

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

REX SMITH,

Claimant,

v.

INTEGROW MALT, LLC,

Employer,

and

ALASKA NATIONAL INSURANCE
CORPORATION,

Surety,
Defendants.

IC 2017-008561

ORDER

FILED

APR - 4 2022

INDUSTRIAL COMMISSION

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

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


1. Claimant has failed to prove a causal connection between the industrial accident and any alleged unpaid medical expenses.
2. Claimant has failed to prove that any unreimbursed medical expenses are reasonable and necessary.
3. Surety correctly paid Claimant for temporary disability benefits due and owing during his period of recovery. Claimant is not entitled to payment of any further TTD/TPD benefits.

4. No physician has opined that Claimant is entitled to permanent impairment; therefore Claimant is not entitled to payment of PPI benefits.
5. As there is no permanent impairment in this case, Claimant is also not entitled to payment of permanent disability benefits. Claimant is further not entitled to disability benefits because he has no permanent work restrictions demonstrating a functional loss of his working capacity.
6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

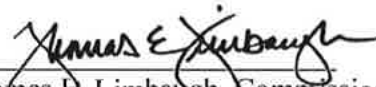
DATED this 1st day of April, 2022.

INDUSTRIAL COMMISSION





Aaron White, Chairman



Thomas D. Limbaugh, Commissioner



Thomas P. Baskin, Commissioner

ATTEST:



Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ^{4th}~~1st~~ day of April, 2022, a true and correct copy of the foregoing **ORDER** was served by regular United States mail and Electronic mail upon each of the following:

REX K. SMITH



RACHEL M. O'BAR
BOWEN & BAILEY
P.O. BOX 1007
BOISE, ID 83701-1007
robar@bowen-bailey.com

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REX K. SMITH,

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INTEGROW MALT, L.L.C.,

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ALASKA NATIONAL INSURANCE
CORPORATION,

Surety,

Defendants.

IC 2017-008561

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED

APRIL 4, 2022

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John C. Hummel, who conducted a hearing via Zoom teleconference on October 7, 2021. Claimant Rex K. Smith appeared and represented himself *pro se*. Rachael M. O'Bar, of the firm Bowen and Bailey, appeared and represented Defendant Employer Integrow Malt, LLC, and Defendant Surety Alaska National Insurance Corporation. The parties presented oral and documentary evidence at the hearing. They did not take post-hearing depositions; however, Defendants submitted a Post-Hearing Brief. The matter came under advisement on March 17, 2022.

ISSUES

The issues to be decided by the Commission as the result of the Notice of Hearing are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident.
2. Whether Claimant's condition is due in whole or in part to a preexisting and/or subsequent injury/condition.¹
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
 - c. Retraining; and
 - d. Permanent partial disability (PPD).

CONTENTIONS OF THE PARTIES

Claimant did not submit a Post-Hearing Brief, however at hearing he alleged that he is entitled to additional medical and income benefits beyond that which was paid on his accepted workers compensation claim. He further alleged that Surety's adjuster lied to him and "failed to pay the appropriate amounts."

Defendants contend that although Claimant believes he is entitled to additional medical care and income benefits, the medical records and evidence show that he is medically stable and there are no ongoing treatment recommendations. Defendants allege that the claim was appropriately adjusted, and that Claimant received appropriate time loss benefits from the time that surgery was recommended until he returned to work full time. Claimant received time loss benefits from July 2017 until March 2018, and Surety covered his surgical care in the form of left shoulder surgery. Defendants contend that Claimant is not entitled to further time loss benefits, and no permanent impairment has been assigned, thus no permanent partial disability is

¹ Defendants' Post-Hearing Brief did not address this issue; thus it is deemed waived.

owed either. In any event, Claimant has been assigned no work restrictions that would support an award of permanent disability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Commission's legal file;
2. The transcript of the hearing held on October 7, 2021; and
3. Defendants' Exhibits 1 through 22 (DE), admitted at the hearing.

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

FINDINGS OF FACT

1. **Claimant's Background.** At the time of hearing, Claimant was 64 years of age, having been born on February 1, 1957, in Rexburg, Idaho. Claimant graduated from Rexburg High School, and thereafter graduated from Brigham Young University with a degree in marketing. He subsequently received a degree in finance and an associate degree in mechanical engineering. He also obtained several certifications in networking CCNA, and MCSD. He did not serve in the military. Tr., 10:23-11:20.

