

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

PAUL RUCZAK,

Claimant,

v.

ALBENI FALLS BUILDING SUPPLY, INC.,

Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,

Surety,
Defendants.

IC 2012-021482

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

Filed February 26, 2019

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 Coeur d’Alene on June 26, 2018. Claimant, Paul Ruczak, was present in person and represented by Dale Robbins, of Liberty Lake, Washington. Defendant Employer, Albeni Falls Building Supply, Inc. (Albeni Falls), and Defendant Surety, Liberty Northwest Insurance Corp., were represented by David M. Farney, of Boise. The parties presented oral and documentary evidence. No post-hearing depositions were taken and briefs were later submitted.¹ The matter came under advisement on November 8, 2018. The undersigned Commissioners have chosen not to adopt the Referee’s recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

The issues to be decided are:

1. Claimant’s entitlement to additional medical care.

¹ Judith Atkinson of Boise substituted in as successor counsel for Defendants on the briefing.

2. Claimant's entitlement to temporary disability benefits.
3. The extent of Claimant's permanent impairment due to his industrial accident.
4. The extent of Claimant's permanent disability due to his industrial accident.

CONTENTIONS OF THE PARTIES

All parties acknowledge Claimant suffered an industrial accident on August 21, 2012, when the delivery truck he was driving rolled. Defendants accepted the claim and paid medical, time loss, and permanent impairment benefits. Claimant now asserts he is entitled to additional medical care, additional temporary disability benefits, unspecified additional permanent impairment benefits, and total permanent disability benefits.² Defendants assert that Claimant has failed to prove he is entitled to any additional benefits due to his industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The pre-hearing deposition testimony of Claimant Paul Ruczak taken December 1, 2017;
3. Joint Exhibits A-X, admitted at hearing; and
4. The testimony of Claimant, Clayton Kersting, M.D., and Susan Melbourn taken at hearing.

All outstanding objections are overruled and motions to strike are denied.

² Claimant also requests "attorney fees payable by Albeni Fall [sic] Building Supply, Inc." Claimant's Post Hearing Brief, p. 22. Hearing on the issue of attorney fees was not requested by any party and therefore was not noticed for hearing by the Commission. Pursuant to Idaho Code § 72-713, this issue cannot be addressed herein.

FINDINGS OF FACT

1. Claimant was born in 1952. He was 65 years old and resided in Cusick, Washington at the time of the hearing. He is right-handed.

2. Albeni Falls is a building materials supplier in Oldtown, Idaho that sells and also delivers building materials to contractors and the general public.

3. **Background.** Claimant was born in Ohio and raised in Vista, California. He worked on a ranch from the third grade until he left high school. Claimant attended high school, but did not graduate. While attending high school, Claimant also performed drywall work on the weekends for Hughes Construction.

4. At the age of 17, Claimant sustained a neck fracture in a dirt bike accident. The fracture healed and he testified that he never had any kind of permanent injury as a result of his neck fracture. Claimant's Deposition, p. 30.

5. Claimant attended Palomar Junior College in San Marcos, California in 1972, but did not graduate. He worked at United Van Lines in Santa Ana, California where he obtained his CDL. He later worked for F. Alioto Fish Company as a dock worker, fish processor, and truck driver. Thereafter he worked for Ralph Sowers Mobile Butcher and Broker for approximately five years. Claimant next worked for Noyo Pride Fish Company in Fort Bragg, and then Colombi Logging.

6. In 1990, Claimant sustained an L5-S1 disc injury while working for Philbrick Logging as a driver in Fort Bragg, California. He was off work for approximately six months and underwent physical therapy. He received no permanent restrictions as a result of this injury. Claimant testified his back injury did not in any way permanently impact his ability to work. Claimant's Deposition, p. 16.

7. In 1991, Claimant obtained his GED.

8. From 1991 through 1992, Claimant worked at Sea-Pal Fish Company as a fish processor and distributor driving small delivery trucks. He next worked for Caito Fisheries from 1993 until approximately 2001 driving a refrigerated tractor trailer. During this employment, Claimant fell and broke his left wrist. The fracture was casted and healed without any lasting ill effects. Claimant's Deposition, p. 31. While working for Caito, Claimant had a motorcycle accident and fractured his ribs on the left side and his left scapula. Claimant testified he had no lasting effects from this accident and injury. Claimant's Deposition, p. 32.

9. In approximately 2001, Claimant began working at Terminix and became certified in pest inspection. In approximately 2002, he became certified in home inspection by American Housing and Foundation. Claimant later worked for Family Oil and Central Refrigeration as a cross country truck driver.

10. In 2006, Claimant commenced working for Albeni Falls as a delivery driver, driving a flatbed truck with a forklift attached on the rear and delivering building materials.

11. In July 2011, Claimant began seeing Clayton Kersting, M.D., as his primary care physician.

12. **Industrial accident and treatment.** On August 21, 2012, Claimant was driving a semi-truck for Albeni Falls in route to deliver building materials when he swerved to avoid a moose stepping into the road. The semi left the roadway, rolled, and struck a large ponderosa pine. Claimant was living in Oldtown, working full-time, and earning \$17.50 per hour at the time of the accident.

13. Claimant was taken by ambulance to the hospital where he was diagnosed with pulmonary contusions and mildly displaced left clavicle fracture.

14. Claimant was treated conservatively by Dr. Kersting and later came under the care of orthopedic surgeon Bryan Mitchell, M.D., when the left clavicular fracture was slow to heal in spite of the use of a bone stimulator. Dr. Mitchell ultimately recommended surgery for clavicular non-union.

