BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ELEUTERIO COLUNGA Claimant, v. OFF-SPEC SOLUTIONS, LLC, Employer, and NATIONAL INTERSTATE INSURANCE CO., Surety, Defendants.	**IC 2018-033881** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **FILED** **JANUARY 17, 2025** **IDAHO 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 November 21, 2023. Clinton Miner represented Claimant through the time of hearing.[1] Andrew Adams appeared for Claimant after the post-hearing deposition of Dr. Hessing was completed. Mr. Adams briefed the case for Claimant. Michael McPeek represented Defendants throughout the proceedings. The parties produced oral and documentary evidence at hearing and submitted post-hearing briefs. One post-hearing deposition was taken. The matter came under advisement on December 19, 2024.

[1] After the hearing but before a briefing schedule was adopted, Mr. Miner lost his license to practice law in Idaho. Mr. Miner did not appear for the post-hearing deposition of Dr. Hessing.

ISSUES

The parties agreed to the following issues for this adjudication:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;

2. Whether Claimant's condition was due in whole or in part to a preexisting condition or injury;

3. Whether and to what extent Claimant is entitled to the following benefits:

    a. Medical Care;
    b. Temporary partial and/or temporary total disability (TPD/TTD);
    c. Disability based on medical factors, commonly known as permanent partial impairment (PPI);
    d. Permanent partial disability (PPD); and

3. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate.

CONTENTIONS OF THE PARTIES

On December 1, 2018, Claimant, while working for Employer, injured his right shoulder when a heavy pallet of milk containers fell on him. A subsequent MRI showed severe preexisting damage and tears within the structures of Claimant's right shoulder and bicep. However, Claimant testified he had not experienced any pain, limitations of movement, or work restrictions associated with his right shoulder prior to the industrial accident in question. Claimant further testified he has experienced continual pain and severe lack of mobility with his right shoulder since the accident. While the preexisting damage is not repairable, eventually Claimant will need a reverse total shoulder surgery. Dr. Hessing gave Claimant a 2% upper extremity permanent disability rating for the accident-related injuries, thus proving there was permanent aggravation to Claimant's preexisting right shoulder condition. Because Claimant was asymptomatic prior to this accident, he argues he is entitled to ongoing treatment, including surgery, for his right shoulder which was permanently aggravated by the work accident of December 1, 2018.

Defendants acknowledge the accident. They point out that Dr. Hessing has repeatedly, both in his medical records/IME report and his deposition, maintained that Claimant's work accident produced no more than a contusion and strain, which healed with time. Dr. Hessing unequivocally found no permanent work restrictions were necessary and Claimant could return to his time-of-injury employment. Claimant produced no medical testimony or evidence to rebut Dr. Hessing's medical opinions, and as such Claimant has failed to carry his burden of proof on causation. Claimant is not entitled to any further benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;

2. Joint exhibits (JE) 1 through 27 admitted at hearing; and

3. The post-hearing deposition transcript of Jeffrey Hessing, M.D., taken on January 9, 2024.

FINDINGS OF FACT

1. Claimant was born in 1962 in Mexico. He attended school there up to the sixth grade. He then began working, first in Mexico and later in the United States (since 1980). He has held a variety of manual labor jobs during his lifetime.

2. Claimant testified he obtained his CDL and began driving trucks in 2014. He drove truck for several years prior to obtaining employment with Employer.

3. Claimant began working for Employer in September 2018, driving a truck between Nampa and Utah. On the trip to Utah he and a co-driver hauled bread. Once delivered, they would pick up pallets of milk to be delivered to various sites.

4. On the day of the accident, December 1, 2018, Claimant and his co-worker had picked up pallets of milk in Murray, UT and were to unload a pallet in Layton, UT. While unloading the pallet of milk Claimant fell from the loading ramp onto a scissor lift approximately 5 feet below the ramp. The pallet fell on him, pinning him under the load, which he testified weighed 520 pounds in addition to the weight of the pallet dolly. Claimant could not extricate himself and was having trouble breathing. Fortunately, workers at the facility came to his rescue.

5. Claimant was taken by ambulance to the Ogden Regional Medical Center where he was seen for blunt trauma injury to his abdomen and chest. Claimant also complained of right shoulder pain at the time. He was treated and released the same day.

