

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NEFTALI ORTEZ MEJIA,

Claimant,

v.

CS BEEF PACKERS, LLC,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Surety,
Defendants.

I.C. 2020-024936

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

**FILED JANUARY 23, 2025
IDAHO INDUSTRIAL COMMISSION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee John Hummel, who conducted a hearing in Boise, Idaho on April 11, 2024. Claimant, Neftali Ortiz Mejia, was present in person; Britney D. Ocampo, of Mossman Law Offices, represented him. James A. Ford, of Elam & Burke, was present and represented Defendants, Employer CS Beef Packers, LLC, and Surety American Zurich Insurance Company. The parties conducted post-hearing depositions and submitted briefs. The matter came under advisement on December 16, 2024.

ISSUES

1. Whether Claimant is entitled to Permanent Partial Impairment (PPI); and
2. Whether Claimant is entitled Permanent Partial Disability (PPD).

CONTENTIONS OF THE PARTIES

This was an accepted claim; Surety paid medical, TTD and PPI benefits to Claimant.

Claimant developed left shoulder pain in or about March 2020 while working for

Employer at its beef processing plant in Kuna, Idaho. He underwent left shoulder surgery in or about May 2021. Dr. Hessing, Claimant's surgeon, released Claimant back to work with no restrictions and a 5% upper extremity impairment. Claimant received an IME evaluation from Dr. Neilson, who assigned permanent work restrictions and a 7% upper extremity impairment.

Claimant argues that he is entitled to the additional impairment as found by Dr. Neilson, and permanent partial disability of 60.1 %.

Defendants submit that Claimant was appropriately paid 5% upper extremity impairment as found by Dr. Hessing and that he is not entitled to any disability in excess of impairment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The deposition of Claimant taken on October 17, 2023;
3. The transcript of hearing of April 11, 2024;
4. Joint Exhibits 1 through 70, with the exception of Exhibit 40 which was excluded;
5. The post-hearing deposition of Michael Keith Neilson, M.D., taken on May 20, 2024;
6. The post-hearing deposition of Jeffrey G. Hessing, M.D., taken on June 27, 2024;
7. The post-hearing deposition of Delyn D. Porter, M.A., CRS, CIWCS, taken on August 7, 2024; and
8. The post-hearing deposition of Broc Thomas Woodrow Draney, taken on August 23, 2024.

FINDINGS OF FACT

1. **Claimant's Background.** Claimant was born on October 7, 1967, in El Salvador

and was 57 years old at the time of hearing. At age 18 or 19, he moved to the United States. He first moved to Massachusetts. He moved to Idaho in 1990. He received four or five years of grade school education while in El Salvador. He received no further education in the United States. He is a Spanish speaker and cannot read, write or speak fluently in English. At the time of hearing, he resided in Caldwell, Idaho. Tr., 22:6-23:20.

2. **Work History.** Prior to working for Employer, Claimant was employed in a number of different positions, primarily in agricultural food processing. While living in Massachusetts after moving from El Salvador, he worked in a restaurant for two to three years. He began his career in Idaho in meat cutting for Conagra in 1990. His position was that of a clod puller. His job with Conagra ended in or about 1998. After that, he worked for Kit Manufacturing building mobile homes. After two years, he went to work for Simplot cutting meat. That position lasted four years. He then worked for Sweet Company, also cutting meat. He then worked for Gale Construction, starting in cleaning and working his way up to welder. From Gale, Claimant went to XL cutting meat for about two years. Next, he worked for American Appetizers processing onions. He next worked for a heating and cooling business installing parts in machines. He then went back to Kit Manufacturing for three months and thereafter for Guho Construction. He then went to work as a clod puller for Employer. Tr., 24:14-30:13.

3. Prior to working for Employer, Claimant made nine claims for workers' compensation benefits. Ex. 46.

4. **Subject Employment.** Employer operates a beef processing plant in Kuna, Idaho. The plant includes facilities for cattle slaughtering, beef processing and meat packaging. Tr., 77:1-5.

5. Employer hired Claimant in the position of clod puller, which involves repeatedly

pulling down with the left hand on a partial beef carcass with about 45 pounds of force from an overhead position every 10-15 seconds. The worker pulls the “clod” from the bone. The worker uses both a knife and a hook in the clod pulling process. The process begins when a quarter of beef comes down the line. The worker puts a hook into the carcass and uses a knife to cut pieces off. Ex. 58.01; Tr., 31:12-32:17; Tr., 53:12-54:21.

6. The position of clod puller is on the “chuck” line. The meat being processed consists of the forequarters of the cow. Tr., 82:3-15. The process is as follows:

Q. Is there a position on the chuck line identified by the term clod puller or pulling clods?

A. Yes.

Q. Explain what this position is.

A. Okay. So this position is the start of the chuck line where you have a forequarter of an animal. And it is the beginning of the breakdown process. You are using a hook and knife to cut the pieces of beef off of the bone along the chain. Which then drops them down onto a belt. So you are working face-to-face cutting stuff down and onto a belt so they can go down the line.

Q. And what is actually involved in the process? You say there is a hook and a knife. Explain how those are used?

A. So you got your piece hanging in front of you. And you use your hook to secure a piece of beef. And you use your knife to cut along the bone. And cut it off completely and let it drop off onto a belt. It is a repetitive process...

