had training in the information technology and computer fields and had gained even more such knowledge and training between the time of her interview and the time of her deposition. Nevertheless, Ms. Eby testified that additional education and knowledge would not make a significant difference in Claimant's job market, because in Ms. Eby's opinion, most jobs in the IT field required a bachelor's degree. Ms. Eby testified Claimant's computer knowledge and skills would, however, enhance Claimant's employability in those service industry jobs for which he is already qualified to perform without a degree.

51. Ms. Eby conceded she had not been asked to re-evaluate Claimant in light of his increasing education and training since she met with him in February 2022. She opined that a re-evaluation would not change her conclusions because there were "still a lot of things that could happen." She pointed out Claimant could have future financial issues, medical issues, and even educational issues which might prevent him from graduating. For that reason, Ms. Eby felt it was more realistic to evaluate Claimant only on his past employment. Eby Depo. p. 30.

52. Ms. Eby was critical of Dr. Barros-Bailey's analysis because she felt Dr. Barros-Bailey "only relied on jobs that [Claimant's] never done and that he qualifies for because of his transferable skills that he has access to now, but has not done, and did not include any of the jobs

that he has actually done." *Id.* at p. 37. She contrasted that approach with hers, where she looked mainly at jobs Claimant had done in the past.

Mary Barros-Bailey

53. Defendants' vocational expert, Mary Barros-Bailey, prepared a disability evaluation report on November 30, 2022. Dr. Barros-Bailey reviewed relevant medical records, interviewed Claimant on November 22, 2022, reviewed his educational background and current status, along with graduation plans. She noted he had an associate degree in general business and was holding a 4.0 GPA at Boise State in his field of information technology management. At the time of the interview, Claimant had obtained certificates in Microsoft Office and QuickBooks. Socially, Claimant enjoyed computer gaming, was married and had a three-year-old son. Regarding limitations, Claimant described difficulties with lifting, pushing/pulling, climbing, crawling, gripping, grasping, fingering and prolonged driving. Many activities of daily living were impacted by his injury.

54. Dr. Barros-Bailey considered Claimant's transferable skills using the *Dictionary of Occupational Titles*, and *Revised Handbook of Analyzing Jobs*. She compiled Claimant's transferrable skills. She noted that Claimant had a job history typical of a college student while completing their education.

55. Like Ms. Eby, Dr. Barros-Bailey agrees that if Dr. Cox's opinions are used, Claimant suffered no permanent disability. If the FCE and Dr. Esplin's opinions are used, Claimant suffered some permanent disability. Using the Occupational Requirements Survey (2022), Dr. Barros-Bailey looked at computer network support specialists, web developers, and other computer occupations to determine what percentage of such jobs would exceed Claimant's limitations and which would not. Using such data and Dr. Esplin's restrictions,

Dr. Barros-Bailey estimated Claimant suffered either a 2.5% or 7.5% (inclusive of impairment) permanent disability from his work injury. She arrived at those figures by estimating a loss of labor market of 15% prior to graduation, and 5% if/when he graduated. Under both scenarios she estimated no loss of income.

56. Dr. Barros-Bailey noted that Claimant, even without a bachelor's degree, qualified for some computer-based support positions, and when he completes his degree, he will qualify for many additional jobs in the computer field.

57. Dr. Barros-Bailey also suggested various ways to enhance Claimant's ability to complete his education, such as applying for IDVR support, and/or evaluation by the Idaho Assistive Technology Project, which can assist Claimant with adaptive keyboard, mouse, and other hardware selection to assist him maximize his abilities and make him more efficient in the workplace.

58. Dr. Barros-Bailey was deposed on April 5, 2023. Therein, she testified that Claimant's work history was not at all unusual for college students. The jobs are a way to get by while in school, not a chosen career path. Claimant's primary "job" during this time was participating in a college education, and he was doing quite well in that pursuit, with a 4.0 GPA.

59. Dr. Barros-Bailey noted transferable skills determination is not simply work based analysis, but also educational based analysis. She also testified at length on the VDARE system for completing transferable skills and loss of market access assessments, which she felt is "essential" to determining those items.[7]

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[7] Because the VDARE methodology does not play a part in the decisions herein, a detailed description of how it is utilized in figuring transferable skills is omitted herein. Dr. Barros-Bailey's criticism of other methodologies, including that used by Ms. Eby, are noted but dismissed as immaterial based on the facts and record of this case.