15. On January 24, 2013, Dr. Mitchell performed left shoulder clavicle open reduction, internal plate and screw fixation, and bone grafting. Claimant thereafter participated in physical therapy.

16. On April 30, 2013, Dr. Mitchell released Claimant to light duty work. Exhibit I, p. 274. During Claimant's recovery, Albeni Falls provided modified duty work. Claimant testified "I was on limited work in the store for a while. That was hard, being on concrete, you know, standing for that amount of time. It hurt a lot." Claimant's Deposition, p. 37. Claimant suffered from plantar fasciitis but does not assert this condition is related to his industrial accident.

17. On May 15, 2013, Claimant was discharged from physical therapy to a home exercise program. He had "no pain with normal ADLs." Exhibit F, p. 221.

18. On June 14, 2013, Dr. Mitchell examined Claimant and recorded:

Clavicle: Patient is 9 months from clavicular fracture nonunion. He is doing better and ready to return to truck driving.

....

No pain at fracture site.

....

Imaging:

Left Clavicle: X-ray Clavicle, Complete – Well-healed clavicle fracture with mature callous formation and satisfactory alignment.

Plan:

Clavicle: 60 year old male with well-healed clavicle fracture nonunion after bone grafting and ORIF. Recommend return to work and request IME for any residual disability. Follow up as needed.

Exhibit I, p. 278. Dr. Mitchell noted Claimant was “released to the job of injury without restrictions” as of June 17, 2013. Exhibit I, p. 279.

19. Claimant returned to his time of injury job as a delivery driver for Albeni Falls.

20. On July 18, 2013, Industrial Commission rehabilitation consultant Jeff Hanson met with Claimant and Employer. Claimant had then been back to full duty work at Albeni Falls for 30 days. Hanson recorded:

The claimant continues to work in his pre-injury capacity at his pre-injury wage. The claimant is able to perform all job duties. The only difference in the claimant’s job duties is that he is driving a different delivery vehicle. The claimant stated that this smaller vehicle makes him sore by the end of the day, but that he is able to perform all duties. Both parties were informed that I would proceed with closing this file.

Exhibit X, p. 617.

21. On July 20, 2013, Claimant was examined by orthopedic surgeon Charles Craven, M.D., at Defendants’ request. He found Claimant’s pre-existing cervical and lumbar spine conditions were not permanently aggravated by his industrial accident. Dr. Craven ordered no radiographic studies but relied upon “the treating physician notes, the examinee’s clavicle films reveal a well-healed fracture with mature callus formation and satisfactory alignment.” Exhibit K, p. 388.

22. Dr. Craven recorded that Claimant’s shoulder ranges of motion were symmetric with:

full motor strength and sensation in the upper extremities and no evidence of atrophy bilaterally in the upper extremities.

....

There are no objective findings related to his left shoulder.

....

In my medical opinion, further curative treatment measures are not necessary to resolve any residual effects of the industrial injury of August 21, 2012.

....

In my medical opinion, the examinee is physically capable of gainful employment on a reasonably continuous basis. I note that he has returned to his duties as a truck driver and laborer for Albeni [sic] Falls Building as of May 2013. He does endorse occasional discomfort in his left shoulder but states that he feels functional and able to do the duties required of his job. In my medical opinion, there are no restrictions necessary as related to the industrial injury under study.

Exhibit K, p. 387. Dr. Craven found Claimant's condition medically fixed and stable and rated his left shoulder permanent impairment at 3% of the upper extremity.

23. Defendants paid Claimant permanent impairment benefits equal to Dr. Craven's 3% upper extremity permanent impairment rating and Claimant continued working at Albeni Falls performing all of this pre-injury duties.

24. On August 23, 2013, Claimant was charged with felony possession of marijuana in an amount greater than three ounces. Exhibit U, p. 579. Claimant subsequently pled guilty to the charge. Exhibit U, p. 580. After his drug charges, Claimant did not return to work for Albeni Falls. Claimant has not worked since leaving Albeni Falls.

25. In January 2014, Claimant was convicted of felony possession of marijuana in Idaho. Claimant's Deposition, p. 18.

26. On November 23, 2015, Claimant was found eligible for Social Security Disability benefits with a disability date of August 23, 2012. Exhibit O, p. 436. The disability finding of the Social Security proceedings concluded: "The claimant has the following severe impairments: degenerative disc disease of the thoracic and lumbar spine; chronic pain;

obstructive sleep apnea, insomnia; history of left clavicle fracture with open reduction/internal fixation and subsequent non-union.” Exhibit O, p. 433. The Social Security Disability decision also noted that Claimant had non-severe impairments including depression and glaucoma. The decision found Claimant had the residual functional capacity to perform sedentary work and noted that Claimant “alleged his impairments limited his ability to lift, squat, bend, stand, reach, walk, sit, kneel, and climb stairs. At hearing, the claimant reported that he had problems walking, and that he could only stand for ten minutes at a time. He testified that he was able to lift ten pounds.” Exhibit O, p. 434. The decision gave moderate weight to Claimant’s sister’s report that “he could lift no more than twenty pounds and that he could walk for one hundred yards before he would need to rest. She also reported that the claimant’s spine was causing him significant pain and mobility problems.” Exhibit O, p. 435.