Tr., 86:8-87:2.

7. The chuck line typically processed 180 cows per hour; with four workers, this meant that Claimant typically processed 45 cows per hour himself. Claimant’s Dep., 33:11-25.

8. Claimant’s employment with Employer began in or about April of 2017 when the plant opened. Tr., 54:22-25.

9. **Industrial Accident.** Beginning in or about March 2020, Claimant experienced left shoulder pain while performing his job as a clod puller. Tr., 33:21-23; Ex.21:1 (injury and illness report); Ex. 26:1 (first report of injury or illness). He did not have a single incident that led to shoulder pain; it was due to repetitive work. Claimant began visiting Employer’s first aid

station and received treatment in the form of icing his shoulder and stretching. Tr., 34:5-35:4.

10. **Medical Treatment.** Claimant first sought treatment at Primary Health Clinic on September 26, 2020. Tr., 35:5-15; Ex. 54. The clinic treated him for overuse syndrome, referred him to physical therapy, and prescribed him medication.

11. From Primary Health Clinic, Claimant was referred to NW Occupational Medicine and Neurosciences Institute for further evaluation, upon referral from Surety. *See*, Ex. 55. Claimant was first seen at occupational medicine on September 29, 2020. Lynette Aages, NP-C, examined him and noted that he had been complaining of left shoulder pain since March 2020. “No MOI injury other than repetitive use. Neftali was pulling down with his left hand (hook hand) and began to experience left shoulder pain which has gradually worsened since March 2020.” Ex. 55:4. PA Aages noted that “Both the mechanism of injury and the physical exam support work related shoulder strain with signs of impingement.” Ex. 55:6. She prescribed Diclofenac and recommended icing and shoulder stretching. Claimant was begun on physical therapy. *Id.* She further released Claimant to return to work with restrictions on overhead activity above the shoulder level and a 15 pound lifting restriction. *Id.* at 7.

12. Claimant returned to NW Occupational Medicine for follow-up on October 13, 2020. *Id.* at 9. Claimant reported being moved to a “less strenuous area for work.” Denise Bahadar, NP-C, confirmed a diagnosis of shoulder strain with impingement. *Id.* at 10. Claimant was advised to take NSAIDs on a daily basis in addition to the Diclofenac. *Id.* Claimant was continued on the same work restriction. *Id.* at 11.

13. Claimant began physical therapy at Intermountain Physical Therapy on October 19, 2020. Ex. 56:1-4 Nevertheless, he continued to have pain in his left shoulder and a reproducible click with active shoulder elevation, so a hold was placed on physical therapy for

clarification of the treatment plan from occupational medicine. Claimant completed twelve physical therapy appointments and was discharged on November 27, 2020. Ex. 56:27-28.

14. Claimant filed a first report of injury, and the claim was accepted by Defendants on November 4, 2020. Ex. 26 and 28.

15. Claimant had a follow-up visit to NW Occupational Medicine on December 2, 2020. Ex. 56:18. NP Bahadar noted that Claimant had completed 12 sessions of PT. Claimant advised that he had been making improvement but it was slow. If “improvement is not as expected, we will seek approval for MRI and injections in shoulder.” *Id.* at 20. Claimant was returned to work with similar restrictions but the lifting restriction was changed to 20 pounds. *Id.* at 21.

16. NP Bahadar referred Claimant to Treasure Valley Hospital for an MRI of his left shoulder. Ex. 57:2. The MRI was performed on January 5, 2021. *Id.* at 6. The MRI showed as follows:

1. Moderate infraspinatus tendinosis with low-grade interstitial tear. Moderate to high grade fissure of the superior subscapularis tendon.
2. Moderate to severe biceps tendinosis. There is a longitudinal split tear of the tendon at the groove entrance. A portion of the tendon may be subluxed onto the lesser tubercle.
3. Moderate degenerative changes of the acromioclavicular joint.
4. Synovitis within the axillary recess.

Ex. 57:10-11.

17. Jeffrey G. Hessing, MD, an orthopedic surgeon, examined Claimant on January 26, 2021. Dr. Hessing reviewed the 1/5/21 MRI. Dr. Hessing continued conservative care of Claimant’s shoulder with an injection of cortisone. He noted that surgical intervention may be necessary if no improvement ensued. Ex. 58:1-2. The diagnosis was left shoulder tendonitis with impingement. *Id.* at 4. Claimant was released to work with restrictions of 2 pound lifting and no

overhead lifting above the shoulder on the left side. Ex. 58:4.

18. Claimant returned to Dr. Hessing on February 9, 2021. Dr. Hessing advised Claimant that his biceps and rotator cuff strain appeared to be healing following the cortisone injection. Dr. Hessing restricted him to 20 pounds lifting and no overhead lifting with the left arm. Ex. 58:6-7.

19. Claimant returned for an office visit with Dr. Hessing on March 23, 2021. He appeared generally uncomfortable. Dr. Hessing discussed surgical options with Claimant. He continued Claimant on conservative care. *Id.* at 8-9.