6. Upon his return to Idaho Claimant sought treatment at St. Al's Occupational Medicine for his right shoulder pain. He was initially diagnosed by orthopedic surgeon Michael Shevlin, M.D. as having a right AC joint separation, type 3. Conservative treatment was suggested, with a two-week follow up visit scheduled.

7. Claimant saw Dr. Shevlin again on December 19, 2018, wherein an MRI arthrogram was recommended to address Claimant's ongoing shoulder complaints.

8. Prior to obtaining the MRI, Claimant was seen on December 28, 2018, by orthopedic surgeon Jeffrey Hessing, M.D. at Surety's request. The MRI was performed shortly thereafter, on December 31.

9. After examining Claimant and the medical records since the date of the accident, Dr. Hessing authored a detailed report. Therein he noted Claimant exhibited magnified pain behaviors throughout the examination, giving specific instances to support his findings. He also noted Claimant felt his shoulder would "lock up" at several points during the examination but Dr. Hessing found no evidence of such. Dr. Hessing noted Claimant complained of such

excruciating pain during his initial visit with Dr. Shevlin that the doctor was unable to perform an adequate shoulder examination secondary to Claimant's pain complaints. Dr. Hessing disagreed with the diagnosis of shoulder separation, noting Claimant's elevated distal clavicle was actually due to *bilateral* enlarged hypertrophic distal clavicles, with no significant difference in presentation between his right and left shoulders.

10. Dr. Hessing opined that Claimant had "sustained a contusion to the posterior aspect of the rotator cuff and deltoid" of his right shoulder in the accident. JE 5, p. 40. Dr. Hessing did not believe Claimant had a significant AC joint separation or new full thickness cuff tearing, but he did not rule out a labral tear. He too felt an MRI arthrogram was appropriate.

11. The MRI was performed on December 31, 2018. On January 2, 2019, Claimant again saw Dr. Hessing in follow up to review the findings. Claimant was informed the MRI showed full thickness widely retracted chronic tearing of both the infraspinatus and supraspinatus rotator cuff tendons. These findings evidenced old injury which predated the accident in question and could be years old. Additionally, due to the age of the tears, they were not repairable.

12. Dr. Hessing reiterated his accident-related diagnosis was "most likely a contusion to the posterior deltoid and infraspinatus portions of the rotator cuff about the shoulder." *Id.* at 42. Dr. Hessing felt the contusion should resolve within a few weeks.

13. Dr. Hessing noted Claimant continued to exhibit pain behaviors which were magnified and inconsistent with the examination findings. He recommended Claimant undergo a month of therapy to increase his right shoulder range of motion and increase strength. Dr. Hessing felt Claimant would need to be "pushed along" in his therapy.

14. In a letter dated January 3, 2019, Surety sent the MRI report to Dr. Shevlin with a summary of Dr. Hessing's opinion that the study showed injuries to Claimant's right shoulder

which predated the industrial accident. The letter also pointed out Dr. Hessing's opinion that Claimant had a contused right shoulder from the accident and attached a copy of Dr. Hessing's report. The letter also highlighted Dr. Hessing's proposal for physical therapy to return Claimant to baseline. The letter concluded with a request that if Dr. Shevlin agreed with Dr. Hessing's findings, conclusions, and recommendations for therapy, he schedule Claimant for physical therapy, and if he disagreed with Dr. Hessing, he schedule an office visit with Claimant on an expedited basis. Dr. Shevlin agreed with Dr. Hessing and so informed Surety on January 10, 2019.

15. Dr. Shevlin saw Claimant on January 14, 2019, and reviewed the MRI findings with him. Dr. Shevlin noted the chronic rotator cuff tear with atrophy and a longitudinal split tear of his bicep tendon. The MRI showed no acute injury. Dr. Shevlin prescribed physical therapy after diagnosing Claimant with a right shoulder contusion.

16. In follow up visits with Dr. Shevlin over the next several months, Claimant continued to complain of pain and lack of range of motion despite physical therapy and cortisone injections. Finally, on March 25, 2019, Dr. Shevlin declared Claimant at MMI and released him to work without restrictions. Dr. Shevlin referred Claimant to another physician for a PPI rating.

17. The next day Claimant was seen by Dr. Hessing who gave Claimant a PPI rating. He calculated Claimant's permanent impairment at 4% upper extremity, with 50% allocated to Claimant's preexisting conditions and 50% to the accident in question. Dr. Hessing also released Claimant back to his time of injury employment without restrictions. Claimant was encouraged to continue with an exercise regimen to strengthen his rotator cuff. Dr. Hessing expressed his opinion that with exercise and time Claimant's "residual symptoms will settle down."

