

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

VINCENT BIANCHI,

Claimant,

v.

DEPARTMENT OF CORRECTIONS,

Employer,

and

STATE INSURANCE FUND,

Surety,  
Defendants.

**IC 2015-026083**

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

**Filed March 26, 2018**

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Lewiston on August 15, 2017. Claimant, Vincent Bianchi, was present in person and represented himself pro se. Defendant Employer, Department of Corrections, and Defendant Surety, State Insurance Fund, were represented by Paul J. Augustine, of Boise. The parties presented oral and documentary evidence. One post-hearing deposition was taken and briefs were later submitted. The matter came under advisement on January 29, 2018.

**ISSUES**

The issues to be decided are:

1. Whether, and to what extent, Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Permanent partial impairment; and
  - c. Disability in excess of impairment.

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

3. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise.

### **CONTENTIONS OF THE PARTIES**

Claimant contends that he needs additional medical care and is unable to work due to the continuing effects of his September 29, 2015 industrial accident. He asserts entitlement to permanent impairment and disability benefits, and maintains he is permanently totally disabled. Defendants acknowledge Claimant's September 29, 2015 industrial accident, but contend that he has received all medical benefits, permanent partial impairment benefits, and disability benefits to which he is entitled due to his industrial accident. Defendants assert that Claimant's continuing complaints are not due to his industrial accident and that he is not entitled to any further benefits.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Claimant's former spouse Darlene Bianchi, Dave Heimer, Cory Barrier, and Sydney Glimp taken at the hearing;
3. Defendants' Exhibits 1 through 19, admitted at the hearing; and
4. The post-hearing deposition testimony of Craig Beaver, Ph.D., taken by Defendants on November 16, 2017.

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

## **FINDINGS OF FACT**

1. Claimant was 55 years old and lived in the Cottonwood area at the time of the 2017 hearing. He is right-handed. He has lived in Idaho for the past 25 years.

2. **Background.** Claimant was born in Chicago and spent most of his growing up years in the San Diego area. He completed the 11<sup>th</sup> grade and later obtained a GED. In 1979 he sustained a concussion, but at hearing denied any lasting ill-effects therefrom. Claimant worked for approximately 35 years in the construction industry. He is a journeyman carpenter and experienced not only in framing and carpentry, but also in concrete, drywall, and glass. Claimant has worked as an installer or estimator for Arnzens Building Construction, Pacific Cabinets, Silverado, Inc., and Bi-State Siding & Windows. Claimant framed million dollar homes in Jackson Hole. He was also self-employed in construction for approximately 10 years.

3. Claimant testified at hearing that during his years in construction: “I never broke a bone or fell on my head.” Transcript, p. 19, l. 25. Past medical records establish that on September 24, 1997, Claimant fell 16 feet off a roof and presented at the emergency room with low back and left elbow pain. He was diagnosed with an L2 compression fracture and treated conservatively. On March 10, 1998, he sought medical treatment for persisting back pain and received medications. On March 16, 2002, Claimant fell off a roof and suffered left leg and knee abrasions and bruising. He underwent physical therapy for several months. On March 21, 2004, Claimant presented to the hospital with right wrist pain after falling on his outstretched right arm. He was treated conservatively and given medication. On April 7, 2008, Claimant presented to two health clinics after he slipped on ice and fell, hitting his head first and then his back. He “saw stars” and reported mild nausea and severe vertigo but denied loss of consciousness. He was given a neck collar and medications. On October 10, 2011, Claimant presented to the

emergency room reporting right upper arm pain while working in construction. He was diagnosed with brachioradialis strain and given medications. Claimant received physical therapy in October and November 2011 for right shoulder and elbow pain and was unable to work. On December 12, 2011, an IME for his right elbow and shoulder pain diagnosed right shoulder impingement, right elbow strain/sprain, and chronic right elbow lateral epicondylitis. On January 30, 2012, Claimant underwent another IME for his right shoulder and elbow pain. A subsequent right shoulder MRI showed supraspinatus tear and glenoid labrum fraying. On April 11, 2012, he underwent right shoulder arthroscopy with labral and rotator cuff debridement, subacromial decompression, and distal clavicular excision. Claimant also underwent right elbow extension tendon repair. He participated in physical therapy thereafter for several months. On May 8, 2015, Claimant injured his back while working from a ladder holding a panel and sought medical treatment. He was diagnosed with a lumbar strain and given medications. On May 15, 2015, Claimant returned to his physician reporting persisting back pain extending into his left buttock. Defendants' Exhibit 5, pp. 74-80.

4. On August 3, 2015, Claimant began working for the Idaho Department of Corrections. He received training at the Peace Officers' Standards Training (POST) Academy in Meridian in preparation for work as a correctional officer.

5. **Industrial accident and treatment.** On the afternoon of Tuesday, September 29, 2015, Claimant was participating in a game of dodge ball at the POST Academy when his feet were knocked out from under him as he ran. His right ankle twisted and he fell, his head and neck striking the gym floor. Claimant testified he was knocked out briefly. Transcript, p. 22. Dave Heimer, training coordinator at the POST Academy, saw Claimant's fall but did not recall Claimant's head striking the floor. Transcript, p. 83. Claimant did not list any head

trauma in the written report of injuries he completed at the time of the accident. At hearing he testified to being moved from the gym floor to a chair and then transported to a hospital emergency room via private vehicle. He did not demonstrate loss of consciousness during these events.