20. Dr. Hessing examined Claimant on April 20, 2021. Ex. 57:13; Ex. 58:11. He recommended surgical intervention as Claimant had “exhausted conservative care.” Dr. Hessing recommended shoulder decompression with excision of the distal clavicle. The rotator cuff, biceps, and labrum could be repaired as needed. *Id.* The plan was for arthroscopy of the left shoulder with decompression, distal clavicle excision, and possible biceps tenodesis, rotator cuff and labral repair. *Id.*

21. Dr. Hessing took Claimant to surgery on May 6, 2021. Ex. 57:45. The postoperative diagnosis was left shoulder impingement with degenerative changes of the acromioclavicular joint with extensive labral tearing and complete biceps tendon rupture only. Rotator cuff was OK. *Id.* The operation performed was arthroscopy of left shoulder, subacromial decompression, distal clavicle excision, extensive labral debridement, and open bicep stenodesis. *Id.* at 46. Claimant tolerated the procedures well. *Id.*

22. Claimant returned to Dr. Hessing for post-operative follow-up on May 10, 2021. He was accompanied by a supervisor. Ex. 58:18. His left shoulder was feeling better, and Claimant appeared to be recovering well. Dr. Hessing encouraged Claimant to undergo a gentle

exercise program on his own. Lifting was limited to 2 pounds with return to work with arm in a sling, right-handed work only. *Id.* at 18-20.

23. Dr. Hessing followed up with Claimant on June 2, 2021. He suggested to Claimant that he was healing well. Dr. Hessing set him up for physical therapy. Claimant was restricted to 2 pounds lifting without the arm sling at work. Ex. 58:21.

24. Claimant returned to Dr. Hessing for follow-up on July 7, 2021. His left shoulder demonstrated improved mobility and function. Dr. Hessing encouraged Claimant to continue with home exercise. He returned Claimant to work with a 20 pound lifting restriction on the left side. Likely Claimant would be able to return to full duty at the next visit. *Id.* at 25.

25. Upon referral from Dr. Hessing, Claimant underwent physical therapy 3 times per week for four weeks beginning in June 2021. The PT was accomplished at Mountain Land Physical Therapy. At the conclusion of the PT, Claimant was released to home exercise. Ex. 59. Physical therapy notes stated that “surgeon discharged patient from PT,” with the additional comment that “Patient failed to meet all established goals.” Ex. 59:42. Claimant had “increased tightness to his left doroscapular region and pectoralis minor Tight left posterior capsule. Limited left motion in all directions.” *Id.*

26. On August 4, 2021, Dr. Hessing advised Claimant that his biceps and shoulder function was returning “nicely.” He was healing satisfactorily. Dr. Hessing released Claimant to full duty at work. Claimant was encouraged to continue with his exercise program. *Id.* at 28.

27. On September 1, 2021, Dr. Hessing met with Claimant in a final follow-up. Claimant advised that he had been returned to working his original job at work but that he had hoped for a lighter alternative. Claimant believed that he did not have the strength to continue in the more vigorous position. Except for exercises on his own, Dr. Hessing had no further

recommendations for Claimant's care. He declared Claimant at MMI and assessed a 5% upper extremity impairment for biceps tendinitis without work restrictions. "He can return to his preinjury job without restrictions if that is his desire. It doesn't appear that he plans to do that." At this time, Claimant was demonstrating 175 degrees of flexion and 170 degrees of abduction in his left shoulder. Dr. Hessing permitted follow-up on a "per needed basis." Ex. 58:31-32. Claimant recalled that he told Dr. Hessing on September 1, 2021, that he was still not feeling well and had continued pain and weakness in his shoulder. Claimant's Dep., 34:4-21.

28. **Dr. Hessing Deposition.** Dr. Hessing's deposition was taken on June 27, 2024. Dr. Hessing is an orthopedic surgeon who has specialized in shoulder surgeries for the 25 years prior to his deposition. Hessing Dep., 5:8-15. He has performed approximately 5,500 shoulder surgeries during his career. *Id.* at 10:22-25.

29. As to the results of Claimant's shoulder surgery, Dr. Hessing stated as follows: "It went very well. I was very comfortable with the procedure, and I think that it corrected things that wanted – we went in to do." *Id.* at 37:11-13.

30. Dr. Hessing explained his release of Claimant to return to work without restrictions as follows:

Q. And when you said you released him without restrictions, and in the note it said release him to full duty, did you realize that you were releasing him to the job that he had when he developed the symptoms that brought him to your practice?

A. If I would have known that I still would have done it, but I thought that he was going back to a lighter job, because that's what he told me. And it was only the next visit, I think, he told me that didn't work out with his employer.

Q. Yeah, it didn't work out that he got the permanent lighter-duty job?

A. Right. Yeah, there it is. That's the way I remember it.

Hessing Dep., 44:10-23.

31. Dr. Hessing opined that the job Claimant could do would be his time of injury employment position. *Id.* at 46:16-18. He explained further as follows:

Q. And was there anything about, you know, his recovery from the surgery that would limit him in being able to do that job that he had at the time of injury?

A. No. I felt that he got a great result. I think we fixed what can be fixed in a shoulder that's got a lot of wear and tear in it. I wasn't surprised that he had some residual symptoms, but I really felt that he seemed to be a pretty hardworking guy and that he would push on.

Id. at 46:22-47:5.