60. Dr. Barros-Bailey testified that paraprofessional positions in the computer field, such as she focused on, do not need a bachelor's degree; they are typically help desk jobs for people with computer questions. She noted, for example, the Nampa school district was hiring for just such a position on the day of her deposition. Claimant's technical skills would assist him in such employment positions. Other opportunities include security and networking positions. Claimant had the training, as well as programming skills and database analysis for such jobs.

61. Claimant's graduation is probable, not speculative, according to Dr. Barros-Bailey. Once he graduates his earning capability will expand, and she believes his loss of access should shrink.

62. In cross examination, Dr. Barros-Bailey clarified that she analyzed job positions which Claimant held pre-injury and found no loss of access to those positions based on FCE/Dr. Esplin restrictions. Therefore she "looked at the ORS, … to look at[sic] into the future." Barros-Bailey Depo. p. 36. She came up with Claimant's losses by looking at future access to future job opportunities and limits on such jobs.

63. Dr. Barros-Bailey found that the recommended typing breaks would not be an impediment to the jobs she looked at for Claimant. She pointed out the jobs were not data entry positions with continuous typing, but IT management jobs which come with natural breaks for his right hand.

64. While Dr. Barros-Bailey used the Nampa job as an example, she had found eleven such positions at various employers, including H-P. While the jobs required some keyboarding, they typically do not require nonstop typing for extended time periods. Instead, the jobs "revolve around people." Claimant was able to do his schoolwork, maintain a 4.0 GPA,

and do computer gaming for fun in his spare time; Dr. Barros-Bailey was confident he could perform the jobs she found.

65. Dr. Barros-Bailey conceded that Claimant had not graduated at the time of hearing, but pointed out that even if he did not graduate, he still qualified for the paraprofessional jobs she included in her report.

Vocational Analysis

66. Claimant argues that Ms. Eby's opinions should be afforded the most weight because she considered those actual jobs Claimant held in the past, and added jobs that he would qualify for given his skill set. She did not consider future jobs as that would be, in her opinion, speculative. Finally, she did not consider jobs which required a college degree, as he did not have one at the time of hearing. In briefing it was argued that "if an emergency arose" Claimant would "most likely" return to the service industry jobs of his past. Cl. Brief, p. 15.

67. Claimant also argues that Dr. Barros-Bailey "failed to sufficiently consider" Claimant's past jobs, and instead "considered professional positions that he was not qualified for since he hadn't graduated from college." *Id.* at 16. Claimant also claims Dr. Barros-Bailey based her decision in part on a physician's opinion who had not seen Claimant since well before his surgery. Finally, she failed to read Claimant's hearing testimony and failed to consider the time he claimed he needed to rest his hand after typing for an hour or so.

68. In analyzing the competing opinions, it is noted Ms. Eby failed to account for the associate degree Claimant attained prior to hearing and the skills and knowledge associated therewith. She did not even highlight that degree in her report; instead, she labelled Claimant as a high school graduate with "some college."

69. Ms. Eby did not consider any jobs for which Claimant was qualified by his education if he had not held such a job in the past. The very notion of transferable skills is an analysis which looks at jobs a claimant may not have done in the past but is qualified to do in the present. Most individuals at some point take a job for the first time. By definition, when they take the job, they do so for reasons other than past experience.

70. Even in her deposition at page 23, when Ms. Eby described determining transferable skills as not just looking at the jobs [Claimant has] done" but also considering "what else [he's] reasonably *had* access to," (emphasis added) her statement appears to apply to Claimant's past. More accurately, determining transferable skills is a process of not just considering jobs a claimant has had in the past, but also jobs the claimant is qualified for and *has* access to presently. Present qualifications do not depend exclusively on past employment. While one may gain skills through employment, as Dr. Barros-Bailey correctly noted, skills are also gained through education.

71. The idea that on the verge of graduating with an IT degree, if some emergency befell Claimant, he would necessarily fall back to service jobs is clearly speculative if not unlikely. Claimant has gained too much computer knowledge to simply throw it away and go back to service jobs which he testified might be difficult for him to do. Instead, Dr. Barros-Bailey's testimony that there are many paraprofessional positions available in which Claimant could use his computer knowledge in a desk job setting makes more sense in this scenario. More probably, Claimant will attain his bachelor's degree, if he has not yet done so by the time of this writing, and move into a career in computer technology. His uncertainty at hearing was not whether or not he will graduate, but which branch of computer technology he will pursue post-graduation, assuming he does not go on to get a master's degree.