2. **Prior Work History.** After receiving his engineering degree, Claimant worked as a technologist for an engineering firm in Utah, Collision Safety Engineering, for approximately 15 years. He also managed the company's pension plan. Thereafter, Claimant worked for Spiral Technologies, which later became Lucenta Technologies, where he provided support for computer networking and technology. Next, he worked for MAI Computers, where he performed network sales for networking equipment. Claimant then worked as a consultant with security for a company, later forming a consulting firm of his own with other colleagues doing consulting for

Cadence Design Systems and IBM. After working in his own consulting firm for a year and a half, Claimant moved back to Idaho from Utah to assist his father. Tr., 11:21-12:15.

3. **Subject Employment.** After returning to Idaho, Claimant went to work at G Modelo Agrícola, the predecessor to Integrow Malt, Employer in this action, in 2005. He continued working for the company after it changed entities. His job title was warehouse coordinator, managing parts coming in and out of the facility and managing shipping and receiving. He also had responsibility for accounting. Claimant would take care of repairing motors, getting parts replaced, and ensuring that everything was ordered, so that the barley malt manufacturing plant could function. The business of Employer was to acquire barley and process it through a malting operation, which ultimately was used in the production of beer. *Id.* at 12:14-14:8.

4. **Industrial Accident.** On February 24, 2017, Claimant was in a meeting with the plant supervisor and plant manager. After that, at approximately 6:00 p.m., Claimant left the plant to go out to his truck. The parking lot was “incredibly slick.” Claimant arrived safely at his pickup truck, but when he went to get into it, he slipped and fell down. He then got up and drove his pickup truck across the street to clock out. He recalls that the plant supervisor Mike Tsamis was there, and Claimant told him that he had slipped and fallen in the parking lot. Claimant initially thought he had injured his left elbow. His hip was also bruised. Later he discovered that he needed rotator cuff surgery on his left shoulder and also believed that he had slipped a disk in his back. *Id.* at 14:15-15:21; DE 1 (First Report of Injury).

5. **Prior Medical Care.** In the years immediately prior to the industrial accident, Claimant received medical evaluation and treatment for the following conditions: fatty liver,

diabetes 2, alcohol use, high cholesterol, high blood pressure, GERD, insomnia, depression, low back pain, and left shoulder concerns as discussed below. DE 2.

6. Beginning in February 2016, Claimant received treatment and evaluation for his nonindustrial left shoulder pain, which he reported had worsened over the last two years. An MRI on March 3, 2016, showed a full thickness tear of the supraspinatus tendon; high grade tear of the distal tendon; and a labral tear. Claimant received a diagnosis of impingement syndrome with full thickness rotator cuff tears. Dr. Gregory Biddulph of Idaho Falls performed rotator cuff arthroscopic surgery on Claimant's left shoulder on May 5, 2016 at Mountain View Hospital. DE 3.

7. **Post-Industrial Accident Medical Care.** Claimant first sought treatment for his industrial injury at RediCare in Idaho Falls on March 11, 2017. DE 5:140. Redicare referred Claimant back to his prior surgeon, Dr. Biddulph. *Id.*

8. Claimant's workers compensation claim was accepted, and on March 29, 2017, Claimant presented to Dr. Biddulph for evaluation. DE 3:112. Dr. Biddulph noted the history of Claimant's previous rotator cuff repair and noted further that Claimant had fallen on the ice on his left shoulder and elbow on March 3, 2017.² *Id.* Dr. Biddulph observed that Claimant received an examination at another clinic, RediCare, about ten days after the accident. Claimant had no bruising or swelling left over from the initial fall. *Id.* at 113. Dr. Biddulph diagnosed left elbow contusion, and new left shoulder pain suspicious of derangement. *Id.* at 114. The recommendation was for Claimant to have an MRI arthrogram of his left shoulder. *Id.*

² Claimant did not notify Employer that he was seeking treatment through Dr. Biddulph and Employer did not direct his care by Dr. Biddulph for this visit. Additionally, Dr. Biddulph got the date of the accident wrong – it was February 24, 2017, not March 3, 2017.

9. On April 6, 2017, the MRI results revealed a new, full-thickness rotator cuff tear and AC joint irritability. DE 3:116. Dr. Biddulph recommended conservative care in the form of physical therapy, with a back-up recommendation of arthroscopic surgery. Claimant was no longer complaining of elbow pain, which apparently had resolved. *Id.* at 119-122.