32. Again, about Claimant's ability to return to his time of injury position without restrictions, Dr. Hessing testified in pertinent part as follows:

Q. Okay. So maybe to wrap up here, as of that September 1, 2021, visit, what were your thoughts as to, you know, Mr. Mejia's, you know, return to work to his time of injury job?

A. Well, I obviously encouraged him to do so. I think it would have been great exercise for him. And I believe that the people, you know, would worked with him, to some degree. They had for a long time. So that's why I encouraged him to do that. And I really feel that you know – that I hoped he would do that, because he gave me the impression that he was a hardworking guy, and he'd get back to it.

Q. And did you think he needed restrictions at that time?

A. I did not.

Q. And why was that?

A. Because I just didn't think he was giving me full effort, and I think he made up his own mind that he wasn't going to go back to work in that job, and I so I just felt that it was my responsibility to push him on.

Id. at 52:10-53:4.

33. Dr. Hessing testified that 5 percent was the appropriate impairment rating to give Claimant. Hessing Dep., 55:11-13.

34. Dr. Hessing testified in pertinent part as follows:

Q. And you've seen this, and I'll just quote for you. You know, Dr. Neilson, in his independent medical evaluation and in his deposition, indicated that range of motion was a better indication of Mr. Mejia's ongoing impairment and problems with his shoulder.

And do you agree with that?

A. No.

Q. And what's the basis of your disagreement of that?

A. Because it's just too patient-effort related. And that's why we fought to get the change [in the Guides]. I was part of a big study back then that they, basically, studied what's the best way to do this at the Orthopedic Academy. And it was, don't based it on tests that so reliant on patient effort because it's just really had to know if you've got maximal effort or not. And so that's why we went away from that, and we wanted a diagnosis-based. And that's what the Guides – the 6th Edition of the Guide is.

Id. at 56:6-25.

35. Dr. Hessing testified that functional capacity examinations are not well-suited to the workers compensation context “because there's so much variability in patient effort.” He further testified that that assessment was based upon research and literature supporting it. *Id.* at 61:5-13.

36. Dr. Hessing testified that patient pain complaints are not an appropriate basis for setting or establishing work restrictions because “patient interpretation can vary so much what is pain and where it is, and so it is not a reliable indication of long-term disability.” *Id.* at 76:4-12.

37. **Functional Capacity Examination.** Claimant underwent a functional capacity examination with Wright Physical Therapy on December 13, 2022. Ex. 66. Due to left shoulder range of motion and left upper extremity weakness, Claimant was deemed limited in the following activities: lifting waist to ground and waist to crown, elevated work, and small object upper extremity manipulation. *Id.* at 3.

38. The evaluator noted the following impairments for Claimant during the physical examination: left shoulder ROM is limited in all planes, with most pronounced being abduction and flexion. Left shoulder weakness was also noted and limited in all planes, with most being pronounced in abduction and flexion, although left elbow flexion weakness was noted. *Id.*

39. Reported pain of the left shoulder was part of the reason for limitations with lifting, carrying, and elevated work. Objective signs were consistent with Claimant's report of pain. Ex. 66:3.

40. Claimant gave maximal effort on all portions of the testing. *Id.*

41. Due to his left shoulder injury sustained in the industrial accident, Claimant would do best with requirements that match his limitations and the recommendations of the FCE, as follows: limit grip/lifting load with left upper extremity, allow increased time with left upper extremity fine manipulation tasks, limit waist to ground lifting to no more than 75 pounds rarely, 50 pounds occasionally, and 25 pounds frequently; limit waist to crown lifting to no more than 40 pounds rarely or 25 pounds occasionally or 10 pounds frequently, but limit carrying to no more than 55 pounds rarely or 40 pounds occasionally or 25 pounds frequently; limit forces with pushing and pulling activities; and avoid overhead activities. Ex. 66:33.

42. **Independent Medical Examination.** Dr. Michael Neilson, DO, performed an independent medical examination of Claimant on February 20, 2023, at the request of Claimant's counsel. Ex. 67. Dr. Neilson took a history of Claimant's injury, noting that Claimant continued to complain of left shoulder pain. Claimant stated that he cannot lift his left arm well and has to use his right hand to assist. He complained of significant weakness of the left shoulder as compared to the right shoulder since the industrial accident. Claimant claimed that he could not lift items well with his left upper extremity. He complained of pain at night in his left shoulder

and pain while driving. Claimant told Dr. Neilson that he had not been able to work because of the limitations.¹ Ex. 67:1-2.

43. Dr. Neilson reviewed all relevant medical records and undertook a physical examination of Claimant. He also reviewed all diagnostic tests, including the MRI. *Id.* at 2-6.

44. The shoulder examination revealed moderate pain at the AC joint with widening of the joint consistent with distal clavicle excision. Moderate pain at anterior shoulder across bicipital groove. Limited range of motion in both active and passive ranges. Weakness when testing rotator cuff tendons against resistance in neck musculature. Positive signs of impingement. *Id.* at 6.

45. Dr. Neilson determined that Claimant was at maximum medical improvement for his left shoulder condition. He assessed a 7% upper extremity impairment as a result of the industrial injury and medical treatment. A 7% upper extremity impairment correlates to a 4% whole person impairment. Ex. 67:7.