6. Upon examination at the hospital, Claimant reported right ankle pain, neck pain, and a headache. He did not report nausea, vomiting, numbness, dizziness, or visual changes. He displayed “normal mental status; alert and awake” with “pupils equally round reactive to light.” Defendants’ Exhibit 14, p. 228. Claimant’s right ankle x-rays showed no evidence of fracture or malalignment, right hip x-rays were normal, lumbar spine x-rays showed no fracture or other acute abnormality, cervical spine MRI showed mild to moderate degenerative changes but no acute abnormality, and head CT scan was normal. Defendants’ Exhibit 4, p. 66. Claimant was diagnosed with right ankle sprain, cervical spine sprain or strain, and closed head injury. He was given medications and released.

7. On Friday, October 2, 2015, while attending a POST training class, Claimant reported to correctional coordinator Cory Barrier that he had a bad headache. Barrier arranged for Claimant to be taken to the emergency room where he was examined and referred to Cody Heiner, M.D., for further evaluation.

8. On October 2, 2015, Claimant presented to Dr. Heiner with a chief complaint of head injury. Dr. Heiner noted an Acute Concussion Evaluation intake survey score of 19 and performed gait and balance testing. He recorded:

Vincent is a pleasant 53 y.o. male who presents to St. Luke’s Occupational Health / Concussion Clinic for initial evaluation of a mild concussion. We have discussed the following aspects of concussion pathophysiology and management:

- The energy supply / demand mismatch that occurs following a concussion.

- The importance of cognitive and physical rest, with gradual resumption of activities.
- A plan for a stepwise return to full cognitive activity, followed by stepwise resumption of full physical activity.
- The importance of getting extra sleep each night (1-2 hours more than usual).
- The appropriate use of OTC analgesics to aid symptoms during resolution.

Defendants' Exhibit 4, p. 68. Claimant was given medication and released.

9. Claimant was unable to continue his training at the POST Academy and shortly after October 2, 2015, returned to his home in Cottonwood.

10. On October 9, 2015, Claimant was examined by Jack Bruner, M.D., in Cottonwood. Claimant asserts that Surety intentionally withheld Dr. Heiner's treatment notes from Dr. Bruner and that Dr. Bruner treated him for eight weeks but never recognized he had suffered a concussion.<sup>1</sup> Claimant reported headaches, balance issues, vertigo, lack of energy, and depression. Transcript, p. 30.

11. On October 21, 2015, Dr. Bruner examined Claimant again. He recorded that Claimant was moaning and groaning, reported severe headaches, and was impatient and agitated. Claimant subsequently received physical therapy for his right ankle.

12. On December 1, 2015, Claimant underwent neuropsychological testing by clinical neuropsychologist Stacey Hill, Ph.D., in Lewiston. Characterizing Claimant's head injury as mild, Dr. Hill reported: "most people have a complete or near complete recovery within the first 3 months following a mild head injury." Defendants' Exhibit 16, p. 336. Claimant continued to report mood and sleep disturbance and was noted to be anxious, mildly depressed, and reporting vague physical symptoms. Dr. Hill concluded there was no obvious need for treatment of

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<sup>1</sup> During his deposition, Claimant asserted that he had documentation that Dr. Bruner redacted his notes after discovering that Claimant had sustained a concussion. Defendants' Exhibit 18, pp. 432, 438. Claimant did not produce any such documentation at hearing.

cognitive disturbance and recommended neurological consult for his headache and neck pain, treatment for his mood and sleep disturbance, and a six-month followup neuropsychological examination if Claimant continued to experience difficulties. Defendants' Exhibit 5, p. 81.

13. On December 9, 2015, Dr. Bruner again examined Claimant and recorded his continued reports of anxiety and sleep disturbance.

14. On December 16, 2015, Claimant was discharged from physical therapy for his ankle and was to transition to home therapy.

15. On February 4, 2016, Claimant was examined by neurologist Natasha Demattos, M.D. She diagnosed traumatic brain injury with continued cognitive complaints, post-trauma vertigo and headaches, and depression and anxiety. Defendants' Exhibit 9, p. 148. Dr. Demattos noted that Claimant's September 29, 2015 CT head scan was normal. On February 24, 2016, Dr. Demattos reviewed Claimant's brain MRI and head and neck MRA, all of which were normal.

16. On April 16, 2016, Claimant was examined at Defendants' request by Robert Friedman, M.D., director of St. Luke's LifeFit Program in Boise. Claimant testified that his balance was so unsteady that Dr. Friedman had to catch Claimant to keep him from falling at Dr. Friedman's office but that Dr. Friedman did not record the incident in his report. Dr. Friedman recorded Claimant's reports of persistent headaches and light-headedness, but found no evidence to support concussion or cognitive dysfunction. Dr. Friedman concluded Claimant's headaches resulted from cervical myofascial pain and reported:

There is no evidence to support a concussion or cognitive dysfunction. Both the neuropsychological testing, my testing, as well as the neurologist's assessment reveals no significant evidence to support a traumatic brain injury or even a concussion. The medical records do not support a loss of consciousness at the time of his fall. The neuropsychological assessment did recommend aggressive treatment of his cervical myofascial pain, as well as his mood difficulties, depression and anxiety, and sleep disturbance. These are the most likely sources of his neurocognitive dysfunction.

It is my opinion that the mood difficulties and depression and anxiety are, on a more probable than not basis, unrelated to the industrial injury. He describes significant psychosocial stressors including changing employment from construction because he was “hurting all over.”

Defendants’ Exhibit 11, p. 180.