27. On January 10, 2017, Claimant was examined by orthopedist Frederick Sylvia, M.D., at Defendants’ request. Dr. Sylvia recorded:

IMAGING STUDIES

No imaging available for review.

DIAGNOSES

1. Left clavicle fracture with nonunion, status post open reduction and internal fixation, related to the motor vehicle crash on a more-probable-than-not basis, healed.
2. Contusions, related to the motor vehicle crash, healed.
3. Chronic left shoulder pain, which cannot be causally related to the motor vehicle crash, based on chart review and objective orthopedic findings.
4. Cervical and lumbar spondylosis, related to the natural progression of aging and unrelated to injury.
- 5.
-

The examinee was found to be medically fixed and stable at the IME conducted on July 20, 2013. With the exception of mild range of motion limitations, the left

shoulder exam was normal. Examinee was release [sic] to unrestricted work. No new injuries were reported. There is no medical basis for objective worsening.

....

No further treatment is recommended based on objective orthopedic diagnosis and findings.

....

On the basis of orthopedic diagnosis and objective findings, the examinee is able to return to work without restrictions.

....

Inability to return to any work at this point would be due to nonorthopedic factors unrelated to the motor vehicle crash.

....

The examinee's current condition of left shoulder pain is related to nonorthopedic factors. Any lumbar or cervical pain would be related to pre-existing spondylosis.

8. Are there any pre-existing or concurrent medical conditions which could be retarding recovery?

Chronic pain, depression, opioid dependence.

Exhibit L, pp. 404-406.

28. **Condition at the time of hearing.** At the time of hearing, Claimant continued to receive Social Security Disability benefits. He possessed a valid CDL with doubles, triples, and HAZMAT endorsements. Claimant testified that his left shoulder has not worsened since July 2013. Transcript, p. 85. He testified he could not work.

29. **Credibility.** As further discussed hereafter, Claimant's credibility is significantly at issue in the present case. Some aspects of Claimant's testimony are concerning when compared with other evidence in the record.

30. Immediately after Claimant's August 21, 2012 accident, his urine screen was positive for opiates. Exhibit F, pp. 80, 84. Dr. Kersting denied prescribing opiates to Claimant at that time. Transcript, pp. 42-43. Claimant asserted he was taking an old opioid prescription for his pre-existing back pain. On July 18, 2013, rehabilitation consultant Hansen recorded that Claimant had returned to work and successfully performed all of his job duties at Albeni Falls for 30 days. Thereafter, he continued to perform all of his regular duties for 30 more days until he was arrested on felony drug charges. However, at hearing, Claimant testified he was taking opioids daily to perform his job and was not comfortable taking opioids while driving truck.

31. In Claimant's Social Security Disability proceedings, his sister testified he could walk only 100 yards before needing to rest. Exhibit O, p. 435. However, Claimant testified at hearing in the instant matter that he walks his dog daily for no more than a mile and only stops every quarter mile for a few minutes to rest. Transcript, p. 83. The administrative law judge found Claimant had severe thoracic and lumbar degenerative disk disease. At the Social Security hearing, Claimant testified that he had limited ability to lift, squat, bend, reach, walk, sit, kneel, and climb stairs. He also testified that he had difficulty walking and could only stand for ten minutes at a time. However, at hearing in the instant matter Claimant testified that his L5-S1 back injury did not in any way permanently impact his ability to work, and that his neck, left scapula, and rib fractures caused no lasting effects. Instead, both at hearing and in his deposition, he testified that he was primarily limited by clavicle and shoulder pain. Claimant's Deposition, pp. 12-14; Transcript, pp. 58-62; 84-86; 93. He denied being significantly limited by his other pre-existing conditions unrelated to the subject accident.

32. Therefore, at the Social Security hearing, where he was incentivized to articulate all the physical problems that limited him, Claimant did so. However, in this proceeding, where

Claimant will only receive compensation for the consequences of the subject accident, Claimant emphasized his clavicular injury as the cause of his disability, but did not emphasize other conditions which figured in his claim for Social Security benefits.

33. In his pre-hearing deposition, Claimant acknowledged he was convicted of felony possession of marijuana. However, when questioned about leaving Albeni Falls, he did not reveal that this was a factor in his departure:

Q. [by Mr. Vook] And it looks like on your resume here, the last time you worked—or at least the last time you worked for Albeni Falls was in August of 2013; is that fair to say?

A. Yes.

Q. Okay, and how did that separation come about from your perspective?

A. I couldn't do the job anymore.

Q. And did you quit or were you terminated?

A. They said I quit. So, yes, I quit.

Q. Okay. And I just want to make sure I understand. You couldn't do the job physically anymore; is that why you're saying you quit?

A. Yes.

Q. Okay. And when you say you couldn't do the job physically, was it the chronic pain that was a factor in that?

A. Yes.

Claimant's Deposition, pp. 27-28.

34. A different picture of Claimant's departure from Albeni Falls was established at hearing. Defense counsel reminded Claimant of his pre-hearing deposition testimony quoted above and the following exchange ensued:

Q. [by Mr. Farney] So you indicated in your deposition that you couldn't do the job anymore and that's why you quit; is that right?

A. I was not comfortable driving the truck under the medication I was on, yes.

Q. Is that the full story?

A. To my knowledge, yes.

Q. Okay, sir. So as you sit here and testify today, the reason you quit your job was that you were uncomfortable because of the medication you took, and that—and is that—and as well as you couldn't do the job physically anymore?