46. Dr. Neilson determined that appropriate work restrictions would be in correlation with those found in the FCE. *Id.*

47. **Neilson Deposition.** Dr. Neilson's deposition was taken on June 27, 2024. Dr. Neilson is a Doctor of Osteopathic Medicine and residency trained in family medicine with an internship in sports medicine. Neilson Dep., 5:11-13. In addition to his orthopedic care practice, he performs independent medical examinations for which he is board certified. *Id.* at 5:14-16. He practices sports medicine or nonoperative orthopedic medicine. *Id.* at 6:20-21. He does not perform orthopedic surgery and did not complete an orthopedic surgical residency. *Id.* at 22:12-23:25. He sees approximately 80 patients a week and 20% of those patients have shoulder

¹ As will be discussed below, Claimant was out of work only one month after quitting employment with

complaints. Neilson Dep., 7:12-14. He first started performing independent medical examinations in October 2022. *Id.* at 34:17-18. He had performed a total of 54 IMEs as of the date of his deposition. *Id.* at 34:21-22.

48. The majority of Dr. Neilson's independent medical examinations are performed at the behest of Claimants. *Id.* at 35:6-8.

49. Dr. Neilson did not agree with Dr. Hessing's lack of permanent work restrictions for Claimant based upon his examination and review of the medical records. *Id.* at 20:2-4.

50. Dr. Neilson found that there was no evidence that Claimant gave a lack of full effort in his independent medical examination. *Id.* at 48:6-9.

51. The result of Dr. Neilson's range of motion tests with Claimant was based upon what Claimant was willing and able to do on the day of the examination. *Id.* at 43:18-19. Dr. Neilson testified that range of motion was a better indicator of Claimant's impairment than the diagnosed based method. *Id.* at 16:13-19. He believed that the Guides to Permanent Impairment permit the use of range of motion to evaluate impairment. *Id.*

52. **Return to Work.** Claimant continued working for Employer for approximately a year after being released by Dr. Hessing. Ex. 58:28; Ex. 5:58. Upon being released to work with no restrictions by Dr. Hessing, Claimant worked in his previous position in clod pulling. Tr., 38:4-40:24. He continued to perform this job full-time, at his previous wage, for a full year before he quit on August 31, 2022. Ex. 65:65/16-66/9. Claimant states that he had several discussions with Employer about being moved to a lighter duty position prior to quitting, but to no avail. *Id.* at 42:3-17. Claimant states that there were times that Claimant reported to Employer that he could not handle the job due to pain; Employer temporarily assigned Claimant to lighter

Employer.

duty positions, but ultimately determined that Claimant would be retained in the job of clod puller. *Id.* at 39:7-25.

53. Claimant states that he visited the first aid station at Employer for his ongoing symptoms with his left shoulder. Tr., 41:8-10. He would have cream or tape applied to his shoulder or use one of the “machines” at the first aid station. *Id.* at 58:3-12.

54. Claimant had reported attendance issues in his post-injury employment with Employer. Prior to his March 2020 injury, Claimant received only one excessive absence warning. After the industrial injury, Claimant received six excessive absence warnings, two of which occurred after his release to return to work by Dr. Hessing. Ex. 5:24,33,40,44, and 54.

55. Claimant quit his job with Employer on or about August 31, 2022. “I decided on my own to not work anymore because my body was telling me that I couldn’t do it anymore. The pain was too strong. I just couldn't do it anymore.” Tr.,42:22-25. Claimant states that he stopped showing up for work because he claimed he was tired of bringing up his shoulder issues with Employer and only being directed to the first aid station. Tr., 60:5-17; Ex. 5:58. Nevertheless, he admitted he abandoned his job without giving notice to Employer or advising them that he felt he could no longer perform his job. Tr. 49:19; 60:5-21.

56. Claimant presented to Primary Health on three different occasions between September 1, 2021 (the date of his discharge by Dr. Hessing) and February 20, 2023 (the date of his IME with Dr. Neilson), but never mentioned problems with his left shoulder at any of those visits. Ex. 54:49-81. During a wellness examination on February 28, 2022, Claimant was found to have full range of motion in his extremities. Ex. 54:69.

57. At the time his employment with Employer ended, Claimant was earning \$25.50 per hour for full-time work. Tr., 43:1-3.

58. At the time of hearing, Claimant was working in a position for Great American Snacks. He began this job approximately a month after his employment with Employer ended. When Claimant began work for Great American Snacks, his job was to palletize onion rings. Claimant's Dep., 12:11-20. This required him to lift heavy objects and to stack boxes. Tr., 45:13-17. Claimant performed this position only briefly before requesting transfer to another, lighter duty position; the lighter duty job was to put onions in a machine which would cut them up for onion rings. He used only his right hand for this work. "And the position I am currently in is a position where I just have to lift up an onion. Which is less than a half a pound in weight." *Id.*, 44:1-45:17. Claimant negotiated with his current employer to perform tasks that he thought were within his capabilities. *Id.* His starting rate of pay for Great American Snacks was \$18.25 per hour. After switching to the night shift, Claimant earned \$20.45 per hour for between 40 and 45 hours per week. Claimant's Dep., 14:10-14.

59. **Claimant's Condition at Time of Hearing.** Claimant claimed as follows concerning his condition at time of hearing: "The pain is still there. It does not go away. During the nighttime I cannot sleep on this [left] side. It is just I think that I'm going to be like this forever." Tr.44:5-8.