17. Dr. Friedman opined Claimant did not require any temporary or permanent work restrictions due to his industrial injury. He rated Claimant's cervical spine impairment at 1% of the whole person pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 6<sup>th</sup> Edition (Guides), with 50% apportioned to Claimant’s pre-existing degenerative cervical arthritis as documented by diagnostic imaging immediately after the industrial accident. Defendants’ Exhibit 11, p. 183.

18. At hearing, Sydney Glimp, Claimant’s daughter’s roommate, testified that in approximately May 2016, while at her apartment, Claimant commented about his pending workers’ compensation case:

Q. [by Mr. Augustine] Okay. Did he ever make any comment to you that he was waiting for the case to be over?

A. Yes. He had said that after his case is finalized, he can go back to being normal and acting how he used to.

Q. And what did you take that to mean?

A. That it’s all—that he’s just playing everybody. It’s not really true. It’s not—  
Mr. Bianchi: What the—

A. —something that should be handled like this.

Q. Now, is that something that he told you? In other words, that he could get back to normal after this whole thing was over?

A. Yes. He said that he is going to be going back to normal after this whole thing is settled.

Transcript, p. 108, ll. 8-23. Claimant's subsequent cross-examination of Ms. Glimp resulted in the following exchange:

A. .... I'm in this case at this point because you told me that you can go back to being normal after this is all over, and I'm sorry, but I don't agree with that.

Q. [by Claimant] Well, I'm not getting back to normal, lady. I don't know you well enough for you to be making accusations against my case. I just want to let you know, thank you very much for trying to undermine my case. Next time, mind your own business.

Transcript, p. 110, l. 20 through p. 111, l. 3. Claimant did not otherwise deny Glimp's assertion.

19. On May 17, 2016, Dr. Demattos examined Claimant and noted his report of headaches up to three times per week lasting one to two hours and his significant anger outbursts. Dr. Demattos referred Claimant for cognitive training.

20. Dr. Bruner ultimately discontinued treating Claimant due to his anger issues. On July 7, 2016, St. Mary's Cottonwood Medical Clinic manager terminated Claimant "from medical care and services due to 'ongoing verbal abuse and argumentative and threatening behavior towards the staff and physicians.'" Defendants' Exhibit 11, p. 109.

21. By correspondence dated July 14, 2016, Dr. Friedman noted that Claimant had received physical therapy for his cervical myofascial pain, needed no further treatment, and should continue with ice, stretching, and gentle conditioning exercises at home. On July 21, 2016, Dr. Friedman reiterated his opinion:

Mr. Bianchi also informed you regarding a report from the "concussion clinic." I was aware that Dr. Heiner had identified a brief loss of consciousness with the concussion.

As I previously stated, Mr. Bianchi may have sustained a concussion with 3+ consciousness. There is no medical evidence to support for posttraumatic headaches or cognitive loss. He has persistent headaches, and reports dizziness. There was no vertigo seen during his examination. I remain of the opinion that Mr. Bianchi's complaints are related to cervical myofascial pain. Should he have had [sic] sustained a concussion at the time of the injury [it] was at worst mild.

This would be expected to resolve in a brief period of time, no longer than two months.

Defendants' Exhibit 11, p. 192. Dr. Friedman reaffirmed that Claimant had reached maximum medical improvement, should be considered medically stable, and had no permanent work restrictions or limitations due to his industrial injury.

22. On July 19, 2016, Dr. Demattos examined Claimant and recorded his reports of persisting headaches.

23. On July 27, 2016, Derek Wynn, P.A., recorded that Claimant wanted "to discuss a referral to Craig Beaver, neuropsych in Boise, ID., Pt. states his Lawyer recommended he see Craig Beaver." Defendant's Exhibit 17, p. 388.

24. On August 1, 2016, Dr. Demattos advised Claimant by letter that she would cease providing him medical care 30 days from that date. Defendants' Exhibit 9, p. 160. Claimant testified at hearing that Dr. Demattos later refused to put in writing the medical opinions she expressed to him in person, but he did not otherwise elaborate on the subject or substance of those opinions.

25. On August 25, 2016, licensed psychologist Craig Beaver, Ph.D., performed a neuropsychological examination of Claimant in Lewiston at the request of Claimant's then attorney, Breck Seiniger,<sup>2</sup> with Surety's concurrence and authorization. Dr. Beaver interviewed Claimant for approximately 90 minutes, and also interviewed Claimant's wife, both with Claimant and independent of him. Dr. Beaver administered the following neuropsychometric tests: Wechsler Adult Intelligence Scale-Fourth Edition, Wechsler Memory Scale-IV (Logical Memory Subtest), Rey Complex Figure Test, SIMS, Stroop Test, Trail Making Test, Rey Auditory Verbal Learning Test, Controlled Oral Fluency Test, Rey 15 Item Memory Test, Category Test, Wisconsin Card Sorting Test, Victoria Symptom Validity Test, Conner's

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<sup>2</sup> Mr. Seiniger assisted Claimant for eight months, discontinuing his assistance before filing of the Complaint herein.

Continuous Performance Test-III, and Minnesota Multiphasic Personality Inventory—RF. Defendants' Exhibit 5, pp. 73-74.