A. There was other factors. I had just gotten arrested for possession of marijuana with the intent to sell. I'd been in jail the weekend. And, yeah, I called work a few days later, Monday afternoon, and they said that I was no longer—no longer had a job, and said I had quit. And I had spoken with my supervisor sooner that I didn't feel comfortable doing my job, and it was a good thing.

....

Q. And isn't it true, sir, that you were arrested for—for felony drug possession on the employer's premises?

A. They were waiting for me when I came in with the last load of the day.

Q. Okay, sir. And you've subsequently, as a result of that arrest, been convicted for felony drug possession; is that accurate?

A. Yes, sir.

Q. More than one count?

A. Two counts, I believe.

Transcript, pp. 78-79.

35. Albeni Falls owner Susan Melbourn also testified regarding the circumstances surrounding Claimant's departure from Albeni Falls:

Q. Mr. Ruczak has testified that, in part, he left the company because he was physically unable to perform the functions of his job. Is it correct that there was no conversation with you regarding that?

A. Correct.

Q. And Mr. Ruczak testified today that he was arrested on the premises for a drug-related charge. Is that accurate?

A. Yes.

Q. What was your understanding of the nature of—of the activity that led to that arrest?

A. It was possession and intent to sell marijuana in our vehicle.

Q. In the company vehicle?

A. Uh-huh.

Q. And so that, in some respects, implicated our company to some degree, I suppose?

A. Yeah.

Q. And is it safe to say that—that impacted the employment relationship?

A. Yes.

Q. And did Mr. Ruczak ever return to your work?

A. No.

Q. So without the arrest and subsequent conviction, is there any reason, from your perspective, why Mr. Ruczak could not have retained employment with your company?

A. The job was there, would have been there, but that didn't happen.

....

Q. So as I understand your testimony, there wasn't a basis why he wouldn't have retained employment but for this subsequent arrest?

A. Correct.

Transcript, pp. 103-105.

36. Following Claimant's arrest on Albeni Falls' property, Claimant was not terminated but never showed back up for work and never called to say he would not be coming back. Transcript, pp. 105-106. He was subsequently denied unemployment benefits.

37. By July 2015, Dr. Kersting reported that Claimant's "pain persists daily left shoulder, four out of ten, uses Hydrocodone to sleep also uses marijuana no interest in looking for work feels he is not retrainable all work use of the left arm increases his pain." Transcript, p. 35. Claimant acknowledged at hearing that he has used marijuana on weekends to help him sleep for the past 18 years. Claimant also testified he discussed his marijuana use with Dr. Kersting, preferred marijuana to hydrocodone for pain control, and stopped taking the hydrocodone prescribed by Dr. Kersting four months before hearing. Transcript, pp. 53, 90.

38. On January 10, 2017, after examining Claimant, Dr. Sylvia recorded: "Examinee left exam room cradling left arm, but noted to not favor the arm when crossing the street. Opened car door with left upper extremity." Exhibit L, p. 404.

39. Dr. Kersting testified that he diagnosed Claimant with chronic pain—"a subjective diagnosis"—based entirely on Claimant's subjective complaints. Transcript, p. 46.

40. The record establishes that Claimant was not motivated to find employment or return to work after he was arrested on drug charges and left Albeni Falls. The record suggests that Claimant at times overstates the extent of his pain and withholds information he perceives to be detrimental to his claim. Having observed Claimant at hearing and compared his testimony with other evidence in the record, the Referee found that Claimant is not an entirely credible witness. Having reviewed the record, the Commission finds that Claimant's self-reported pain complaints and limitations lack internal consistency over time and are also inconsistent with other evidence of record. For this reason too, the Commission views Claimant's testimony about

his limiting conditions with skepticism.

41. Having observed Susan Melbourn at hearing, and compared her testimony with other evidence in the record, the Referee found that she is a credible witness. Having compared Dr. Kersting's testimony with other evidence in the record, the Referee found that Dr. Kersting is a credible witness although his opinions and conclusions are not entirely persuasive. The Commission finds no reason to disturb the Referee's findings and observations on presentation or credibility.

DISCUSSION AND FURTHER FINDINGS

42. 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).

43. **Medical benefits.** The first issue is Claimant's entitlement to additional medical care for his August 21, 2012 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).

44. In the present case, Defendants provided Claimant medical benefits regularly through August 2, 2013, and even as late as July 27, 2015. Exhibit W, p. 605. Claimant alleges he is entitled to additional medical treatment due to his August 21, 2012 industrial accident; however, Claimant does not clearly specify the additional medical treatment he desires. At hearing, Claimant enumerated various modalities he utilizes for pain management since his industrial accident, including: diet, stretching, hot and cold therapy, supplements, lying on the ground, going barefoot, acupressure, and marijuana. Transcript, pp. 53, 90-91. Claimant testified he quit using the hydrocodone prescribed by Dr. Kersting four months prior to hearing.

45. In large part Claimant supports his request for further medical care by repeated assertions in his briefing that his left clavicle fracture had not healed even as late as 2017:

Notably, neither Dr. Mitchell, Dr. Craven or the Defendant can cite an x-ray which shows a healed clavicle fracture. In fact, the fracture was still nonunion four years later! (Jt. Ex. Pg. 404-405)

The fact that the left clavicle fracture with nonunion status post open reduction into [sic] fixation on January 10, 2017 undisputedly and completely undermines the first two assessment [sic] which were based on incorrect finding [sic] that claimant was “at maximum medical improvement (“MMI”) with the ‘well-healed’ clavicle fracture.”