72. Claimant next argues it is improper to even consider any job which requires a bachelor's degree because "disability should be determined as it existed at the time of the hearing." Reply Brief, p. 1. Claimant then cites to the Supreme Court decision of *Sharp v. Thomas Bros. Plumbing,* 170 Idaho 343, 351, 510 P.3d 1136, 1144, which held (quoting from *Brown v. Home Depot*, 152 Idaho 605, 272, P.3d 577 (2012) "the Commission is to consider the claimant's ability to work as of the time the evidence is received. There is no "present" opportunity for the commission to makes its determination apart from the time of hearing." The court goes on to declare "[i]t is the claimant's personal and economic circumstances at the time of hearing, not at some earlier time that are relevant to the disability determination." After that analysis, the Court concluded by holding that "the relevant labor market for evaluating the non-medical factors under I.C. §72-430 and in determining a claimant's disability is the labor market at the time of the hearing." Using this passage, Claimant argues it was improper for Dr. Barros-Bailey to consider jobs that would be available to Claimant when he graduates.

73. Idaho Code §72-425 states, "[e]valuation (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 section 72-430, Idaho Code." (Emphasis added.) In light of Idaho Code §72-425, it is highly unlikely that *Sharp* prohibits the Commission from considering Claimant's probable graduation (which may have already occurred) and the jobs which would flow therefrom when deciding Claimant's disability rating. In fact, it appears Idaho Code §72-425 would require consideration and a determination of Claimant's probable future ability to engage in work, including his probable graduation with a bachelor's degree, if such analysis

was required to determine Claimant's appropriate disability rating. However, it is not necessary to definitively determine the merits of Claimant's *Sharp* argument in this case for reasons set out below.

74. At deposition, Dr. Barros-Bailey considered Claimant's past jobs, which she reasonably labelled as typical jobs college students take when pursuing their studies, and determined that Claimant's restrictions did not preclude returning to those occupations, if necessary.[8] However, she recognized that more likely than not Claimant would use his education and training to seek employment more aligned with his interests, education and training. She called these paraprofessional jobs in the computer field and identified eleven of them available in the Treasure Valley on the day of her deposition. Assuming Claimant would seek these more desirable paraprofessional jobs, she considered how his disabilities and limitations would impact such employment and calculated a permanent disability rating accordingly. Dr. Barros-Bailey persuasively rebutted Ms. Eby's assertion that those jobs required a bachelor's degree.

75. Dr. Barros-Bailey also considered professional career jobs awaiting Claimant if/when he graduates with a bachelor's degree. (She rightfully did not speculate on what would be available to Claimant if he continued his schooling to obtain a master's degree.) She testified a bachelor's degree would, in her opinion, open more doors to Claimant and thus reduce his permanent disability rating to nearly equal his impairment rating.

76. Defendants argue Dr. Barros-Bailey's analysis should carry more weight because she used the VDARE methodology, which she claims is essential to doing a valid evaluation.

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[8] Dr. Barros-Bailey's written report contained no discussion of Claimant's loss of access to service jobs, nor did it present any argument on why Claimant had allegedly lost no access to service jobs such as those Claimant held in the past. Her report focused on paraprofessional and professional jobs. Her first mention of the notion that Claimant had no loss of access to service jobs came at her deposition in response to cross examination questions.

Ms. Eby did not use such methodology. Defendants' argument is not persuasive on that point. The true test is not what method is utilized to arrive at a conclusion on disability, but on how sound such conclusions are when considering *all* the evidence. Using VDARE or any other methodology does not guarantee accuracy and cannot be considered as the exclusive methodology to be considered, no matter how fond Dr. Barros-Bailey is of the procedure.

77. On the whole, Dr. Barros-Bailey's testimony and report presents a better reasoned, more reasonable, more realistic, and more probable estimate of Claimant's permanent disability. Ms. Eby's conclusions fail to take full account of Claimant's education, training, and expertise. Nothing in the record suggests that Claimant would return to the service industry if his hand healed, or that he pursued a bachelor's degree because he was precluded from working in the service industry. The record supports the proposition that Claimant is seeking training and skills which will allow him to put his service industry employment history in his rear-view mirror.