10. Claimant returned to Dr. Biddulph on June 6, 2017 for continuing evaluation of his left shoulder injury. He reported that PT offered him some relief, but he still had left shoulder pain, with about 5% improvement. Claimant was ready to proceed with arthroscopic surgery of the left shoulder. Dr. Biddulph recommended proceeding with arthroscopic surgery with rotator cuff repair and distal clavicle excision and scheduled the surgery for July 6, 2017 at Mountain View Hospital. *Id.* at 125. Meanwhile, Surety approved the surgery and TTD benefits were initiated. DE 21.

11. When Claimant reported for surgery on July 6, 2017, the anesthesiologist cancelled the surgery because Claimant had elevated blood sugar levels due to his diabetes being uncontrolled. His blood sugars were averaging 400 to 500. Incidentally, TTD benefits were discontinued when the surgery was cancelled. In an office visit on August 16, 2017, with Dr. Biddulph, the treatment plan was for Claimant to get his blood sugars under control and to continue with PT. Claimant was released to return to work full time with no use of the left upper extremity. *Id.* at 127-130. Pursuant to this work restriction, TTD benefits were resumed. DE 21.

12. Claimant moved to Missoula Montana, from Idaho Falls, Idaho, in or about July of 2017. There was some delay in medical care with obtaining a new primary care provider and orthopedic specialist. *Id.*

13. In Missoula, Montana, Claimant established orthopedic care with Ravalli Orthopedics & Sports Medicine, where David Nolan, PA-C examined him on October 6, 2017.

PA Nolan reviewed medical records that Claimant brought with him. Although the disc with Claimant's MRI was corrupted, PA Nolan was able to read the corresponding report. He assessed the following: left RTC strain, left AC arthrosis, left shoulder pain, and left arm radiculopathy. He was uncertain whether the numbness and tingling Claimant was reporting was due to the industrial accident but was centered in the C8 and C7 nerve roots. PA Nolan noted that the exam was consistent with the MRI findings of left rotator cuff tear and left AC arthrosis/degeneration. Claimant expressed an interest in having his left shoulder repaired. PA Nolan explained that he would need to be seen first by Dr. Behm before the surgery could be scheduled. Meanwhile, Claimant's work status form was filled out to indicate no work with the left upper extremity. DE 8:227-229.

14. Claimant established general care at CostCare Direct in Missoula for his diabetes care. DE 10:279-280.

15. Claimant saw Gregory M. Behm, M.D., on October 30, 2017, for a pre-operative visit. *Id.* at 231-235. Dr. Behm opined that surgical intervention on Claimant's left shoulder was indicated. Claimant consented to the surgery. Dr. Behm indicated that Claimant could perform light duty, with no work above the left shoulder. *Id.* Dr. Behm's office requested approval for the surgery from Surety. *Id.* at 236-237.

16. Dr. Behm took Claimant to arthroscopic surgery at Steele Memorial Medical Center in Salmon, Idaho on November 30, 2017. The diagnoses were as follows: left shoulder recurrent rotator cuff tear; left biceps tendon strain; status post left shoulder arthroscopy; and shoulder impingement syndrome. The operative procedures performed were as follows: arthroscopic rotator cuff re-repair; arthroscopic biceps tenodesis; arthroscopic limited debridement; and arthroscopic subacromial decompression. Claimant experienced no

complications. For indications, Dr. Behm noted as follows: Claimant “is a 60-year-old gentleman who had a previous repair done by Dr. Biddulph in Idaho Falls. Unfortunately, he had a reinjury and was scheduled for surgery with Dr. Biddulph but ended up having the surgery cancelled because his blood sugar was out of control. His blood sugar is much better controlled now, and he was brought to the operating room today for the above procedure.” DE 8:242-244.

17. Dr. Behm anticipated medical stability within eight months of the surgery. *Id.* at 247-249. The records of Dr. Behm and Claimant’s PT provider show progressive postoperative recovery. DE 7:196-223. On December 27, 2017, Claimant was released from the requirement to use a left-arm sling. DE 8:251. He received a light duty work release on January 22, 2018. *Id.* at 252-253. Dr. Behm was “thrilled” to see Claimant’s motion of his upper left extremity upon examination. *Id.* At the February 19, 2018, follow-up appointment, Claimant was “doing well.” Dr. Behm indicated that “he can lift whatever he is comfortable with his arm by his side” but he still had a 5-pound lifting limitation with his arm away from his body. Claimant was continued in PT. *Id.* at 254. On April 2, 2018, Dr. Behm was “really pleased to see Mr. Smith doing so much better.” *Id.* at 256.