26. Dr. Beaver reviewed Claimant's extensive pre-accident medical records, noting that Claimant had sustained multiple prior accidents for which he received medical treatment, including falling 16 feet off a roof in September 1997 and suffering an L2 compression fracture, falling off a roof in April 2002 and suffering left leg and knee contusions and abrasions, falling at work with his right arm outstretched in March 2004 and suffering right upper extremity pain, suffering chronic thrombosis in December 2005, falling on his head and back on the ice in April 2008 and "seeing stars," catching his right long finger in a table saw in May 2008, suffering right upper arm pain in October 2011 while sawing at work and ultimately undergoing right shoulder arthroscopy in April 2012, and injuring his low back at work while on a ladder holding a panel in May 2015. Dr. Beaver also reviewed Claimant's post-accident medical records including his September 29, 2015 examination in the emergency room, October 2, 2015 return to the emergency room and then to Dr. Heiner, multiple 2015 and 2016 examinations by Dr. Bruner, December 1, 2015 neuropsychological evaluation by Dr. Hill, multiple 2016 examinations by Dr. Demattos, April 2016 IME by Dr. Friedman, and various physical therapy records from 2015 and 2016.

27. Dr. Beaver reported that during his interview, Claimant became mildly agitated, tended to be verbose and tangential, and at times required prompting to return to the task at hand. He noted that Claimant's workers' compensation benefits had been discontinued on July 1, 2016, but Claimant was on a long-term disability policy obtained through Employer and had also applied for Social Security Disability. Claimant expressed significant frustration, believing he was not being treated fairly by the workers' compensation system. He reported headaches two to

three times per week, lasting hours or the whole day. He was reportedly forgetful, disengaged, easily upset, and very short-fused since his accident. Defendants' Exhibit 5, p. 89.

28. Dr. Beaver evaluated Claimant's psychological functioning and reported:

Mr. Bianchi was administered the Structured Interview of Malingered Symptoms (SIMS). This instrument is designed to help assess issues of symptom magnification or feigning of symptomatology. Mr. Bianchi had a significantly elevated score on the SIMS raising concern about symptom magnification.

Mr. Bianchi also completed the MMPI-2, RF. In review of the validity scales on the MMPI-2, RF, I would note that he was consistent in his responding .... However, on the F Scale, he had extreme elevation. Similarly, on the Fs, FBS-r, and RBS Validity Scales, he also had marked elevations. As a consequence of this, his MMPI Profile is not valid. The elevations in these scales are consistent with concerns raised by the SIMS. More specifically, although Mr. Bianchi appeared to put forth reasonable effort in the neurocognitive exam, he appeared to be greatly overstating his psychological difficulties and neurocognitive complaints.

Defendants' Exhibit 5, p. 91.

29. Dr. Beaver concluded that on a more-probable-than-not basis:

Mr. Bianchi suffered a concussion (mild TBI) in the work-related fall on 09/29/2015. He reports a brief loss of consciousness accompanied with some confusion. Neuroradiological studies have been within normal limits.

Additionally, in interviewing Mr. Bianchi, as well as in reviewing the records, he is able to provide relatively detailed recollection of events after his injury and over the ensuing days. That also adds to the consideration that this was a relatively mild injury that would not be expected to result in persistent neurocognitive difficulties.

Defendants' Exhibit 5, p. 92.

30. Dr. Beaver compared Claimant's test results with those recorded by Dr. Hill in December 2015 and observed that Claimant had improved on some tests, declined in others, and "had showed an extremely high tendency to overstate his psychological and neurocognitive symptomatology," thus analysis was challenging. Dr. Beaver noted that Claimant had not followed through with some recommended treatment, had been "essentially fired from his

primary care physician, and has been openly hostile towards his healthcare providers” and concluded: “At this point in time, I would not anticipate Mr. Bianchi would have continuing neurocognitive deficits from the mild nature of his injuries in September 2015.” Defendants’ Exhibit 5, pp. 92-93. Dr. Beaver observed Claimant presented as having difficulty sustaining attention, but concluded this was most consistent with psychological duress, sleep deprivation, and pain rather than residual brain damage. Dr. Beaver recommended a structured pain management program, such as the WorkFit Program, and anticipated maximum medical improvement within 30 days of program completion.

31. Surety arranged for Claimant’s transportation to Boise, a vestibular evaluation, and an evaluation for the WorkFit Program. Defendants’ Exhibit 17, pp. 67-68.

32. On September 22, 2016, Claimant presented to Kevin Krafft, M.D., and psychologist Robert Calhoun, Ph.D., at Defendants’ request for evaluation for St. Alphonsus’ WorkFit work hardening program in Boise. Claimant reported to Dr. Krafft that Claimant’s wife after approximately 27 years “is filing for divorce and is causing him depression and anxiety.” Defendants’ Exhibit 6, p. 108. Dr. Krafft assessed ongoing right neck pain without trigger points and episodic tension headaches likely related to his neck, all of which would improve with an ongoing home exercise program. Dr. Krafft recommended establishing job goals, without which he concluded Claimant would not likely be successful in a work hardening program. Dr. Calhoun recorded Claimant’s report of ongoing headaches and neck pain, sleeping only three to six hours per night due to pain, constant pain during the day, marital distress due to pain, and stress generated headaches. Defendants’ Exhibit 10, p. 165. Dr. Calhoun administered the Minnesota Multiphasic Personality Inventory – 2 which produced a profile of questionable validity. Dr. Calhoun reported of Claimant: “He is at risk for over reporting physical and

psychological symptoms. He does acknowledge difficulties controlling his thought processes. .... He is at risk for somaticizing stress. .... Cognitively, the patient is highly somatically focused.” Defendants’ Exhibit 10, p. 166. Dr. Calhoun concluded Claimant was a marginal candidate for a work hardening program.