60. Claimant ices his left shoulder every day or every other day. *Id.* at 47:1-4.

61. Claimant's range of motion with his left upper extremity is limited. He cannot lift his arm up the whole way. He has "very little strength" in his left shoulder. "It is not the same as it used to be. I'm always being careful so that nothing happens to it." Tr., 47:15-19.

62. Claimant lifts and carries objects with his right arm only. "And I use the other one just to support it." *Id.*, 47:20-24.

63. Claimant can lift his left arm up to shoulder height only. *Id.*, 48:3-9.

64. Claimant sometimes experiences extreme pain while driving and holding the steering wheel. *Id.*, 48:21-49:12.

65. Claimant's left shoulder condition affects his ability to do chores and maintenance around his house. *Id.*, 49:21-50:10.

66. Claimant's abilities to play basketball, go to the gym, fish, lift weights, hunt, and similar pastimes have been affected by his shoulder injury. *Id.* 50:11-51:6.

67. **Vocational Evaluation.** Delyn D. Porter, M.A., CRC, CIWCS, performed a vocational evaluation of Claimant and delivered a report to the attention of Claimant's counsel on March 23, 2023. Ex. 68. Mr. Porter's qualifications are known to the Commission.

68. Mr. Porter conducted an intake interview in Spanish with Claimant on March 10, 2023. Ex. 68:1. He completed a records review, including all relevant medical records, performed an analysis of physical restrictions and functional limitations/residual functional capacity profile, reviewed Claimant's educational history, reviewed prior job demands, performed a pre and post injury labor market analysis, reviewed demographics and nonmedical factors, took a vocational history, conducted a pre and post injury wage earning capacity analysis, and drafted disability findings and conclusions. Ex. 68:2.

69. Additional information reviewed by Mr. Porter included Industrial Commission records, Intermountain Claims file, PPI payments (9/1/2021 – 12/14/2021), AMA Guides to Evaluation of Permanent Impairment, 6th Edition, Idaho Department of Labor, Occupational Employment Quarterly, Dictionary of Occupational Titles, O*Net, Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles, New Guide for Occupational Exploration, The Revised Handbook for Analyzing Jobs, Rehabilitation Consultant's Handbook, 4th Edition, The Henry J. Kaiser Family Foundation, Occupational

Outlook Handbook, SkillTRAN, and U.S. Bureau of Labor Statistics. Ex. 68:3.

70. Mr. Porter reviewed pertinent medical records dating between 2/14/2007 and 2/20/23. Ex. 68:3-7.

71. For a Family/Social History, Mr. Porter noted that Claimant was born on October 7, 1967, in El Salvador. He attended school through the 4th grade in El Salvador. He is able to speak Spanish proficiently and has limited reading and writing proficiency in Spanish. Claimant has limited English language proficiency. Claimant migrated to the United States 35 years ago. He has lived in Massachusetts, California, and Idaho. He has permanent legal alien work status in the United States. Claimant is married with four children. He resides with his wife in Caldwell, Idaho. They own the home where they are living. Claimant does not have any computer skills. He does not have any current hobbies. He does not use tobacco and occasionally drinks alcohol. He denies any recreational drug use. Ex. 68:8-9.

72. Mr. Porter identified ten previous industrial injuries for Claimant, all of from which he recovered. *Id.* at 9. Prior to the industrial injury with Employer, he was never assigned any permanent work restrictions that limited his work capacity. *Id.* at 10.

73. Claimant reported the following residual functional capacity: lifting and carrying, restricted; pushing and pulling, restricted; limited range of motion with his left upper extremity; unable to fully extend his left arm over his head; reports chronic pain in his left shoulder; unable to sleep on his left side; has difficulty driving due to difficulty in holding the steering wheel with his left hand; and has to use his right arm to perform most activities of daily living; performs ADLs independently but much slower than before the industrial injury. Ex. 68:10-11.

74. Mr. Porter identified the following job titles as relevant to Claimant's previous employment: butcher, meat; meat cutter; animal eviscerator; metal fabricator; hand packager;

cleaner, industrial; and construction worker. Ex. 68:11-15.

75. For Specific Vocational Preparation, Mr. Porter determined that Claimant had worked in unskilled to skilled occupations, up to Level 7 (skilled, over 2 years and up to 4 years). Claimant's transferable skills include meat cutting and processing, welding, construction labor, cleaning, and packaging. *Id.* at 15-16.

76. Claimant has a GED level of 1, completion of less than elementary school. *Id.* at 18. For experience general education development, Claimant has a GED level of 2, successful work experience involving standardized duties. *Id.* at 19.

77. Claimant's limited English language proficiency and educational level have limited his employability. *Id.*

78. Mr. Porter concluded that using the medical opinions of Dr. Hessing, Claimant does not have any permanent partial disability, which is calculated at 0.0%. *Id.* at 20. Based upon the medical opinions of Dr. Hessing, who assigned work restrictions identical to those found in the functional capacity examination, Claimant has sustained a partial labor market loss and disability in excess of impairment. *Id.* at 21.