18. After being released by his physicians Claimant went to work doing drywall plaster, texture and patchwork for Tyler Drywall of Nampa. He testified the work was painful and he did as much as possible with his left hand.[2]

19. Claimant quit his employment with Tyler Drywall in December of 2019. He began working for T Bird, Inc. of Nampa shortly thereafter. His duties included operating a cement truck. In March of that year Claimant injured his left shoulder when he fell over a four-inch pipe while running the equipment. Subsequently he underwent two surgeries on his left shoulder.

20. In August 2021 Claimant sought treatment at Terry Reilly Health Clinic (Terry Reilly) for chronic right shoulder pain. Physical therapy was recommended.

21. In April 2022 Claimant again presented to Terry Reilly for right shoulder pain. An MRI showed the longstanding full thickness retracted tear of the distal supraspinatus tendon.

22. As of August 2022, Claimant was employed by Rainey Brothers as a truck driver, hauling hay. He presented that month at Terry Reilly for right shoulder pain which came on after Claimant was pulling tarps off his load. A tarp stuck and when Claimant pulled harder to free the tarp he "felt something give" in his right shoulder. He was having trouble sleeping and was unable to move his shoulder.

23. Surety had Claimant examined by Dr. Hessing on February 8, 2023. Dr. Hessing reviewed the updated medical records since he had last seen Claimant in 2018. Again Dr. Hessing noted magnified pain behaviors and described specific instances of Claimant's inconsistent behavior. Dr. Hessing noted no instability in Claimant's right AC joint and felt it was identical to

[2] In the summer of 2019 Claimant suffered a crush injury to his right hand while working for Tyler Drywall. His injury occurred when he reached out with his right arm to catch scaffolding that had started to fall and got his hand caught between scaffolding bars, twisting his hand and injuring his right index finger. Defendants note that none of the medical or physical therapy records related to this injury mention any issues with Claimant's right shoulder.

his left shoulder. Dr. Hessing did note that Claimant had completely torn his proximal bicep since the doctor last saw him, giving Claimant a pronounced Popeye deformity. Dr. Hessing concluded that Claimant's December 1, 2018 accident was not the cause of his ongoing right shoulder problems. Instead, Claimant's complaints are the result of his preexisting "massive right shoulder rotator cuff tear and impingement syndrome associated with AC joint arthritis." JE 14, p. 207.

24. In that same report, Dr. Hessing reiterated to Claimant that his right shoulder injury from the industrial accident in December 2018 was only a "contusion and straining injury to the posterior aspect of the rotator cuff and deltoid." He went on to explain the contusion and strain caused only a "temporary exacerbation of Claimant's preexisting conditions." Claimant's more recent proximal biceps tendon issue was also not caused by the 2018 accident. *Id.*

25. In response to specific questions from Surety, Dr. Hessing indicated Claimant's work-related injury from the 2018 accident had "long ago" resolved by the time he saw Claimant in 2023. Claimant needed no further medical treatment related to his 2018 work accident and injury. While he might be a candidate for a reverse total shoulder replacement surgery, the need for such surgery (should Claimant elect to undergo it) was related to his preexisting conditions and "not for the effects of his December 1, 2018 accident." *Id.* at 208.

26. Dr. Hessing noted his PPI rating done in 2018 apportioned 2% upper extremity impairment to the effects of his work accident in question. In his next paragraph, Dr. Hessing stated "I do not believe [Claimant] has any permanent restrictions at work causally related to the effects of his December 1, 2018 accident and injury. *** [T]he effects of the [accident in question] caused a temporary exacerbation of his preexisting conditions [and have] resolved." *Id.* He went on to note that any limitations Claimant continued to experience were related to his preexisting conditions.

DISCUSSION AND FURTHER FINDINGS

CAUSATION FOR MEDICAL AND TEMPORARY DISABILITY BENEFITS

27. The first issue is whether Claimant has proven his current right shoulder condition was caused, in whole or in part, by the industrial accident of December 1, 2018. If it was, then he would be entitled to reasonable and necessary medical treatment for such injury. If it was not, then no such benefits are available to Claimant. *See, e.g., Williamson v. Whitman Corp./Pet, Inc.*, 130 Idaho 602, 944 P.2d 1365 (1997) (An employer is only obligated to provide medical treatment necessitated by the industrial accident and is not responsible for medical treatment not related to the industrial accident.)