Claimant’s Reply To Defendant’s Employer/Sureties [sic] Responsive Brief, p. 3.

46. Directly refuting Claimant’s assertions, Dr. Mitchell examined Claimant on June 14, 2013, reviewed imaging studies, and recorded: “Patient is 9 months from clavicular fracture nonunion. No pain at fracture site. Imaging: Left Clavicle: X-ray Clavicle,

Complete – Well-healed clavicle fracture with mature callous formation and satisfactory alignment. Plan: Clavicle: 60 year old male with well-healed clavicle fracture nonunion after bone grafting and ORIF.” Exhibit I, p. 278 (emphasis supplied). Therefore Dr. Mitchell recommended return to work and released Claimant to his job of injury without restrictions. Dr. Mitchell did not prescribe any additional medical treatment. Exhibit I, p. 279.

47. Claimant’s reference to Dr. Sylvia’s January 10, 2017 report misstates his conclusion which was: “DIAGNOSES: 1. Left clavicle fracture with nonunion, status post open reduction and internal fixation, related to the motor vehicle crash on a more-probable-than-not basis, healed.” Exhibit L, p. 404 (emphasis supplied). Thus Dr. Sylvia concluded Claimant’s professed chronic left shoulder pain “cannot be causally related to the motor vehicle crash, based on chart review and objective orthopedic findings.” Exhibit L, p. 405 (emphasis supplied).

48. Dr. Kersting prescribed hydrocodone to Claimant on April 25, 2013. At that time Claimant complained of joint pain and swelling, loss of strength, and left shoulder pain along his clavicle. Dr. Kersting recorded his impression of left clavicle fracture. Exhibit F, pp. 57-58. On August 19, 2013, Dr. Kersting recorded Claimant’s complaints of joint pain and stiffness, left shoulder and clavicle, and anxiety and depression. His impression was left clavicle fracture and he again prescribed hydrocodone. Exhibit F, pp. 52-53. On February 7, 2014, Dr. Kersting recorded his impression of left clavicle fracture and depression and again prescribed hydrocodone. Exhibit F, p. 52. Commencing on September 13, 2014 and thereafter, Dr. Kersting did not list left clavicle fracture, but rather recorded his impression of chronic pain due to trauma and prescribed hydrocodone. Exhibit F, pp. 48-50.

49. The record does not contain x-rays or other definitive diagnostic testing Dr. Kersting may have ordered or performed to confirm his impression of fractured left clavicle

in July or August 2013, or February 2014. To the contrary, Dr. Kersting agreed at hearing that Claimant reached maximum medical improvement by June 14, 2013—the very date Dr. Mitchell recorded that x-rays showed Claimant’s left clavicle fracture was well-healed and he was ready to return to truck driving. Transcript, pp. 31-32.

50. On July 17, 2013, Claimant presented to Keith Bell, PAC, for a DOT physical examination. Insofar as the record reveals, no physical limitations, concerns, or need for additional medical treatment were noted. Exhibit F, pp. 54-55. Claimant testified he passed the DOT physical. Transcript, p. 89.

51. Dr. Craven examined Claimant on July 20, 2013, and found that his shoulder ranges of motion were symmetric with “full motor strength and sensation in the upper extremities” and “no objective findings related to his left shoulder.” Dr. Craven opined that “further curative treatment measures are not necessary to resolve any residual effects of the industrial injury of August 21, 2012,” found Claimant’s condition medically fixed and stable, and observed that Claimant had “returned to his duties as a truck driver and laborer.” Exhibit K, p. 387. Dr. Craven prescribed no additional medical treatment.

52. Dr. Sylvia examined Claimant on January 10, 2017, noted Claimant’s condition was found medically fixed and stable in July 2013, and: “With the exception of mild range of motion limitations, the left shoulder exam was normal. Examinee was release[d] to unrestricted work. There is no medical basis for objective worsening. No further treatment is recommended based on objective orthopedic diagnosis and findings.” Exhibit L, pp. 405-406.

53. Claimant repeatedly emphasizes that on July 10, 2017, Dr. Kersting wrote that Claimant “sustained fractured clavicle, which required open reduction internal fixation and chronic pain medication for ongoing pain. To a degree of reasonable medical certainty, Paul’s

current condition relates to the original injury on August 21st, 2012.” Exhibit G, p. 251. Dr. Kersting’s statement references past medical treatment and suggests additional medical treatment only to the extent of ongoing chronic pain medication. However, Claimant himself testified that his left shoulder had not worsened since July 2013. Transcript, p. 85. Dr. Kersting’s own notes record that by January 22, 2016, Claimant’s chronic pain was “More pronounced recently, increase back pain. Having headaches” Exhibit F, p. 34. Dr. Kersting’s conclusion that Claimant’s current condition relates to his industrial accident is founded on Claimant’s unreliable subjective complaints, ignores his pre-existing and ongoing back pain, and is not persuasive given the opinions of Drs. Mitchell, Craven, and Sylvia.

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

55. **Temporary disability.** The next issue is whether Claimant is entitled to additional temporary disability benefits due to the industrial accident. Idaho Code § 72-102 (11) defines “disability,” for the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees “during the period of recovery.” The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P.2d 939 (1980).