79. Mr. Porter performed a pre and post labor market analysis for Claimant. His job market consists of a 50-mile radius around Caldwell, Idaho. *Id.* Based upon his vocational profile, Claimant had pre-injury access to approximately 13,088 total jobs. Using the work restrictions of Dr. Neilson, Claimant continues to have access to approximately 3,049 total jobs, a calculated labor market loss of 76.5%. Ex. 68:22-23.

80. According to Mr. Porter, Claimant had a pre-injury wage-earning capacity of \$29.35 per hour. "Considering his current employment as well as other employment options available based upon his vocational profile and the assigned restrictions of Dr. Neilson, Mr. Ortiz

has sustained an average wage-earning capacity loss of 43.5%. *Id.* at 24-25.

81. Using Dr. Neilson's restrictions, and averaging labor market loss of 76.5% and wage-earning capacity loss of 43.5%, Mr. Porter found that Claimant has sustained a permanent partial disability of 60.1%. *Id.* at 26.

82. **Porter Deposition.** Mr. Porter conducted the interview of Claimant in Spanish. Porter Dep., 12:23-13.1.

83. Mr. Porter did not update his wage capacity loss analysis based upon increase in earnings of Claimant from March 2023 (when the report was issued) to April 2024 (when the hearing occurred). *Id.*, 28:13-16.

84. Mr. Porter did not include food service as a job Claimant had performed in his report because Claimant did not report it to him. *Id.*, 41:10-18.²

85. Mr. Porter acknowledged that Claimant worked for a year as a clod puller for Employer following his release to return to work by Dr. Hessing. *Id.*, 42:10-25.

86. Mr. Porter did not update his wage loss or market loss analysis based on new information available at time of hearing. In particular, he did not update Claimant's wages from Great American Snacks, which had increased from March 2023 to the hearing date. Porter Dep., 28:13-23.

87. Mr. Porter's conclusion in his report that Claimant continued to have dysfunction and pain in upper left extremity was based upon Claimant's subjective viewpoint. *Id.* at 32:12-14.

88. Mr. Porter admitted that Claimant was able to perform the essential functions of the job as a clod puller for a year following his release by Dr. Hessing. *Id.* at 42:10-25.

² Claimant testified at his deposition that he had an "easy job" in a restaurant for the two to three years he

89. Mr. Porter testified that he was unaware of any information that Employer was dissatisfied with Claimant's job performance during his last year of working there. *Id.* at 44:3-12.

90. Mr. Porter was unaware of any recommendation by a physician that Claimant should quit his job with Employer due to inability to perform the essential functions of the job. *Id.* at 47:9-12.

FURTHER FINDINGS AND DISCUSSION

91. 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).

92. **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014).

resided in Boston, Massachusetts. Claimant Dep., 38:5-9.

93. In cases where two physicians have issued conflicting impairment ratings for the same body part(s), the Commission has the discretion to average the impairment ratings or choose the impairment rating that more closely aligns with the evidence. *Waters*, 156 Idaho at 262, 322 P.3d at 995. Averaging impairment ratings for the same body part by two or more physicians is also codified in the administrative regulations pursuant to IDAPA § 17.01.01.402.02.

94. Two physicians have opined as to Claimant's permanent partial impairment. Dr. Hessing found that Claimant sustained a 5% upper extremity impairment based upon diagnosis, using the DBI (diagnosis-based impairment) criteria in the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition. Dr. Neilson found that Claimant sustained a 7% upper extremity impairment based upon range of motion, also based upon the *Guides*, 6th Edition but contained in the grade modifiers. The two physicians disagree which criteria, diagnosis based or range of motion, is the preferable method to assess Claimant's impairment.

95. Dr. Neilson testified that because Claimant had limited range of motion upon examination, the range of motion criteria gave a "more accurate and appropriate level of impairment." Neilson Dep., 17:13-22. Nevertheless, Dr. Hessing testified that the whole point of the changes in the 6th Edition of the *Guides* was to focus on diagnosis-based impairment as the primary method of evaluation. Dr. Hessing testified that he used the DBI model for determining Claimant's permanent impairment because: "The 6th Edition *Guide* is based on diagnoses; that's what it is." Hessing Dep., 54:3-4. According to Dr. Hessing, the whole point of the change in the 6th Edition from the 5th Edition of the *Guides* was to remove the variables produced by reliance on tests that assessed a patient's effort. "It's just hard to know if you are getting full effort from people," Dr. Hessing testified, commenting further that "so we took that [effort] out of the

equation. That's what we all liked about it [the 6th Edition]." Hessing Dep., 56:3-5. Dr. Hessing disagreed with Dr. Neilson's reliance on the old range of motion criteria "because it's just too patient effort related." *Id.*, 56:15-25.

96. Claimant counters that Dr. Hessing's notes did not contain any reference to lack of effort, that Dr. Neilson found that Claimant gave full effort in his examination, and that the functional capacity examination determined that Claimant did not malingering or give less than full effort. *See*, Claimant's Brief at 14.

97. Defendants submit that Dr. Hessing's approach is based on the consensus of the medical community, as contained in the 6th Edition of the *Guides*, that adopts a new standard that relies chiefly on objective criteria for determining the basis of impairment ratings. Although range of motion is retained in the *Guides*, it is to be used almost exclusively as a component of one of several "non-key" adjustment factors. *See*, Defendants' Brief at 12.