28. Claimant must prove not only that he 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). Claimant also carries the burden to prove he is entitled to temporary disability benefits during his period of recovery after the proposed surgery. I.C. §§ 72–408, 72–423; *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005).

29. Claimant has the burden of proving the condition for which compensation is sought is causally related to an industrial accident. *Callantine v Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). Importantly, there must be evidence of medical opinion—by way of physician's testimony or written medical record—supporting the claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). No special formula is necessary when medical opinion evidence plainly and unequivocally conveys a doctor's conviction that the events of an industrial accident and injury are causally related. *See, e.g. Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375 (1997). Argument suggesting a causal link is not sufficient to satisfy

Claimant's burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 901 P.2d 511 (1995). The Commission may not decide causation without opinion evidence from a medical expert. *Anderson v. Harper's Inc.*, 143 Idaho 193, 141 P.3d 1062 (2006).

30. Defendants argue Claimant failed to present any expert medical testimony to establish a causal connection between his December 1, 2018 accident and his current shoulder condition. Dr. Hessing was the only physician to render opinions, and his opinions directly undercut Claimant's arguments for benefits.

31. The first step in deciding Claimant's right to additional medical benefits is to determine whether Claimant has, in the first instance, made a *prima facie* case for causation, which must be supported by medical evidence and/or opinion. In order to obtain such benefits, he must first present medical evidence to establish a causal link between his accident in question and his current condition.[3]

32. Citing to *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 34, 43 P.3d 788, 793 (2002) and *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 104, 666 P. 2d 629, 631 (1983), Claimant notes that "an employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim, *provided* the employment [accident] aggravated or accelerated the injury for which compensation is sought." (Emphasis added.) This, of course, is an axiom well known to worker's compensation attorneys. Unfortunately, it does little to advance Claimant's case.

[3] At hearing, Claimant's former counsel did not request a bifurcated hearing, but presented no evidence supporting a PPI rating beyond that given by Dr. Hessing, no evidence of contested past temporary benefits, and no testimony on the extent of Claimant's permanent partial disability. Mr. Adams did a valiant job of attempting to argue for such benefits in the absence of substantial evidence.

33. The caveat to the "employer-takes-employee as employer finds him/her" is that the accident must aggravate or accelerate, (or "light up") a previous condition, whether the condition is manifest or latent. Dr. Hessing admitted the accident in question "temporarily" aggravated Claimant's longstanding torn rotator tendon tears. Hessing depo. p. 29, (injury was just a temporary exacerbation of preexisting conditions). There is nothing in the record to suggest Defendants have not paid for Claimant's treatment associated with the temporary exacerbation.[4]

34. The issue is whether Claimant's work accident lit-up his previously latent preexisting condition and/or accelerated his need for surgery on his shoulder. That is an issue on which there must be medical evidence presented. It is not enough for Claimant to highlight the fact that his right shoulder, although seriously compromised, was asymptomatic and caused him no work or daily living limitations prior to the work accident in 2018, in stark contrast to his condition post-accident. He must present medical testimony that the work accident was at least a causative factor in his current need for surgery.

35. Claimant argues the present case is very similar to *Labbee v. Rush International Truck Center,* IIC 2014-026012 (January 10, 2020). Therein, the claimant had a preexisting substantial right shoulder condition. He suffered an admitted work injury to his right shoulder in 2014, which required a total shoulder replacement surgery. The issue was whether the surgery was due to the 2014 accident or the claimant's preexisting condition. In that case, Dr. Richardson and Dr. Wathne opined that Claimant's industrial accident aggravated his right shoulder condition and accelerated his need for shoulder replacement surgery. Dr. Faciszewski concluded

[4] Some physicians will use the term "exacerbation" to mean a temporary worsening of a condition, while "aggravation" is used when the worsening is permanent. However, this distinction is not universally used among physicians. Herein, it is clear that whether called an exacerbation or an aggravation, Dr. Hessing opined the increase in symptoms due to the work accident in question was caused by a soft tissue contusion and strain, and temporary in nature.

Claimant's 2014 industrial accident did not accelerate his need for total shoulder arthroplasty. The Commission sided with Drs. Richardson and Wathne.