56. In the present case, Claimant has not worked since August 23, 2013, when he was arrested for drug possession and ceased working at Albeni Falls. Exhibit W, p. 607, establishes

that Defendants paid Claimant temporary disability benefits at a rate of \$478.23 per week as follows:

08/22/12 through 10/17/12	\$3,894.09
10/22/12 through 01/23/13	\$4,295.32
01/24/13 through 03/17/13	\$3,620.96
03/18/13 through 06/16/13	\$4,496.37
Total	\$16,306.74

57. Claimant's Post Hearing Brief, p. 22, itemizes "Past Due Benefits" for temporary disability at a rate of \$478.23 per week as follows:

08/22/12 through 10/17/12	\$3,894.16
10/22/12 through 01/23/13	\$4,295.32
01/24/13 through 03/17/13	\$3,620.89
01/24/13 ³ through 06/16/13	\$4,496.37
Total	\$16,306.74

The total amount Claimant requests for all periods prior to June 17, 2013, is identical to the total amount of temporary disability benefits already paid by Defendants.

58. Additionally, Claimant's Reply To Defendant's Employer/Sureties [sic] Responsive Brief, p. 16, requests temporary total disability benefits from 06/17/13 through 07/28/18 in the amount of \$127,004.22. However, it is well established that temporary disability benefits are paid during the period of recovery. Idaho Code § 72-408. On June 14, 2013, Dr. Mitchell examined Claimant and noted he was ready to return to truck driving. Dr. Kersting later testified he agreed that Claimant reached maximum medical improvement by that date. Transcript, pp. 31-32. Thereafter Claimant was no longer in a period of recovery. Dr. Mitchell "released [Claimant] to the job of injury without restrictions" as of June 17, 2013. Exhibit I, p. 279. Claimant returned to work driving for Albeni Falls at that time.

³ The second entry of the date 01/24/2013 is duplicative and appears to be a typographical error in the brief.

59. Claimant has not proven his entitlement to any additional temporary disability benefits.

60. **Permanent impairment.** The next issue is the extent of Claimant's permanent impairment attributable to the industrial accident. "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. A determination of physical impairment is a question of fact and the Commission is the ultimate evaluator of impairment. Soto v. J.R. Simplot, 126 Idaho 536, 887 P.2d 1043 (1994).

61. The record in the present case establishes that Claimant sustained injuries to his left shoulder in August 2012, and underwent open reduction internal fixation of his left clavicle fracture in January 2013, that resulted in a well healed clavicle fracture by June 2013. On July 20, 2013, Dr. Craven recorded that Claimant's shoulder ranges of motion were symmetric with: "full motor strength and sensation in the upper extremities" and "no objective findings related to his left shoulder." Dr. Craven noted Claimant's report of "occasional discomfort in his left shoulder but states that he feels functional and able to do the duties required of his job." Exhibit K, p. 387. Dr. Craven found Claimant's condition medically fixed and stable and rated his left shoulder permanent impairment at 3% of the upper extremity. No other impairment

rating is found in the record. Claimant testified that his left shoulder has not worsened since July 2013, Transcript, p. 85.

62. Claimant has proven he sustained 3% left upper extremity permanent impairment due to his industrial accident. Defendants have paid Claimant benefits for this permanent impairment. Exhibit W, p. 607.

63. In terms of impairments related to pre-existing conditions, the Social Security Disability decision issued November 23, 2015 identifies severe impairments of degenerative disc disease of the thoracic and lumbar spine, chronic pain, obstructive sleep apnea, and insomnia. These "impairments" are deemed severe because they "more than minimally" limit Claimant's ability to perform basic work. Exhibit O, p. 433. The report also identifies non-severe impairments, to include depression and glaucoma. No effort was made by the administrative law judge who wrote the decision to quantify Claimant's pre-existing impairments; it is unclear whether, or to what extent, these conditions would qualify for an impairment rating under the *AMA Guides to the Evaluation of Physical Impairment*.

64. **Permanent disability.** The final issue is the extent of Claimant's permanent 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. 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. In sum, 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). The proper date for disability analysis is generally the date of the hearing, not the date that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

65. If the degree of disability resulting from an industrial injury is increased because of a pre-existing physical impairment, an employer is liable only for the disability from the industrial injury. See Idaho Code § 72-406(1); Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008). Since an employer may only be held responsible for disability causally related to the industrial injury, apportionment is always at issue where the evidence suggests that pre-existing conditions contribute to Claimant's disability. When the Commission determines that it is appropriate to apportion disability between work caused and pre-existing injuries, it must explain its rationale with sufficient specificity to allow the Court to determine whether the Commission's decision on apportionment is supported by substantial and competent evidence. Where apportionment is at issue, a two-step process is envisioned to evaluate how much of an injured worker's disability should be assigned to the subject accident. First, the injured worker's disability should be evaluated in light of all accident-produced and pre-existing impairments as

of the date of hearing. Following this assessment of disability, the portion of claimant's disability fairly referable to the subject accident should be assigned to employer. Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 772 P.2d 119 (1989).

66. To evaluate Claimant's permanent disability several areas merit close examination including his restrictions relating to permanent impairments and relevant nonmedical factors enumerated at Idaho Code § 72-430.

67. Work restrictions. The record herein contains no permanent work restrictions for Claimant's left shoulder condition. To the contrary, Dr. Mitchell examined Claimant on June 14, 2013, and recorded that he was "ready to return to truck driving" and "released [Claimant] to the job of injury without restrictions" as of June 17, 2013. Exhibit I, pp. 278-279.