98. The approach adopted by Dr. Hessing, diagnosis-based, is more persuasive. It reflects the latest instructions contained in the 6th Edition of the *Guides*. Furthermore, Dr. Hessing was Claimant's treating physician who had completed over 5,500 career shoulder operations, whereas Dr. Neilson was an IME doctor and a non-operative physician. For these reasons, the Referee finds that the impairment rating of 5% upper extremity found by Dr. Hessing is more credible than the 7% upper extremity impairment found by Dr. Neilson. The two impairment ratings, furthermore, should not be averaged. Claimant is not entitled to further impairment.

99. **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. “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 permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

100. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is “whether the physical impairment, taken in conjunction with nonmedical factors, has reduced Claimant’s capacity for gainful employment.” *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on Claimant’s ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

101. Permanent disability is a question of fact, in which the Commission considers all relevant medical and nonmedical factors and evaluates the advisory opinions of vocational experts. See *Eacret v. Clearwater Forest Industries*, 136 Idaho 733, 40 P.3d 91 (2002); and *Boley v. State of Idaho, Industrial Special Indemnity Fund*, 130 Idaho 278, 939 P.2d 854 (1997). The burden of establishing permanent disability is upon Claimant. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

102. The first requirement for determining whether Claimant has sustained disability in excess of impairment is to establish that Claimant has a permanent partial impairment. See *Urry*, 115 Idaho 750, 769 P.2d 1122. Claimant has met the *Urry* bar. Two physicians opined that Claimant has a permanent partial impairment.

103. The next issue to resolve is whether Claimant should be subject to permanent work restrictions. Dr. Hessing did not assign any work restrictions to Claimant; Dr. Neilson did. Depending upon which one of them is correct, the disability analysis can proceed. As Mr. Porter

observed, if Dr. Hessing's lack of work restrictions applies, then Claimant has suffered no disability above impairment. *See, e.g., Fairchild v. Kentucky Fried Chicken*, 159 Idaho 769, 358 P.3d 769 (2015) (No disability above impairment found where Claimant's treating physician did not assign work restrictions).

104. Dr. Hessing's opinions are the most credible with regard to work restrictions. Dr. Hessing was Claimant's treating surgeon. He had performed over 5,500 shoulder surgeries. In contrast, Dr. Neilson was not Claimant's treating physician and was not a surgeon but rather a Doctor of Osteopathic Medicine who did not perform surgeries.

105. Moreover, Claimant worked in the same position as a clod puller for a full year after being released by Dr. Hessing. This demonstrates that he was able to perform the job without restrictions. He left his job at Employer with no notice and no indication that he was incapable of performing it.

106. Additionally, although Claimant sought treatment at Primary Health on at least three occasions after being released by Dr. Hessing, he did not raise problems with his shoulder at any one of those visits. He also did not return to Dr. Hessing with any complaints of shoulder pain. Despite Claimant's claim that he was unable to perform the duties of his job because of ongoing left shoulder problems, during the months after he was released to full duty by Dr. Hessing and before he left his job, he was only seen once for left shoulder complaints at the Employer's first aid station, and never at Primary Health.

107. Dr. Hessing wrongly concluded that Claimant was not working due to problems with his left shoulder. In fact, Claimant was unemployed for only a month after leaving his employment with Employer and was still gainfully employed full time at the time of hearing.

108. For the foregoing reasons, it is reasonable to find that Dr. Hessing's assignment of no work restrictions is more reasonable and credible than Dr. Neilson's work restrictions. Assuming *arguendo*, that this is not the case, however, Mr. Porter's vocational assessment does not provide a reasonable basis to conclude that Claimant suffered disability in excess of impairment. His job market analysis is flawed because it did not include any restaurant service jobs, which Claimant performed for two to three years when he first emigrated to the United States. Similarly, Mr. Porter's wage loss analysis is flawed because it did not take into account Claimant's higher wages at the time of hearing.

109. For all of the foregoing reasons, it is reasonable to find that Claimant did not suffer any disability in excess of impairment.

CONCLUSIONS OF LAW

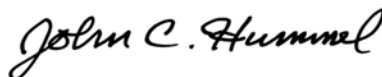
1. Claimant is entitled to permanent impairment as found by Dr. Hessing in the amount of 5% left upper extremity impairment.
2. Claimant is not entitled to any disability in excess of impairment.

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 19th day of December, 2024.

INDUSTRIAL COMMISSION



John C. Hummel, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2025, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

NEFTALI ORTEZ MEJIA,

Claimant,

v.

CS BEEF PACKERS, LLC,

Employer,

and

AMERICAN ZURICH INSURANCE
COMPANY,

Surety,
Defendants.

IC 2020-024936

ORDER

**FILED JANUARY 23, 2025
IDAHO 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 is entitled to permanent impairment as found by Dr. Hessing in the amount of 5% left upper extremity impairment.
2. Claimant is not entitled to any disability in excess of impairment.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 22nd day of January, 2025.



INDUSTRIAL COMMISSION

Claire Sharp

Claire Sharp, Chair

Aaron White

Aaron White, Commissioner

Thomas E. Limbaugh

Thomas E. Limbaugh, Commissioner

ATTEST:

Kameron Slay

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2025, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

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