36. While both the current case and *Labbee* involve a right shoulder injury superimposed on a preexisting condition, the similarities are negated by the crucial difference. In *Labbee* there were two physicians who testified to their opinions that the need for the claimant's total shoulder replacement surgery was due to his industrial accident and not the progression of his preexisting condition. In the instant case, no physician has opined that the need for Claimant's proposed surgery is due in whole or in part to his preexisting condition. Here, there is no weighing of opinions to consider. There is only Dr. Hessing, who has never expressed an opinion that the proposed surgery on Claimant's right shoulder would be due in whole or in part to his accident in question. The burden of proof requires such an opinion from a medical provider.

37. No doctor has directly testified that the work accident in question permanently aggravated Claimant's preexisting shoulder defects. No physician has stated in testimony or records that Claimant's current need for surgery is in any way related to his work accident of 2018. Dr. Hessing, both in writing and under oath in deposition, has stated the opposite, that the accident did not permanently aggravate Claimant's preexisting condition or provide a basis for his right shoulder surgery should he choose to pursue such treatment. However, that is not the end of the analysis.

38. While Claimant tacitly acknowledges he has no doctor who has gone on record to overtly support his claim to medical (and disability) benefits, he argues Dr. Hessing has in fact impliedly done so. The argument, contained only in Claimant's reply brief, argues that "Dr. Hessing's opinion on impairment *supports the idea* that the last accident accelerated Claimant's condition to 'produce the disability' for which compensation is sought." Cl. Reply Brief, p. 5. (Emphasis added.) Claimant's argument is that by assigning a permanent impairment

rating to the December 1, 2018 accident, Dr. Hessing is admitting, without saying, that Claimant indeed suffered a *permanent* "anatomic or functional abnormality" (as defined in I.C. §72-422) as the result of the accident in question. If, as Dr. Hessing testified, Claimant's only injury was a temporary contusion and strain, there would be no basis for an award of permanent impairment benefits. Instead, the argument continues, that whatever permanent anatomical or functional abnormality was caused by the accident, it was the "straw that broke the camel's back and led to or accelerated the need for Claimant's surgery.

39. There is no denying that the assignment of a permanent impairment rating runs contrary to Dr. Hessing's stated opinions that the work accident caused no permanent injury to Claimant and would not be a contributing factor in his need for shoulder surgery. The question is what weight to assign to the doctor's decision to provide Claimant a permanent impairment rating due to his injuries stemming from the accident in question.

40. The undersigned draws guidance from the Idaho Supreme Court's language in Jensen *v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001), when it noted "magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; *only their* ***plain and unequivocal testimony*** *conveying a conviction that events are causally related*." (Emphasis added.) Dr. Hessing never provided any plain and unequivocal testimony supporting a causal connection between Claimant's current condition and the work accident in question. In fact, he did just the opposite.

41. Unfortunately, defense counsel did not take the time to adequately clear up this inconsistency during Dr. Hessing's deposition, and Claimant did not have an attorney there to represent his interest, as Mr. Miner abandoned Claimant prior to the deposition. So, the parties and the undersigned are left with this inconsistency.

42. Looking at the action of Dr. Hessing in providing a rating, it cannot be argued in good faith that such action is tantamount to ***plain and unequivocal testimony*** conveying a conviction that Dr. Hessing shared a belief that Claimant's work accident played a part in his need for right shoulder surgery.

43. Whether or not Claimant failed to make a *prima facie* case for causation is academic. If he did fail, then his claim for continued benefits fails. If he succeeded in making a *prima facie* case by utilizing Dr. Hessing's actions in assigning a permanent impairment rating to Claimant, then such *prima facie* case is heavily outweighed by Dr. Hessing's repeated and unequivocal written and oral opinions under oath that there is no causal link between Claimant's work accident in 2018 and his current right shoulder condition.

44. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that his right shoulder condition was caused in whole or in part by the industrial accident of December 1, 2018.

45. Because Claimant has failed to prove his right shoulder condition was caused in whole or in part by his industrial accident of December 1, 2018, he has likewise failed to prove his claim for future medical treatment, including surgery, for his right shoulder.

46. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence his entitlement to future medical care for his right shoulder.

47. Because Claimant has failed to prove his entitlement to future medical treatment for his right shoulder, he has likewise failed to prove his entitlement to temporary disability benefits during his time of recovery from such surgery.

48. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence his entitlement to temporary disability benefits during his period of recovery from any right shoulder surgery he chooses to undergo.