33. Also on September 22, 2016, Claimant underwent vestibular functional testing by Connie Simpson, P.T. She recorded Claimant’s complaints of dizziness and nausea, administered various vestibular tests, and reported:

Balance Sensory Organization Test (SOT): Composite at 69 which is 1% below norms; Somatosensory, Visual, Vestibular, Visual Conference all WNL. C of G Alignment WNL. With Vertiginous Position testing and dix [sic] Hallpike testing – no provoking of signs of nystagmus and no significant symptoms of dizziness provoked. Visual: No eye instability noted, even though patient reports it is hard to track his eyes together.

....

This PT provoked very mild dizziness with patient during thorough Vestibular Evaluation and primarily while walking with head turned upward, which patient complained of his neck being stiff. .... This PT does not know if patient needs Vestibular Rehab, and if he returns to this PT – would only need 1-2 more sessions.

Defendants’ Exhibit 12, p. 199. Based on the evaluation and discussions with Drs. Krafft and Calhoun, it was determined that Claimant “is not a good candidate for the Work Hardening program due to no return to work goals, client reports he is applying for long term disability. Client also demonstrates many barriers to rehabilitation (high pain behaviors, illness conviction).” Defendants’ Exhibit 12, p. 212.

34. On October 25, 2016, Claimant presented to Brett Johnson, D.O., in Grangeville. Dr. Johnson recorded that Claimant: “presents to the office after he was arrested last week by police. He states that he was trying to get them to help him but they ‘slammed’ him into a wall and then dragged him by his head through the police cruiser to get him into the car. .... Today

he states that he has a lot of pain in his neck and back from the altercation.” Defendants’ Exhibit 17, p. 75. Claimant subsequently threatened to sue the police.

35. Also on October 25, 2016, Claimant was admitted to Intermountain Hospital in Boise where he was treated by psychiatrist Matthew Pitcher, D.O. Claimant testified at hearing: “It is as a result of my injury that I was so depressed that I checked myself into Intermountain.” Transcript, p. 58, ll. 21-23. Claimant was observed to be grandiose, irritable, and exhibiting disorganized and illogical thought processes. Dr. Pitcher noted that Claimant had threatened suicide and recorded:

[H]is mood has not been good, but states that ... doctors are working for pharmaceutical companies and the pharmaceutical companies are telling the doctors what to order .... He states that doctors who have been providing for him outside of the hospital are treating him like a guinea pig and states that he is outsmarting them all. Also states that he is outsmarting and [sic] independent medical examiner and some police which he has pending legal issues with and states ... “my god is better than their god, they are all luciferians [sic].”

Defendants’ Exhibit 8, p. 123.

36. Dr. Pitcher diagnosed “Unspecified bipolar disorder, currently manic” and “Traumatic brain injury in 2015 with no subsequent findings on both CT and MRI.” Defendants’ Exhibit 8, p. 125. Dr. Pitcher prescribed and adjusted medications including gabapentin, Topamax, and Depakote. Claimant remained hospitalized until November 1, 2016. Dr. Pitcher’s concluding diagnosis was psychosis and Bipolar disorder (type 2). Defendants’ Exhibit 8, p. 140.

37. On November 7, 2016, Claimant presented to Dr. Johnson who recorded: “Vincent presents to the clinic after he was in a psychiatric facility. He reports that they did not help him at all and they violated his privacy by reading his journal. He is suing them as well. He states he still has pain in his right neck, lower back, and right leg.” Defendants’ Exhibit 17,

p. 415. Dr. Johnson diagnosed bipolar disorder and muscle spasm and referred Claimant for psychiatric help to Dr. Rambeau in Lewiston as Claimant's condition was too complicated to treat in Grangeville.

38. On May 23, 2017, Claimant presented to Anita Ringering, N.P., at Valley Medical Center in Lewiston. She examined him and specifically noted that he complained of back pain, mentation change, depression and anxiety but denied headaches, nausea, or memory loss. She noted his neck was supple and recorded:

Patient was angry at the appointment when I explained that I had reviewed his extensive medical records. He has had multiple tests completed and no evidence of a closed head injury. He has not been compliant with prior recommendations from multiple providers. I explained that I am not a mental health specialist, nor a disability specialist.

....

**Impression & Plan Summary:**

HX OF CLOSED HEAD INJURY – Stable. After reviewing his records I do not have anything further to offer. He refuses to see neurology or mental health.

BIPOLAR 1 DISORDER, MIXED – Deteriorated. Patient refuses mental health services.

At this point I am not able to establish [care] with this patient because he is refusing intervention for his stated problems/diagnosis/complaints.

Defendants' Exhibit 19, pp. 447, 451.

39. **Condition at the time of hearing.** At the time of the hearing Claimant testified that he suffered headaches, neck pain, dizziness, light-headedness, vertigo, and sleep disorder. He testified that his right ankle will occasionally give out and roll causing him to stumble and fall. Transcript, p. 25. Claimant testified at hearing he was receiving Social Security Disability of \$1,182 per month.

## DISCUSSION AND FURTHER FINDINGS

40. 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).

41. **Additional medical care and causation.** The first issue is whether Claimant is entitled to additional medical benefits for his September 29, 2015 industrial accident. Idaho Code § 72-432(1) requires an employer to provide an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Of course an "employer cannot be held liable for medical expenses unrelated to any on-the-job accident or occupational disease." Henderson v. McCain Foods, Inc., 142 Idaho 559, 563, 130 P.3d 1097, 1102 (2006). Thus claims for medical treatment must be supported by medical evidence establishing causation. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995).