18. On May 14, 2018, Dr. Behm noted that at “this point I think Mr. Smith is doing so well that we can release him.” It was no longer necessary for Claimant to attend PT, as long as he did his home exercises. *Id.* at 260. Claimant was released from care with no impairment and no work restrictions. *Id.*

19. **Post-Industrial Accident Employment.** Employer terminated Claimant’s employment for alleged cause on March 14, 2017. DE 12:335 (notice of termination).

20. Claimant’s next employment was for H&R Block from in or about December 2017 through 2021. In this job he performed seasonal tax preparation work. Tr., 40:2-18. The

work was sedentary, with no physical demands beyond sitting at a computer and talking to customers on the phone. Tr., 34:18-21.

21. On or about July 14, 2021, Claimant began working full-time as a night stocker for Lowe's Home Improvement. His initial wage was \$15.32 per hour. His work duties required him to lift 70-80 pounds regularly. He was working this job at the time of hearing. *Id.* at 40:21-24; 41:11-13.

22. **Temporary Disability Benefits.** Claimant received payment of temporary total disability benefits from Surety for the following biweekly time periods: July 6 through July 15, 2017; August 18 through September 16, 2017; September 17 through September 30, 2017; October 1 through October 14, 2017; October 15 through October 28, 2017; October 29 through November 11, 2017; November 12 through November 25, 2017; November 26 through December 9, 2017; December 10 through December 23, 2017; December 24, 2017 through January 6, 2018; January 7 through January 20, 2018; January 21 through February 3, 2018; February 4 through February 17, 2018; February 18 through March 3, 2018; and March 4 through March 17, 2018. DE 20:570-576.

23. **Medical Benefits.** Surety paid medical benefits on Claimant's behalf related to the industrial injury to his left shoulder, including surgery, from April 17, 2017, through July 12, 2018. *Id.*

DISCUSSION AND FURTHER FINDINGS

24. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however,

need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992). A worker's compensation claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934 (1993). Uncontradicted testimony of a credible witness must be accepted as true, unless that testimony is inherently improbable, or rendered so by facts and circumstances, or is impeached. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937).

25. **Causation; Additional Medical Care.** Claimant carries the burden of proving causation. *Serrano v. Four Seasons Framing*, 157 Idaho 309, 317, 336 P.3d 242, 250 (2014) (quoting *Duncan v. Navajo Trucking*, 134 Idaho 202, 203, 998 P.2d 1115, 1116 (2000)). "The proof required is 'a reasonable degree of medical probability' that the claimant's 'injury was caused by an industrial accident.'" *Id.* (quoting *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)). Put another way, the "claimant has the burden of proving a probable, not merely a possible, causal connection between the employment and the injury or disease." *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 332, 179 P.3d 288, 295 (2008) (quoting *Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995)). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Estate of Aikele v. City of Blackfoot*, 160 Idaho, 903, 911, 382 P.3d, 352, 360 (2016) (quoting *Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). "The Commission may not decide causation without opinion evidence from a medical expert." *Serrano*, 157 Idaho at 317, 336 P.3d at 250 (quoting *Anderson*, 143 Idaho at 196, 141 P.3d at 1065).

26. 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. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). Where there is both a positive and a negative diagnosis between two qualified doctors, the fact finder may examine the methodologies of both physicians to determine which physician is more credible. *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 759, 302 P.3d 718, 727 (2013). It is the role of the Commission to determine the weight and credibility of testimony and resolve conflicting interpretations of testimony. *Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 565, 130 P.3d 1097, 1103 (2006).

27. At hearing, Claimant was asked “what are the current medical benefits you are seeking that are related to the industrial injury?” Tr., 18:14-16. Claimant responded that “there were payments for massage therapists and for chiropractic care. There is payments for MRIs... And for any additional medical treatment needed.” *Id.* at 18:17-21. Claimant’s testimony in this regard appears to refer to care/evaluation he received for his back following his release by Dr. Behm.

28. However, the record is devoid of any evidence connecting or linking the need for such care to the subject accident, because the medical evidence does not establish that Claimant’s back condition, if extant, is causally related to the accident of February 24, 2017. As noted above, Claimant carries the burden of proving causation. What the record shows is that Dr. Behm, after engaging in the covered arthroscopic surgery of Claimant’s left shoulder, released Claimant from care on May 14, 2018, without any further opinion for treatment recommendations, nor did Dr. Behm refer Claimant to any other physician for additional treatment of any industrially related condition. Furthermore, Dr. Behm released Claimant from care without any work restrictions or assigned impairment.