PERMANENT PARTIAL IMPAIRMENT BENEFITS

49. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and other activities. The Commission can accept or reject the opinion of a physician regarding impairment. *Clark v. City of Lewisto*n, 133 Idaho 723, 992 P.2d 172 (1999). The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 769 P.2d 1122 (1989).

50. Claimant argues Dr. Hessing was incorrect to apportion PPI benefits when Claimant was asymptomatic prior to the December 1, 2018 industrial accident. He claims Dr. Hessing's rationale for apportionment was arbitrary and not scientific. However, Claimant cites to no authority that such a methodology is legally insufficient. There is no countervailing opinion. In fact, Claimant, having failed to prove a permanent element to his work injury, is not entitled to PPI benefits had they not been paid previously. If no such PPI benefits have been paid to date, none are due now. If the benefits were paid, what was done was done. However, the argument that Claimant should receive an additional 2% PPI, (assuming PPI benefits were paid on the apportioned amount), when he was entitled to no PPI benefits in the first place, carries no weight. Additionally, there is no medical testimony supporting an unapportioned 4% UE PPI rating. Here, Claimant has no medical opinion supporting a 4% UE PPI rating.

51. For the reasons listed above, Claimant has failed to prove an entitlement to a 4% UE PPI rating.

52. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to a permanent partial impairment benefits over the amount previously paid, if any.

PERMANENT PARTIAL DISABILITY BENEFITS

53. 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. (Emphasis added.)

54. All providers who treated Claimant for his right shoulder industrial injury released him to time-of-injury employment with no restrictions for injuries sustained in the subject industrial accident. With no work restrictions Claimant is not entitled to permanent partial disability benefits. As noted above, disability only results when the claimant's ability to engage in gainful activity is reduced or absent because of permanent impairment. Furthermore, Claimant has failed to prove he suffered any permanent injury from the accident in question. He cannot be permanently disabled by a temporary injury. *See, e.g. Smith v. State of Idaho, Industrial Special Indemnity Fund*, 165 Idaho, 443 P.3d 178 (2019).

55. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent partial disability benefits as the result of the work accident of December 1, 2018.

APPORTIONMENT UNDER IDAHO CODE § 72-406

56. Defendants have argued for apportionment under Idaho Code § 72-406. Idaho Code § 72-406 allows a deduction for preexisting injuries in cases where a claimant has suffered less than total permanent disability, when the disability resulting from the industrial accident is increased or prolonged because of the preexisting physical impairment. In the absence

of permanent disability in excess of PPI, apportionment under Idaho Code § 72-406 is inapplicable.

57. The issue of apportionment under Idaho Code § 72-406 is moot.

CONCLUSIONS OF LAW

1. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that his right shoulder condition was caused in whole or in part by the industrial accident of December 1, 2018.

2. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence his entitlement to future medical care for his right shoulder.

3. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence his entitlement to temporary disability benefits during his period of recovery from any right shoulder surgery he chooses to undergo.

4. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to a permanent partial impairment benefits over the amount previously paid, if any.

5. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent partial disability benefits as the result of the work accident of December 1, 2018.

6. The issue of apportionment under Idaho Code § 72-406 is moot.

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 9th day of December, 2025.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of _____, 2025, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** 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

ELEUTERIO COLUNGA Claimant, v. OFF-SPEC SOLUTIONS, LLC, Employer, and NATIONAL INTERSTATE INSURANCE CO., Surety, Defendants.	**IC 2018-033881** **ORDER** FILED JANUARY 17, 2025 IDAHO 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 record is considered, Claimant has failed to prove by a preponderance of the evidence that his right shoulder condition was caused in whole or in part by the industrial accident of December 1, 2018.

2. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence his entitlement to future medical care for his right shoulder.

3. When the totality of the evidence is considered, Claimant has failed to prove by a preponderance of the evidence his entitlement to temporary disability benefits during his period of recovery from any right shoulder surgery he chooses to undergo.

4. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to a permanent partial impairment benefits over the amount previously paid, if any.

5. When the totality of the record is considered, Claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent partial disability benefits as the result of the work accident of December 1, 2018.

6. The issue of apportionment under Idaho Code § 72-406 is moot.

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

DATED this the 17th day of January, 2025.

INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White, Commissioner

Thomas E. Limbaugh, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of January, 2025, 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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