42. In the present case, Claimant alleges that his September 29, 2015 industrial accident caused ankle and traumatic brain injuries requiring additional treatment continuing after Defendants ceased providing medical benefits approximately July 1, 2016. Claimant testified he

continues to suffer headaches, depression, anxiety, bipolar disorder, post-concussion syndrome, sleep disorder, and gait issues related to his industrial accident for which he takes Gabapentin, Topamax, Depakote, aspirin, ibuprofen, and acetaminophen. Transcript, p. 32. He has paid out of pocket for these medications since Defendants discontinued providing medical benefits. In order to receive additional medical benefits for these conditions, Claimant must establish by expert medical evidence that each condition is related to his industrial accident and that further medical treatment is needed for such condition or is reasonably required by his treating physician.

43. Claimant vigorously asserts his psychological and psychiatric difficulties are caused by his industrial accident. However, after Claimant's hospitalization at Intermountain Hospital, Dr. Pitcher's concluding diagnosis on November 1, 2016, was psychosis and Bipolar disorder (type 2). He did not relate this diagnosis to Claimant's industrial injury.

44. Dr. Beaver affirmatively opined Claimant's continuing symptoms were not caused by his industrial accident. As noted previously, Dr. Beaver testified that Claimant had an extremely high deviation on the SIMS test calling into serious question the validity of Claimant's continuing complaints: "a score of twenty-eight—and you get concerned with scores over fourteen, indicated that he showed a strong tendency to exaggerate his symptomatology." Beaver Deposition, p. 17, ll. 9-12.

45. Dr. Beaver explained other considerations convincing him that Claimant's continuing complaints were not due to his industrial accident:

[T]he relative severity of a concussion or a mild TBI is not only how the event happens but, you know, the level of amnesia, confusion, things of that nature that surround the event because that helps give us additional information to understand its severity.

On the one hand, Mr. Bianchi had indicated that he had several weeks post-accident in which he couldn't really remember anything and was confused, yet, at the same time, when we talked about the accident, both leading up to the accident, the accident itself, and his care and treatment in the days and weeks following that, he was very articulate in what happened and how he wasn't treated properly. So there was a discrepancy there.

The second thing is that, in reviewing with him during the interview his symptom complaints, he described, essentially, there being no improvement in his symptoms over time, if anything, that they had gotten worse over time and that multiple treatments had failed him.

That is not the typical course. When I saw him he was eleven months post-injury. People typically, have good improvement during the first six months or so.

So it was very atypical not to report any improvement and that any and all treatment had essentially failed him.

Q. [by Mr. Augustine] You say he didn't have any improvement. Are you saying that you would expect someone who has suffered a traumatic brain injury to experience improvement in their symptomatology over a period of time following the accident?

A. Yes. There is a certain percentage of people that still have some persistent difficulties. Even in that circumstance, they report improvement over time, moving closer to their baseline of functioning. That was not the case with him.

Beaver Deposition, p. 11, l. 8 through p. 12, l. 20

46. At his post-hearing deposition, Dr. Beaver reaffirmed his December 14, 2016 updated report reflecting consideration of additional medical records by Drs. Pitcher and Johnson from October and November 2016, wherein Dr. Beaver concluded:

Both Dr. Johnson, who has some familiarity with Mr. Bianchi, and Dr. Pitcher, psychiatrist at Intermountain Hospital, concluded that Mr. Bianchi has a bipolar type II disorder, mixed, with both depression and hypomania. Bipolar type II is an organic condition that typically is genetic and has a biological basis. It is not caused by a specific event or accident such as the work injury on 09/29/2015. While the work injury likely temporarily exacerbated his emotional distress, after a full year, I would not attribute his current emotional lability as related to the industrial accident. His level of aggressiveness, paranoia, and reported distress is consistent with an individual who is hypomanic. .... I view him as at maximum medical improvement as it relates specifically to any temporary exacerbation of his underlying psychiatric issues from the work injury.

His psychiatric difficulties are not predominately caused, above all other causes, by the work injury of 09/29/2015.

In regard to his report of ongoing chronic pain, there appear to be multiple factors. Interestingly, he had reported good improvement in his pain in the last treatment done by Ms. Dummer, physical therapist at St. Alphonsus. In fact, on a scale of 1-10, he rated his pain at 1 out of 10, indicating minimal difficulty. Interestingly, he already had a pre-accident history of some pain difficulties. He now reports significant pain and, in his meeting with Dr. Johnson, attributes it to how he was treated by the police when they arrested him.

.... [I]t appears that related to the work injury of 09/29/2015, he is at maximum medical improvement with regard to pain issues as well.

Defendants' Exhibit 5, pp. 100-101 (emphasis supplied).

47. Claimant asserts the reports and opinions of Dr. Beaver are laughable. Beaver Deposition, p. 25. To the contrary, Dr. Beaver's conclusions arise from well-explained thorough analysis and are well supported by his comprehensive testing and by the record as a whole. Dr. Beaver's expert opinion that Claimant's psychological problems after July 2016 were not caused by his September 29, 2015 industrial accident is un rebutted by any expert medical evidence.