68. The social security disability evaluation of November 23, 2015 identifies, in addition to certain pre-existing impairments, a number of restrictions:

The claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) except that he can occasionally climb ramps or stairs; he can never climb ladders, ropes, or scaffolds; he can occasionally balance, stoop, kneel, crouch, and crawl; he can never perform overhead reaching or lifting with the left upper extremity; and he must avoid concentrated exposure to extreme cold and industrial vibration.

Exhibit O, p. 433-434. The administrative law judge explained that in coming to this conclusion she considered those of Claimant's symptoms which were consistent with the objective medical evidence. The administrative law judge accepted the opinions of Dr. Kersting and Dr. Francis (a physician who testified at the social security disability hearing) that Claimant could perform no work in excess of the sedentary exertional level. The administrative law judge also gave moderate weight to the statements of Claimant's sister who reported that Claimant's pain kept him awake at night and confirmed that Claimant had stopped performing hobbies outside because of pain. She also reported that Claimant could lift no more than 20 pounds and that he

could walk for 100 yards before he needed to rest. Finally, Claimant's sister reported that Claimant's spine was causing him significant pain and mobility problems. Exhibit O, p. 435.

69. In contrast to the findings of the administrative law judge, from Claimant's deposition and hearing testimony, a different picture emerges concerning his pre-existing restrictions. While working for a California logging company in the 1990s, Claimant suffered a compensable injury to his lumbar spine. He denied receiving any permanent restrictions as the result of that injury and denied that this low back injury permanently impacted his ability to work in any way. Claimant's Deposition, p.16.

70. At 17, Claimant "broke" his neck as the result of a motorcycle accident. Again, he denied any permanent injury as the result of that mishap. *Id.* at 29-30.

71. At some point between 1993 and 2001, Claimant suffered a work-related injury to his wrist. He had no lasting effects from that injury. *Id.*

72. During the same period, Claimant suffered a second motorcycle accident as a result of which he suffered broken ribs on his left side and a broken scapula. He denied any lasting effects from that injury. *Id.* at 31-32.

73. At hearing, Claimant admitted that he was taking opiates for control of low back pain at the time of the subject accident. Even so, he testified that since the early 1990s his low back pain has been "manageable," by which he meant that it did not affect him much and left him still able to perform work duties. Transcript, pp. 67-69.

74. When examined by Dr. Craven in July of 2013, Claimant provided the following information concerning his low back condition:

At this time, we took the opportunity to discuss his lumbar spine history prior to the industrial injury under study. When asked if the examinee had prior back pain, he indicates "I am a truck driver" and indicates that he has had back pain through the years; specifically, he had a prior issue with an L5-S1 disk with described left

lower extremity radiculopathy. The examinee states that his pain was well managed and he was functional preceding the injury under study.

Exhibit K, p. 380. Per Dr. Craven, Claimant also acknowledged that the subject accident did not seem to aggravate his pre-existing low back discomfort:

The examinee, when asked how his back pain compares to the symptoms he had predating the injury under study, states, "I cannot say if it is different now than before it."

Id. at 381. However, at hearing, Claimant did not remember giving this history to Dr. Craven.

75. By July 20, 2013, the date of Dr. Craven's independent medical evaluation, Claimant had returned to his time-of-injury driving job with Employer. Per Dr. Craven, while Claimant endorsed occasional discomfort in his left shoulder he nevertheless felt functional and capable of performing the duties of his job. Exhibit K, p. 387. At hearing, Claimant did not remember giving this history to Dr. Craven. However, he did "vaguely" remember having a conversation with the ICRD consultant, described in the ICRD notes as follows:

Vocational Issues: The claimant stated that he is employed driving the 1-Ton delivery truck and that he is able to perform all job duties. The claimant was informed that I would monitor his return to work for a period of 30 days from his release before closing his file. The claimant was advised to contact me at the ICRD office if his employment status changes or if he has any concerns with his return to work.

...

Vocational Issues: The claimant continues to work in his pre-injury capacity at his pre-injury wage. The claimant is able to perform all job duties. The only difference in the claimant's job duties is that he is driving a different delivery vehicle. The claimant stated that this smaller vehicle makes him sore by the end of the day, but that he is able to perform all duties. Both parties were informed that I would proceed with closing this file. A call was placed to the claims examiner but she will be out until 22 July. I advised the claimant and employer to contact me at the ICRD office in the future with any questions regarding this case.

Exhibit X, p. 617. While Claimant testified that he left his time-of-injury job because he was physically unable to continue performing the same, the evidence suggests that it was more likely than not his marijuana charge that led to the termination of his employment.

76. Challenging his sister's apparent testimony that he was unable to walk 100 yards without rest, Claimant testified that he can walk his dog for no more than a mile, with stops every quarter mile for a few minutes rest.

77. While Claimant testified that his main pain complaints are in his left shoulder/clavicle, he also acknowledged that his left shoulder complaints have not notably worsened since he was released to return to work in the spring of 2013. Transcript, p. 85. Claimant also acknowledged that his low back pain has not significantly increased since he was released to return to work in the spring of 2013. Transcript, p. 89. Neither his diagnosis of glaucoma nor sleep apnea has interfered with his ability to find or maintain work. Transcript, pp. 89-90. On July 17, 2013, after having returned to his time of injury job, but before his termination, Claimant passed a DOT physical. See Exhibit F, pp. 54-55; Transcript, pp. 88-89.