78. Even though Dr. Barros-Bailey's report and testimony are afforded the greater weight, they are not flawless. Dr. Barros-Bailey testified in her deposition that Claimant would not lose any access to jobs in the service field if he chose, or for some reason had, to look there for employment. It is not realistic to assume there are no jobs in the service or labor fields which would have requirements beyond Claimant's limitations, especially in the areas of gripping, lifting, and carrying. Even though it is unlikely that Claimant would need to return to the service industry jobs of his youth, if he did, he would find at least some jobs required more than he was capable of doing on a regular basis. This disability does need to be accounted for when considering Claimant's permanent disability rating.

79. It is also not clear why Dr. Barros-Bailey drastically reduced Claimant's disability rating should he attain his bachelor's degree. Regarding Claimant's "professional employment opportunities" which await Claimant upon graduation, Dr. Barros-Bailey testified,

> So, if you think about loss of access being somebody's access to a piece of the pie in the entire labor market if they have injuries their ability to use those labor skills shrink because those skills are based on the experience and the education they have at the time of injury. If they get more skills they open up more market that they didn't have access to before they went through the training. So there is a mitigation factor that is involved with retraining that also impacts what loss of access they might have.

Barros-Bailey Depo. p. 27. Defense counsel then tried to summarize by asking if it would be accurate to analogize Claimant's situation as "his initial hand injury may have shrunk in [sic] his piece of the labor market pie, … but because of those educational pursuits … that pie has been opening up." Dr. Barros-Bailey agreed with this explanation. Her explanation and summarization lacked any substantive analysis in this case as opposed to a generalized statement which, although logical on its face, may or may not apply to the particulars of Claimant's situation.

80. While it is true that training may open up job categories, it does not change Claimant's limitations. While Dr. Barros-Bailey noted that retraining can mitigate loss of labor market access, most often that training is in a different field, allowing a person to move from, for example, labor intensive work which might no longer be suitable for the person, to a much less labor-intensive field of work. In such situations, the training is beneficial to reducing disability ratings by opening new fields of work with much different (typically less) physical requirements.

81. In the present case, Claimant's degree will most likely move him from "paraprofessional jobs" in the computer field to "professional jobs" in the computer field. While Dr. Barros-Bailey created charts to show the differences between requirements in the two fields, reviewing those charts did not produce significant differences. While lifting and climbing

requirements were higher in paraprofessional jobs than those in professional computer jobs, the differences were minor, and not surprisingly, few jobs in either paraprofessional or professional computer jobs had such requirements. Realistically, the limits on Claimant's ability to keyboard for more than an hour or so will most likely be the most-encountered issue. However, Dr. Barros-Bailey convincingly testified that most paraprofessional and professional computer industry jobs are not data entry and will not typically involve nonstop typing for an hour or more.

82. Claimant is trained and has skills needed to work in the computer field. His job title and computer responsibilities may change somewhat, but with or without his degree, Claimant is qualified for employment somewhere in the computer and technology fields, in addition to his past service industry jobs and their transferable skills.

83. Claimant is going to have some loss of labor market access in the computer field with or without his bachelor's degree. Even though he will have access to more jobs once he gets his bachelor's degree, there will still be a percentage of those jobs which will exceed Claimant's work limitations, such as his keyboarding limits. The difference in physical job requirements in the categories of lifting, gripping, climbing, and keyboarding between paraprofessional and professional computer jobs is not significant.

84. Dr. Barros-Bailey did not convincingly establish a justification for the significant difference in disability ratings between Claimant with a bachelor's degree and him at the time of hearing. Claimant's disability should be examined in how it will impact his career, factoring all the evidence and advisory opinions of the vocational experts. When doing so, it appears Claimant's loss of market access in the computer field is modest, as is his loss of service industry jobs. While it is unlikely that Claimant will return to making hamburgers or delivering packages,

loss of those types of jobs must be accounted for in addition to the potential loss of job opportunities in Claimant's more likely career jobs in the computer field.

85. When all the evidence, including Claimant's subjective complaints of weakness and loss of function, which he convincingly testified to at hearing, is considered, the record supports a 8% whole person permanent disability rating, inclusive of Claimant's 2% whole person impairment rating.

86. When the record as a whole is considered, Claimant has proven he is entitled to benefits equal to a 8% whole person permanent disability rating, inclusive of his impairment rating.

CONCLUSION OF LAW

When the totality of the evidence is considered, Claimant has proven his entitlement to permanent disability benefits for a 8% whole person rating.

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 18th day of July, 2023.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2023, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by email transmission and regular United States Mail upon each of the following:

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