48. The record establishes that Drs. Heiner, Friedman, and others found Claimant's headaches were initially caused by his industrial accident and recommended medical treatment. Dr. Friedman reported Claimant: "has cervical myofascial pain as the cause of his referred headaches." He concurred: "with the neurologist [in] treatment of his neck and headache with aggressive physical therapy." Defendants' Exhibit 11, p. 181. Dr. Friedman recommended outpatient physical therapy for four to six weeks for Claimant's myofascial neck pain. Claimant received the recommended physical therapy. On July 14, 2016, Dr. Friedman then concluded Claimant: "has reached maximum medical improvement in regards to his neck." Defendants' Exhibit 11, p. 192. Dr. Friedman found Claimant needed no further supervised medical

treatment and should continue with a cervical home exercise program including gentle conditioning, stretching, and ice.

49. Regarding Claimant's ankle, Dr. Friedman reported on April 16, 2016:

It is my opinion that Mr. Bianchi has reached maximum medical improvement regarding his right ankle and his right hip. These have resolved. He does not require any further treatment and does not require any further medication. There are no restrictions or limitations in regards to his ankle and hip.

Defendants' Exhibit 11, p. 182.

50. At hearing, Claimant testified that his ankle still rolls occasionally and that his industrial accident and resulting traumatic brain injury caused his depression, headaches, psychosis, bipolar disorder, apparent personality change, and tendency to anger issues. Claimant's former wife testified that after returning to their home in Cottonwood following his industrial accident in Meridian, Claimant reported persisting headaches. Transcript, p. 76. She also testified regarding Claimant's apparent personality change and tendency to be tangential in his communications after his industrial accident: "Thoughts where you asked him a specific question, and he will start with that and he gets so off topic and moves. He never did that before. He always had focus and concentration. He's been an intelligent man, and this has really changed him." Transcript, p. 77, ll. 14-18. However, the record does not establish that either Claimant or his former wife have training sufficient to qualify either of them as a medical expert.

51. At hearing Claimant affirmed that no medical expert had related his persisting complaints to his industrial accident:

Q. [by Referee Taylor] Mr. Bianchi, one of the issues noticed for hearing has to do with the causation, and you, in your comments already this afternoon, have talked about ongoing headaches and neck pain. Are there any doctors or any doctor or medical expert that has concluded that your ongoing headaches and/or neck pain is related to your accident?

A. No, because they are all agenda based. They are being paid not to allow that to come out, you see.

Transcript, p. 42, ll. 14-22.

52. Even entirely ignoring Dr. Beaver's and Dr. Friedman's opinions, Claimant has not shown by expert medical evidence that his continuing complaints are related to his industrial accident.

53. It is well established that:

The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Jensen v. City of Pocatello, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000), citing Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (emphasis supplied).<sup>3</sup>

54. The Idaho Supreme Court has pointedly admonished Commission referees not to exceed their roles as finders of fact: "we take this moment to reaffirm that the role of the Commission's referee is that of a finder of fact and not a medical expert." Mazzone v. Texas Roadhouse, Inc., 154 Idaho 750, 760, 302 P.3d 718, 728 (2013). Thus a referee's evaluation of evidence cannot substitute for a qualified medical professional's diagnosis and expert opinion.

55. Claimant herein has provided no expert medical evidence that any continuing ankle instability or psychological issues, including but not limited to psychosis and bipolar disorder, are related to his industrial accident. He has received medical treatment for his cervical myofascial pain which was thereafter found to be medically stable and for which a permanent

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<sup>3</sup> The notice of hearing in the present case expressly advised Claimant: "At hearing, Claimant will bear the burden of presenting expert medical evidence of the extent and duration of any alleged temporary disability. Claimant will also bear the burden of presenting expert medical evidence to establish that any alleged injury, medical treatment, and permanent impairment for which Claimant seeks benefits was caused by an industrial accident." Notice of Hearing and Pre-Hearing Telephone Conference, p. 2.

impairment rating was given. Claimant has provided no expert medical evidence that because of his industrial accident he is entitled to additional medical treatment for his reported ankle instability, depression, headaches, dizziness, vertigo, neck pain, psychosis and bipolar disorder, or any other psychological or psychiatric issues persisting after June 2016.

56. Claimant has not proven he is entitled to additional medical benefits due to his industrial accident.

57. **Permanent partial impairment.** The next issue is the extent and causation of Claimant's permanent 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.

58. In the present case, Dr. Friedman examined Claimant on April 16, 2016, and rated his cervical spine impairment at 1% of the whole person, pursuant to the AMA Guides, with 50% apportioned to Claimant's pre-existing cervical arthritis shown by diagnostic imaging immediately after the industrial accident. Defendants' Exhibit 11, p. 183. Claimant asserts he is entitled to permanent impairment benefits due to his continuing headaches, neck pain, and right ankle instability. Transcript, p. 41. However, Claimant has presented no medical appraisal of his permanent impairment by any medical expert. Dr. Friedman's rating considers Claimant's continuing headaches and neck pain and is the only impairment rating contained in the record.

Claimant has proven no permanent impairment beyond 0.5% of the whole person due to his industrial accident.

59. **Permanent disability.** The final issue presented is whether and to what extent Claimant is entitled to permanent disability benefits in excess of his permanent impairment, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise.

60. “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. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The focus of a determination of permanent disability is on the claimant’s ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). Work restrictions assigned by medical experts and suitable employment

opportunities identified by vocational experts may be particularly relevant in determining permanent disability. Berger v. All Seasons Tree Service, 2017 WL 5558587 (Idaho Ind. Com. 2017).