78. It is difficult to square the administrative law judge's findings on Claimant's residual functional capacity with his testimony at hearing. Even granting that Claimant had "manageable" low back pain as of the date of accident, that discomfort did not interfere with his ability to perform his employment either at the time of injury or after he returned to work at his time-of-injury position in June of 2013. None of the other conditions identified by the administrative law judge appear to have even registered with Claimant except, of course, the clavicular injury which is the subject of this claim. Even so, by his actions, and reports to both Mr. Hansen and Dr. Craven, Claimant was able to perform the functions of his time-of-injury job until his drug charge, which ultimately led to the termination of his employment. Therefore,

notwithstanding that the administrative law judge did assign to Claimant fairly onerous permanent restrictions, we find these conclusions to be largely undermined by other evidence of record. To the extent that the administrative law judge assigned significance to Claimant's clavicular injury, it is interesting that the injury is described in this fashion:

History of left clavicle fracture with open reduction/internal fixation and subsequent nonunion.

This passage reflects an apparent understanding that the surgery performed by Dr. Mitchell failed to address Claimant's chronic nonunion. Of course, the evidence is to the contrary. While the Commission appreciates that Dr. Kersting stated that Claimant currently suffers from chronic clavicular pain for which he requires ongoing medication, Dr. Kersting also acknowledged that his recommendation concerning his diagnosis of chronic pain is based entirely on Claimant's subjective presentation:

Q: [By Mr. Farney] Now, Doctor, it's my understanding that you have diagnosed Mr. Ruczak with chronic pain due to trauma. Is that correct?

A: That is correct.

Q: And in diagnosing chronic pain, are there any objective measures - - or objective standards that - - that are utilized in coming up with that diagnosis?

A: No, it is a subjective diagnosis.

Q: Is that based entirely, then, on the patient's subjective complaints?

A: That is correct.

Transcript, p. 46. While Claimant also exhibited decreased range of motion on exam, Dr. Kersting acknowledged that decreased range of motion does not necessarily support a finding that a patient has chronic pain. Dr. Kersting's notes also reflect that by January 22, 2016, Claimant's pain also contained a component of low back pain and headaches.

79. As noted *infra*, we find the records and reports of Drs. Mitchell, Craven, and Sylvia more persuasive on the question of whether Claimant has ratable impairment or limitations vis-à-vis the clavicular fracture.

80. Therefore, contrary to what both Dr. Kersting and the administrative law judge have found, it is difficult for the Commission to articulate a basis upon which to conclude that Claimant has significant functional restrictions which, in conjunction with his non-medical factors, demonstrate any reduction on his ability to engage in gainful activity.

81. In addition to his failure to prove significant restrictions from all causes, Claimant has also failed to articulate non-medical factors which would support his claim of disability. Claimant performed his time-of-injury job for over a month before his marijuana arrest led to the end of his employment. Claimant's employment did not end because of his physical inability to perform the same. This is well demonstrated in the contemporaneous notes of Dr. Craven and the ICRD.

82. Since leaving Employer, Claimant has done little-to-nothing to advance his prospects for obtaining another job. He did not return to the ICRD for assistance, even though he professed that he was "desperate" to obtain employment. Transcript, p. 81. Claimant testified to only one job contact since leaving Employer. Transcript, pp. 80-81.

83. Claimant did not graduate from high school, but he does have a GED. He attended college for a time at Palomar Junior College in San Marcos, California. Claimant's Deposition, p. 10. He has received training in pest control and home inspection. *Id.* at 10-11. As of the date of hearing he held a CDL with endorsements on doubles, triples and hazmat. *Id.* at 8-9. Claimant has experience driving forklifts and serving customers. He has computer skills sufficient to allow him to use email and shop on line, and sufficient typing skills to write letters.

84. As noted above, where apportionment of disability is at issue, the Commission's first task is to identify Claimant's disability from all causes. Here, there are certain findings in the records of Dr. Kersting and the social security disability determination, which, if accepted, suggest that Claimant suffers from accident-caused and pre-existing conditions which significantly impact his ability to engage in gainful activity. However, as noted, we find these conclusions suspect, and reject the same. Rather, Claimant's pre-existing conditions appear to have caused, at the very most, symptoms that he was able to manage, and which did not impact his ability to work. Further, we conclude that Claimant has nothing in the way of restrictions referable to the subject accident. Therefore, we are unable to conclude that Claimant has disability stemming from his pre-existing conditions and the subject accident, at least not over and above the 3% upper extremity rating assigned for his clavicular fracture.

85. Even were we to assume that Claimant has some disability resulting from the combined effects of his work accident and pre-existing impairments (if any), quantification of that disability would be unnecessary in view of our conclusion that Claimant has no disability resulting from the effects of the subject accident over and above the 3% upper extremity rating previously paid. This conclusion follows from our finding that Claimant has nothing in the way of physical restriction stemming from the subject accident.

86. Claimant has failed to demonstrate disability above his 3% upper extremity impairment from the 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 not proven that he is entitled to additional temporary disability benefits due to his industrial accident.

3. Claimant has not proven that he is entitled to additional permanent impairment benefits beyond 3% of the left upper extremity due to his industrial accident.

4. Claimant has not proven he suffers permanent disability beyond his 3% left upper extremity permanent impairment 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 ___February___, 2019.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas P. Baskin, Chairman

_____/s/_____
Aaron White, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___26th___ day of ___February___, 2019, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DALE ROBBINS
22809 E COUNTRY VISTA DR NO 240
LIBERTY LAKE WA 99019

JUDITH ATKINSON
PO BOX 6358
BOISE ID 83707-6358

_____/s/_____