29. Claimant has completely failed to produce any medical evidence that relates additional medical care to which he believes he is entitled to the industrial accident, or medical evidence that shows that any additional medical care is reasonable as determined by a physician. The evidence shows, rather, that Claimant is medically stable as to his left shoulder injury sustained in the industrial accident, for which medical expenses have been reasonably paid by Surety. The evidence shows that Surety reasonably adjusted the claim, paying for all reasonable and necessary medical treatment related to the industrial accident. While Claimant did receive care/evaluation for his back following his release by Dr. Behm, there is no evidence relating Claimant's back condition to the subject accident.

30. In conclusion, Claimant has failed to prove causation in the matter of any unreimbursed medical expenses.

31. **Temporary Disability Benefits (TPD/TTD).** Idaho Code § 72-408 provides in pertinent part that temporary income benefits shall be paid during an injured worker's period of recovery. Claimant has the burden of proving that he is still in a period of recovery from any industrially related condition, based upon medical evidence, and the extent and duration of the disability to recover temporary disability benefits. *Sykes v. C.P. Clare and Co.*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980).

32. Here the evidence shows that Claimant received TTDs during his period of recovery, including surgery, up until he returned to work full time. Claimant has provided no evidence that he remained in a period of recovery beyond May 14, 2018, the date of his release by Dr. Behm, nor has he presented any evidence whatsoever that he was temporarily disabled past his period of recovery.

33. In conclusion, the record supports a finding that Claimant is not entitled to an award of any further temporary disability benefits beyond those already paid by Surety.

34. **Permanent Partial Impairment (PPI).** “Permanent impairment” is “any anatomic or functional abnormality or loss after maximum medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation.” Idaho Code § 72-422.

35. No physician has evaluated Claimant for permanent impairment as a result of the industrial accident. His treating surgeon, Dr. Behm, released Claimant from his care on May 18, 2018 without opining as to PPI.

36. Based upon the lack of any medical evidence as to permanent impairment, Claimant is entitled to no award of PPI.

37. **Permanent Partial Disability.** ““Permanent disability” or “under a 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. Without permanent impairment, there can be no permanent disability as “there must be impairment for disability to exist.” *See, Urry v. Walker and Fox Masonry Contractors*, 115 Idaho 750, 753, 769 P.2d 1122, 1124 (1989).

38. As noted above, no physician including Dr. Behm assigned Claimant any impairment as a result of his industrial injury. Therefore, according to Idaho Code § 72-423 and the *Urry* case, *Id.*, because there is no impairment, there is no permanent disability in this case either.

39. Furthermore, even if Dr. Behm had assigned Claimant permanent impairment, he did not assign Claimant any work restrictions. Without any functional loss of his ability to work,

Claimant has no disability as a result of the industrial accident. On the contrary, the evidence shows that as of the time of hearing, Claimant was working a medium to heavy job for Lowe's full time, lifting weights in the range of 70 to 80 pounds regularly. Under these circumstances, Claimant is not disabled.

CONCLUSIONS OF LAW

1. Claimant has failed to prove a causal connection between the industrial accident and any alleged unpaid medical expenses.

2. Claimant has failed to prove that any unreimbursed medical expenses are reasonable or necessary.

3. Surety correctly paid Claimant for temporary disability benefits due and owing during his period of recovery. Claimant is not entitled to payment of any further TTD/TPD benefits.

4. No physician has opined that Claimant is entitled to permanent impairment; therefore Claimant is not entitled to payment of PPI benefits.

5. As there is no permanent impairment in this case, Claimant is also not entitled to payment of permanent disability benefits. Claimant is further not entitled to disability benefits because he has no permanent work restrictions demonstrating a functional loss of his working capacity.

RECOMMENDATION

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

DATED this 28th day of March, 2022.

INDUSTRIAL COMMISSION

John C. Hummel

John C. Hummel, Referee

ATTEST:

Shannon Carver
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2022, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail and Electronic mail upon each of the following:

REX K. SMITH

[REDACTED]

RACHEL M. O'BAR
BOWEN & BAILEY
P.O. BOX 1007
BOISE, ID 83701-1007
robar@bowen-bailey.com

Shannon Carver