61. In the present case, Claimant asserts that his 2015 industrial accident renders him totally and permanently disabled. Claimant's permanent disability must be evaluated based upon his medical factors, including his permanent impairment, the physical restrictions arising from his permanent impairment, and his non-medical factors, including his capacity for gainful activity and potential employment opportunities.

62. Claimant testified that before his 2015 industrial accident he made as much as \$46 per hour in the construction trades and for approximately ten years owned his own construction business. However, other than attending a few POST training classes shortly after his accident, Claimant has not worked since his industrial accident. Claimant testified that he could not work, that he was "knocked out of the workplace, completely, permanently." Transcript, p. 34, ll. 12-13.

63. While Claimant was temporarily restricted from working for a time because of his industrial accident, no physician has permanently restricted Claimant from work activities due to his 2015 industrial accident. Dr. Beaver opined:

As it relates to the industrial injury, there are no barriers for him to return to work. In physical therapy, he demonstrated the capacity to do medium to medium-heavy work. Neurocognitively, I do not feel he has any impediments to employment. He may have psychiatric impediments to return to work, but this is not related to the industrial injury.

Defendants' Exhibit 5, pp. 100-101. He reaffirmed this opinion at his post-hearing deposition.

64. Referring to Claimant's right ankle and hip, Dr. Friedman reported on April 16, 2016, that "There are no restrictions or limitations in regards to his right ankle and hip"

and opined “Mr. Bianchi does not require any temporary or permanent work restrictions in regards to his 09/29/2015 injury.” Defendants’ Exhibit 11, p. 182. Regarding Claimant’s myofascial cervical pain and resulting headaches, by July 14, 2016, Dr. Friedman concluded: “Mr. Bianchi does not have any current work restrictions or limitations. He has reached maximum medical improvement in regards to his neck. .... Based on his work restrictions for his cervical spine, he can return to work as a corrections officer.” Defendants’ Exhibit 11, p. 192.

65. Claimant has proven no permanent functional limitations related to his industrial accident. He has not proven that his capacity for gainful employment or his ability to compete in the open labor market has been permanently reduced because of his industrial accident.

66. Claimant has proven no permanent disability beyond his 0.5% whole person permanent impairment due to his industrial accident.

67. **Permanent total disability and the odd-lot doctrine.** Claimant asserts that he is an odd-lot worker, totally and permanently disabled due to his industrial accident. Defendants dispute this assertion.

68. A claimant who is not 100% permanently disabled may prove total permanent disability by establishing he is an odd-lot worker. An odd-lot worker is one “so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.” Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable “in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part.” Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54,

57 (1984). The burden of establishing odd-lot status rests upon the claimant. Dumaw v. J. L. Norton Logging, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990). A claimant may satisfy his burden of proof and establish total permanent disability under the odd-lot doctrine in any one of three ways: (1) by showing that he has attempted other types of employment without success; (2) by showing that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available; or (3) by showing that any efforts to find suitable work would be futile. Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

69. In the present case, Claimant has not proven that he has any permanent disability beyond his 0.5% permanent partial impairment due to his industrial accident. He has not proven that he has attempted other types of employment without success, that he or vocational counselors or employment agencies on his behalf have searched for other work and other work is not available, or that any efforts to find suitable work would be futile. Claimant's assertion that he cannot work because of his industrial accident is unpersuasive as it is refuted by the expert opinions of Dr. Friedman and Dr. Beaver that Claimant has no permanent work restrictions due to his industrial accident.

70. Claimant has not proven a prima facie case that he is an odd-lot worker under the Lethrud test.

71. Claimant has not proven that he is totally and permanently disabled due to his industrial accident.

### **CONCLUSIONS OF LAW**

1. Claimant has not proven that he is entitled to additional medical benefits due to his industrial accident.

2. Claimant has proven no permanent impairment beyond 0.5% of the whole person due to his industrial accident.

3. Claimant has proven no permanent disability beyond his 0.5% whole person permanent impairment due to his industrial accident.

4. Claimant has not proven that he is totally and permanently disabled due to his industrial accident.

### **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 \_\_\_26th\_\_\_ day of March, 2018.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Alan Reed Taylor, Referee

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2018, 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:

PAUL J AUGUSTINE  
PO BOX 1521  
BOISE ID 83701

VINCENT BIANCHI  
506 BASH STREET  
COTTONWOOD ID 83522

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**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

VINCENT BIANCHI,

Claimant,

v.

DEPARTMENT OF CORRECTIONS,

Employer,

and

STATE INSURANCE FUND,

Surety,  
Defendants.

**IC 2015-026083**

**ORDER**

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Pursuant to Idaho Code § 72-717, Referee Alan Taylor 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 not proven that he is entitled to additional medical benefits due to his industrial accident.
2. Claimant has proven no permanent impairment beyond 0.5% of the whole person due to his industrial accident.
3. Claimant has proven no permanent disability beyond his 0.5% whole person permanent impairment due to his industrial accident.
4. Claimant has not proven that he is totally and permanently disabled due to his industrial accident.

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

DATED this \_\_\_26th\_\_\_ day of \_\_\_March\_\_\_\_\_, 2018.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas P. Baskin, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
Aaron White, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_26th\_\_\_ day of \_\_\_March\_\_\_\_\_, 2018, a true and correct copy of the foregoing **ORDER** was served by regular United States mail upon each of the following:

VINCENT BIANCHI  
506 BASH STREET  
COTTONWOOD ID 83522

PAUL J AUGUSTINE  
PO BOX 1521  
BOISE ID 83701

sc

\_\_\_\_\_/s/\_\_\_\_\_